Claim No. QBD-2022-BHM-000044

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

BETWEEN:

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

Claimants

- and –

PERSONS UNKNOWN & OTHERS

Defendants

CORE BUNDLE A

for hearing on 26 and 27 May 2022

13	*DPP v Ziegler* [2022] AC 408	A219-A271
14	*Cuciurean v SSfT and High Speed Two (HS2) Limited* [2021] EWCA Civ 357	A272-A297
15	Claimant's Second Skeleton Argument – Merits	A297-a - A297-x
16	Sixth Defendant's Defence	A298 – A302
17	Sixth Defendant's Skeleton Argument	A303 - A339

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Claim No: QB-2022-BHM-000044

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

CLAIMANTS' SKELETON ARGUMENT ON APPLICABLE LEGAL PRINCIPLES

A003

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 Unknow*n [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].[1]

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].[2]

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*

[1] 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*).
[2] 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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18th May 2022

HS2 ROUTE WIDE INJUNCTION

CLAIMANT'S KEY AUTHORITIES

[The following are included in the core bundle, behind the Claimants' first skeleton argument on legal principles. The first skeleton argument, in the electronic version is hyperlinked to those passages which the Claimant suggest the court might wish to read. Otherwise, the electronic bundle is tabbed in the usual way]

1. *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)
2. *SSfT & HS2 v Persons Unknown (Euston Square Gardens)* [2021] EWHC 821 (Ch)
3. *DPP v Cuciurean* [2022] EWHC 736 (Admin)
4. *City of London Corporation v Samede* [2012] EWCA Civ 160
5. *Cuadrilla Bowland Ltd v Persons Unknow*n [2020] 4 WLR 29
6. *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 (CA)
7. *Canada Goose v Persons Unknown* [2020] EWCA Civ 303
8. *London Borough of Barking and Dagenham v Persons Unknown & Ors* [2022] EWCA Civ 13
9. *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658
10. *National Highways Limited v Persons Unknown & Ors* [2021] EWHC 3081 (QB)
11. *DPP v Ziegler* [2022] AC 408
12. *Cuciurean v SSfT and High Speed Two (HS2) Limited* [2021] EWCA Civ 357

Neutral Citation Number: [2019] EWHC 1437 (Ch)

Case No: PT-2018-000098

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 16/05/2019
Start Time: **10.40.45 a.m.** Finish Time: **12.30.28 p.m.**

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Before:

DAVID HOLLAND QC
Sitting as a Deputy Judge of the High Court

- -

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 HARVIL ROAD, HAREFIELD IN THE LONDON BOROUGH OF HILLINGDON SHOWN COLOURED GREEN, BLUE AND PINK AND EDGED RED ON THE PLANS ANNEXED TO THE CLAIM FORM **(2) PERSONS UNKNOWN INTERFERING WITH THE PASSAGE BY THE CLAIMANTS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES OR EMPLOYEES WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT TO, FROM, OVER AND ACROSS THE PUBLIC HIGHWAYS IN THE LONDON BOROUGH OF HILLINGDON SHOWN COLOURED ORANGE AND PURPLE ON THE PLANS ANNEXED TO**	**Defendants**

DAVID HOLLAND QC :

Introduction

1. This is an application by the Claimants, The Secretary of State for Transport and High Speed Two (HS2) Limited, dated 25th April 2019 to vary and extend an interim injunction made in these proceedings by Mr. Justice Barling on 19th February 2019 (to which I shall refer as "the order").

2. The proceedings were started by way of Part 8 Claim Form issued on 5th February 2018 which sought, on a final basis, the same relief, or much the same relief, as was granted on an interim basis. The order currently prevents trespass to and obstruction of access to a site at Harvil Road, Hillingdon being developed by the claimants and their contractors in connection with the High Speed Two, or HS2, railway project.

3. The Claimants seek to vary the order in three ways or for three reasons. First of all, the order is shortly to expire, it being time-limited to 1st June 2019. However, the Claimants submit that the evidence shows that the risk of unlawful acts has not abated such that a temporal extension is required. Secondly, additional land has been brought within the scope of the overall site which is subject to the works and on which trespass has occurred and continues to be threatened, it is said. It is appropriate, the Claimants say, to extend the geographical scope of the order to include that additional land. Thirdly, in his judgment which gave rise to the order, Mr. Justice Barling placed some weight on the first instance decision in *Ineos v Persons Unknown* [2017] EWHC 2946 (to which I shall refer to *Ineos* and "*Ineos* at first instance"). Aspects of that decision made by Mr. Justice Morgan were subject to a gloss, if not overturned, by the Court of Appeal in the same case, the reference being [2019] EWCA Civ 515. I am asked specifically to consider the extension of the order in the light of the Court of Appeal's comments in that case.

4. The order is currently addressed to a number of Defendants. The First Defendant is defined as: "persons unknown entering or remaining without the consent of the claimants on land at Harvil Road, Harefield in the London Borough of Hillingdon shown coloured green, blue and pink and edged red on the plans annexed to the claim form". Secondly, the Second Defendant is: "persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highways in the London Borough of Hillingdon shown coloured orange and purple on the plans annexed to the claim form".

5. The proposed draft leaves the definition of the First Defendant in substantially the same form, save that the word "amended" is added in the definition of "claim form". The Second Defendant is proposed to be defined as follows: "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 between the public highway at Harvil Road, Harefield in the London Borough of Hillingdon shown coloured orange and the land at Harvil Road shown coloured green, blue and pink and edged in red on the plans annexed to the amended claim form".

6. There are currently, in addition, six named Defendants. It is proposed that the Fifth, Sixth, Seventh and Eighth Defendants be removed as named Defendants. It was originally proposed that a party known as Laura Hughes be added as Ninth Defendant. However, at the start of this application, Mr. Roscoe, on behalf of the Claimants, withdrew that application.

7. There are subject to the order three different categories of land. First of all, there is land within the freehold ownership of the First Claimant that is coloured blue on both sets of plans, 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 High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 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 the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans.

8. It is not in dispute, nor can it be, that, as a matter of law, the Claimants are entitled to apply for possession or to bring a claim for trespass in respect of all these categories of land. However, Mr. Powlesland, for the Fourth Defendant, makes a point in relation to the green land which I shall discuss below.

9. Since the date of the order, additional land has been added to the overall site. This is set out in a plan at bundle 2, divider 2, page 30 to the papers in front of me. There are three additional tracts of freehold land coloured blue and a number of additional tracts of temporary possession land coloured green. I shall refer to this land as "the Additional Land" and I shall refer to the original land and the additional land hereafter together as "the Site". The Additional Land includes, in particular, two tracts of land, one numbered C232_064 and the other numbered C111_111 which together form what has been referred to before me as "the Ragwort Field".

Reading and Submissions

10. I have read the following witness statements: that of Mr. McCrae dated 30th January 2018; that of Ms. Dilcock dated 2nd February 2018; that of Ms. Thompson dated 2nd February 2018. All of these were filed on behalf of the Claimants. I have also read a document headed "Application to discharge and vary" prepared by the Third Defendant for the hearing before Mr. Justice Barling. I have read a statement of the Fourth Defendant dated 19th February 2018, again prepared for the hearing before Mr. Justice Barling.

11. I have also read the following additional evidence which has been prepared for the hearing before me: a witness statement of Mr. McCrae dated 25th April 2019; a witness statement of Mr. Jordan dated 25th April 2019; a witness statement of Ms. Dilcock dated 8th May 2019; and a statement of Mr. Clarke dated 13th May 2019. All of these were prepared and filed on behalf of the Claimants.

12. I have also read: an undated statement from the Eighth Defendant; a statement from the Fourth Defendant dated 11th April 2019; and a statement from the Third Defendant dated 10th May 2019.

13. I have heard written and oral submissions from Mr. Roscoe on behalf of the Claimants. I have heard oral submissions from the Third and Eighth Defendants and I have heard oral submissions from Mr. Powlesland for the Fourth Defendant.

Further Background

14. Further background is set out in paragraphs 1 to 19 of Mr. McCrae's first statement and paragraphs 5 to 13 of Ms. Thompson's first statement.

15. Mr. McCrae describes himself as the Second Claimant's project director for sector 2 (Northolt Tunnels) of Phase One of the High Speed Railway Project. He states that it is the construction of Phase One of this scheme which is authorised by the 2017 Act. He describes the Act, which Mr. Justice Barling described rightly as a voluminous document. It is described by Mr. McCrae as the culmination of nearly five years of work.

16. Ms. Thompson further describes the procedure, that is the Parliamentary procedure, which led to the Act. She says the Bill which became the Act was a hybrid Bill and, as such, subject to a petitioning process following its deposit with Parliament. In total she says 3,408 petitions were lodged against the Bill and its additional provisions, 2,586 in the Commons and 822 in the Lords and select committees were established in each house to consider these petitions.

17. She says the government was able to satisfy a significant number of petitioners without the need for a hearing before the committees. In some cases in the Commons this involved making changes to the project to reduce impacts or enhance local mitigation measures and many of these were included in one of the additional provisions to the Bill deposited during the Commons select committee stage.

18. Of the 822 petitions submitted to the House of Lords select committee, the locus of 278 petitions was successfully challenged. Of the remaining 544 petitions, the select committee heard 314 petitions in formal session with the remainder withdrawing, or choosing not to appear before the select committee, mainly as a result of successful prior negotiation with the Claimants.

19. Not all of the concerns raised during the petitioning processes, she says, were environmental in nature but the majority of petitions did include at least some environmental concerns: for example the general impact of construction and specific matters such as construction traffic, noise, dust and settlement were frequently mentioned.

20. In addition to considering the petitions of those directly and specially affected by the scheme, the Commons select committee was also responsible for scrutinising and approving a significant number of changes made to the project as prescribed in the additional provisions. Many changes were aimed, in whole or in part, at reducing environmental impacts. Examples include the provision of higher noise barriers in three locations along the Colne Valley Viaduct which will be constructed in the vicinity of the Site.

21. During the Lords select committee process, over 2,400 further assurances were issued providing commitments binding on the Claimants, bringing the total number of

individual assurances offered over the course of the two select committee stages to well over 4,500. A number of parties submitted petitions, she says, and were heard by the select committees in relation to the scheme in the vicinity of the Site. Most importantly, these included the Third and Fourth Defendants. The Third Defendant was a petitioner during the passing of the Bill before both the House of Commons select committee and the House of Lords select committee. She exhibits to her statement copies of the Third Defendant's petitions. Both the Third and Fourth Defendants spoke before the House of Lords select committee.

22. Accordingly, Ms. Thompson says, the Third and Fourth Defendants and other parties affected by the scheme in the vicinity of the land, that is the Site, had the opportunity to advance their concerns about the scheme via the prescribed Parliamentary process and those concerns were given due consideration by the Claimants and responses provided. It is also true to say that one of the petitioners was Affinity Water and that particular petition was referred to in submissions before me by the Third Defendant and I shall refer to it further.

23. It is quite clear, as has been intimated by what I have just said, that there has been, and still is, significant opposition to the High Speed Two process. Many groups and individuals have concerns about aspects of it, including at the Site. These concerns include concerns about the cost, environmental impact and the impact on local amenity. A number of individuals, it is said, embarked on a series of what are referred to as "direct-action protests" at the Site and between October 2017 and the hearing before Mr. Justice Barling in February 2018 there had been 31 incidents in total, sometimes multiple incidents per day. These were set out in detail in Ms. Dilcock's statement and a selection of them is described in the judgment of Mr. Justice Barling.

24. The named Defendants are all individuals whom the Claimants were able to identify ahead of the hearing before Mr. Justice Barling and who had been involved in unlawful protest activity such as to justify their inclusion as named Defendants in the order.

The Claimants' submissions

25. For the Claimants, Mr. Roscoe submitted to me as follows.

26. As I have said, he withdrew the application to join the proposed Ninth Defendant as a named defendant.

27. He was keen to emphasise that his application was to vary and extend the temporal and physical reach of the order, the terms of which, he emphasised, had never been appealed. He emphasised that it was not a contempt application; he was not seeking to punish anyone for breach of the order.

28. He emphasised that the named Defendants had not been singled out for victimisation or bullying but simply because, he said: their identities were known and it would be wrong to "lump them together" with those protestors whose identities were not known; and, indeed, for convenience as they had been able to come to court and address the judge on the last occasion. He made it clear both that the named Defendants were not intended to be bound to any greater extent than any Defendant

whose identity was not known and that no costs orders were being sought against any of them.

29. The Claimants' claim, he said, was essentially based on two causes of action. I agree.

30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act. Section 15 simply says as follows:

> *"Schedule 16 contains provisions about temporary possession and use of land in connection with the works authorised by this Act."*

One then goes to Schedule 16 and paragraph (1)(ii) says as follows:

> *"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."*

The Second Claimant is the nominated undertaker and the Site is within the Act limits. The procedure is set out in paragraph 4. Paragraph 4(1) provides:

> *"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."*

31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and "take possession". That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.

32. In paragraph 40 of his judgment in *Ineos* at first instance, Mr. Justice Morgan says this:

> *"The cause of action for trespass on private land needs no further exposition in this case."*

Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass.

33. The second head of claim on which the Claimants rely is principally that of private nuisance. As Mr. Roscoe described it in his skeleton argument, the owner of land adjoining the highway has a private right to gain access to the highway separate to the right to use the highway as a member of the public. He pointed me to a passage from Clerk & Lindsell on Torts at paragraph 20-180. This was also referred to in paragraph 42 of the judgment of Mr. Justice Morgan in *Ineos* at first instance where he says:

> *"However, I note that Clerk & Lindsell on Torts, 21st ed., at para. 20-180 states that the right of an owner of land adjoining the highway to gain access to the highway is a private common law right distinct from the right of the owner of the land to use the highway itself as a member of the public."*

Again, no one has seriously sought to say that that is not a correct statement of the law. It is against that sort of activity or infringing activity which the Second Defendants are named.

34. When questioned by me, Mr. Roscoe stated that the Second Defendants were there because there was some uncertainty as to where the public highway ceased and the Claimants' land began and it was intended to cover those who not only technically trespassed on the Claimants' land but those who were also guilty of private and, to an extent, a public nuisance.

35. As he emphasised, there are two main categories of acts to which the Claimants have taken exception: incidents of trespassing on the site (to which I shall refer as "incursions") and incidents of activity on the bell-mouths either on or just off the Site on the public highway which activity had been intended to, and had, obstructed access to and egress from the Site entrances. I shall refer to these incidents as "obstructions".

36. Mr Roscoe emphasised, as I have said, that prior to the grant of the order of Mr. Justice Barling there had been 31 separate incidents of trespass and obstruction. In his oral submissions, he highlighted a number of them which were all referred to in the evidence before Mr. Justice Barling. He referred me to a schedule annexed to the statement of Mr. McCrae. In particular, he highlighted the following incidents.

37. On 2nd October 2017 the Third Defendant entered the land and crawled under an excavator and, in fact, spent a night under the excavator on the Site. The Fourth and Eighth Defendants, as well as other persons unknown, were also present.

38. On 10th October 2017, 20 persons unknown entered the land. They were asked to leave, which they did. However, the Third Defendant chained herself to a tree and the Eighth Defendant attached himself to another tree by looping a "D-lock" around his neck.

39. On 24th October 2017, the Third and Fifth Defendants separately and simultaneously entered the Site at different locations. Both lay down, both were asked to leave voluntarily and refused and were thereafter removed by security.

40. On 4th November 2017, 15 persons unknown, many aggressive, rushed the north compound entrance, which is one of two existing entrances into the Site. About 7 persons unknown gained access and progressed about five metres into the Site before they were repelled by security. The police attended.

41. On 11th November, 10 trespassers comprising six unknown females, three unknown males and the Fourth Defendant entered the Site. They were asked to leave by security and refused and sat in a circle and linked arms. A specialist removal team was called.

42. On 17th November the Third Defendant climbed on to an excavator being delivered on the back of a low-loader vehicle whilst it was stationary on the "bell-mouth" in the north compound entrance. (The "bell-mouth" is the splayed area of tarmac or hardstanding between the public highway and the gate into the Site). She remained there for a number of hours before she climbed down.

43. On 28th November, the Third Defendant lay in the bell-mouth to the north compound entrance stopping access to and egress from the Site. She was later joined by another female person unknown. The Fifth and Sixth Defendants also joined her at various times.

44. On 4th December, about 11 trespassers, including the Third, Fourth, Fifth, Sixth and Seventh Defendants entered the bell-mouth area of the north compound entrance to the Site and posed for photographs with large banners. The Seventh Defendant climbed on to a truck making a delivery to the north compound entrance which was then driven away. The Seventh Defendant jumped out of the truck when it returned to the north compound entrance. The seventh defendant then lay down in the bell-mouth at the north compound entrance.

45. On 7th December 2017, the Third and Fifth Defendants and another unknown person sat in the bell-mouth to the north compound entrance and prevented access to the site.

46. Mr Roscoe also pointed out a series of incidents on the 8th, 9th and 10th January 2018 which took place in the bell-mouth of the north compound entrance.

47. Again, these incidents were all in evidence before Mr. Justice Barling at the hearing: that they occurred was not seriously in doubt. However, whilst, of course, these were in evidence before Mr. Justice Barling and led him to make the order which is presently time-limited, they are relevant before me by way of background when I come to consider whether I should grant a further injunction.

<u>More recent incidents</u>

48. More importantly, Mr. Roscoe highlighted incidents which had taken place after the date of the order. These are set out in Mr. Jordan's witness statement at paragraph 10 and following and thereafter in Ms. Dilcock's statement at paragraph 18 and following. The incidents are as follows.

49. There was an incident on 16th May 2018 which occurred on part of the Additional Land. However, Mr. Roscoe accepts that he cannot rely on that because at that time the Second Claimant was not in possession of that land and therefore it is not an incident of trespass.

50. However, on 21st May 2018 a person unknown broke through the perimeter fence adjacent to the south compound entrance and entered on to the Site in breach of the current order.

51. On 13th November 2018, while the Second Claimant's contractors were present, they were approached by two persons unknown who trespassed over a bund of soil (which is a mound of earth) located on land at the west side of Harvil Road and which has

been put in place to block access to the Site. This access/egress bund is located on the Additional Land, that is on the boundary between the highway and the Ragwort Field.

52. It is correct to say that the Additional Land is not subject to the injunction in the order. Therefore, any trespass on or any incursion into the Additional Land is not a breach of the injunction. However, the evidence of Mr. Clarke, which I accept, is that statutory notice was served in respect of the Additional Land, including both tracts of the Ragwort Field, in May 2018 and possession was formally taken on 4th October 2018. Thus, from 4th October 2018 any incursion into the Additional Land, in particular the Ragwort Field, whilst not a breach of the terms of the injunction, was a trespass if it was, as all of these were, unauthorised by either of the Claimants.

53. On 22nd November the Second Claimant's contractors were carrying out ecological surveys on S232_064, that is part of the Ragwort Field. The surveys in question involved climbing trees and ropes had been set up by the contractors for that purpose. The contractors had completed work on one tree when the Third Defendant entered on to the land. The contractors informed the Third Defendant that she was trespassing but she did not leave and continued to film her encounter with the contractors on her mobile phone, during which time she lectured the contractors on various ecological issues. The Third Defendant then lay down under the tree in question and when the contractors tried to move the tree climbing equipment, she began to wrap herself round the suspended safety rope such that it was unsafe for the contractors to continue work. Again, whilst the Third Defendant might have entered the Ragwort Field via a public footpath which runs through it, any incursion beyond that and certainly any obstruction of work on the Ragwort Field constituted a trespass. Although it is accepted that it is not a breach of the terms of the order.

54. On 23rd November 2018 it is said that the Second Claimant's senior property acquisition manager, one David Clarke, was attending a pre-possession meeting on the Ragwort Field and had reported that the Third Defendant and another person unknown were observed walking on that plot. The location of this plot is shown on the plan. Again, I understand the Third Defendant would say that on that occasion she did not leave the public footpath and, if that is right, then it is not a trespass because there is no objection to anyone using that public footpath for proper purposes.

55. A further incident is described on 27th/29th November which interfered with planned night works. However I understand Mr. Roscoe to say that that was neither trespass on the site nor a breach of the injunction.

56. On 27th November 2018 one of the Second Claimant's security analysts, one Pete Robbins, became aware and subsequently informed Mr. Jordan that video footage of a potential "lock-on" situation had been recorded and posted on social media by the Third Defendant. The footage suggested that the Third Defendant and others were in a field where they believed the Second Claimant was due to undertake works of removing a soil bank the same evening. In the video footage the Third Defendant was seen and heard to explain that she was locked to a gate which was buried in the soil bank. Three other persons unknown were also believed to be locked onto the gate. Again, that gate and bank is, I believe, either on the highway or on the Ragwort Field. It would not be subject to the terms of the present order but the activities described would constitute trespass on the Ragwort Field to that extent.

57. Subsequently, on 28th November, in addition to the Third Defendant there were present approximately ten other persons, being a mix of male and female adults, sitting and lying on top of the access/egress bund with at least two of these individuals being in sleeping bags. Again, this would be a trespass on the Additional Land at that time. At about 9.30 the security contractors informed these protestors that they were trespassing and in breach of the current order. The police had been notified. The protestors, it is said, disputed that they were in breach of the current order because they considered the signage displaying the injunction plan was small and not easy to see that the access/egress bund fell within the land covered by the injunction. The access/egress bund, however, is, it is said, part of S232_064 being the Ragwort Field. Indeed, insofar as the Third Defendant on that date stated that such incursion was not a breach of the injunction, which I accept that she did, she was correct. The Additional Land on which this was a trespass is not subject to the order and, thus, whilst this was a trespass, it is not a breach of the injunction. More protestors arrived on that evening.

58. On 29th November, two male persons unknown entered the bell-mouth area of the north compound entrance and stood in front of the gates, both trespassing on the land and obstructing vehicular access. At that time, one vehicle was attempting to exit the Site and another vehicle was attempting to enter the Site. Both vehicles were prevented from proceeding by the presence of these persons unknown.

59. On 11th December 2018 works were being carried out by a JCB digger on the Ragwort Field. At around 10.30, three individuals arrived at the heras fencing and began taking photographs and protesting against the work. At this stage the protestors were situated on the Harvil Road public pavement directly outside the access/egress bund. At around 11.20 the Third Defendant and two other persons arrived and by 11.50 there were eight persons present, including the Third and Fourth Defendants. These persons immediately crossed on to and then off the land covered by the order, of which there appeared to be deliberate breaches, albeit, it is said fleeting. By 12.40 there were ten protestors present and the police were called. A group of protestors were "huddled together", it is said, with the Third Defendant located somewhere in the middle of the group. The Third Defendant then dropped down to the pavement and pushed the heras fencing upwards, whilst some of the group lifted the fencing to allow her to roll underneath and onto the Ragwort Field. The Third Defendant then ran to the JCB digger working on the Ragwort Field and climbed onto the roof. She was informed she had breached the injunction but did not come down. At one o'clock Craig Leech of the Second Claimant's security team arrived and persuaded the Third Defendant to climb down. As the Third Defendant was leaving the land, the originally proposed Ninth Defendant ran on to the plot and used a bicycle "D-lock" around her neck to attach herself to the front part of the digger.

60. This incident has led to a charge of aggravated trespass against the Third Defendant which she denies. Indeed, in the course of her submissions she showed me a document prepared by her counsel for the hearing at the Uxbridge Magistrates' Court in which she denies that offence. However, it does not appear to be denied that she was present on the Ragwort Field on that occasion and, indeed, had climbed on to the digger.

61. On 18th February 2019 whilst the Second Claimant's contractors were undertaking fencing works on the land at plot C111_002, they were approached by the Third

Defendant and an unknown male, both of whom stated to the contractors that they were "live on social media" and started asking questions about what works were currently taking place. The Third Defendant and the unknown male continued asking questions and disrupting the contractors. Again, it may be, as the Third Defendant asserts, that at that stage she was actually on the public footpath.

62. Further incidents took place and, indeed, it appears that they took place with increasing frequency, once this application had been issued. As I have said, these are dealt with in the witness statement of Ms. Dilcock. She says that contractors working on the land had been subject to significant levels of threatening and abusive behaviour, including an incident on 27th April 2019 when a male person unknown approached the north compound entrance gates and verbally harangued the security officer on duty there, using offensive and racist language and made threats to kill and trace the officers. This incident lasted for 45 minutes.

63. In another incident on 30th April 2019 a security officer had his helmet pushed off his head by protestors attempting to obstruct a lorry entering the Site at the north compound entrance.

64. On 27th and 28th April, it is said that tree cutting works were scheduled to be carried out but approximately 15 to 20 persons unknown climbed the trees on each of the days in question and refused to come down. However, it is quite clear that this particular incident involved neither a breach of the order nor a trespass on the Site. Therefore I make it clear that it is irrelevant to any consideration that I have made and will make.

65. However, on 27th April 2019, a male person unknown obstructed security contractors attempting to leave the land by the north compound entrance in their security vehicle.

66. On 28th April 2019 the perimeter intruder detection system detected a female person unknown digging under the perimeter fence at the eastern boundary of plot 232_036. She left following an audio challenge from the detector system. Later that day the system detected four persons unknown at the perimeter fence at the western boundary of 232_036 who were observed on the CCTV apparently looking for ways to gain entry onto the Site. They left following an audio challenge.

67. On 29th April 2019 there were a number of incidents throughout the day during which persons unknown obstructed and prevented access to, and egress from, the Site at the north compound entrance by standing, sitting and lying in front of vehicles at the bell-mouth in front of the gates. These actions obstructed both delivery vehicles and the vehicles belonging to the contractors working on the land. Various posts were made on social media about this obstruction.

68. On 30th April a group of protestors blocked the gate at the north compound entrance preventing a lorry from leaving and contractors from entering for a period of over two hours spanning most of the morning. The police were called to that incident.

69. On the morning of 1st May a female person unknown obstructed two vehicles attempting to enter the Site via the gates of the new entrance to the land which entrance is into the Ragwort Field or in that vicinity. She was joined by another three persons unknown and the entrance was obstructed for around two hours.

70. On the afternoon of 2nd May a group of persons obstructed the gates at the north compound entrance preventing vehicular access and egress.

71. On 3rd May a group of persons approached the gates of the north compound entrance. One individual, identified apparently as Tanis Jacob Wolf or Tara Wolf, locked herself onto the middle gate of the north compound entrance by placing a D-lock around her upper arm and through the gate to secure herself in place and then placing her arm in a plastic tube with a nail driven through it to which she glued her hand in order to make removal of her arm from the D-lock difficult. This was, in short, a protestor gluing herself to the gates into the north compound entrance so that the gates could not be opened. This is shown in photographs which are annexed to the statement.

72. On 3rd May a diesel delivery vehicle was stopped by protestors whilst attempting to enter the Site at the north compound entrance. The vehicle was unable to enter the Site and was forced to abandon its attempt at entry.

73. I go through those incidents in some detail so that it is clear about those upon which I rely. It has not seriously been challenged that those incidents took place and I find that they did.

74. As I have said, the Third Defendant has made the point, as she is entitled to, that certain of those incidents were not trespass or that certain of them, if they *were* trespass, were not breaches of the terms of the order.

75. However, I do find, as I have said, that the Second Claimant took possession of the land known as the Ragwort Field on 4th October 2018, as Mr. Clarke has said and, thus, that any incursion by the Third Defendant or anyone else on to that land after that date without the permission of the claimants was a trespass.

76. In her submissions to me, the Third Defendant intimated that possession had not been taken by the Claimants until 11th December 2018. Whereas it might have been understandable for her to think that, I find that she is wrong about that and that legal possession was taken justifying any claim of trespass from 4th October 2018 onwards.

77. Not only does Mr. Roscoe point to these incidents which have occurred after the date of the order but he also points to certain other matters which, he says, indicate a continued threat of trespass and obstruction.

78. He points to what the proposed Ninth Defendant said outside Uxbridge Magistrates' Court following a hearing there and in the presence of the Third Defendant. It is quoted in an exhibit to the statement of Mr. McCrae. What was said by the proposed Ninth Defendant (who is pictured with her arm round the Third Defendant) outside Uxbridge Magistrates' Court, was: *"I think we need to up the game and start doing loads of lock-ons"*. The assembled crowd cheers. Then she says, *"I think that's the only solution here"*. She subsequently says:

> *"We've got to, like, XR [that is a reference to the so-called extinction rebellion protest movement] we need to put the pressure on to XR, maybe form our own XR. I mean we are our own thing anyway but we need to, like, get people who are*

> *willing to go and stop what they're doing because it's not that scary. Coming here today is like that's it, I'm here, that's done. It's like you're not going to get locked up. If we get fined, we'll crowd-fund for them. Just get involved, don't be scared. We've got to do this for our children. I've got three children, I'm doing this for them. Every moment I get, I'm doing this sort of stuff for them so I can tell them what I tried. We can't just leave it until July to find out that all our water is contaminated, like what's going to happen with all our kids?"*

Then the Fourth Defendant is recorded as speaking saying, *"Yeah, it's happening now and we've got to stop it now,"* and then an unknown male person speaks and says:

> *"And the time really is now, it really is now. We work for a charity, don't we, Sarah? It's so hard getting people to come together and you know a lot of people, they just sit there, will type on Facebook but that's not enough, is it?"*

79. Then there were, in particular, a number of statements made by the Fourth Defendant which are also recorded in that same exhibit. I believe this one is from Facebook and it records the Fourth Defendant saying in relation to the incident which resulted in the charge of aggravated trespass:

> *"Two arrested. Still need people here. Need to hold them up at every opportunity."*

Then he is also recorded as saying on 28th April, whilst addressing a lady called Lainey Round, as follows:

> *"No, Lainey, these trees are alongside the road so they needed a road closure to do so. They can't have another road closure for 20 days. Meanwhile they have to worry BIG time about being targeted by extinction rebellion and, what's more, they're going to see more from us at other places on the royte VERY soon. Tremble HS2, tremble."*

80. I also note from his own witness statement that the Fourth Defendant says as follows. In paragraph 3 he says this:

> *"Yet again, I find myself here defending not just my honesty and my integrity but that of all those millions out there who hate HS2."*

He says in paragraph 20 as follows:

> *"But that pales next to contempt of youth, of our children and their children, of our future and contempt of the planet we all share."*

And at 21:

> *"I will NOT stand by. My daughter, who knows she has little chance of reaching my age, deserves all my energy and all my activism to end such horrible conceit."*

Paragraph 23 of that statement is as follows:

> *"We have no route open to us but to protest. And however much we have sat in camp waving flags, and waving at passersby tooting their support, that was never and will never be the protest that gets our voices heard. We are ordinary people fighting with absolute integrity for truth that is simple and stark. We are ordinary people fighting an overwhelming vast government project. But we will be heard. We must be heard."*

81. I fully accept that this expresses the passion with which the Fourth Defendant opposes the HS2 scheme and while they may not indicate that the Fourth Defendant will personally breach any order or be guilty of any future trespass, I think there is, I frankly find, a faintly sinister ring to these comments which in light of all that has gone before causes me to agree with Mr. Roscoe and the Claimants that there is a distinct risk of further objectionable activity should an injunction not be granted.

82. Mr. Roscoe submits that, absent the continuation of injunctive relief, not only the named Third and Fourth Defendants, but others unnamed, will continue to trespass and obstruct. As stated, I agree with him, certainly in relation to those falling within the categories defined as the First and Second Defendants.

The Third Defendant's Submissions

83. The Third Defendant made oral submissions to me in a moderate and restrained way.

84. As set out above, she raised issues with whether certain of the recent incidents on which the Claimants rely actually constitute trespass. As I have already stated, I think that she is mistaken as a matter of law as to when the Ragwort Field fell into the possession of the Second Claimant. However, I agree with her that nothing done on that field hitherto can be a breach of the order, although any incursion after 4th October 2018 will be a trespass.

85. She emphasised that she ran a business conducting boat tours on the Grand Union Canal which was fed by the River Colne. She feared that this would be adversely affected by the Claimants' works. She emphasised that the land and the Additional Land had previously been public land owned by the London Borough of Hillingdon and had been accessed frequently by the public. She asserted that she had tried not to breach the injunctions, she had not done so and would not do so. She did not intend to trespass on the Claimants' land, she said.

86. Her principal concern, however, was the proposed pile driving works on the Ragwort Field which she said would have the effect of causing pollution from an already contaminated former landfill site to the north to leach further into the chalk aquifer in the area polluting both the ground and surface waters. This is an area from which a substantial number of people receive their drinking water. She pointed me to an

expert report from a Mr. Haydon Bailey at exhibit SG7 to her statement on which she intended to rely at her trial for aggravated trespass, her case being that she was not interfering with lawful activity as the pile driving which risked causing the spread of pollution was illegal and unauthorised.

87. She pointed out that during the passage of the Bill, this had been the subject of a petition to the House of Commons by Affinity Water. At SG8, she drew my attention specifically to paragraphs 26 and 27 of this document. These read as follows:

> *"Pollution of the groundwater (temporary or permanent) during or following construction may reduce your petitioner's ability [the petitioner being Affinity Water] to abstract from these sources. There is also the risk that pollution will occur as a result of the existence of the railway as the capability of the chalk to filter the water may be reduced by the railway's positioning. In addition, pollutants from further afield may be able to transit more easily to the sources as a result of the piling/tunnelling processes. Your petitioner has concerns that the promoter has not proposed adequate measures to prevent or respond to such pollution and that such pollution could be so severe as to render a source temporarily or permanently redundant. Your petitioner is concerned that should such pollution occur, without sufficient mitigation measures in place, there would not be time to mobilise alternative water supplies. In any event, such alternative sources would only be secured with substantial difficulty and at great cost.*
>
> *Your petitioner is concerned that in addition to any reduction in availability of water due to pollution, the construction methods themselves will alter the directions and volumes of water flowing through the chalk as the fissures in the chalk could become blocked by the tunnelling, grouting or piling processes."*

As a result of that petition, an undertaking was issued in favour of Affinity Water to provide financial compensation if there should be any contamination to the water supply.

88. The Third Defendant also asserts that this issue has been subject to an unanswered question in the European parliament. Whilst she has taken the issue up with various statutory and regulatory bodies and with her MP, she had had, she said, no adequate response and so felt constrained to raise this issue before me. Her submission to me was as follows: I should resist the grant of an injunction as it will give added protection to HS2 who are about to carry on activities on the Ragwort Field which will increase the likelihood or risk of pollution.

89. She also accused the Claimants of providing a deliberately inaccurate plan to the police and to the CPS. She said they did not therefore come to equity with clean hands. In answer to this, Mr. Roscoe accepted there was a plan which showed the Additional Land and which might in error have shown that as land covered by the order. The Third Defendant urged me to distinguish the *Ineos* case on the basis that

the Claimant there was a private company and here the Claimants were a government minister and effectively a publically owned company.

The Eighth Defendant's Submissions

90. The Eighth Defendant addressed me with some passion. He insisted that this was, in effect, an appeal from Mr. Justice Barling's order. He urged me not to amend or "fix" this "sick" order but to let it lapse and let the Claimants take their chances on an application for a new order once a further incident occurred, if it did. Formally, I disagree with the Eighth Defendant there. This is not an appeal; it is an application to extend. As a matter of law he is wrong on that but I understand the point he is trying to make.

91. He agreed with the Third Defendant that there was a significant risk of water pollution which was contrary, he said, to European law. He agreed with her that there was already evidence of a river being silted up due to deforestation. He did not, he said, want to be released as a named Defendant. He stated that he had never entered the land without openly calling the police as he felt he had nothing to hide.

The Fourth Defendant's Submissions

92. Mr. Powlesland made submissions on behalf of the Fourth Defendant and, indeed, on behalf, he said, of all the unnamed Defendants. Some of his submissions might be described as far-reaching.

93. He started by emphasising that the orders sought were against persons unknown and that, as such, I should be cautious about granting relief as such persons were, of necessity, unrepresented before me.

94. He submitted that it was important that parliament had enacted the offence of aggravated trespass in section 68 of the Criminal Justice and Public Order Act 1994. This provided for a certain level of punishment if guilt is proved. I should not, he argued, therefore in the exercise of my discretion grant an injunction to prevent trespass because the punishment for its breach was at least potentially far greater than that stipulated by Parliament for commission of the offence of aggravated trespass. This would be *"supercharging"* land owners' powers over and above the criminal law and allowing wealthy land owners, such as the Claimants here, to *"buy their own criminal law"*.

95. He went further. He pointed out that there was a social value in doing things that may be unlawful in the course of public protest. There was nothing wrong with peaceful and non-violent "direct-action" even if tortious. He pointed to the suffragettes and the chartists and more recently to the activities of the so-called "Extinction Rebellion" movement. He submitted that Parliament had designated only minor criminal penalties for offences committed in the course of peaceful protest and that this reflected society's view as to the utility of such a protest even though it might involve the commission of criminal offences. Many of these protests were in support of activities or viewpoints which society subsequently recognised as mainstream.

96. Both the fact that there were already criminal penalties and the fact that they were relatively minor should have an impact, he said, on whether or not I should grant an

injunction. He also pointed out that the Claimants had not sought to bring proceedings for contempt against anyone. This is what they should have done if they were convinced of their position, he submitted. This also showed, he said, that the Claimants did not consider the prospect of the injunction being flouted as really likely.

97. In relation to trespass to the various tracts of green land, that is the land of which the second claimant has temporary possession pursuant to section 15 and Schedule 16 of the 2017 Act, he made another submission which echoed something the Third Defendant had said. He pointed out that possession could only be taken for "Phase One" purposes which were defined by section 67 of the 2017 Act. Thus whilst a private company such as the Second Claimant was given wide ranging statutory powers, its possessory title was derived from what he described as a unique statutory scheme.

98. He submitted that private citizens should have the right to check that the Second Claimant was not abusing or exceeding those powers. A court, he said, should not grant an injunction to prevent what he described as "concerned citizens" from going onto land to check that the Second Claimant was not misusing or exceeding its powers by carrying out work that was not strictly permitted by statute. It would be wrong, he said, to grant injunctive relief effectively to prevent this.

99. In relation to the private and public nuisance, he addressed me on the Court of Appeal decision in the *Ineos* case. He referred to, and relied on, the last sentence of paragraph 42. Paragraph 42 reads as follows:

> *"Mr. Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide-ranging injunctions of the kind granted against the third and fifth defendants should be granted."*

This is the sentence upon which Mr. Powlesland relies:

> *"The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."*

100. Mr. Powlesland submitted that the Court of Appeal had in that case put a break on what he described as *"the creative use of injunctions to restrain the right to protest"*. He referred me to the statement of Lord Justice Laws in the *Tabernacle* case which is cited at paragraph 81 of *Ineos* at first instance. It is a quotation from the case of *Tabernacle v Secretary of State for Defence* and Lord Justice Laws said this at paragraph 43:

> *"Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by*

> *others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope."*

101. Mr. Powlesland said that one of the uses of the public highway was to march and protest. The offence of obstruction of a highway was not punishable by imprisonment and therefore I should not injunct such activities on the public highway, thus effectively increasing the penalties for those in breach.

102. He complained that the terms of the proposed injunction so far as the designation of the Second Defendant was concerned, in its use of the word "substantial", was too wide and too vague. It would, he said, prevent a legitimate protest and have a chilling effect on those who might wish to do so. He pointed to paragraphs 39 and 40 in the *Ineos* case and submitted that the comments in relation to the word "without lawful excuse" applied equally to use of the word "substantially" here. In paragraph 40 of the *Ineos* in the Court of Appeal, Lord Justice Longmore said this:

> *"Fourthly, the concept of 'unreasonably' obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction… but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of 'without lawful authority or excuse' into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse."*

As I have said, Mr. Powlesland asked me to apply that by analogy to the use of the word "substantially" in the proposed definition of the Second Defendant.

103. He suggested that, if I was minded to grant an injunction, it should be limited to a defined section of highway and/or by reference to a defined list of prohibited activities. He submitted that, due to the elastic and uncertain definition of certain torts such as private nuisance, it may not be possible to grant injunctions to prevent them, particularly not when public protest is involved.

104. I should not, he added, grant an injunction whose terms were bound to be breached, either deliberately or accidentally.

105. He finally submitted that the Fourth Defendant should be removed as a named Defendant as there was no evidence that he had breached the order or will do so in future.

Service

106. The details of how this application came to be served on both the named and unnamed Defendants are set out in the statement of Ms. Dilcock dated 8th May 2019 at paragraphs 2 to 10 and there are a number of certificates of services at divider 4 to bundle 2. I am quite content that, for the purpose of section 12(2) of the Human Rights Act 1998, the Claimants have taken all practicable steps to notify the First and Second Defendants and indeed, no one has seriously suggested otherwise.

Discussion

107. A number of things are clear.

108. Both the named and unnamed Defendants are protesting against the activities on the original 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.

109. The protests in, on and around the land which started in late 2017 and eventually gave rise to the order have continued since it was granted in February 2018. The so-called protestor encampment immediately opposite the north compound gate (the presence of which is not prohibited by either the order or the proposed order) is still there and, indeed, has grown in size. There are protestors at the site if not daily, then very frequently indeed. The opposition to the works at the Site being carried out by the Claimants is just as vehement now as it was when the order was originally granted.

110. It is certainly the case that both the Third and Fourth Defendants are still both vehemently opposed to the works being carried out by the Claimants and are still closely involved in the public protests against those works around the Site.

111. The order has had the effect, if not of eliminating the complained of behaviours, then certainly of reducing their frequency. There were 31 incidents between 2nd October 2017 and 30th January 2018 leading up to the grant of the order but there have been at most 17 in the 15 or so months since that time.

112. However, whilst the order has had the effect of reducing the incidence of incursions and obstruction at the Site and whilst it has doubtless had the effect of causing the named Defendants and others to amend their behaviour around the Site in order not to breach its terms, it is clear to me that there are persons who are prepared to ignore its terms. The incidents which I have already outlined have occurred since the grant of the order and it has not been disputed before me that many of those involved breach of the terms of the order, albeit not by the named Defendants.

113. Even the Third Defendant admitted to me that, whilst she had mostly endeavoured strictly to comply with the terms of the order, she had trespassed on at least one occasion. As I have said, the passionate opposition to the activities of the Claimants on the site has not waned.

114. 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 I have outlined, after a lengthy Parliamentary procedure during which those who objected had a chance to explain their reasons.

The test for the grant of an interim injunction in these circumstances

115. What is being sought is an interim injunction. It is not strictly a quia timet injunction as, of course, both before and after the grant of the order incursions and obstructions have occurred. Thus, this case on its facts is materially different from the *Ineos* case which I will discuss in detail a little later.

116. However, as the order sought involves the restriction on the Defendants' Article 10 and 11 rights, then the claimants must overcome a higher hurdle than the traditional *American Cyanamid* test. However one starts with that test. That was the test applied also by Mr. Justice Barling in paragraphs 46 and 47 of his judgment.

117. The starting point for an application of this kind is the *American Cyanamid* test and one starts with the fact that the Claimants have to show a serious case to be tried. Mr. Justice Barling concluded that, in fact, the case before him was a very strong one and I agree with that conclusion on the evidence before me.

118. I have no hesitation in finding that the Claimants have established at least a serious case to be tried. There is a very strong case that the Defendants have been guilty in the past of incursions and obstructions and I think that on the evidence, as I have outlined, there is a strong likelihood that, if the injunction is not continued, then there would be further incursions and obstructions.

119. I also think, as did Mr. Justice Barling, that damages would not be an adequate remedy in this case, which is the second limb of the *American Cyanamid* test. These incursions and obstructions have as their effect, if not their intention, the delay of a major national infrastructure project which has been permitted by an act of Parliament. Not only is the cost of such disruption and delay unquantifiable but there is also no evidence that any of the Defendants would be able to pay substantial damages.

120. However, the parties agree that there is a higher hurdle because of the Defendants' human rights which are potentially engaged here. What is engaged are those rights under Article 10 and Article 11 of the Convention. Article 10 provides as follows:

> *"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."*

Article 11 provides:

> *"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."*

121. It is accepted that section 12 of the Human Rights Act also applies. This reads as follows:

> *"(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."*

As I have set out above, I have no difficulty in ruling that the Claimants have met the test in section 12(2). They have taken all reasonable steps to notify the respondents, including persons unknown. It is accepted that section 12(3) applies and that what is

being restrained, or potentially restrained, here is publication and, thus, there is the higher standard set out in section 12(3) that applies.

122. In *Ineos* at first instance Mr. Justice Morgan considered the test to be applied when a court is considering the grant of a quia timet injunction. He summarised it at paragraph 98. He said:

> *"I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm')."*

As I have said above, this case does not involve a quia timet injunction. In paragraph 87 of his judgment in *Ineos* Mr. Justice Morgan made clear what he meant by that term. He said this:

> *"The interim injunctions which are sought are mostly, but not exclusively, claimed on a quia timet basis. There are respects in which the claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a quia timet basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to, seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will approach the present applications as if they are made solely on the quia timet basis."*

123. Here, of course, incursions and obstructions have occurred both before and since the date of the order. Thus, strictly the test applied by Mr. Justice Morgan and the Court of Appeal does not apply. The Court of Appeal, it appears to me, in the *Ineos* case confirmed that this was the case. In paragraph 48 they said this:

> *"Nevertheless, I consider that there is force in Ms. Williams' submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to Site 7 where it is said that planning permission for fracking has twice been refused and Sites 3 and 4 where planning permission has not yet been sought."*

124. Thus, in relation to applications for an injunction on a quia timet basis, it has to be established that the threat is "imminent and real". As I have said, strictly that test

does not apply here because incursions and obstructions have already occurred. However, I find that those tests are met on the facts of this case on the evidence that I have seen and which I have outlined. I find that there is an imminent and real risk of harm if injunctive relief is not continued. I find on the evidence that there is a real risk that incursions and obstructions will continue and, indeed, will increase in frequency if injunctive relief is not continued.

125. So far as the balancing exercise required by the Human Rights Act is concerned, this was considered again by Mr. Justice Morgan in paragraphs 103 to 106 of his judgment at first instance in *Ineos*. He said this:

> *"As regards the cause of action in trespass, the right to freedom of expression and the right of assembly under Articles 10 and 11 are relevant. However, there is clear authority as to how those Articles should be applied in cases where the claim is for trespass to private land. I was referred to Appleby v United Kingdom [2003] 37 EHHR 783, School of Oriental and African Studies v Persons Unknown [2010] EWHC 3977 (Ch) and Sun Street Property Ltd v Persons Unknown [2011] EWHC 3432 (Ch). Although the law is quite clear and the result of applying it in the present case was not really in dispute before me, I will refer further to the last of these three cases as it is relevant to submissions I will later deal with as to whether I was misled when I granted injunctions ex parte on 28 July 2017.*
>
> *In Sun Street, the judge (Roth J) referred to Articles 10 and 11 and to the earlier cases of Appleby and School of Oriental and African Studies. He also referred to Mayor of London v Hall and quoted two paragraphs ([37] and [38]) from that case which referred to a number of relevant matters when balancing competing rights for the purposes of Articles 10 and 11. Roth J then contrasted the position of a prominent public space with private land. On the facts of the particular case, Roth J said at [32] in relation to submissions as to Article 10:*
>
> *'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 whether if the bank, or, more accurately, its subsidiary, 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 or groups currently in the property can manifestly communicate their views about waste of resources or the practices of one or more banks without being in occupation of this building complex. No one is seeking to prevent them from coming together to campaign or promulgate those views. 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.'"*

Mr. Justice Morgan continued:

> *"In the present case, if a final injunction were sought on the basis of the evidence presented on this interim application, the court is (to put it no higher) likely to grant an injunction to restrain the protestors from trespassing on the land of the claimants. The land is private land and the rights of the claimants in relation to it are to be given proper weight and protection under Articles 10(2) and 11(2). The claimants' rights are prescribed by law, namely the law of trespass, and that law is clear and predictable. The protection of private rights of ownership is necessary in a democratic society and the grant of an injunction to restrain trespass is proportionate having regard to the fact that the protestors are free to express their opinions and to assemble elsewhere. There would also be concerns as to safety in the case of trespass on the claimants' land at a time when that land was an operational site for shale gas exploration.*
>
> *I take the same view as to the claim in private nuisance to prevent a substantial interference with the private rights of way enjoyed in relation to Sites 3 and 4. I would not distinguish for present purposes between the claim in trespass to protect the possession of private land and the claim in private nuisance to protect the enjoyment of a private right of way over private land."*

126. This test was also considered by Mr. Justice Barling when he gave his judgment which resulted in the order in this case. He said this at paragraph 58:

> *"In my view the claimants have clearly surmounted the American Cyanamid hurdle in all respects, both as to the seriously arguable case and as to the inadequacy of any relief in damages. With respect to the higher hurdle that applies in the present case, I also consider, in the light of the material before me, that it is likely at trial the claimants would succeed in obtaining the kind of protective orders that they seek, both in relation to the application of trespassory injunction and the application for an injunction in respect of activities in or about the entrance compounds, north and south. I make these findings having carried out the balancing exercise which is appropriate given that Articles 10 and 11 are engaged here. The defendants are undoubtedly exercising their freedoms of expression and assembly in protesting as they have done (and will in all likelihood continue to do) about the activities carried out on this site. However, in my view the balance very clearly weighs in favour of granting relief because the defendants'*

> *right to protest and to express their protest both by assembling and by vociferating the views that they hold, can be exercised without trespassing on the land and without obstructing the right of the claimants to come in and out of the land from and on to the public highway. What the defendants seek to do by carrying out these activities goes beyond the exercise of their undoubted freedoms of expression and assembly, what they wish to do, as well as protesting, is to slow down, or stop, or otherwise impede the work being carried out. Whilst a legitimate process might encompass an element of pressure, so that how we protest and how far we are allowed to go in protesting about something with which we do not agree, may involve a difficult balance and assessment, here the defendants have clearly strayed beyond what those qualified rights under the Convention entitles them to do. I consider that in all the circumstances the balance of convenience favours the grant of relief, and that it is just and convenient for me to do so."*

127. Having considered the further evidence put before me as well as that which was before him, like Mr. Justice Barling, I consider that the same factors continue to apply now as they did before him. I consider on the evidence which I have seen and considered, that it is highly likely that the Claimants will obtain the orders they seek at a trial. Whilst the Defendants are undoubtedly exercising their Article 10 and 11 rights, the balance weighs very heavily in favour of granting relief. The Defendants can continue to exercise their right to protest by not trespassing on the Site and by not obstructing access and egress from it. They are perfectly at liberty to protest elsewhere lawfully. It continues to be the case that the aim of those who would trespass on the site and obstruct access to it goes beyond legitimate protest and encompasses a desire to impede the work being carried out there.

The *Ineos* case in the Court of Appeal

128. Contrary to the submissions of Mr. Powlesland, I do not think that anything said by the Court of Appeal in the *Ineos* case militates against the grant of injunctive relief in this case. A number of points about that case appear clear to me.

129. Firstly, as I have said, on its facts that was a case in which quia timet relief was being sought. No actual trespass or nuisance had occurred at any of the sites. Indeed, no fracking had actually occurred at any of them. It seems to me that the comments of the court in that case must be put in that context (see for example paragraphs 2 and 42 of the Court of Appeal judgment). That is not the case here. Further, the relief sought in that case went far beyond the relief sought here (see for example paragraphs 5 to 9 and 15 of the Court of Appeal judgment).

130. Thirdly, a full-frontal attack was made by the Appellants in that case on the jurisdiction of the court to grant an injunction against persons unknown in such cases (see paragraphs 18 to 34). That attack was rejected by the Court of Appeal. The court was clearly content to uphold injunctions granted against persons unknown to prohibit trespass on private land (see paragraph 37). The court also clearly endorsed the grant of such an injunction to prevent "substantial interference" in private nuisance (see paragraph 37 and paragraph 149 of the judgment of Mr. Justice

Morgan). To that extent, I reject the submissions of Mr. Powlesland to the effect that the inclusion of such words render the injunction too vague.

131. Applying the tentatively framed requirements in paragraph 34 as set out by Lord Justice Longmore, and assuming for present purposes that they apply to a case such as this which does not concern quia timet relief, I find as follows. Firstly, as set out above, I find that there is a real and imminent risk that trespass and private nuisance will occur if an injunction is not granted. Secondly, it is impossible to name all of those who have and are likely to commit such torts. Thirdly, it is possible to give effective notice of the injunction and, indeed, the Claimants have done so in the past, as I so find. Fourthly, the terms of the proposed orders correspond to the threatened torts, that is the incursions and the obstructions, and do not prohibit lawful activity. The amended definition of the Second Defendants and the terms of paragraphs 7, 8 and 9 of the draft order make this clear.

132. The terms of the order are sufficiently clear and precise to enable persons potentially affected to know what they must not do. As I have stated, I reject any submission that the insertion of the words "substantially interfering" will render the order too vague in this sense.

133. The order will have a clear geographical and temporal limit.

The Defendants' Submissions

134. I think that the balancing exercise as described by Mr. Justice Morgan in paragraphs 103 to 106 at first instance in *Ineos* and that as carried out by Mr. Justice Barling and myself deals with most of the points made by Mr. Powlesland.

135. Articles 10 and 11 protect freedoms of expression and assembly. They are qualified and not absolute rights. The authorities referred to by Mr. Justice Morgan make clear that they do not encompass the commission of torts provided that any restrictions are "prescribed by law" and "are necessary in a democratic society for the prevention of disorder or crime for the protection of the rights of others".

136. As owners and being entitled to possession of the Site, of course, the Claimants have their own rights under Protocol 1, Article 1 of the Human Rights Act. The protection of those rights has to be balanced against any possible infringement of the Defendants' Article 10 and 11 rights. The balance to be struck is as outlined in paragraphs 105 and 106 of Mr. Justice Morgan's judgment. There is no warrant for refusing an injunction to prevent either trespass or private nuisance in this case. 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".

137. It is worth noting that similar submissions to those made by Mr. Powlesland were made to Mr. Justice Morgan (see paragraph 78 of his judgment). They do not appear to have found favour with him and nothing in the Court of Appeal judgment in that case undermines this aspect of his judgment.

138. I also decline to recognise a class of "concerned citizens" whose desire to ensure that statutory requirements are being complied with permits them to commit trespass, or at

least allows them to do so without the threat of injunctive relief being granted. Whilst such "concerned citizens" would no doubt alert the relevant government department, agency or statutory body if they thought there was a breach of any statutory requirement, they have no right to usurp the functions of these entities and commit a tort in so doing.

139. Nor does the fact that the criminal law may cover the same facts mean that a civil court should not intervene to grant injunctive relief in appropriate cases (see the case of *Attorney General v Harris* [1961] 1 QB 74 as cited to me by Mr. Roscoe).

140. Further, as Mr Roscoe made clear: firstly, the punishment of a crime provides no remedy to the victim of that crime; secondly, the decision as to whether or not to prosecute is not that of the victim but is, rather, that of the police and the CPS; thirdly, prosecution for a criminal offence involves the higher criminal standard of proof. Thus, I reject Mr. Powlesland's submissions in this regard.

141. Finally, I do not think that the risk of breach should prevent me from granting the injunction sought. I was referred to case of *Secretary of State for the Environment v Meier & Ors* [2009] 1 WLR 2780 where Lord Rodger of Earlsferry said this:

> *"Nevertheless, as Lord Bingham of Cornhill observed in South Buckinghamshire DC v Porter [2003] 2 AC 558 at paragraph 32, in connection 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.'"*

Temporal Limits

142. I do agree with Mr. Powlesland, however, that an injunction granted until 2024 is too long in the light of the guidance given by the Court of Appeal in the *Ineos* case. I propose to grant injunctive relief until 1st June 2020 and no longer. Thereafter the Claimants will be at liberty as they have done here to apply for an extension in the circumstances as they exist at that date.

The Individual Named Defendants

143. The Claimants apply to remove the Fifth, Sixth, Seventh and Eighth Defendants from the order. The Fifth, Sixth and Seventh Defendants have not appeared and I see no reason not to grant the order sought by the Claimants. The Eighth Defendant does not want to be removed as a named Defendant. In the light of this, I see no reason to remove him.

144. For what it is worth, if I was forced to make a decision, I would not remove the Third and Fourth Defendants as named Defendants. They have been guilty of incursions and obstructions in the past. While they have not been guilty of any breach of the terms of this order, as I have stated above, they are still both vehemently opposed to

the HS2 project in general and to the works being carried out on the Site in particular. Both are still intimately involved in the protests at the site. The Third Defendant has been guilty of trespass on the Ragwort Field and, indeed, has obstructed work on it. She feels that she has a duty effectively to monitor the work being carried out there. The Fourth Defendant has, as I have described above, made what I regard as, I am afraid, distinctly sinister comments on social media.

145. I have no doubt that the Third Defendant has made her points at length to her MP and to various other government bodies and statutory authorities. She submitted that she felt constrained to explain her objections to me when she felt that no one was listening. I cannot say whether she is right or wrong on this. However, she does not appear to countenance the possibility that the lack of action or response may be because those to whom she has addressed her concerns do not share them or do not share them to the same degree.

146. However, as I indicated in argument, whether or not the Third or Fourth Defendant continue as named parties can be a matter of agreement. The Claimants indicated through Mr. Roscoe that they have no particular interest in having them as named parties, as they will be bound by the terms of any order against the First and Second Defendants and no costs order is sought. I note simply that the advantage of the Third and Fourth Defendants of remaining as named parties may be the right to appear and make submissions at any future hearing of this case.

Conclusion

147. I propose to make the order sought in the form of the draft annexed to the application dated 25th April 2019, save that I will not remove the Eighth Defendant as a Defendant. I will limit the time for which the order is granted to 1st June 2020 and thereafter the Claimants are at liberty to apply for a further extension. I will leave it to the parties as to whether or not they agree that the Third and Fourth Defendants should be removed as parties. That is the end of my judgment.

(For proceedings after judgment see separate transcript)

148. Following the delivery of my judgment and discussion of the order, the Claimants, as indicated at the start, have not sought and are not seeking their costs against anyone. However, Mr. Powlesland on behalf of the Fourth Defendant submits that the Fourth Defendant should have his costs, or at least a contribution thereto. He advances this submission for essentially three reasons.

149. Firstly, he says that, until it was confirmed in the week before the hearing, there was a risk that his client, by being a named Defendant, would have costs sought against him and that therefore it was incumbent upon him to obtain legal representation. I am told that, only once Mr. Powlesland was instructed and checked with the Claimants' solicitors, was it confirmed that no costs would be sought.

150. Secondly, he says there is a real value to the Fourth Defendant being represented by a lawyer in cases such as this to put the contrary arguments and to test those put forward by the Claimants.

151. Thirdly, he said that the Fourth Defendant has, in fact, won a significant victory in the sense that the original application and the primary position of the Claimants was that they required an extension until 2024 and, in fact, I have only granted an extension for a year until 1st June 2020.

152. He says that, for all those reasons, he should have an order for costs.

153. This is opposed by Mr. Roscoe who said that effectively no order for costs was sought in the draft order and also said that, in fact, it is the Defendants who have lost and the Claimants who have won given the arguments that have been made and the points that I have decided.

154. The rules as to costs are set out in CPR 44.2 which emphasises, in 44.2(1), that I have a discretion as to whether costs are payable by one party to another. CPR 44.2(2) sets out that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party and I am afraid, contrary to what Mr. Powlesland says, on the face of it, it is in my view the Claimants who have been the successful party. Whereas I accept that they have not obtained everything they sought, the major argument at the hearing before me was not over the time to which the extension should be granted (which involved almost no time at all) but, rather, over other matters on which the Claimants were successful. Therefore, I think it is a bold submission by Mr. Powlesland to describe his client as the winner.

155. I accept that it is desirable that Defendants be represented in cases such as these and make applications and make arguments to test those advanced by Claimants. However, I think that it would be wrong to order the Claimants to pay any part of the Fourth Defendant's costs. It seemed to me that, if they sought their own costs, the Claimants would have a very strong argument against those that have opposed them. They do not and I acknowledge that. So it seems to me that the appropriate order and the one I am going to make is that there be no order for costs.

(For proceedings after judgment see separate transcript)

Neutral Citation Number: [2021] EWHC 821 (Ch)

Case No: PT-2021-000132

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rollls Buildings
Fetter Lane
London EC4A 1NL

Date: 19/02/2021

Before :

MR JUSTICE MANN

- -

Between :

(1) Secretary of State for Transport **(2) HS2**	**Claimants**
- and -	
Persons Unknown	**Defendants**

- -
- -

Saira Kabir Sheikh QC and Michael Fry (instructed by **Government Legal Service Companies and General Private Law Litigation Team**) for the **Claimants**
John Cooper QC (instructed by **Edwin Coe LLP**) for the **Defendants**

Hearing dates: 18th & 19th February 2021

- -

APPROVED JUDGMENT

Mr Justice Mann :

1. This is an application for a possession order and injunctive relief against persons unknown and various named individual, all of whom are occupying tunnels which they have dug in a piece of land between Euston Station and Euston Road, London. They (or some of them) originally occupied the land itself but in the face of eviction they have dug tunnels and retreated into them.

2. The defendants are a number of individuals who have been identified as occupying the tunnels together with "persons unknown entering or remaining without the consent of the claimants on land at Euston Sq, Gardens, London, shown in green on the plans are next to the particulars of claim". In fact since the proceedings were issued two of the defendants (Rory Hooper, the fourth defendant and Scott Breen, the fifth defendant) have voluntarily left the tunnels, though the claimants still persist in their possession claim against them. One of the defendants, the 6th defendant Isla Sandford Hall (known as Blue) is understood to perhaps be a minor, but that is not absolutely clear. That presents problems with which I deal with below.

3. The second defendant, Dr Larch Maxey, was represented before me by Mr John Cooper QC. The claimants were represented by Ms Saira Sheikh QC.

4. The claimants are the Secretary of State for Transport and High Speed Two (HS2) Ltd ("HS2"). The latter company is the substantial enterprise charged by statute and statutory instrument with the delivery of the High Speed rail link from London to Birmingham. HS2 requires the land for its operations. The defendants have occupied it, and now the tunnels they have built, as a protest against the project and in order to obstruct it. Their activities have received widespread coverage in the media.

5. Having taken possession of the surface HS2 now seeks orders removing the protesters from the tunnels they have dug. The protesters are doing all they can to obstruct their removal, including stating that they have chained themselves to parts of the tunnel and discouraging the removal of access hatches by claiming that they had attached themselves to the hatches by nooses. The evidence I have seen, and which I accept, demonstrates other serious obstructive acts including one or two involving limited violence, though this latter evidence is said to be disputed.

6. Before turning to the issues which arise in this application I shall elaborate a little more on the factual background which impacts on various matters arising. For the purposes of the large scale construction project which is the HS2 project, HS2 is said to have acquired possession or ownership of various pieces of land between London and Birmingham, and the subject land is a relatively small piece of land outside Euston station of which it needs possession in order to store or conduct some works. The project has attracted a lot of hostility from a number of people on ecological and other grounds.

This judgement and this application are in no way concerned with the rights and wrongs of those objections or the rights, wrongs or merits of the HS2 project itself.

7. At some point in the summer a number of individuals occupied the land in question. It is thought that Dr Maxey was one of the original occupiers; it is not known whether the other individuals who are defendants in this action were original occupiers but that does not matter. Originally the occupants established a barricade of wooden pallets and other structures on the land and put elevated platforms within various trees. Unknown to the claimants, the occupants were also digging tunnels into which they could retreat. The tunnels were not known to the claimants until they put into operation their possession plans at the end of January. At that point the occupiers retreated into the tunnels where they seem to have a good supply of food and means of communicating with the outside world (they have posted posts on social networks and it is understood that one of them has put in an appearance on the radio). They have made statements which clearly indicate that they do not intend to leave voluntarily, though as I have already observed two of them have. For present purposes it is quite clear that they will not leave unless it is under some form of compulsion, and eviction will be difficult and dangerous.

8. The evidence of the claimants, which I accept, is that the tunnels present significant danger both to the occupiers and to the representatives of the claimants who are lawfully trying to remove them. The tunnels are said to be not well constructed and are in imminent danger of collapse. There is some evidence that there has already been a collapse. Although the claimants managed to gain possession of part of the tunnels at one stage, the occupiers regained possession by subterfuge. The evidence is that those above ground have heard further tunnelling activities of the tunnellers recently, and spoil has been put by the latter at one of the entrances; though it is right to record that Mr Cooper, for his client Dr Maxey, seems to deny that there had been further tunnelling.

9. The tunnels and tunnelling are so dangerous that the representatives tasked with securing the situation and ultimately removing the tunnellers cannot engage in a process of removal by simply going down the tunnels themselves. The tunnellers claim to have chained, or will chain, themselves to each other and/or to parts of the tunnels. In order to gain access to the tunnels for their removal, additional shafts have been constructed or are still under construction (in anticipation that some point they will be used), and those shafts have been properly constructed. Nonetheless, the danger of collapse of the tunnels is real and serious, and imperils both the tunnellers and those who seek to remove them, and indeed others on the surface. From time to time the Health and Safety Executive has been in attendance, as have the London Fire Brigade and the ambulance service. There is also a police presence. The claimants estimate that their security and damage control operation has cost £1.35 million to date and is currently running at a cost of some £64,000 per day. I accept those figures. The activities of the tunnellers in opposition to attempts to remove them have given rise to an enormous amount of expensive activity which the claimants point out is at the public expense. At one stage a concern which turned out to be a false alarm caused the ambulance service to attend

as a major incident, which diverted resources which are obviously needed elsewhere. That, and the police, fire brigade and HSE attendances again divert public services.

10. A second witness statement of Richard Jordan, the Chief Security and Resilience Officer for HS2 gives evidence (albeit hearsay) of recent conduct by the tunnellers which he says demonstrates a determination to obstruct operations on the land. Allegations of some limited violence are made against Dr Maxey and other tunnellers are said to have interfered with the work of an extraction team installing acro props to shore up the tunnel system. It is right that I should record that on instructions Mr Cooper disputed the allegations against Dr Maxey and pointed out that the witness statement was produced so late that there was no possibility of his getting instructions on it or of Dr Maxey being able to respond. Nonetheless, overall that witness statement affirms the earlier evidence of Mr Jordan to the effect that the tunnellers seem bent on staying put and protecting their installation against intrusion, and themselves from removal.

11. Once the works in anticipation of retaining possession had started, Dr Maxey brought an application for an injunction requiring HS2, the London Fire Brigade and the High Court Enforcement Group Limited (who are tasked with removal of the tunnellers and who have been carrying out preparatory work) to cease operations. That application was dismissed by Robin Knowles J on 1 February 2021 (at 8:15pm). He recorded in his judgement that Dr Maxey (who did not appear in person before him) was in a very dangerous situation.

12. On 3rd and 5th February Dr Maxey made further applications. He sought to renew his application requiring the withdrawal of various authorities from the site and orders adding the Health and Safety Executive as an interested party. He sought the cesser of all operations and required the provision of oxygen monitoring equipment, a hard-wired communication system and food and drinking water for the occupiers, together with arrangements for the removal of human waste from the tunnel. (I should record that the claimants were already supplying a compressed air supply to the tunnels in order to ensure the safety of the tunnellers.) He also sought permission for one of his witnesses to be given access to the site for various reasons which I do not need to go into. Those matters came before Steyn J and on 10 February 2021 she delivered a comprehensive judgement on all the points ([2021] EWHC 246). Essentially Dr Maxey failed under all heads. Again on the basis of clear evidence, Steyn J acknowledged the serious danger to the occupiers. For example, she said (at paragraph 34):

> "Any contention that the Defendant has an obligation to supply them with food and water, to enable them to remain longer in the highly dangerous situation they are currently again, is misconceived."

13. I shall need to return to the relief granted by those judges in due course. For the moment I rely on their reference to the dangers of the situation, with which I agree. I am quite

satisfied that there is a danger not merely to the tunnellers but also to those above ground who are preparing, entirely legitimately, for their eviction.

The relief sought

14. Faced with that situation the claimants seek relief under two heads. First, they seek possession against all the defendants; and second they seek an interim injunction against the defendants (save, now, against the fourth and fifth defendants and Dr Maxey) in the following terms:

> "4. Further, the Defendants and each of them must forthwith:
>
> 4.1 Cease any further tunnelling activity and not cause, assist or encourage any other person to engage in tunnelling;
>
> 4.2 Inform the Claimants, the Health and Safety Executive, the London Fire Brigade and the Metropolitan police (i) how many people are in the tunnel or tunnels, and (ii) how many of those are children (and where children, their age and immediate contact details for any adult who to his or her knowledge as their parent or guardian or has responsibility for their case);
>
> 4.3 Provide details to the Claimants, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to the best of the Claimants' 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
>
> 4.4 Cooperate with the Claimants, 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."

15. This closely mirrors relief granted against Dr Maxey alone by Robin Knowles J and repeated by Steyn J. Because they already have an injunction against Dr Maxey, the claimants do not pursue the injunction claim in this matter against him. It is, however, the case that Dr Maxey has made no attempt whatsoever to comply with those orders.

The possession claim

16. So far as the possession claim goes, the claimants seek to invoke the shortened procedures provided by CPR 55. They have issued a claim form accordingly. For that purpose they have to establish that they have title, or title to sue. They have to establish that they were dispossessed (which is not their actual claim) or that they have a better right to possession than the tunnellers. At this point it will be convenient to mention that it transpired during the hearing that the Secretary of State in fact had no title to sue. After a certain amount of debate Ms Sheikh accepted that the appropriate plaintiff was HS2 alone. I can ignore the Secretary of State from now on in this judgment.

17. HS2 does not have legal title to this land. It does, however, claim to be entitled to possession under statute and to have a higher right of possession to that of the defendants. The source of its rights is the High Speed Rail (London – West Midlands) Act 2017. The act provides for a nominated undertaker to undertake the general construction works and gives ancillary rights to take possession. Section 1 provides:

> "1 Power to construct and maintain works for Phase 1 of High Speed 2.
>
> (1) The nominated undertaker may construct and maintain the work specified in schedule one, being –
>
> (a) works for the construction of Phase 1 of High Speed 2, and
>
> (b) works consequent on, or incidental to, such works."

Section 45 provides for the appointment of a nominated undertaker by the Secretary of State:

> "45 Nominated undertaker
>
> (1) the Secretary of State may by order –
>
> (a) appoint a person specified in the order as the nominated undertaker for such purposes of such provisions of this Act as may be so specified;
>
> (b) provide that an appointment under paragraph (a) ceases to have effect in such circumstances as may be specified in the order."

18. HS2 was appointed as the nominated undertaker for the purposes of all relevant works under the Act by the High Speed Rail (London – West Midlands) (Nomination) Order 2017.

19. Schedule 16 para 1 allows the nominated undertaker to take possession:

> "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 [a column in the table],
>
> (b) for the purpose of constructing such works as are mentioned in [another column], or
>
> (c) otherwise for Phase 1 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 1 purposes."

20. The land of which possession is sought in this action is land falling within the description in schedule 4. So far HS2 can claim an entitlement to possession.

21. However, paragraph 4(1) of the same Schedule seems to provide a prior requirement before possession is taken. It provides:

> "(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."

22. HS2 did that in relation to Network Rail, the London Borough of Camden and two bus companies, who were apparently the owners or lessees of the land, or at least in the case of the bus companies occupiers of the land, and there is no problem about those notices.

The difficulty in this case is that by the time those notices were given the land which is the subject of this action was already occupied by the trespassers. No notice was given to them.

23. Prima facie that would seem to me to indicate that the right of possession as against those trespassers has not yet arisen. The Act would seem to require that notice be given to occupiers before HS2 is entitled to take possession. Ms Sheikh sought to say that these provisions were all about compulsory purchase, because they go on to deal with compensation which was not applicable to trespassers. Accordingly notice need not be given to trespassers. That is not obvious to me. The word "occupiers" literally means "occupiers", and is capable of covering trespassers on its natural meaning. Although there are ensuing provisions about compensation, that does not obviously qualify the normal meaning of "occupiers".

24. If that is right then while HS2 is entitled to going to possession as against the companies to whom it gave notice, it does not have a right of possession as against occupiers. It seems to me at the moment to be arguable that what it ought to have done is serve notices on the occupiers at the time by leaving the notices on the land pursuant to section 65 of the Act (which might be thought to anticipate the position of unknown trespassers as well as other unidentified occupiers). That section provides for the service of notices in subsection (1), and subsections (5) and (6) provide for service on unidentifiable owners or occupiers:

> "(5) 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, and
>
> (b) the person's name or address cannot be ascertained after reasonable enquiry.
>
> (6) The document may be given to the person by addressing it to the person by name or by the description of "owner" or "occupier" (as the case may be) of the land and—
>
> (a) leaving it with a person who is, or appears to be, resident or employed on the land, or
>
> (b) leaving it conspicuously affixed to some building or object on or near the land."

25. Ms Sheikh put a lot of reliance on a warrant that has been issued pursuant to section 13 of the Compulsory Purchase Act 1965, which is applied to the 2017 Act via schedule 16 paragraph 11 of the latter act. Section 13, as thus imported, empowers the nominated undertaker to issue a warrant directed to the Sheriff or enforcement officer directing them to deliver possession of the land to the nominated undertaker. That has been done in a warrant dated 25 January 2021. It refers to the notices that have been given and ends by containing the necessary direction to an enforcement officer to deliver

possession of the whole of the land. Ms Sheikh seems to consider that this gives her some form of title as against the occupiers. I do not consider that it does. It is a mode of enforcement which she is not seeking to invoke. It neither improves nor hinders such rights to possession as she has or might have against the occupiers. She also submitted that I should not go behind that warrant and question its validity. I do not do so. I consider that it is an irrelevance in seeking to establish whether or not HS2 has a better right to possession, at the moment, than the occupiers.

26. I was referred to the decision of Mr David Holland QC in *Secretary of State for Transport v Persons unknown* [2019] EWHC 1437 (Ch), another case involving encroachment on to HS2 land. In the course of his judgment he said:

> "30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act. Section 15 simply says as follows:
>
> "Schedule 16 contains provisions about temporary possession and use of land in connection with the works authorised by this Act."
>
> One then goes to Schedule 16 and paragraph (1)(ii) says as follows:
>
> "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."
>
> The Second Claimant is the nominated undertaker and the Site is within the Act limits. The procedure is set out in paragraph 4. Paragraph 4(1) provides:
>
> "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."
>
> 31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and "take possession". That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land."

27. I do not consider that that authority assists Ms Sheikh. The entitlement of the claimants in that case (who included HS2) to possession was specifically said by the judge not to be in dispute (see paragraph 8) and it appears that the claim was for an injunction, not possession. Furthermore, it would seem that HS2 was already in possession by the time of the wrongful acts. So Mr Holland's summary was quite correct, and would be applicable in this case if HS2 started from the position of being in possession and had been dispossessed by the tunnellers; but that is not this case.

28. Ms Sheikh seemed to be taken by surprise by any question-mark over the title of her clients to sue. However, I consider that there is a question mark. HS2 does not claim to be entitled to possession by reason of any ownership interest. It claims to be entitled to have possession of the land pursuant to the Act. However, it I am not satisfied at the moment that it has complied with all the provisions of the act which are necessary to entitle it to possession as against the occupiers. It can undoubtedly acquire a right; it just does not seem to me to be clear that it has yet acquired one.

29. That is a troubling conclusion. There is no doubt that HS2 could fulfil the requirements of the Act and put itself in the position of having an unquestionable right to possession by serving a notice on the occupiers (and waiting the 28 days for it to expire). Had it done so already, and as will appear below, there is no doubt but that it should have a possession order. However, I am not at present satisfied that it has demonstrated it has a better title to possession than the occupiers. Unless it can establish that better title as against the occupiers then it cannot succeed.

30. Under other circumstances, and since Ms Sheikh is not yet managed to convince me that her clients have a better right to possession as against the occupiers, I would dismiss the possession claim. However, because of the very special circumstances of this case and the danger to life and limb that it presents, and because HS2 is seeking to remove that danger, I am prepared to give HS2 a further opportunity to convince me that it has a better right to possession than the occupiers. It may be that further delving into the Act and its mechanics will demonstrate that Ms Sheikh is correct in saying that the need to give notice does not apply to occupying trespassers, or that the failure to give them notice somehow does not detract from a higher right of HS2 to possession. That analysis has simply not been done. Rather than dismissing the claim and leaving HS2 to make a better case in the future in another claim, with all the delays (and the danger arising out of the delay) that that entails, I consider that the convenient course would be, if Ms Sheikh wishes to adopt it, to adjourn this matter for a short while (probably until Monday – today is Friday) to enable Ms Sheikh to address the point. I appreciate that that is probably unusual, but these are unusual circumstances and, if there is an answer to my misgivings, I consider that it would be more appropriate to advance it in these proceedings rather than in fresh proceedings.

31. I shall therefore not make a possession order today. However, because it may become relevant on an adjourned hearing, and in any event because I believe it will be useful to provide an answer to various other questions that have arisen in this case whether in these proceedings or in future proceedings, I shall go on to consider whether there are any other obstacles to a possession order being made as if as if there were no question mark over the title to sue.

32. Had there not been that question mark about HS2's right to possession there would not have been any other obstacle to the grant of the possession order on this occasion, and indeed it is absolutely plain to me that possession would have been ordered. Several matters have to be dealt with before arriving at that conclusion, but they are all resolved in favour of HS2.

33. First, service. If this were a pure possession claim then HS2 would be able to avail itself of CPR 55, within which the proceedings would be brought. However, HS2 has not sought to avail itself of the special service provisions in CPR 55.6 (fixing the proceedings to the front door or other part of the land, posting them through the letterbox or placing stakes on the land), and sensibly so. The occupiers are not occupying a building with anything like a front door, though I suppose that pinning the proceedings to the entrance to the tunnel might suffice. The occupiers have not thought fit to install a letterbox for the tunnels; and placing stakes would be a rather pointless exercise. The occupiers have not made themselves available for personal service. Instead HS2 has procured that a representative leave copies of the proceedings documents at two of the tunnel entrances. I have seen a video recording of each of those events, with a soundtrack which demonstrates that the representative announced to anyone within the tunnel what he was doing. Although it was not apparent to me from the video, it was apparently the case that there was an individual inside each entrance when the proceedings were left. In any event, it seems to me that HS2 cannot have done more. Furthermore, the fact that Dr Maxey procured representation at the hearing before me demonstrates that he knew that the proceedings were on foot, and if he knew the other occupants must also have known. I am quite satisfied that the occupants of the tunnels have had proper notice of these proceedings. Had an application be made in advance the court would certainly have made an order for substituted service in the manner in which these documents were left, and insofar as it is necessary to do so I make an order under CPR 16.15(2) that steps taken to serve the proceedings are good alternative service, operating retrospectively. Ms Sheikh sought to overcome any service difficulties by relying on CPR 3.1(m) (power of the court to make any order to further the overriding objective), but I do not think I need to rely on a general provision such as that, though the order that I would propose under CPR 16.15(2) certainly does further the overriding objective.

34. That course means that, insofar as the proceedings go beyond being possession proceedings, they are nonetheless to be treated as validly served.

35. Mr Cooper drew to my attention and relied on the new Practice Direction 55C which provides for temporary modifications of CPR Part 55 between 20 September 2020 and 30 July 2021. Paragraph 6.1 provides that in any claim brought after 3 August 2020:

> "The Claimant must –
>
> (a) bring to the hearing two copies of a notice –

…

(ii) in all claims, setting out what knowledge that party has to the effect of the Coronavirus pandemic on the Defendant and their dependents; and

(b) serve on the Defendant not less than 14 days prior to the hearing the notices referred to in sub-paragraph (a) setting out what knowledge that party has as to the effect of the Coronavirus pandemic on the Defendant and their dependants.

36. Mr Cooper pointed to the fact that HS2 had not served any such notice on the defendants and had not brought such a notice to court.

37. Mr Cooper seems to be correct in his description of those failings. Ms Sheikh acknowledged that but said that I should waive the defect under CPR 3.1(m). I am not sure that that contains an appropriate waiver power for these purposes, but CPR 3.10 certainly does. That provides:

"3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error."

38. I am quite satisfied that in the circumstances of this case it would be right to waive the defect and proceed in the absence of notices required by the Practice Direction. It seems to me that the Practice Direction is intended to deal with a more typical situation of trespassers on the surface, whose removal might adversely affect them or the community in terms of the coronavirus pandemic. The present case is rather different. The occupants of the tunnels are in grave danger and causing danger to others. They are not using the property as a dwelling; they are damaging property as a means of protest. A notice, whatever it might say, in the circumstances would be utterly pointless. Since they have been underground for several weeks, and have not complained about a coronavirus infection, the virus is presumably not affecting them underground in any event. Either they are not suffering from a coronavirus infection, in which case there is no reason why they should not be removed, or they are, in which case there is every reason why they should be removed. I therefore waive non-compliance with this provision.

39. Next is the question of the possible presence of a minor. As appears above, it is thought that one of the defendants may be a minor, though the position is not clear. If she is then, as things stand, there is a limit to which these proceedings can affect her without the appointment of a litigation friend, unless that requirement is dispensed with. CPR 21.2 provides as follows:

> "21.2 – (2) A child must have a litigation friend to conduct proceedings on his behalf unless the court makes an order under paragraph (3).
>
> (3) The court may make an order permitting a child to conduct proceedings without a litigation friend.
>
> (4) An application for an order under paragraph (3)
>
> …(c) if the child has no litigation friend, a be made without notice.
>
> (5) where –
>
> (a) the court has made an order under paragraph (3); and
>
> (b it subsequently appears to the court that it is desirable for a litigation friend to conduct the proceedings on behalf of the child,
>
> the court may appoint a person to be the child's litigation friend."

40. CPR 21.3 (3), which does not apply where the court had made an order under rule 21.2(3), prevents any step beyond the issue of proceedings being taken against a child who does not have a litigation friend. Subparagraph (4) provides:

> "(4) Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise."

41. Unless something is done to address the situation, the technicalities are such that if a possession order is made then there difficulties about enforcing it against the minor, if she turns out to be one, or perhaps even in ordering possession as against her. This point needs to be addressed somehow lest technicalities (albeit important ones) stand in the way of obvious justice. If this person is indeed a minor, she is thought to be approaching the age of majority. She has apparently joined a group of trespassers and put herself, and others, in grave danger. Removing her from the tunnel is obviously in her own best

interests. If it is obvious that possession has to be given, then the immediate presence of a litigation friend is not going to assist anyone. So far as necessary, I consider it right to make an order permitting her to conduct proceedings without a litigation friend pursuant to CPR 21.2(3), at least for the time being, which prevents any difficulties which might otherwise be posed. So far as necessary, I would in the alternative make an order under CPR 21.4 providing that all steps up to and executing a possession order may be taken against this defendant, even if a minor, and even though she has no litigation friend. The alternative would be to continue the proceedings, and make a possession order, against all the defendants except her, which would hardly be a sensible outcome.

42. Mr Cooper raised other points in favour of his client. His first point was a complaint that he had been unable to take satisfactory instructions in relation to this hearing, and also in relation to new evidential material (as to service and certain recent provocative events). The latter point was a question of timing. The first arose because when he attempted to have a consultation with his client over the phone could not do so satisfactorily because a bailiff (as he was described) was standing a few steps away from Dr Maxey at the entrance of the tunnel, so they could not have a private conversation. In relation to this event Mr Cooper was in effect giving evidence without the benefit of a witness statement, but I accept the facts from him. It was an unfortunate event, but I do not think that it is an event which stands in the way of my making a possession order which ought otherwise to be made. No plausible defence has ever been suggested to this claim and Dr Maxey has already failed twice in his attempts to challenge the actions which are designed to secure the site and which were precursors to the application for a possession order. Mr Cooper sought to say that, as a result of that incident, HS2 does not come to the court with clean hands. However, the absence of clean hands is no bar to the enforcement of a legal (as opposed equitable) right. If there were some indication that instructions might have led to the advancing of a credible defence, the position might be different and an adjournment might be appropriate. However, in all the circumstances of this case, and bearing in mind the pressing need to do something, I do not think that it is an event which requires the court to take any particular step as a result of it.

43. Mr Cooper went on to complain about what he described as a lack of candour on the part of HS2. He pointed to statements made by counsel for HS2 to Steyn J about the role of the Health and Safety Executive and what it did and did not require on the site. The evidence of this was not at all clear, but in any event I am quite satisfied that nothing under this head goes to whether or not a possession order ought to be made in this case.

44. Mr Cooper also complained about the extent to which the success of HS2's case depended on a significant number of departures from the rules and Practice Direction, which he said gives rise to concern in a case such as this. There is nothing in this point. The significant number of waivers and departures from the rules is necessitated by the unusual circumstances of this case and to a significant degree by the conduct of the occupiers themselves.

45. Mr Cooper went so far as to suggest that I should discharge the injunction ordered by Steyn J, partly, I think, on the basis of his allegations of lack of candour. He also complained that HS2 was trying to make an example of Dr Maxey and putting him at risk of a longer prison sentence than the criminal sanction of three months under section 68 of the Public Order Act 1994 (aggravated trespass). There is nothing in this point. There is no basis on which I can properly discharge the injunction made by Steyn J, especially on the without notice basis on which Mr Cooper advanced it. He drew my attention to the case of *City of London Corporation v Bovis Construction Ltd* [1992] 3 All ER 697 in which Lord Bingham set out some principles for the grant of an injunction in aid of the criminal law. The short answer to this point is that the injunction ordered against Dr Maxey, and indeed the injunction sought in the present case, are not injunctions sought in support of the criminal law. They are injunctions sought to support the civil rights of HS2.

46. Accordingly, were it not for the question mark about the title to sue of HS2 this would plainly be a case in which a possession order ought to be made against all defendants, and I would make one.

The injunction claim

47. I turn last of the question of the injunction that is sought. I confess that for a long time my reaction was that this injunction was really rather pointless. I consider that there was a serious risk that the court would be seen to be acting in vain. What the claimants are aiming for is possession, and if they get possession and extract the tunnellers then they will not need an injunction. During the period before possession the injunction is hardly likely to be obeyed, and it will be difficult to comply with while the respondents to it are underground. I had difficulty seeing the point in it. True it is that a similar order was made against Dr Maxey by Robin Knowles J and Steyn J, but those were injunctions ordered against a particular individual who seems to be something of a ringleader who was actually making applications to the court, and in different circumstances.

48. However, having reflected on the matter I consider that the injunction will serve some useful purpose. If another individual emerges voluntarily from the tunnel, then that individual can usefully be ordered to disclose the information required by the injunction. If and when HS2 finally breaks into the tunnel, the injunction, if complied with, ought to prevent the occupiers from obstructing their removal by fixing themselves to each other or parts of the tunnel structure, or doing other acts which obstruct possession. The history of this matter indicates that there is a serious risk of that. The occupiers will understand that if they conduct those acts, then not only are they likely to be futile in the end, they may result in a prison sentence.

49. I therefore consider that the injunction may serve a useful purpose and will grant it. Since the full identities of persons in the tunnel are not necessarily known, it is right that the injunction should also be made against the persons unknown in the tunnel appropriately described – the heading in the title to this action is not quite adequate for these purposes and must be more focused. I am satisfied that the injunctions can be appropriately targeted. I would also make a direction that the order for the injunction will be properly served, and treated us personally served, if left at the entrance or entrances to the tunnels with an announcement at the mouth of the tunnel as to what is happening (as happened on the occasion of the service of these proceedings) because I am satisfied that it will then come to the attention of the occupiers of the tunnels.

50. The result of the hearing is therefore that it will be adjourned for a short while, until Monday 22nd February, to allow HS2 to clear up, if it can, the question of its title to sue and obtain possession. If it can, then the full order will be made. If they cannot then I will have to consider what other orders might be appropriate, but I will grant the injunction.

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

Case No: CO/745/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2022

Before:

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

- -

Between:

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

- -
- -

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

Hearing date: 23 March 2022

- -

Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 68 of the Criminal Justice and Public Order Act 1994

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

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

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

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

(b) of obstructing that activity, or

(c) of disrupting that activity.

(1A) …

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

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

(4) [repealed].

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

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

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

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

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

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

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

The Proceedings in the Magistrates' Court

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

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

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

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

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

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

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

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

25. The judge made the following findings:

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

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

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

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

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

6. He did not act violently.

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

8. The Respondent believed the views he was expressing.

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

10. The land specifically related to the HS2 project.

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

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

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

Convention Rights

26. Article 10 of the Convention provides: -

"**Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority

> and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27. Article 11 of the Convention provides: -

> "**Freedom of assembly and association**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

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

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground 3

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

Court of Appeal

City of London Corpn *v* Samede and others

[2012] EWCA Civ 160

2012 Feb 13; 22

Lord Neuberger of Abbotsbury MR, Stanley Burnton, McFarlane LJJ

Human rights — Freedom of expression — Freedom of assembly — Interference with — Demonstrators setting up camp in St Paul's Cathedral churchyard obstructing highway and in breach of planning control — Majority of occupied land owned by local authority having planning control over portion of occupied land owned by Church — Judge granting local authority's claims for possession and injunction requiring removal of all tents — Whether unjust interference with demonstrators' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

In the middle of October 2011 the defendants and others set up in the churchyard of St Paul's Cathedral a protest camp consisting of a large number of tents, which were used for overnight accommodation, meetings and other activities and services. Many of the occupants of the tents designated their organisation the "Occupy Movement" or "Occupy London" whose concerns were mainly centred on the perceived crisis of capitalism and the banking industry and the inability of democratic institutions to deal with many of the world's most pressing problems. The greater part of the occupied land was open land owned by and under the responsibility of the claimant local authority as planning or highway authority, while a portion was owned by the Church over which the claimant had planning control. The local authority brought proceedings for possession of the occupied land, for an injunction requiring the defendants to remove the tents from all the occupied land and not to erect tents on that land thereafter, and for declarations that the claimant was entitled to remove the tents. The judge found that the defendants had no defence to the claim for possession, that the camp was a clear and unreasonable obstruction of the highway and a breach of planning control, and concluded that the defendants' rights of freedom of expression and freedom of assembly under, respectively, articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] were undoubtedly engaged, but that the factors for granting the claimant relief easily outweighed the factors against. The judge considered that the claimant had convincingly established a pressing social need not to permit the camp to remain, that the orders sought represented the least intrusive way to meet that need, and that it would not be disproportionate to grant the relief claimed, and he granted the orders in the claimant's favour.

On the defendants' applications for permission to appeal—

Held, dismissing the applications, that the case raised the question as to the limits to the right of lawful assembly and protest on the highway; that the answer was inevitably fact-sensitive, and would normally depend on a number of factors

[1] Human Rights Act 1998, Sch 1, Pt I, art 10: "1. Everyone has the right to freedom of expression . . . 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 . . . 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 . . ."

Sch 1, Pt I, art 11: "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 . . . 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 . . ."

A including but 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 occupied the land, and the extent of the actual interference the protest caused to the rights of others as well as the property rights of the owners of the land and the rights of any members of the public; that articles 10 and 11 of the Convention were undoubtedly engaged in that the defendants were entitled to invoke their rights under those provisions in relation B to the maintenance of the camp; that it could be appropriate and fair to take into account the general character of the views whose expression the Convention was being invoked to protect, but that could not be a factor which trumped all others and was unlikely to be particularly weighty; that the judge had taken into account the fact the defendants were expressing strongly held views on very important issues but further analysis of those views and issues would have been unhelpful and inappropriate; that by the time the judge came to give his judgment the camp had C been for three months trespassing in the churchyard, substantially interfering with the public right of way and the rights of those who wished to worship in the cathedral, in breach not just of the owner's property rights and of planning control but significantly causing other problems connected with health, nuisance and the like and some damage to local businesses, and was likely to continue, so that it was very difficult to see how the defendants' Convention rights could ever prevail against the will and rights of the landowner and the rights of others by their continuous and exclusive occupation of public land; that, furthermore, whether a court should make D orders which were less intrusive would require a defendant to propose a specific arrangement which would be workable in practice and would not give rise to such breaches of statutory provisions and the rights of others as in the present case; that no such proposal had been put forward nor realistically could any have been; that, therefore, there was no basis for saying that any of the defendants' criticisms, even taken together, could persuade an appellate court that the judge's decision was wrong; and that, accordingly, the judge had been entitled to reach the conclusion that E he had (post, paras 23, 28, 38, 39, 41, 44, 49, 53–55, 60).

Per curiam. In future cases of this nature, where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of others, it should be possible for the hearing to be disposed of at first instance more quickly than in the present case. Little if any court time need be taken up with evidence of the defendant protesters explaining to F the court the views they were seeking to promote. The contents of those views should not be in dispute, and they are very unlikely to be of much significance to the legal issues involved. While it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case did not take up a disproportionate amount of court time (post, paras 62, 63).

Mayor of London (on behalf of the Greater London Authority) v Hall [2011] G 1 WLR 504, CA applied.

Decision of Lindblom J [2012] EWHC 34 (QB) affirmed.

The following cases are referred to in the judgment of the court:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Appleby v United Kingdom (2003) 37 EHRR 783

H *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)

G v Federal Republic of Germany (1989) 60 DR 256

G v Norway (1984) 6 EHRR SE 357, EComHR

Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR

London (Mayor of) (on behalf of the Greater London Authority) v Hall [2010] EWHC 1613 (QB); [2010] HRLR 723; [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Lucas v United Kingdom (Application No 39013/02) (unreported) 18 March 2003, ECtHR
Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2010] UKSC 45; [2011] PTSR 61; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] 1 All ER 285, SC(E)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA

The following additional cases were cited in argument:

R (British Broadcasting Corpn) v Secretary of State for Justice [2012] EWHC 13 (Admin); [2012] 2 All ER 1069, DC
Steel v United Kingdom (2005) 41 EHRR 403
Sunday Times v United Kingdom (1979) 2 EHRR 245

APPLICATIONS for permission to appeal

On 15 and 16 October 2011 a protest camp was set up in the churchyard of St Paul's Cathedral consisting of a large number of tents. Notice was served by the claimant, the City of London Corpn, on the camp on 16 November requiring the removal of the tents by the next day. The tents not having been removed, on 18 November the claimant issued proceedings against persons unknown for possession of the highway and other open land in the churchyard and injunctions requiring the removal of the tents and other structures in the camp. On 25 November at a directions hearing Wilkie J appointed Tammy Samede as the representative defendant of those taking part in the protest, and George Barda and Daniel Ashman were added as litigants in person as second and third defendants. After a five-day hearing in December 2011, Lindblom J on 18 January 2012 [2012] EWHC 34 (QB) granted orders for possession in favour of the claimant, an injunction and declarations that the claimant was entitled to remove the tents from all areas, and he refused permission to appeal.

The defendants applied for permission to appeal on the ground that the judge's decision was wrong because it was not the least intrusive interference with the defendants' engaged rights that could be justified under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998. On 30 January 2012, the Court of Appeal (Stanley Burnton LJ) directed that all applications for permission to appeal be listed before a three-judge Court of Appeal to include the Master of the Rolls and two Lords Justices of Appeal on 13 February 2012. The fourth and fifth defendants, Paul Randle-Jolliffe and Stephen Moore were added as parties before the hearing of the permission to appeal.

The facts are stated in the judgment of the court.

John Cooper QC and *Michael Paget* (instructed by *Kaim Todner Solicitors Ltd*) acting pro bono for the first defendant.

Felicity Williams (instructed directly) acting pro bono for the second defendant.

A The third to fifth defendants, with assistants, in person.

David Forsdick and *Zoe Leventhal* (instructed by *Comptroller and City Solicitor, City of London Corpn*) for the claimant local authority.

The court took time for consideration.

22 February 2012. **LORD NEUBERGER OF ABBOTSBURY MR** B handed down the following judgment of the court to which all members had contributed.

1 On 18 January 2012 Lindblom J handed down a very full and careful judgment, following a five-day hearing the previous month. Having heard consequential arguments, he then made orders in favour of the Mayor Commonalty and Citizens of the City of London ("the City"), against three C named defendants Tammy Samede (who had been appointed by the court as a representative defendant), George Barda, and Daniel Ashman and "persons unknown". If implemented, the effect of these orders would be to put an end to the camp which has been located in the St Paul's Cathedral churchyard in London since 15 October 2011, and has received much publicity.

D *The factual background*

2 The camp was described by the judge in his judgment [2012] EWHC 34 (QB) at [4] in these terms:

> "It consists of a large number of tents, between 150 and 200 at the time of the hearing, many of them used by protestors, either regularly or from E time to time, as overnight accommodation, and several larger tents used for other activities and services including the holding of meetings and the provision of a 'university' (called 'Tent City University'), a library, a first aid facility, a place for women and children, a place where food and drink are served, and a 'welfare' facility. The size and extent of the camp has varied over time. Shortly before the hearing its footprint receded in some F places. At an earlier stage some adjustments had been made to it in an effort to keep fire lanes open."

3 Many of the occupiers of the camp have designated their organisation the "Occupy Movement". The concerns of the Occupy Movement were summarised by the judge, at para 155 as:

> "largely [centring] on, but . . . far from being confined to, the G crisis—or perceived crisis—of capitalism, and of the banking industry, and the inability— or perceived inability—of traditional democratic institutions to cope with many of the world's most pressing problems. They encompass climate change, social and economic injustice, the iniquitous use of tax havens, the culpability of western governments in a number of conflicts, and many more issues besides. All of these topics, H clearly, are of very great political importance."

4 The concerns of those in the camp are well summarised in that passage, and they were well articulated before us. In particular, Mr Barda, Mr Ashman and the Mr Randle-Jolliffe, in powerful, eloquent and concise submissions, advanced the causes which the Occupy Movement and the

camp stand for, with a passion which was all the more impressive given the restraint and humour with which their arguments were presented.

5 The majority of the area occupied by the camp consists of a piece of highway land owned by the City, but the occupied area also includes other open land which is owned by the Church. The City's claim was for orders for (i) possession of the highway land which it owns and which is occupied by the camp, (ii) an injunction requiring the removal of the tents from that land, and restraining the erection of tents thereon in the future, (iii) an injunction requiring the removal of the tents from the land owned by the Church, and restraining the erection of tents thereon in the future, (iv) possession of adjoining highway land and open space land owned by the City and onto which it was feared that the camp would move, and (v) an injunction restraining the erection of tents on the adjoining land in the future. Apart from its right to possession of the land referred to in (i) and (iv), the City principally relied on its power to seek injunctive relief under section 130(5) of the Highways Act 1980, as the camp obstructs the highway, and under section 187B of the Town and Country Planning Act 1990, as the camp breaches planning control and an enforcement notice has been served.

The judgment of Lindblom J

6 At [2012] EWHC 34 (QB) at [1] the judge identified the general issue which these proceedings involved as being "the limits to the right of lawful assembly and protest on the highway", which, as he said, "[in] a democratic society [is] a question of fundamental importance." More specifically, the judge said that these proceedings raised the question whether the limits on the rights of assembly and protest:

> "extend to the indefinite occupation of highway land by an encampment of protestors who say this form of protest is essential to the exercise of their rights under articles 10 and 11 of the . . . Convention on Human Rights, when the land they have chosen to occupy is in a prominent place in the heart of the metropolis, beside a cathedral of national and international importance, which is visited each year by many thousands of people and where many thousands more come to exercise their right, under article 9 of the Convention, to worship as they choose?"

7 At para 13, the judge correctly identified the three main issues for him as being:

> "first, whether the City has established that it is entitled to possession of [the areas it owns], so that, subject to the court's consideration of the interference with the defendants' rights under articles 10 and 11 of the Convention, an order for possession ought to be granted; second, whether, again subject to the court's consideration of the interference with the defendants' rights, the City should succeed in its claim . . . and third, whether the interference with the defendants' rights entailed in granting relief would be lawful, necessary and proportionate."

8 In the following two paragraphs, he recorded that the City did not dispute that the defendants' rights under articles 10 (freedom of expression)

A and 11 (freedom of assembly) of the Convention were engaged. He then stated that the City contended that the orders it was seeking did not prevent the defendants from exercising those rights, and that they would amount to a "justified interference" with those rights. He also mentioned that the City's case, in summary terms, was that the defendants could not rely on articles 10 and 11 of the Convention to justify occupying land as "a semi-
B permanent campsite", particularly bearing in mind that such occupation was in breach of a number of statutory provisions, infringed the property rights of the City and the Church, and also impeded other members of the public from enjoying their rights, most notably the right of access to the cathedral to worship, which engages article 9 of the Convention (freedom of religion), and obstructed the use of the highway by members of the public generally.

C **9** The judge then explained, at paras 17–100, in some detail the evidence which he had heard from witnesses called on behalf of the City and on behalf of the defendants, and some of the distinguished people who had provided written evidence in support of the views supported and propagated by the Occupy Movement. In the next 13 paragraphs he summarised the arguments which had been advanced to him. At paras 114–152, the judge then discussed the various issues which had been raised under three
D headings, which reflected the three main issues which he had identified.

10 Under "Possession", at paras 114–126, the judge concluded that the defendants were in occupation of the areas of land owned by the City and had no domestic law defence to the City's possession claim. Under the heading "Injunctive and declaratory relief", in the next 17 paragraphs (paras 127–143), the judge concluded that the camp was "undoubtedly" an
E "unreasonable obstruction of the highway" and a breach of planning control, both of which the City had a duty to enforce, and which applied to the area of land owned by the Church.

11 In those circumstances, as the judge said, the only basis upon which the defendants could hope to succeed in resisting the relief sought by the City was under the third heading "Human rights", which he dealt with at paras 144–164. We shall describe his analysis in those paragraphs in a little
F more detail.

12 He began by discussing the arguments raised by the defendants. They relied on "the fundamental importance in a democratic society of the rights under articles 10 and 11 of the Convention" (para 154), which was, as the judge accepted, a good point—as far as it went. The defendants also relied on the fundamental importance of the concerns which motivated
G them. As to that the judge said, at para 155: "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." However, he accepted that he should:

> "give due weight not only to the defendants' conviction that their protest is profoundly important but also to their belief that it is essential
H to the protest and to its success that it is conducted in the manner and form they have chosen for it—by a protest camp on the land they have occupied in St Paul's Churchyard."

13 It was next contended by the defendants, at para 156, that "some inconvenience to other members of the public would be likely to result even

from a lawful protest on this part of the highway." The judge said that, in his view: A

> "the harm caused by this protest camp, in this place, is materially greater than the harm that would be likely if the protest were conducted by the same protestors, assembling every day but without the tents and all the other impedimenta they have brought to the land."

B

He went on to reject the "suggestion that the City's main concerns could be met by an injunction stipulating that no tents were to be occupied between certain hours" on the ground that it was "wholly unconvincing". He doubted that it could be enforced. Anyway, he said, "it would not serve to remove the obstruction of the highway" or "overcome the problems attributable to the presence of the camp, including the damage being done to the work of, and worship in, the cathedral, to the amenity of the cathedral's surroundings, and to local businesses". C

14 The defendants also relied on the fact that they had been prepared to negotiate after the City resorted to litigation. The judge was unimpressed with that, not least because the defendants and their representatives had not come up with any clear proposals. Finally, the defendants submitted (para 158) that "many of the protestors have done everything they can to limit the impacts of the protest camp." However, the judge said, even accepting that was true, "the defendants have not been able to prevent the camp causing substantial harm", namely obstruction of the highway, nuisance by noise, and "[disruption to] the exercise by others of their Convention rights, including the article 9 rights of those who wish to worship in St Paul's Cathedral". D

15 The judge then turned to the five arguments raised by the City which he described as being, in his view, "very strong" (para 159). First, he thought he should give (para 160): E

> "considerable weight to the fact that Parliament has legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them, and local planning authorities powers to enforce planning control in the public interest." F

He then referred to section 2 of the Local Government Act 2000, section 137 of the Highways Act 1980, section 179 of the Town and Country Planning Act 1990, section 269 of the Public Health Act 1936, and section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict c 32). He said that the significant point was that: G

> "the continued presence of the protest camp on this land is plainly at odds with the intent and purpose of [those] statutory schemes . . . The corollary is this. For Parliament's intention in enacting those statutory schemes to be given effect it is necessary for the relief sought by the City to be granted."

16 Secondly, as the judge accepted (para 161), "it would be impossible . . . to reconcile the presence of the protest camp with the lawful function and character of this land as highway". He drew support from what was said in this court in *Mayor of London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 48. H

A **17** Thirdly, the judge (para 162) was "convinced that the effects of [the] protest camp . . . have been such as to interfere seriously with the rights, under article 9 of the Convention, of those who desire to worship in the cathedral". He explained that:

> "During the camp's presence, and, in my view, largely if not totally as a result of its presence, there has been a drop of about two fifths in the
B numbers of those worshipping in the cathedral. About the same fraction has been lost in the number of visitors, an important source of funds for the upkeep of the building and for its ministry".

He also took into account "the effects of the presence of the protest camp on the work and morale of the cathedral staff as a significant factor in the balancing exercise", referring to the fact that "noise from the camp has been
C a persistent problem", that "members of the cathedral's staff have been verbally abused", and that "[graffiti have] been scrawled on the Chapter House and on the cathedral itself".

18 Fourthly, at para 163, the judge explained that the camp caused other problems. By interfering with the public right of way, and reducing pedestrian traffic, the camp had, he thought, "damaged the trade of local
D businesses". Also, as the judge found, it had resulted in a "loss of open space that the public can get to", "has strained the local drainage system beyond capacity", "has caused nuisance by the generation of noise and smell", and "has made a material change in the use of the land for which planning permission would not be granted". The judge also thought that, albeit perhaps only indirectly, the camp had resulted in "an increase in crime and
E disorder around the cathedral". Fifthly, the judge said, at para 164, "the length of time for which the camp has been present is relevant", citing the *Hall* case, at para 49.

19 The judge therefore concluded, at paras 165–166, that "when the balance is struck, the factors for granting relief in this case easily outweigh the factors against", that the City had "undoubtedly" "convincingly
F established a pressing social need not to permit the defendants' protest camp to remain in St Paul's Churchyard, and to prevent it being located elsewhere on any of the land to which these proceedings relate", and that it would "undoubtedly" not be "disproportionate to grant the relief the City has claimed". He was clear that the orders the City was seeking represented "the least intrusive way in which to meet the pressing social need, and strikes a fair balance between the needs of the community and the individuals
G concerned so as not to impose an excessive burden on them", and that to withhold relief would simply be "wrong".

These applications

20 After hearing argument as to the form of order which he should make, Lindblom J concluded that he should make: (1) orders for possession
H in respect of the two areas of land owned by the City at St Paul's Churchyard and occupied by the defendants; (2) an injunction requiring the defendants (a) to remove forthwith all tents in the area currently occupied by the camp, (b) not to impede the City's agents from removing such tents, and (c) not to erect tents on the other areas around the cathedral the subject of the

proceedings; and (3) declarations that the City could remove tents from all those areas.

21 Lindblom J refused permission to appeal, but the three named defendants, Ms Samede, Mr Barda, and Mr Ashman, then applied for permission to appeal from this court. Their written applications came before Stanley Burnton LJ, who ordered that the applications be heard in court with the appeals to follow if permission to appeal is granted.

22 The hearing of those applications took place on 13 February and lasted a full day. Ms Samede and Mr Barda were respectively represented by Mr Cooper QC and Mr Paget and by Ms Williams (who were acting pro bono, and should be commended for that), and Mr Ashman represented himself. Many other members of the Occupy Movement attended (and unfortunately the court room was not big enough to accommodate all of them). Two of them, Mr Randle-Jolliffe and Mr Moore, made submissions in support of an appeal, and they were added as parties.

23 Having heard the arguments we decided to reserve judgment on the question of whether to allow the projected appeals to proceed, and if so, on what points. We have decided that permission to appeal should be refused, for the reasons which follow.

Are articles 10 and 11 engaged?

24 Stanley Burnton LJ raised the question whether it was clear that the City was right to concede that articles 10 and 11 of the Convention were engaged. The European Court of Human Rights ("the Strasbourg court") jurisprudence establishes that it was. In that connection it is worth referring to *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 where the Strasbourg court considered the case of an applicant who took part in a small demonstration which, for a short time, obstructed access to a public court building. The court, at para 35,

> "[reiterated] at the outset that the right to freedom of assembly covers both private meetings and meetings on public thoroughfares, as well as static meetings and public processions; this right can be exercised both by individual participants and by those organising the assembly . . ."

25 As for article 10, it is clear from the Strasbourg court's decision in *Lucas v United Kingdom* (Application No 39013/02) (unreported) 18 March 2003, "that protests can constitute expressions of opinion within the meaning of article 10 and that the arrest and detention of protesters can constitute interference with the right to freedom of expression".

26 In *Appleby v United Kingdom* (2003) 37 EHRR 783 the Strasbourg court held that article 10 and article 11 raised the same issues in a case where a group of people were banned from seeking to collect signatures for a petition from shoppers in a privately owned shopping centre. It was held that there was no infringement of the Convention because the ban did not have "the effect of preventing any effective exercise of freedom of expression or [of destroying] the essence of the right", not least because they could carry out their activities elsewhere: paras 47 and 48.

27 Domestic law is consistent with this view. Thus in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a

positive duty to take steps to ensure that lawful public demonstrations can take place, and the same view was taken by this court in the *Hall* case [2011] 1 WLR 504. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February 2009 is also worth mentioning. In that case bylaws preventing the maintenance of the long-standing, one weekend a month, Aldermaston Women's Peace Camp, protesting on government owned open land against nuclear weapons, were held to breach the protesters' Convention rights. As Laws LJ said, at para 37: "the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it', and, to the protesters, " 'the manner and form' *is* the protest itself".

28 It is clear from the judge's findings, and from what was said by the defendants who addressed us, that the Occupy Movement seeks to propagate the views summarised by Lindblom J in the passage, set out in para 3 above, to educate members of the public about those views, and to engage in dialogue with others about those views. It is also clear that this aim is sought to be achieved through the activities, leaflets, books, newspapers and speeches at the camp, reinforced by its attendant publicity, which is partly attributable to its large size and prominent location, not merely in the City of London (the heart of the financial world), but in the churchyard of St Paul's Cathedral. In those circumstances it seems clear that articles 10 and 11 of the Convention are engaged—i e the defendants can invoke their rights under those provisions of the Convention in relation to the maintenance of the camp. (During the hearing it was suggested that at least some of the defendants might also be entitled to invoke article 9; it is unnecessary to decide the point, as it can take matters no further in the same way as article 11 took matters no further over article 10 in the *Appleby* case 37 EHRR 783, para 52.)

The argument that the judge should have dismissed the City's claim

29 With the exception of Ms Samede, the defendants making the present applications are seeking to set aside all the orders made by Lindblom J, on the basis that they contend that the judge ought not to have found for the City at all, but should have dismissed the claim and allowed the camp to continue in place. It is convenient to deal first with one or two rather esoteric arguments raised by Mr Randle-Jolliffe.

30 First, he challenged the judgment on the ground that it did not apply to him, as a "Magna Carta heir". But that is a concept unknown to the law. He also says that his "Magna Carta rights" would be breached by execution of the orders. But only chapters 1, 9 and 29 of Magna Carta (1297 version) survive. Chapter 29, with its requirement that the state proceeds according to the law, and its prohibition on the selling or delaying of justice, is seen by many as the historical foundation for the rule of law in England, but it has no bearing on the arguments in this case. Somewhat ironically, the other two chapters concern the rights of the Church and the City of London, and cannot help the defendants. Mr Randle-Jolliffe also invokes "constitutional and superior law issues" which, he alleges, prevail over statutory, common law, and human rights law. Again that is simply wrong—at least in a court of law.

31 Another ground he raised was the contention that the City had no locus standi to bring the proceedings "as the current mayoral position has been previously usurped by the guilds and aldermen in contravention of the City of London's 1215 Royal Charter". We do not understand that point, not least because both the Lord Mayor and the aldermen and guilds (through the Commonalty and Citizens) are included in the claimants.

32 Three arguments raised by Ms Williams on behalf of Mr Barda, and supported by Mr Ashman, can also be taken shortly. First, it was said that the City's arguments based on the breach of the various statutes identified in the judgment, and the public rights and the City's powers and duties under the statutes referred to, are not of themselves enough to render the judge's decision proportionate. Even if that is right (and we rather doubt whether it is) these concerns were only the subject of the first of the five reasons which, when combined, persuaded the judge to reach the conclusion that he reached.

33 Secondly, it was said that the judge was wrong to take into account the increase in crime: [2012] EWHC 34 (QB) at [163]. It is true that the evidence showed that the police considered that those responsible for the camp had done their best to minimise the risk of criminal activity, but there was evidence that crime had increased in the area, so there was evidence which justified the judge's view. But the point can be said to cut both ways: there is no guarantee that the admirable care to ensure that criminal activity is kept to a minimum would continue. Anyway, it is fanciful to suggest that the judge would not have reached the conclusion that he did if he had thought that the evidence or arguments did not satisfy him that he should take this factor into account.

34 Thirdly, it was said that the judge ought not to have found as he did, at para 162, that there was any interference with the rights of those who wished to worship at St Paul's Cathedral, given that (a) no worshipper gave evidence, and (b) the Occupy Movement stands for the same values as the Church of England. As to (a), the judge was plainly entitled to reach the conclusion that he arrived at. He had figures which showed a very significant reduction in worshippers at, and visitors to, the cathedral since the camp had arrived, and evidence of opinion from the cathedral registrar that the reduction was caused by the camp. While there were some other possible explanations for the reduction, the judge was, to put it at its lowest, entitled to reach the view that he did. As to point (b), it is true that some prominent members of the Church of England have expressed support for the camp, but that is no answer to the judge's concern about the interference by the camp with the access of people who wish to worship in the cathedral.

35 Mr Ashman had two further criticisms of the judgment. First, he complained that the judge wrongly referred to the camp as a "protest" camp. We accept that the aims of Occupy London are not by any means limited to protesting in the familiar sense of, say, a protest march. The aims of the movement, as implemented in the camp, include education, heightening awareness and fostering debate. However, the judge was plainly aware of this, as the passages in his judgment quoted in paras 2 and 3 above demonstrate. Further those activities do include protesting; indeed they may be said to be based on protesting, in the sense that the Occupy Movement's raison d'être is, at least to a substantial extent, based on its opposition to

many of the policies, especially economic, financial, and environmental policies, adopted by the United Kingdom Government.

36 Secondly, it is said that the defendants intend to strike the camp, possibly by the end of this month. It is by no means clear that this would happen voluntarily. Indeed, the impression given by Mr Ashman, when he was asked about this, was that the camp would only be struck when the Occupy Movement believed that it had had a definite effect in the form of some sort of change of government policy. All in all it appears improbable that the camp will cease voluntarily within the next few months. If the judge was otherwise right to make the orders which were made, it would have required a very clear commitment by the defendants to vacate the churchyard in the very near future before there could even have been any possibility of justifying the judge not making the orders.

37 The broadest argument in support of the contention that the orders made by Lindblom J should simply be set aside is rather more fundamental. That argument is that, assuming the correctness of all the findings of fact made, and the relevant factors identified, by the judge in his judgment, it was an unjustified interference with the defendants' Convention rights to make any order which closed down the camp. This argument amounts to saying that articles 10 and 11 effectively mandated the judge to hold that the camp should be allowed to continue in its current form, presumably for the foreseeable future. The basis of this argument is that, on the facts of this case, there was an insufficiently "pressing social need in a democratic society" to justify the orders which the judge made, bearing in mind the defendants' article 10 and 11 rights.

38 This argument raises the question which the judge identified at the start of his judgment, namely "the limits to the right of lawful assembly and protest on the highway", using the word "protest" in its broad sense of meaning the expression and dissemination of opinions. In that connection as the judge observed, at para 100, it is clear that, unless the law is that "assembly on the public highway *may* be lawful, the right contained in article 11.1 of the Convention is denied"—quoting Lord Irvine of Lairg LC in *Director of Public Prosecutions v Margaret Jones* [1999] 2 AC 240, 259. However, as the judge also went on to say, at para 145:

> "To camp on the highway as a means of protest was not held lawful in *Director of Public Prosecutions v Jones*. Limitations on the public right of assembly on the highway were noticed, both at common law and under article 11 of the Convention: see Lord Irvine LC at p 259A–G, Lord Slynn of Hadley at p 265C–G, Lord Hope of Craighead at p 277D–278D, and Lord Clyde at p 280F. In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping."

39 As the judge recognised, the answer to the question which he identified at the start of his judgment 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.

42 In *Appleby v United Kingdom* 37 EHRR 783 the Strasbourg court accepted that the applicants' article 10 and 11 rights were engaged, but held, at para 43, that there was no infringement of those rights because "[regard] must also be had to the property rights of the owner of the [privately owned] shopping centre", and there were other places where the applicants could exercise their article 10 and 11 rights. While St Paul's Churchyard is a particularly attractive location for the movement, in view of its prominence

A in the City of London, the judge's orders clearly do not prevent the movement protesting anywhere other than the churchyard. And there are many "rights" with which the camp interferes adversely.

43 The level of public disruption which a protest on public land may legitimately cause before interference with article 10 and 11 rights is justified was discussed by the Strasbourg court in the *Kuznetsov* case, para 44. After B explaining that the demonstration in that case had lasted about half an hour, and had blocked the public passage giving access to a court house, the court emphasised that a degree of tolerance is required from the state, and then said this:

> "The court considers the following elements important for the assessment of this situation. Firstly, it is undisputed that there were no C complaints by anyone, whether individual visitors, judges or court employees, about the alleged obstruction of entry to the court house by the picket participants. Secondly, even assuming that the presence of several individuals on top of the staircase did restrict access to the entrance door, it is creditable that the applicant diligently complied with the officials' request and without further argument descended the stairs onto the pavement. Thirdly, it is notable that the alleged hindrance was D of an extremely short duration. Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all E substance . . . Accordingly, the court is not satisfied that the alleged obstruction of passage, especially in the circumstances where the applicant gave evidence of his flexibility and readiness to cooperate with the authorities, was a relevant and sufficient reason for the interference."

44 In that case, the demonstration amounted to a trespass and blocked a public right of way, but it not only lasted only 30 minutes, but it appeared to F interfere with no public rights in practice, and ended as soon as the police requested it to end. In this case, by the time that Lindblom J came to give his judgment, the camp was, and had been for three months, (i) trespassing in St Paul's Churchyard, (ii) substantially interfering with the public right of way and the rights of those who wished to worship in the cathedral, (iii) in breach of planning control, and (iv) causing strain on public health facilities, and G some damage to local businesses. In those circumstances, far from it not being open to the judge to make the orders that he made, it seems to us that there is a very powerful case indeed for saying that, if he had refused to make any order in the City's favour, this court would have reversed him.

45 The facts of this case are a long way from those in the *Tabernacle* case [2009] EWCA Civ 23 where (i) members of the public (and therefore, at least prima facie the protesters) had the right to pitch tents where the protest H was camped, (ii) the protest camp was in place only one weekend a month, (iii) there was no interference with any third party rights, (iv) the very object of their protest was on adjoining land owned by the same public landowner, and (v) the protest had continued for 20 years with no complaint. On the other hand, in one respect the defendants' case is stronger than that of the

applicants in *Appleby v United Kingdom* in that the land involved here is publicly owned; against that, the activities of the applicants in the *Appleby* case, unlike those of the defendants here, did not involve possessing the land concerned, or interfering with its use by other people, or with the enjoyment of other peoples' Convention rights.

46 The contrast between the facts of this case and those in the *Kuznetsov* case is very marked. In that case the period of occupation of the public passage way by the protesters was less than an hour, during which the protesters accommodated the requests of the authorities, there was no evidence of any actual obstruction of anyone else's rights, and there was no suggestion of the breach of any statutory provisions or of any nuisance or public health implications. It is true that the Convention rights of the protesters in the *Kuznetsov* case were held to be infringed, but the way in which the Strasbourg court expressed itself (as quoted at para 43 above) is not helpful to the defendants in this case, to put it mildly. That point is reinforced by the fact, pointed out by the judge [2012] EWHC 34 (QB) at [145], that "complaints brought against evictions in cases where a protest on a far smaller scale than [the camp] has blocked a public road or occupied a public space have been held inadmissible [by the Commission]": see *G v Federal Republic of Germany* (1989) 60 DR 256 and *G v Norway* (1984) 6 EHRR SE 357.

47 It is worth referring in a little more detail to the Commission's decision in *G v Germany*, not least because it was cited with approval by the Strasbourg court in its judgment in *Lucas v United Kingdom* 18 March 2003. *G v Germany* 60 DR 256 concerned a sit-in, which was a protest against nuclear arms and which obstructed a highway, which gave access to a United States army barracks in Germany, for 12 minutes every hour. Consistently with all the relevant authorities, the Commission said that it considered that "the right to freedom of peaceful assembly is secured to everyone who organises or participates in a peaceful demonstration." However, it went on to say:

> "the applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration . . . as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued."

48 The domestic case with the greatest similarity to this case is the *Hall* case [2011] 1 WLR 504, which was concerned with a protest camp, known as the Democracy Village, on Parliament Square Gardens ("PSG") opposite

A the Houses of Parliament in London. In that case, at paras 46–47, this court held that it was "to put it at its lowest . . . open to the judge" to conclude that there was

> "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of PSG and to demonstrate with authorisation but also importantly for the
B protection of health . . . and the prevention of crime"

as well as to enable "the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented".

49 It would be unhelpful to attempt to determine whether in these proceedings the City had a stronger or weaker case than the Mayor of
C London in the *Hall* case. Indeed, if the court entered into such a debate, it would risk trespassing into the forbidden territory discussed by the judge in the passages referred to in para 12 above. The essential point in the *Hall* case and in this case is that, while the protesters' article 10 and 11 rights are undoubtedly engaged, it is very difficult to see how they could ever prevail against the will of the landowner when they are continuously and
D exclusively occupying public land, breaching not just the owner's property rights and certain statutory provisions, but significantly interfering with the public and Convention rights of others, and causing other problems (connected with health, nuisance, and the like), particularly in circumstances where the occupation has already continued for months, and is likely to continue indefinitely.

50 During the hearing of the applications, reliance was placed on the
E fact that the camp was also used as a place where the homeless could be accommodated. That is a new argument, not raised below. Further, although it may add article 8 of the Convention into the issues, in that it might be said that the orders made below would involve evicting the formerly homeless from their homes, we do not think that the point can possibly assist the defendants. It must be doubtful whether the very
F temporary sleeping facilities at the camp afforded to some homeless people results in their article 8 rights being engaged. Even if it does, the defendants' article 10 and 11 (and possibly article 9) rights are not nearly close enough to balancing the factors in favour of making Lindblom J's orders, for the relatively weak article 8 rights in play to have any possibility of tipping the balance the other way.

G *The argument that the judge should have made more limited orders*

51 In reliance on the principle that, even where it concludes that it is appropriate to make an order which interferes with an individual's Convention rights, the court should ensure that it identifies the least intrusive way of effecting such interference, Mr Cooper contends that the orders made
H by the judge were too extreme. The judge could, and should, he argues, have made an order which was less intrusive of the defendants' Convention rights than the orders which he made.

52 The first problem with that argument is that only one possible alternative to maintaining the camp in its current state was put to the judge, namely that which he discussed in para 13 above. The judge rejected that

possibility for reasons which appear to us to be plainly good, and which were not challenged by Mr Cooper. However, says Mr Cooper, the judge was none the less under a duty to investigate, effectively it would appear on his own initiative, whether there was an order which he could make which would be less intrusive than those that he did make. Furthermore, says Mr Cooper, in reliance on what Lord Bingham said in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 44, if the judge did not perform that duty, the Court of Appeal should do so.

53 We are prepared to assume that in some cases a court may have a duty to investigate whether there is a less intrusive order which could be made, even though this would involve the court taking the point itself (although that assumption seems arguably inconsistent with what the Supreme Court said, albeit on a slightly different point in *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening* [2011] PTSR 61; [2011] 2 AC 104, para 61). However, as already mentioned, the point was in fact taken by the defendants, and justifiably rejected by the judge. Assuming that the judge's duty none the less required him to consider the question further, it seems to us that it cannot have required him to do more than to raise the issue with the defendants. If they were then to persuade him to make any less intrusive order than he did, they would have had to come up with a specific arrangement which (i) would be workable in practice, (ii) would not give rise, at least to anything like the same degree, as the breaches of statutory provisions and other peoples' rights, as the current state of affairs, and (iii) would be less intrusive of the defendants' Convention rights as the orders made by the judge.

54 The defendants did not put forward a proposal which satisfied any of those criteria to the judge; nor did they put forward any such proposal to the Court of Appeal. In our view, therefore, it was not open to the judge, and it would not be open to the Court of Appeal to make any such less intrusive order. If we had been presented with a proposal which was said to satisfy the three requirements referred to at the end of the previous paragraph, then we would have had to consider whether it was arguably capable of doing so, and if it had been, we would have considered allowing permission to appeal on the basis that the case would be sent back to Lindblom J.

55 However, it is only right to add that we are very sceptical as to whether any such proposal could realistically have been put forward in this case (which may well explain why it has not happened). It is not merely that the tents appear to be an integral part of the message (to use a compendious word) which the Occupy Movement is seeking to maintain through the medium of the camp, and it is impossible to see how they could remain in St Paul's Churchyard. It is also that we think it unlikely that any scheme which satisfied the second and third of the three requirements would have much prospect of satisfying the first.

Mr Moore's application

56 Mr Moore's position is rather different. Although he occupies one of the tents in the churchyard, he is not a member of the Occupy Movement and is a member of a different, smaller group, albeit one whose principles are similar to those of the movement. His case is simply that, although bound by

A the orders as one of the "Persons Unknown" or as a result of Ms Samede representing all those in occupation of the churchyard, he should be allowed to appeal as neither he nor his tent was served with the City's claim form.

57 There is telling evidence to support the view that his tent was served, but the issue is sufficiently debatable for this court to accept that it cannot be decided without proper evidence. However, despite that, we do not consider B that Mr Moore has a good argument for setting the orders made aside, at least so far as they relate to him.

58 First, he saw all the papers relating to the proceedings, and clearly must have appreciated that the City was claiming possession of the land occupied by his tent, and was seeking removal of his tent. That is because, as he fairly told us, he is not unfamiliar with legal proceedings, and had advised the Occupy Movement about the City's claims for possession orders and C injunctive relief, for which purpose he was supplied with all the court papers.

59 Secondly, essentially for the reasons contained in this judgment as to why permission to appeal should be refused to the other defendants, it seems to us that he would have no reasonable prospect of persuading the Court of Appeal that he could possibly succeed in defending the proceedings if they D were re-heard as against him.

Concluding remarks

60 For these reasons, we would refuse all the defendants permission to appeal against the orders made by Lindblom J. There is no chance that any of the criticisms raised by each of the defendants, or even all of those E criticisms taken together, could persuade an appellate court that his decision was wrong. Like Griffith-Williams J at first instance in the *Hall* case [2010] HRLR 723, in a very clear and careful judgment Lindblom J reached a conclusion which, to put it at its very lowest, he was plainly entitled to reach. Indeed, as Mr Forsdick put it on behalf of the City, this was, on the judge's findings of fact and analysis of the issues, not a marginal case.

61 The hearing of this case took up five days and resulted in a F conspicuously full and careful judgment. The hearing at first instance in the *Hall* case took eight days and also resulted in a detailed and clear judgment. Each case has now also resulted in a full judgment on the application for permission to appeal. There is now, therefore, guidance available for first instance judges faced with cases of a similar nature; indeed, that is part of the purpose of this judgment.

G 62 Of course, each case turns on its facts, and where Convention rights are engaged, case law indicates that the court must examine the facts under a particularly sharp focus. None the less, in future cases of this nature (where the facts involve a demonstration which involves not merely occupying public land, but doing so for more than a short period and in a way which not only is in breach of statute but substantially interferes with the rights of H others), it should be possible for the hearing to be disposed of at first instance more quickly than in the present case or in the *Hall* case.

63 For instance, in each case a significant amount of court time was taken up by the defendant protesters explaining to the court the views they were seeking to promote. In strict principle, little if any court time need be taken up with such evidence. The contents of those views should not be in

dispute, and, as we have sought to explain, they are very unlikely to be of much significance to the legal issues involved. Of course, any judge hearing such a case will not want to be thought to be muzzling defendants, who want to explain their passionately held views in order to justify their demonstration (and, at least where the defendants are as they are in this case, it is informative and thought provoking to hear those views). Accordingly, while it would be wrong to suggest that in every case such evidence should be excluded, a judge should be ready to exercise available case management powers to ensure that hearings in this sort of case do not take up a disproportionate amount of court time.

64 We recognise, of course, that it is one thing for the Court of Appeal to make that sort of observation about a hypothetical future claim, and that it can be quite another thing for a trial judge, faced with a difficult actual claim, to comply with it. None the less, with the benefit of the guidance given in two first instance judgments and two judgments of the Court of Appeal (and the Strasbourg and domestic decisions referred to above), it is not unreasonable to hope that future cases of this sort will be capable of being disposed of more expeditiously.

65 Not least for that reason, this judgment, like that in the *Hall* case [2011] 1 WLR 504, may be cited as an authority, notwithstanding that it is a decision refusing permission to appeal.

Applications refused.

ROBERT RAJARATNAM, Barrister

Court of Appeal

Cuadrilla Bowland Ltd and others *v* Persons Unknown and others

[2020] EWCA Civ 9

2019 Dec 10, 11; 2020 Jan 23 Underhill, David Richards, Leggatt LJJ

Contempt of court — Committal proceedings — Appeal — Protestors deliberately disobeying injunction found guilty of contempt and sentenced to imprisonment — Whether injunction insufficiently clear and certain to allow committal — Whether suspended orders for imprisonment appropriate sanction

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". The claimants had been granted an injunction against the first to third defendants, who were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group, to prevent trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. The judge subsequently made an order committing three protestors to prison for contempt of court. Their contempt consisted in deliberately disobeying the injunction and as punishment for two deliberate breaches of the injunction, the judge committed one of the protestors to prison for two months plus four weeks. The other two were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that each obeyed the injunction for a period of two years. The protestors appealed against the committal orders contending that the judge erred in committing them under two paragraphs of the injunction—paragraph 4 (trespass) and paragraph 7 (unlawful means conspiracy)—as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

On the appeal—

Held, dismissing the appeal in part, (1) that the terms of an injunction might be unclear if a term was ambiguous in that the words used had more than one meaning, vague in so far as there were borderline cases to which it was inherently uncertain whether the term applied, or by its language too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction was addressed; that all those kinds of clarity (or lack of it) were relevant at the stage of deciding whether to grant an injunction and, if so, in what terms; that they were also relevant where an application was made to enforce compliance or punish breach of an injunction by seeking an order for committal; that, in principle, people should not be at risk of being penalised for breach of a court order if they acted in a way which the order did not clearly prohibit so that a person should not be held to be in contempt of court if it was unclear whether their conduct was covered by the terms of the order; that that was so whether the term in question was unclear because it was ambiguous, vague or inaccessible and it was important to note that whether a term of an order was unclear in any of those ways was dependent on context; that there was nothing objectionable in principle about including a requirement of intention in an injunction, nor was there was anything in such a requirement which was inherently unclear or which required any legal training or knowledge to comprehend; that it was not in fact correct that the requirement of the tort of conspiracy to show damage could only be incorporated into a quia timet injunction by reference to the defendant's intention, since it was perfectly possible to frame a prohibition which applied only to future conduct that actually caused damage; that it was, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that was lawful, it was necessary to include a requirement that the defendant's conduct was intended to cause damage to the claimant and there was nothing ambiguous, vague or difficult to understand about such a requirement; that limiting the scope of a prohibition by reference to the intention required to make the act wrongful

avoided restraining conduct that was lawful; that in so far as it created difficulty of proof, that was a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provided an additional protection; and that, accordingly, although the inclusion of multiple references to intention risked introducing an undesirable degree of complexity, there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the injunction in the present case provided a reason not to enforce it by committal (post, paras 57–60, 65, 69, 74, 110, 111, 112).

Dicta of Longmore LJ in *Ineos Upstream Ltd and others v Persons Unknown and others (Friends of the Earth intervening)* [2019] 4 WLR 100, para 40 not followed.

(2) That it was clear from the case law that, even where protest took the form of intentional disruption of the lawful activities of others, as it did here, such protest still fell within the scope of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that any restrictions imposed on such protestors were therefore lawful only if they satisfied the requirements set out in articles 10(2) and 11(2) and that was so even where the protestors' actions involved disobeying a court order; that although the protestors' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2); that the judge was entitled to conclude that the restrictions which he imposed on the liberty of the protestors by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority, which was an aim specifically identified in article 10(2), and to prevent disorder as identified in both articles 10(2) and 11(2); that in deciding what sanctions were appropriate, the judge had approached the decision, correctly, by considering both the culpability of the protestors and the harm caused, intended, or likely to be caused by their breaches of the injunction; that there was no merit in the protestors' argument that, in making that assessment, he had misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order; and that, as to the sanction applied, the court would vary the committal order made in relation to the first protestor by substituting for the period of imprisonment of two months a period of four weeks (post, paras 100–102, 110, 111, 112).

Per curiam. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule (post, para 50, 111, 112).

APPEAL from Judge Pelling QC, sitting as a judge of the High Court

Pursuant to an application by Cuadrilla Bowland Ltd and others for an injunction to prevent trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant, Judge Pelling QC, sitting as a judge of the High Court granted an injunction on 11 July 2018 to run until 1 June 2020 against persons unknown.

On 3 September 2019 the judge made an order to commit three protestors, Katrina Lawrie, Lee Walsh and Christopher Wilson to prison for contempt of court. As punishment for two deliberate breaches of the injunction, the judge committed the first protestor to prison for two months plus four weeks. The other two protestors were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that they obeyed the injunction for a period of two years.

By an appellant's notice dated 24 September 2019, the protestors sought permission to appeal against the committal order with appeal to follow. The grounds of appeal were that, in relation to the two incidents on which the order for committal was based: (1) the judge had erred in committing the protestors under paragraphs 4 (nuisance) and 7 (unlawful means conspiracy) of the injunction, as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge had erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

The facts are stated in the judgment of Leggatt LJ, post, paras 3–23.

Kirsty Brimelow QC, *Adam Wagner* and *Richard Brigden* (instructed by *Robert Lizar Solicitors, Manchester*) for the protestors.

Tom Roscoe (instructed by *Eversheds Sutherland (International) llp*) for the claimants.

The court took time for consideration.

23 January 2020. The following judgments were handed down.

LEGGATT LJ

Introduction

1 On 3 September 2019 Judge Pelling QC, sitting as a judge of the High Court, made an order committing the three appellants to prison for contempt of court. Their contempt consisted in deliberately disobeying an earlier court order, which I will refer to as "the Injunction", made on 11 July 2018 with the aim of preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant ("Cuadrilla"). As punishment for two deliberate breaches of the Injunction, the judge committed one of the appellants, Katrina Lawrie, to prison for two months plus four weeks. The other appellants, Lee Walsh and Christopher Wilson, were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that the appellant obeys the Injunction for a period of two years.

2 The appellants have exercised their rights of appeal against the committal order. They appeal on the grounds (1) that the relevant terms of the Injunction were insufficiently clear and certain to be enforceable by committal because those terms made the question whether conduct was prohibited depend on the intention of the person concerned; and (2) that imposing the sanction of imprisonment (albeit suspended) was inappropriate and unduly harsh in the circumstances of this case. Relevant circumstances include the facts that the Injunction was granted, not against the appellants as named individuals, but against "persons unknown" who committed specified acts, and that the acts done by the appellants in breach of the Injunction were part of a campaign of protest involving "direct action" designed to disrupt Cuadrilla's activities. This context is one in which the appellants' rights to freedom of expression and assembly are engaged.

Background

3 Cuadrilla and the other claimants own an area of land off the Preston New Road (A583), near Blackpool in Lancashire, on which Cuadrilla has engaged in the hydraulic fracturing, or "fracking", of rock deep underground for the purpose of extracting shale gas. It is not in dispute that all Cuadrilla's activities have been carried out in accordance with the law. Equally, there is no dispute that Cuadrilla's activities are controversial and that a significant number of people, including the appellants, have sincere and strongly held views that fracking ought not to take place because of its impact on the environment. It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. The right of protest is protected both by the common law of England and Wales and by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention") which is incorporated into UK law by the Human Rights Act 1998.

4 Protests on and near Cuadrilla's site started in 2014, well before any drilling or preparatory work had commenced, when part of the site was occupied by a group of protestors. On 21 August 2014 Cuadrilla issued proceedings to recover possession of the land and for an injunction to prohibit further trespassing. Such an injunction was granted until 6 October 2016.

5 Protests intensified after work in preparation for exploratory drilling at the site started in January 2017. The evidence adduced by the claimants when they applied for a further injunction in May 2018 showed that, since January 2017, Cuadrilla and its employees, contractors and suppliers had been subjected to numerous "direct action" protests, designed to obstruct works on the site. The actions taken by some protestors included "locking on"—that is, chaining oneself to an object or another person—at the entrance to the site in order to prevent vehicles from entering or leaving it; "slow walking"—that is, walking on the highway as slowly as possible in front of vehicles attempting to enter or leave the site; and climbing onto vehicles to prevent them from moving.

6 The overall scale of such protest activity is indicated by the fact that, between January 2017 and May 2018, the police had made over 350 arrests in connection with protests against Cuadrilla's operations, including 160 arrests for obstructing the highway, and substantial police resources had to be deployed in order to deal with the actions of protestors, with around 100 officers directly involved each day and at a total policing cost of some £7m.

7 In July 2017 a group calling themselves "Reclaim the Power" organised a "month of action" targeting Cuadrilla. Of the many actions taken by protestors during that month to attempt to disrupt transport to and from the Preston New Road site, one particularly disruptive incident involved criminal offences and led to sentences which were the subject of an appeal to the Criminal Division of the Court of Appeal: see *R v Roberts (Richard) (Liberty intervening)* [2018] EWCA Crim 2739; [2019] 1 WLR 2577. That incident began on the morning of 25 July 2017, when two protestors managed to climb on top of lorries approaching the site along the Preston New Road, forcing the lorries to stop to avoid putting the safety of the two men at risk. Two more men later climbed on top of the lorries. Each of the protestors stayed there for two or three days and the last one did not come down until 29 July 2017. For all this time the lorries were therefore unable to move, with the result that one carriageway of the road remained blocked. Substantial disruption was caused to local residents and other members of the public.

8 Further particularly serious disruption occurred on 31 July 2017. The events of that day were described in a letter from Assistant Chief Constable Terry Woods put in evidence by Cuadrilla, as follows:

> "The last day of the RTP [Reclaim the Power] rolling resistance month of action saw a final lock-in involving a supposedly one tonne weight concrete barrel lock-on in the rear of a van with a prominent RTP activist attached to it via an arm tube. This action, coupled with an already tense atmosphere amongst the RTP activists, anti-fracking activists and local protestors, resulted in confrontation with police and they arrested two protestors. During the evening the protestors then became aware of a convoy en route to the drill site resulting in four protestors deploying in two pairs with arm tube lock-ons and blocking the A583. Further confrontation and aggression towards police ensued, with one of the locked-on protestors also assaulting a police officer. A security staff van was then mobbed by protestors and damaged, with a further protestor being arrested from that incident. Protestors also blockaded three vans of police protest liaison officers outside the Maple Farm Camp. The vehicle of a drill site staff member's partner dropping them off was then confronted by protestors, with a number of protestors climbing on the roof of the vehicle as it attempted to reverse away. The A583 was finally reopened to traffic at around 21:00 once police had removed all the protestors locked on, resulting in four arrests …"

9 At the hearing of the application for an injunction on 31 May and 1 June 2018, evidence was also adduced that the "Reclaim the Power" protest group was planning and promoting a further campaign of sustained direct action targeting Cuadrilla from 11 June to 1 July 2018. The group had openly stated their intention to organise a mass blockade of the Preston New Road dubbed "Block around the Clock" with the aim of completely preventing access to and egress from Cuadrilla's site for four days from 27 June to 1 July 2018.

The Injunction

10 It was against this background that Judge Pelling QC granted an interim injunction on 1 June 2018 to restrain four named individuals and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with the claimants' rights of passage to and from their land and unlawfully interfering with Cuadrilla's supply chain. This injunction was granted until 11 July 2018. On that date it was replaced by a further order in similar terms, to continue until 1 June 2020 (unless varied or discharged in the meantime). This is the Injunction that was in force when the appellants did the acts which led to their committal for contempt of court.

11 As with the order initially made on 1 June 2018, the Injunction had three limbs, each designed to prevent a different type of wrong (tort) being done to the claimants.

Paragraph 2: trespass

12 The first type of wrong, prohibited by paragraph 2 of the Injunction, was trespassing on the claimants' land situated off the Preston New Road. The land was identified by reference to the title numbers under which it is registered at the Land Registry and was denoted in the order as "the PNR Land".

Paragraph 4: nuisance

13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct

or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181.

14 These rights protected by the law of nuisance underpinned paragraph 4 of the Injunction, which applied to the second defendant. The second defendant to the proceedings is described as:

> "Persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highway known as Preston New Road."

Paragraph 4 of the Injunction prohibited persons falling within this description from carrying out the following acts on any part of "the PNR Access Route":

> "4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;
> "4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;
> "4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance; in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees."

An exception was made in paragraph 5 for a weekly walk or march from Maple Farm on the Preston New Road to the Site Entrance followed by a meeting or assembly for up to 15 minutes at the bell-mouth of the Site Entrance.

15 The "PNR Access Route" was defined in paragraph 3 to mean:

> "The whole of the Preston New Road (A583) between the junction with Peel Hill to the northwest and 50 metres to the east of the vehicular entrance to the PNR Site ("the Site Entrance" —as marked on the plan annexed to this Order as Annex 2) …"

Paragraph 7: unlawful means conspiracy

16 The third type of wrong which the Injunction was designed to prevent was unlawful interference with Cuadrilla's supply chain. This was the subject of paragraph 7 of the Injunction, which prohibited persons unknown from "committing any of the following offences or unlawful acts by or with the agreement or understanding of any other person":

> "7.2 obstructing the free passage along a public highway, or the access to or from a public highway, by: (i) blocking the highway or access thereto with persons or things when done with a view to slowing down or stopping vehicular or pedestrian traffic, and with the intention of causing inconvenience and delay; (ii) slow walking in front of vehicles with the object of slowing them down, and with the intention of causing inconvenience and delay; (iii) climbing onto or attaching themselves to vehicles … in each case with an intention of damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors, sub-contractors, suppliers or service providers engaged by [Cuadrilla], in connection with [Cuadrilla's] searching or boring for or getting any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata at the PNR Site or on the PNR Land."

17 The tort underpinning this limb of the Injunction was that of conspiracy to injure by unlawful means.

18 Conspiracy is one of a group of "economic torts" which are an exception to the general rule that there is no duty in tort to avoid causing economic loss to another person unless the loss is parasitic upon some injury to person or damage to property. As explained by Lord Sumption JSC and Lord Lloyd-Jones JSC in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2018] 2 WLR 1125, para 7, the modern law of conspiracy developed in the late 19th and early 20th centuries as a basis for imposing civil liability on the organisers of strikes and other industrial action. In the form of the tort relevant for present purposes, the matters which the claimant must

prove to establish liability are: (i) an unlawful act by the defendant, (ii) done with the intention of injuring the claimant, (iii) pursuant to an agreement (whether express or tacit) with one or more other persons, and (iv) which actually does injure the claimant.

The breaches of the Injunction

19 As required by the terms of the Injunction, extensive steps were taken to publicise it and bring it to the notice of protestors. These steps included: (i) fixing sealed copies of the Injunction in transparent envelopes to posts, gates, fences and hedges and positioning signs at no fewer than 20 conspicuous locations around the PNR Land including at the Site Entrance and at either side of the public highway in each direction from the Site Entrance advertising the existence of the Injunction; (ii) leaving a sealed copy of the Injunction at protest camps; (iii) advertising and making copies of the Injunction available online; and (iv) sending a press release and copies of the Injunction to 16 specified news outlets.

20 Despite this publicity, a number of incidents occurred in the period July to September 2018 which led Cuadrilla on 11 October 2018 to issue a committal application.

The incident on 24 July 2018

21 The first main incident occurred on 24 July 2018 and involved all three appellants. The facts alleged, which were not seriously disputed by the appellants, were that at around 7 am on the morning of that day they (and three other individuals) lay down in pairs on the road across the Site Entrance. Each person was attached to the other person in the pair by an "arm tube" device. This was done in such a way as to prevent any vehicle from entering or leaving the site. The protestors remained in place for some six and a half hours until around 1.30 pm, when they were cut out of the arm tube devices and removed by the police.

The incident on 3 August 2018

22 The second main incident occurred on 3 August 2018 and involved Ms Lawrie alone. It took place on the "PNR Access Route" (as defined in paragraph 3 of the Injunction) about 1200 metres to the west of the Site Entrance. At about 12.55 pm Ms Lawrie, along with three other people, attempted to stop a tanker lorry which was on its way to the site in order to collect rainwater. In doing so she stood in the path of the lorry, raising her arms above her head. To avoid hitting her, the lorry had to veer across the centre line of the carriageway into the opposite lane. These facts were proved by video evidence from a camera on the dashboard of the lorry cab.

The other breaches of the Injunction

23 There were three more minor incidents: (1) On 1 August 2018 Ms Lawrie trespassed on the PNR Land for approximately two minutes. (2) Also on 1 August 2018, Mr Walsh sat down on the road in front of the Site Entrance until he was forcibly removed by police officers. (3) On 22 September 2018, as a sewage tanker was attempting to enter the site, Ms Lawrie ran into its path, forcing it to stop. She then lay on the ground in front of the lorry before being helped to her feet by security staff and persuaded to move.

The findings of contempt of court

24 Although two other individuals were also named as respondents, the committal application was pursued only against the three current appellants. The application was heard in two stages. The first stage was a hearing over four days from 25 to 28 June 2019 to decide whether the appellants were guilty of contempt of court.

The legal test for contempt

25 It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) at [20]. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.

26 For reasons given in a judgment delivered on 28 June 2018, the judge found all the relevant factual allegations proved to the requisite criminal standard of proof. There is no appeal against any of his factual findings.

Knowledge of the Injunction

27 The main factual dispute at the hearing concerned the appellants' knowledge of the Injunction at the time when the incidents occurred. Although they gave evidence to the effect

that they did not know of its terms, the judge rejected that evidence as inherently incredible and untruthful.

28 The judge explained in detail his reasons for reaching that conclusion. In the case of Ms Lawrie, the relevant evidence included her own admissions that there was a lot of discussion about the Injunction around the time that it was granted and that she was concerned about its effect on lawful protesting. As the judge observed, that evidence only made sense on the basis that she was aware of its terms. There were also photographs showing Ms Lawrie placing decorations on the fence around the site "in such close proximity to the notices summarising the effect of the [Injunction] as to make it virtually impossible for her not to have read the information in the notice unless she was deliberately choosing not to do so". In the case of Mr Walsh, the relevant evidence included social media posts that he had shared with others that referred to or summarised the main effects of the Injunction. The third appellant, Mr Wilson, accepted that he was aware of the Injunction and that it affected protests at the site entrance. There was also video evidence of Cuadrilla's security guards seeking to draw the Injunction to the attention of the appellants by providing them with copies of it, which they refused to take.

The intentions proved

29 In relation to the first main incident on 24 July 2018, in which each of the appellants lay in the road across the Site Entrance attached to another person by an arm tube device, they all gave evidence that in taking this action they intended to protest. The judge accepted this but thought it obvious from what they did, and was satisfied beyond reasonable doubt, that they also intended to stop vehicles from entering or leaving the site and thereby cause inconvenience and delay to Cuadrilla. Having found on this basis that the appellants were in breach of paragraph 4 of the Injunction, he considered it unnecessary to decide whether they were also in breach of paragraph 7.

30 In relation to the second main incident which occurred on 3 August 2018, Ms Lawrie admitted that she together with others was attempting to stop the lorry. The judge found it proved beyond reasonable doubt that she was acting with the agreement or understanding of others present and with the intention of slowing down or stopping the vehicle, causing inconvenience and delay, and thereby damaging Cuadrilla by interfering with the activities undertaken at the site. He accordingly found that she was in breach of paragraph 7 of the Injunction.

31 The judge also found that the three more minor incidents (referred to at para 23 above) all involved intentional breaches of the Injunction, but he did not consider that it was in the public interest to impose any sanction for those breaches.

The committal order

32 The second stage of the committal application was a hearing held on 2 and 3 September 2019 to decide what sanctions to impose for the two principal breaches of the Injunction found proved at the earlier hearing. The judge had already made it clear that he would not impose immediate terms of imprisonment, so that the available penalties were (a) no order (except in relation to costs), (b) a fine or (c) a suspended term of imprisonment.

33 The judge was satisfied that, in relation to both incidents, the custody threshold was passed such that it was necessary to make orders for committal to prison, although their effect should be suspended. In reaching that conclusion and in fixing the length of the suspended prison terms, the judge had regard to his finding that the breaches were intentional and to the need not only to punish the appellants for their intentional disobedience of the court's order, but also to deter future breaches of the order (whether by them or others).

34 The judge recognised that the breaches were committed as part of a protest but was not persuaded that this should result in lesser penalties. The judge also had regard, by analogy, to the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. This guideline identifies three levels of culpability, where level A represents a very serious or persistent breach, level B a deliberate breach falling between levels A and C, and level C a minor breach or one just short of reasonable excuse. Harm—which includes not only any harm actually caused but any risk of harm posed by the breach—is also divided into three categories. Category 1 applies where the breach causes very serious harm or distress or "demonstrates a continuing risk of serious criminal and/or anti-social behaviour". Category 3 applies where the breach causes little or no harm or distress or "demonstrates a continuing risk of minor criminal and/or anti-social behaviour". Category 2 applies to cases falling between categories 1 and 3.

35 In the case of the first incident involving all three appellants, where the Site Entrance was blocked by a "lock-on" for several hours, the judge assessed the level of culpability as

falling at the lower end of level B and the harm caused together with the continuing risk of breach demonstrated as falling at the lower end of category 2. The guideline indicates that the starting point in sentencing for breach of a criminal behaviour order in category 2B is 12 weeks' custody, with a category range between a medium level community order and one year's custody. A community order is not an available sanction for contempt of court. In the circumstances the judge concluded that the appropriate penalty was a short suspended term of imprisonment, which he fixed at four weeks.

36 In relation to the second main incident, involving Ms Lawrie alone, the judge assessed the level of culpability as at the top end of level B within the guideline and the degree of harm that was at risk of being caused as in the top half of category 2. In making that assessment, he said:

> "The risk I have identified was a serious one, involving the risk of death or injury to Ms Lawrie; to the driver of the vehicle she was attempting to stop by standing in front of it in the highway; and those driving on the other side of the road into which the lorry was forced by reason of the presence of Ms Lawrie in the road. Those risks were worsened by the fact that the incident occurred during a period of heavy rain …"

The judge also found that the breach was aggravated by "the failure of Ms Lawrie to acknowledge the danger posed by her conduct, or to apologise for it, or to offer any assurance that it will not happen again".

37 The sanction imposed for this contempt of court was committal to prison for two months. As with the penalties imposed in relation to the first incident, execution of the order was suspended on condition that the Injunction is obeyed for a period of two years.

Variation of the Injunction

38 In the same judgment given on 3 September 2019 in which he decided what sanctions to impose, Judge Pelling QC also dealt with an application by the appellants to vary the Injunction, in particular by removing paragraphs 4 and 7. In making that application, the appellants relied on the decision of this court in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] EWCA Civ 515; [2019] 4 WLR 100, which I will discuss shortly. For the moment I note that, while the judge on 3 September 2019 made some variations to the wording of the Injunction, he rejected the appellants' contention that the original wording was impermissibly wide or uncertain. Furthermore, none of the variations made on 3 September 2019 would, had they been incorporated in the original wording of the Injunction, have rendered the appellants' conduct not a breach.

39 The appellants applied for permission to appeal against the decision not to vary the Injunction by removing paragraphs 4 and 7. However, on 2 November 2019 the Government announced a moratorium on fracking with immediate effect. In the light of the moratorium, the claimants themselves applied on 19 November 2019 to remove paragraphs 4 and 7 of the Injunction for the future on the ground that they no longer require this protection, as Cuadrilla has ceased fracking operations on the site and will not be able to resume such operations unless and until the moratorium is lifted. On 25 November 2019 the judge granted the claimants' application. In these circumstances the appellants withdrew their appeal against the judge's previous refusal to vary the Injunction in that way, as the relief which they were seeking had been granted (albeit for different reasons from those which they were advancing).

The right to protest

40 Before I come to the grounds of the appeal against the committal order, I need to say something more about the two contextual features of this case which I mentioned at the start of this judgment. The first is the legal relevance of the fact, properly emphasised by counsel for the appellants, that the appellants' breaches of the Injunction were a form of non-violent protest against activities to which they strongly object.

41 The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.

42 Exercise of the right to protest—for example, holding a demonstration in a public place—often results in some disruption to ordinary life and inconvenience to other citizens. That

by itself does not justify restricting the exercise of the right. As Laws LJ said in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 at [43]: "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them". Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.

43 The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.

44 The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in *Kudrevicius v Lithuania* CE:ECHR:2015:1015JUD003755305; 62 EHRR 34; 40 BHRC 114. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention. In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:

> "In the court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention."

Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).

45 In the present case the claimants accept that the conduct of the appellants which constituted contempt of court likewise fell within the scope of articles 10 and 11 of the Human Rights Convention, even though disruption of Cuadrilla's activities was not merely a side-effect but an intended aim of the appellants' conduct. It follows that both the Injunction prohibiting this conduct and the sanctions imposed for disobeying the Injunction were restrictions on the appellants' exercise of their rights under articles 10(1) and 11(1) which could only be justified if those restrictions satisfied the requirements of articles 10(2) and 11(2) of the Convention.

The Ineos case

46 A second significant feature of this case is that the Injunction was granted not against the current appellants as named individuals but against "persons unknown". Injunctions of this kind were considered in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, which forms an essential part of the backdrop to the issues raised on this appeal.

47 Like the present case, the *Ineos* case concerned an injunction granted on the application of a company engaged or planning to engage in "fracking" to restrain unlawful interference with its activities by protestors whom it was unable to name. In the *Ineos* case, however, the court was not concerned, as it is here, with breaches of such an injunction. The appeal involved a challenge to the making of an injunction against persons unknown before any allegedly unlawful interference with the claimants' activities had yet occurred. This context is important in understanding the decision.

48 The main question raised on the appeal was whether it was appropriate in principle to grant an injunction against "persons unknown". That question was decided in favour of the claimant companies. The court held that there is no conceptual or legal prohibition on suing

persons unknown who are not currently in existence but will come into existence if and when they commit a threatened tort. Nor is there any such prohibition on granting a "quia timet" injunction to restrain such persons from committing a tort which has not yet been committed. None the less, Longmore LJ (with whose judgment David Richards LJ and I agreed) warned that a court should be inherently cautious about granting such injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance (see para 31).

49 Longmore LJ stated the requirements necessary for the grant of an injunction of this nature "tentatively" (at para 34) in the following way:

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

50 In the light of precedents which were not cited in the *Ineos* case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); [2020] 1 WLR 417 and in these circumstances I express no opinion on the point.

51 In the *Ineos* case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar—although in some respects wider and more vaguely worded—terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach—which simply accepted the claimants' evidence at face value—did not adequately justify granting a quia timet injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty. I will come back to one aspect of the reasoning on that point when discussing the first ground of appeal.

This appeal

52 I turn now to the issues raised on this appeal. The appellants' notice puts forward three grounds. However, Ms Brimelow QC, who now represents the appellants, did not pursue one of them. This challenged the judge's finding that Ms Lawrie was in contempt of court by trespassing on the "PNR Land" on 1 August 2018 in breach of paragraph 2 of the Injunction. As Ms Brimelow accepted, a challenge to that finding, even if successful, would provide no reason for disturbing the committal order, as the judge considered that there was no public interest in taking any further action in relation to the three minor incidents, of which the trespass incident was one, and made no order in respect of them. The order under appeal was based only on the "lock-on" at the Site Entrance by all three appellants on 24 July 2018 and Ms Lawrie's action in standing

in the path of a lorry on 3 August 2018. Nothing turns, therefore, on whether or not Ms Lawrie trespassed on the "PNR Land" on 1 August 2018.

53 The two grounds of appeal pursued are that, in relation to the two incidents on which the order for committal was based: (1) the judge erred in committing the appellants under paragraphs 4 and 7 of the Injunction, as these paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

(1) Was the Injunction unclear?

54 It is a well-established principle that an injunction must be expressed in terms which are clear and certain so as to make plain what is permitted and what is prohibited: see eg *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, para 35. This is just as, if not even more, essential where the injunction is addressed to "persons unknown" rather than named defendants. As Longmore LJ said in the *Ineos* case, para 34, in stating the fifth of the requirements quoted at para 49 above: "the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

55 A similar need for clarity and precision "to a degree that is reasonable in the circumstances" forms part of the requirement in articles 10(2) and 11(2) of the Convention that any interference with the rights to freedom of expression and assembly must be "prescribed by law": see *Sunday Times v United Kingdom* CE:ECHR:1979:0426JUD000653874; 2 EHRR 245, para 49; *Kudrevicius v Lithuania* 62 EHRR 34, para 109.

The references to intention in the Injunction

56 As mentioned, the aspect of paragraphs 4 and 7 of the Injunction which the appellants contend made those terms insufficiently clear and certain to support findings of contempt was the fact that they included references to the defendant's intention. Paragraph 4.1, of which all three appellants were found to be in breach by their "lock on" at the Site Entrance on 24 July 2018, prohibited "blocking any part of the bell mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic" and "with the intention of causing inconvenience or delay to the claimants". Establishing a breach of this term therefore required proof of two intentions. Paragraph 7.2(1), of which Ms Lawrie was found to have been in breach when she stood in front of a lorry on 3 August 2018, required proof of three intentions: namely, those of "slowing down or stopping vehicular or pedestrian traffic", "causing inconvenience and delay", and "damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors …" It was also necessary to prove that the act was done with the agreement or understanding of another person.

Types of unclarity

57 There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".

58 A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.

59 All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

60 It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the "PNR Land" was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial.

The concept of intention

61 Of these three types of unclarity, it is the third that is said to be material in the present case. For the appellants, Ms Brimelow argued that references to intention in an injunction addressed to "persons unknown" made the terms insufficiently clear because intention is a legal concept which is difficult for a member of the public to understand. In the judgment given on 28 June 2019 in which he made findings of contempt of court, the judge referred to the maxim that a person "is presumed to intend the natural and probable consequences of his acts", citing a passage from the speech of Lord Bridge of Harwich in *R v Maloney* [1985] AC 905, 928–929. Ms Brimelow submitted that a person with no legal knowledge or training would not understand that, even if they do not have in mind a particular consequence of their action, they will be held to intend any natural and probable consequence of it. Such a person might reasonably consider that their intention was, for example, to prevent fracking, or to protect the environment, or to protest, rather than, say, to cause inconvenience and delay to Cuadrilla, even if such inconvenience and delay was a natural or probable consequence of what they did.

62 I do not accept that the references in the terms of the Injunction to intention had any special legal meaning or were difficult for a member of the public to understand. In criminal law there has not for more than 50 years been any rule of law that persons are presumed to intend the natural and probable consequences of their acts. That notion was given its quietus by section 8 of the Criminal Justice Act 1967, which provides:

> "A court or jury, in determining whether a person has committed an offence — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

63 This was the point that Lord Bridge was making in the *Maloney* case in the passage to which Judge Pelling QC referred. The House of Lords made it clear in that case that juries should no longer, save in rare cases, be given legal directions as to what is meant by intention. Lord Bridge described it (at p 926) as the "golden rule" that, when directing a jury on intent, a judge should avoid any elaboration or paraphrase of what is meant by intent and should leave it to the jury's good sense to decide whether the person accused acted with the intention required to be guilty of a crime. Just as no elaboration of the concept of intention is required for juries, so equally its meaning does not need to be explained to members of the public to whom a court order is addressed. It is not a technical term nor one that, when used in an injunction prohibiting acts done with a specific intention, is to be understood in any special or unusual sense. It is an ordinary English word to be given its ordinary meaning and with which anyone who read the Injunction would be perfectly familiar.

64 That is not to say that proof of an intention is always straightforward. Often it causes no difficulty. A person's immediate intention may be obvious from their actions. Thus, when the appellants and three others lay across the Site Entrance on 24 July 2018 in pairs linked by

arm tube devices, it was obvious that they were intending to stop vehicles from entering or leaving the site. Had that not been their intention, they would not have positioned themselves where they did. Similarly, when in the incident on 3 August 2018 Ms Lawrie stood in the road in front of a lorry, waving her arms, there could be no doubt that her intention was to cause the vehicle to stop. To determine whether less direct consequences or potential consequences of a person's actions are intended may require further knowledge of, or inference as to, their plans or goals. In so far as there is evidential uncertainty, however, a person alleged to be in contempt of court by disobeying an injunction is protected by the requirement that the relevant facts must be proved to the criminal standard of proof. Hence where the injunction prohibits an act done with a particular intention, if there is any reasonable doubt about whether the defendant acted with that intention, contempt of court will not be established.

65 I accordingly cannot accept that there is anything objectionable in principle about including a requirement of intention in an injunction. Nor do I accept that there is anything in such a requirement which is inherently unclear or which requires any legal training or knowledge to comprehend.

Dicta in the Ineos case

66 Nevertheless, I acknowledge that the appellants' argument gains some traction from a statement in the judgment of Longmore LJ in the *Ineos* case. One of the terms of the injunction granted by the judge at first instance in that case, like paragraph 7 of the Injunction in this case, was designed to protect the claimants from financial damage caused by an unlawful means conspiracy. In the *Ineos* case the term in question prohibited persons unknown from "combining together to commit the act or offence of obstructing free passage along a public highway (or access to or from a public highway) by … slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or … otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants." The wording of this prohibition was held to be insufficiently clear, both because it contained language which was too vague ("slow walking" and "unreasonably and/or without lawful authority or excuse obstructing the highway") and because, as Longmore LJ put it, "an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse": see *Ineos Upstream Ltd v Persons Unknown* at para 40.

67 In addition to making these points, however, Longmore LJ also agreed with a submission that one of the "problems with a quia timet order in this form" was that "it is of the essence of the tort [of conspiracy] that it must cause damage". He commented, at para 40:

> "While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible to change and, for that reason, should not be incorporated into the order."

68 Although this was not an essential part of the court's reasoning, I agreed with the judgment of Longmore LJ in the *Ineos* case and therefore share responsibility for these observations. However, while I continue to agree with the other reasons given for finding the form of order made by the judge in the *Ineos* case unclear as well as too widely drawn, with the benefit of the further scrutiny that the point has received on this appeal I now consider the concern expressed about the reference to the defendants' intention to have been misplaced.

69 It is not in fact correct, as suggested in the passage quoted above, that the requirement of the tort of conspiracy to show damage can only be incorporated into a quia timet injunction by reference to the defendants' intention. It is perfectly possible to frame a prohibition which applies only to future conduct that actually causes damage. It is, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that is lawful, it is necessary to include a requirement that the defendants' conduct was intended to cause damage to the claimant. As already discussed, there is nothing ambiguous, vague or difficult to understand about such a requirement. The only potential difficulty created by its inclusion is one of proof.

The Hampshire Waste case

70 The case of *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9, to which Longmore LJ referred, involved an application by companies which owned and operated waste incineration sites for an injunction to restrain persons from trespassing on their sites in connection with a planned day of protest by environmental protestors described as "Global Day of Action Against Incinerators". On similar occasions in the past protestors had invaded sites owned by the claimants and caused substantial irrecoverable costs.

71 The injunction was sought against defendants described in the draft order as "Persons intending to trespass and/or trespassing" on six specified sites "in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003". Sir Andrew Morritt V-C considered that the case for granting an injunction to prevent the threatened trespass to the claimants' property was clearly made out and that, in circumstances where the claimants were unable to name any of the protestors who might be involved, it was appropriate to grant the injunction against persons unknown. He raised two points, however, about the proposed description of the defendants (see para 9). The two points were that:

> "it seems to me to be wrong that the description of the defendant should involve a legal conclusion such as is implicit in the use of the word 'trespass'. Similarly, it seems to me to be undesirable to use a description such as 'intending to trespass' because that depends on the subjective intention of the individual which is not necessarily known to the outside world and in particular the claimants, and is susceptible of change."

To address these points, the Vice-Chancellor amended the opening words of the proposed description of the defendants to refer to: "Persons entering or remaining without the consent of the claimants" on the specified sites.

72 I take the Vice-Chancellor's objection to the use of the word "trespass" to have been that trespass is a legal concept and that the class of persons affected by the injunction ought to be identified in language which does not use a legal term of art. His objection to the reference to intention was different. It was not that intention is a legal concept which might not be clear to persons notified of the injunction. It was that "the outside world and in particular the claimants" would not necessarily know whether a person did or did not have the relevant intention and also that this state of affairs was susceptible of change.

73 Although the Vice-Chancellor did not spell this out, what was particularly unsatisfactory, as it seems to me, about the proposed description was that it would have made the question whether a person was a defendant to the proceedings dependent not on anything which that person had done (with or without a specific intention) but *solely* on their state of mind at any given time (which might change). Thus, a person who had formed an intention of joining a protest which would involve entering on the claimants' land would fall within the scope of the injunction even if he or she had done nothing which interfered with the claimants' legal rights or which was even preparatory or gave rise to a risk of such interference. It is easy to see why the Vice-Chancellor regarded this as undesirable.

74 I do not consider that the same objection applies to a term of an injunction which prohibits doing specified acts with a specified intention. Limiting the scope of a prohibition by reference to the intention required to make the act wrongful avoids restraining conduct that is lawful. In so far as it creates difficulty of proof, that is a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provides an additional protection. Accordingly, although the inclusion of multiple references to intention —as in paragraph 7 of the Injunction in this case—risks introducing an undesirable degree of complexity, I would reject the suggestion that there is any reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the Injunction in the present case provided a reason not to enforce it by committal.

The width of the Injunction

75 I mentioned earlier that the appellants withdrew their appeal against the judge's decision on 3 September 2019 to refuse their application to vary the injunction, when the relief which they were seeking was granted for different reasons following the Government's moratorium on fracking. The arguments which the appellants would have made on that appeal, however, did not disappear from the picture.

76 It is no defence to an application for the committal of a defendant who has disobeyed a court order for the defendant to say that the order is not one that ought to have been made.

As a matter of principle, a court order takes effect when it is made and remains binding unless and until it is revoked by the court that made it or on an appeal; and for as long as the order is in effect, it is a contempt of court to disobey the order whether or not the court was right to make it in the first place: see eg *M v Home Office* [1992] QB 270, 298–299, *Burris v Azadani* [1995] 1 WLR 1372, 1381. In the present case, therefore, it is not open to the appellants to argue that they were not guilty of contempt of court because the Injunction should not have been granted or should not have been granted in terms which prohibited the acts which they chose to commit in defiance of the court's order.

77 If it were shown that the court was wrong to grant an injunction which prohibited the appellants' conduct, that would none the less be relevant to the question whether it was appropriate to punish the appellants' contempt of court by ordering their committal to prison. Although no such argument was raised in the appellants' grounds of appeal against the committal order, in the course of her oral submissions Ms Brimelow suggested that this was the case. She did so, as I understood it, by reference to the grounds on which the appellants had sought permission to appeal against the judge's refusal to remove paragraphs 4 and 7 of the Injunction (before that appeal was withdrawn). Although there was no formal application to rely on those grounds for the purpose of the appeal against the committal order, it would be unreasonable not to permit this.

78 The grounds on which the appellants argued that paragraphs 4 and 7 should not have been included in the Injunction were essentially the same, however, as the grounds on which they argued that those terms could not properly form the basis of findings of contempt of court —namely, that the terms were insufficiently clear and certain because of their references to intention. For the reasons already given, I do not consider this to be a valid objection.

79 I would add that it has not been argued—and I see no reason to think—that on the facts of this case paragraph 4 of the Injunction, as it stood when the breaches occurred, was too widely drawn. Although a similarly worded term was criticised by this court in the *Ineos* case, there was in that case, as I have emphasised, no previous history of interference with the claimants' rights. The injunction sought was therefore what might be called a "pure" quia timet injunction, in that it was not aimed at preventing repetition of wrongful acts which had caused harm to the claimants but at preventing such acts in circumstances where none had yet taken place. The significance which the court attached to this can be seen from para 42 of the judgment of Longmore LJ, where he said:

> "[Counsel] for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."

80 In the present case, by contrast, there was a well documented history of obstruction and attempts to obstruct access to and egress from Cuadrilla's site by blocking the Site Entrance and by obstructing the highway or otherwise interfering with traffic on the part of the Preston New Road defined in paragraph 3 of the Injunction as the "PNR Access Route". That history of conduct which clearly infringed the claimants' rights of free passage provided a solid basis for the prohibition in paragraph 4.

81 Paragraph 7 is a different matter. The only breach of paragraph 7 in issue on this appeal, however, is Ms Lawrie's conduct on 3 August 2018 in standing in the road in an attempt to stop a lorry which was approaching the Site Entrance and with the intention of causing inconvenience and delay to Cuadrilla. Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct. It clearly amounted to an actionable public nuisance. As such, the prohibition in paragraph 4 could have been framed so as to prohibit such conduct. Indeed, one of the variations made to the Injunction on 3 September 2019 was an amendment to paragraph 4 to prohibit:

> "Standing, sitting, walking or lying in front of any vehicle on the carriageway with the effect of interfering with the vehicular passage along the PNR Access Route by the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees;"

This squarely covered conduct of the kind which occurred on 3 August 2018.

82 The word "effect" was included in the variations made on 3 September 2019 to avoid referring to intention. In my view, reference to intention should not have been removed because there is nothing unclear in such a requirement and I see no sufficient justification for framing the prohibition more widely so as to catch unintended effects. But what matters for present purposes is that the terms of the Injunction were not criticised—and it seems to me could not reasonably be criticised—as too wide in so far as they prohibited the conduct of Ms Lawrie on 3 August 2018, as they did both before and after the variations were made.

83 I am therefore satisfied that, when considering the sanctions imposed on the appellants, it cannot be said in mitigation that the acts which formed the basis of the committal order were not acts which ought to have been prohibited by the Injunction.

(2) Were the sanctions too harsh?

84 The second ground of appeal pursued by the appellants is that—on the footing that the relevant restrictions placed on their conduct by the Injunction were legally justified—the judge was nevertheless wrong to punish their breaches of the Injunction by ordering their committal to prison (albeit that execution of the order was suspended).

The standard of review on appeal

85 In deciding what sanction to impose for a contempt of court, a judge has to assess and weigh a number of different factors. The law recognises that a decision of this nature involves an exercise of judgment which is best made by the judge who deals with the case at first instance and with which an appeal court should be slow to interfere. It will generally do so only if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge. It follows that there is limited scope for challenging on an appeal a sanction imposed for contempt of court as being excessive (or unduly lenient). If, however, the appeal court is satisfied that the decision of the lower court was wrong on one of the above grounds, it will reverse the decision and either substitute its own decision or remit the case to the judge for further consideration of sanction. See *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA 392; [2019] 1 WLR 3833, paras 44–46 and *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524; [2019] 4 WLR 65, paras 37–38.

86 The appellants' case that the judge's decision was wrong is put in two ways. First, it is argued that the judge made an error of principle and/or failed to take into account a material factor in treating as irrelevant the fact that, when they disobeyed the Injunction, the appellants were exercising rights of protest which are protected by the common law and by articles 10 and 11 of the Convention. Secondly, it is argued that, in having regard (as the judge did) to the guideline issued by the Sentencing Council which applies to sentencing in criminal cases for breach of a criminal behaviour order, the judge misapplied that guideline and, in consequence, reached a decision that was unduly harsh.

Sentencing protestors

87 The fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest will seldom provide a defence to a criminal charge. But it is well established that it is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case. On behalf of the appellants, Ms Brimelow QC emphasised the following observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

88 This passage was quoted with approval by Lord Burnett of Maldon CJ, giving the judgment of the Court of Appeal (Criminal Division) in *R v Roberts* [2019] 1 WLR 2577, the case

mentioned earlier that arose from "direct action" protests at Cuadrilla's site in July 2017 by four men who climbed on top of lorries. Three of the protestors were sentenced to immediate terms of imprisonment, but on appeal those sentences were replaced by orders for their conditional discharge, having regard to the fact that they had already spent three weeks in prison before their appeals were heard. The Court of Appeal indicated that the appropriate sentence would otherwise have been a community sentence with a punitive element involving work (or perhaps a curfew). The Lord Chief Justice (at para 34) summarised the proper approach to sentencing in cases of this kind as being that:

> "the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

89 Ms Brimelow submitted that this approach to sentencing should have been, but was not, followed in the present case when deciding what sanction to impose for the breaches of the Injunction committed by the appellants.

Were custodial sentences wrong in principle?

90 At one point in her oral submissions Ms Brimelow sought to argue that, where a deliberate breach of a court order is committed in the course of a peaceful protest, it is wrong in principle to punish the breach by imprisonment, even if the sanction is suspended on condition that there is no further breach within a specified period. This mirrored a submission which she made when representing the protestors in the *Roberts* case. The submission was rejected in the *Roberts* case (at para 43) and I would likewise reject it as contrary to both principle and authority.

91 There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used. Court orders would become toothless if such an approach were adopted—particularly in relation to those for whom a financial penalty holds no deterrent because it cannot be enforced as they do not have funds from which to pay it. Unsurprisingly, no case law was cited in which such an approach has been endorsed. Not only, as mentioned, was it rejected in the *Roberts* case in the context of sentencing for criminal offences, but it is also inconsistent with the jurisprudence of the European Court of Human Rights.

92 Thus, in *Kudrevicius v Lithuania* 62 EHRR 34 mentioned earlier, the Grand Chamber of the European Court saw nothing disproportionate in the decision to impose on the applicants a 60-day custodial sentence suspended for one year (along with some restrictions on their freedom of movement)—a sentence which the court described as "lenient" (see para 178). The Grand Chamber also referred with approval to earlier cases in which sentences of imprisonment imposed on demonstrators who intentionally caused disruption had been held not to violate articles 10 and 11 of the Convention. For example, in *Barraco v France* CE:ECHR:2009:0305JUD003168405; (Application No 31684/05) 5 March 2009, the applicant had taken part in a protest which involved blocking traffic on a motorway for several hours. The European Court held that his conviction and sentence to a suspended term of three months' imprisonment (together with a fine of €1,500) did not violate article 11.

93 Another case cited by the Grand Chamber in *Kudrevicius* that is particularly in point because it involved defiance of court orders is *Steel v United Kingdom* CE:ECHR:1998:0923JUD002483894; 28 EHRR 603; 5 BHRC 339. In that case the first applicant took part in a protest against a grouse shoot in which she intentionally obstructed a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing. She was convicted of a public order offence, fined and ordered to be bound over to keep the peace for 12 months. Having refused to be bound over, the applicant was committed to prison for 28 days. The second applicant took part in a protest against the building of a motorway extension in which she stood under the bucket of a JCB digger in order to impede construction work. She was likewise convicted of a public order offence, fined and ordered to be bound over. She also refused to be bound over and was committed to prison for seven days. The European Court held that in each of these cases the measures taken against the protestors interfered with their rights under article 10 of the Convention but that in each case the measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and also (in relation to

their committal to prison for refusing to agree to be bound over) maintaining the authority of the judiciary.

94 The common feature of these cases, as the court observed in the *Kudrevicius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case—like the *Kudrevicius* case—involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see para 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.

95 Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.

96 On the other hand, courts are frequently reluctant to make orders for the *immediate* imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct action protest for conscientious reasons. It is notable that in the *Kudrevicius* case and in the earlier cases there cited in which custodial sentences were held by the European Court to be a proportionate restriction on the rights of protestors, in all but one instance the sentence imposed was a suspended sentence. The exception was *Steel v United Kingdom*, but in that case too the protestors were not immediately sentenced to imprisonment: it was only when they refused to be bound over to keep the peace that they were sent to prison. A similar reluctance to make (or uphold) orders for immediate imprisonment is apparent in the domestic cases to which counsel for the appellants referred, including the *Roberts* case. As Lord Burnett CJ summed up the position in that case (at para 43): "There are no bright lines, but particular caution attaches to immediate custodial sentences." There are good reasons for this, which stem from the nature of acts which may properly be characterised as acts of civil disobedience.

Civil disobedience

97 Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see eg John Rawls, *A Theory of Justice* (1971) p 364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act—in contrast to the actions of other law-breakers who generally seek to avoid detection—is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.

98 It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally—apart from their protest activity—a law-abiding citizen, there is reason to expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of

what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases".

99 These considerations explain why, in a case where an act of civil disobedience constitutes a criminal offence or contempt of a court order which is so serious that it crosses the custody threshold, it will none the less very often be appropriate to suspend the operation of the sanction on condition there is no further breach during a specified period of time. Of course, if the defendant does not comply with that condition, he or she must expect that the order for imprisonment will be implemented.

The judge's approach

100 The judge had regard to the fact that the breaches of the Injunction committed by the appellants in this case were part of a protest but did not accept that this was relevant in deciding what sanction to impose. That was an error. As I have indicated, it is clear from the case law that, even where protest takes the form of intentional disruption of the lawful activities of others, as it did here, such protest still falls within the scope of articles 10 and 11 of the Convention. Any restrictions imposed on such protestors are therefore lawful only if they satisfy the requirements set out in articles 10(2) and 11(2). That is so even where the protestors' actions involve disobeying a court order. Although—as the judge observed—the appellants' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2) of the Convention.

101 That said, the judge was in my opinion entitled to conclude—as he made it clear that he did—that the restrictions which he imposed on the liberty of the appellants by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority. The latter aim is specifically identified in article 10(2) as a purpose capable of justifying restrictions on the exercise of freedom of expression. It is also, as it seems to me, essential for the legitimate purpose identified in both articles 10(2) and 11(2) of preventing disorder.

Reference to the Sentencing Council guideline

102 In deciding what sanctions were appropriate, the judge approached the decision, correctly, by considering both the culpability of the appellants and the harm caused, intended or likely to be caused by their breaches of the Injunction. I see no merit in the appellants' argument that, in making this assessment, he misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. In *Venables v News Group Newspapers Ltd* [2019] EWHC 241 (QB) at [26], the Divisional Court thought it appropriate to have regard to that guideline in deciding what penalty to impose for contempt of court in breaching an injunction. As the court noted, however, the guideline does not apply to proceedings for committal. There is therefore no obligation on a judge to follow the guideline in such proceedings and I do not consider that, if a judge does not have regard to it, this can be said to be an error of law. The criminal sentencing guideline provides, at most, a useful comparison.

103 Caution is needed in any such comparison, however, as the maximum penalty for contempt of court is two years' imprisonment as opposed to five years for breach of a criminal behaviour order. It would be a mistake to assume that the starting points and category ranges indicated in the sentencing guideline should on that account be made the subject of a linear adjustment such that, for example, the starting point for a contempt of court that would fall in the most serious category in the guideline (category 1A) should only be of the order of ten months' custody (which is roughly 40% of the guideline starting point of two years' custody). As the Court of Appeal observed in *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65, para 40:

> "[Counsel for the appellant] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

104 A further material difference is that, in proceedings for contempt of court, a community order is not available as a lesser alternative to the sanction of imprisonment. There may therefore be cases where, although the sentencing guideline for breach offences might suggest that a

community order would be an appropriate sentence, it is necessary to punish a contempt of court by an order for imprisonment because the contempt is so serious that neither of the only alternative sanctions of a fine and/or an order for costs could be justified.

Sanction for the first incident

105 In relation to the first incident on 24 July 2018 involving all three appellants, there is no basis for saying that the judge's assessment of culpability and harm by reference to the sentencing guideline for breach offences, or his decision on sanction in the light of that assessment, was wrong on any of the grounds listed in para 85 above. The judge was right to start from the position that a deliberate breach of a court order is itself a serious matter. He was entitled, as he also did, to treat the appellants' culpability as aggravated by the element of planning involved in their use of lock-on devices and to take account of (i) the number of hours of disruption and delay caused by their conduct, (ii) evidence that the incident caused Cuadrilla additional (and irrecoverable) costs of around £1,000, and (iii) the fact that the incident only ended when police were deployed to cut through the arm lock devices and remove the appellants. It was also relevant that the appellants expressed no remorse and gave no indication that they would not commit further breaches of the Injunction. Nor were they entitled to any credit for admitting their contempt, as they declined to do so, thereby necessitating a trial at which evidence had to be called.

106 Had it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience in the sense I have described, short immediate custodial terms would in my view have been warranted. As it is, it cannot be said that the judge's decision to impose suspended terms of imprisonment of four weeks was wrong in principle or outside the range of decisions reasonably open to him.

Sanction for the second incident

107 In relation to the second incident on 3 August 2018 involving Ms Lawrie alone, somewhat different considerations apply. Although Ms Lawrie's action in standing in the path of a lorry to try to stop it was also found to be a deliberate breach of the court's order, there was no evidence of planning and the incident was far shorter in duration lasting only a few seconds. In assessing the harm caused or risked by Ms Lawrie's breach of the Injunction, the judge emphasised the danger of injury or death to which her action had exposed Ms Lawrie herself, the driver of the lorry and other road-users. However, as David Richards LJ pointed out in the course of argument, in approaching the matter in this way the judge seems to have lost sight of the fact that the purpose of paragraph 7 of the Injunction, which he was punishing Ms Lawrie for disobeying, was not to protect the safety of road-users but was to protect Cuadrilla from suffering economic loss as a result of conspiracy to disrupt its supply chain by unlawful means. In assessing the seriousness of the breach, the judge should have focused on the extent to which the breach caused, or was intended to cause or risked causing, harm of the kind which the relevant term of the Injunction was intended to prevent. Had he done this, the judge would have been bound to conclude not only that no harm was actually caused but that the amount of economic loss intended or threatened by delaying a lorry on its way to collect rainwater from the site was slight.

108 The judge was, I consider, entitled to take into account as aggravating Ms Lawrie's culpability the nature of the unlawful means used and the fact that, on his findings, it amounted not merely to a public nuisance through obstruction of the highway but to an offence of causing danger to road-users contrary to section 22A of the Road Traffic Act 1988. To be guilty of an offence under that statutory provision, it is not necessary that the person concerned should have intended to cause, or realised that they were causing, danger to life or limb, and the judge made no such finding in relation to Ms Lawrie. It is sufficient that it would be obvious to a reasonable person that their action would be dangerous—a matter of which the judge was clearly satisfied on the evidence.

109 Ms Lawrie was not prosecuted, however, and the judge was not sentencing her for a criminal offence under the Road Traffic Act. In the circumstances, giving all due weight to the nature of the unlawful means used, the fact that this was Ms Lawrie's second deliberate breach of the Injunction and her complete lack of contrition, I do not consider that the term of imprisonment of two months which the judge imposed was justified. In my judgment, although the judge was right to conclude that the custody threshold was crossed, the appropriate penalty for this contempt of court was the same as that imposed for the earlier contempt committed by all three appellants—that is, a suspended term of imprisonment of four weeks.

Conclusion

110 For these reasons, I would vary the committal order made by Judge Pelling QC on 3 September 2019 by substituting for the period of imprisonment of two months in paragraph 2 of the order a period of four weeks. In all other respects I would dismiss the appeal.

DAVID RICHARDS LJ

111 I agree.

UNDERHILL LJ

112 I agree with Leggatt LJ, for the reasons which he gives, that this appeal should be dismissed save in the one respect which he identifies. The courts attach great weight to the right of peaceful protest, even where this causes disruption to others; but it is also important for the rule of law that deliberate breaches of court orders attract a real penalty, and I can see nothing wrong in principle in the judge's conclusion that the appellants' conduct here merited a custodial sentence, albeit suspended.

Appeal dismissed in part.
Variation of committal order.

ALISON SYLVESTER, Barrister

Court of Appeal

Ineos Upstream Ltd and others *v* Persons Unknown and others (Friends of the Earth intervening)

[2019] EWCA Civ 515

2019 March 5, 6; April 3 Longmore, David Richards, Leggatt LJJ

Practice — Parties — Persons unknown — Injunction — Claimants seeking injunctions on quia timet basis to prevent anticipated unlawful "fracking" protests against various classes of unknown defendants — Whether injunctions properly granted — Guidance as to granting of injunction as against persons unknown

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

Held, allowing the appeal in part, that, while there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort, the court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance; that, although it was not easy to formulate the broad principles on which an injunction against unknown persons could properly be granted, the following requirements might be thought necessary before such an order could be made, namely (i) there had to have been shown a sufficiently real and imminent risk of a tort being committed to justify a quia timet injunction, (ii) it had to have been impossible to name the persons who were likely to commit the tort unless restrained, (iii) it had to be possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they had not to do, and (vi) the injunction ought to have clear geographical and temporal limits; that, on the facts, the first three requirements presented no difficulty, but the remaining requirements were more problematic where the injunctions made against the third and fifth defendants had been drafted too widely and lacked the necessary degree of certainty; and that, accordingly, those injunctions would be discharged, and the claims against the third and fifth defendants dismissed; but that the injunctions against the first and second defendants would be maintained pending remission to the judge to reconsider (i) whether interim relief ought to be granted in the light of section 12(3) of the Human Rights Act 1998, and (ii) if the injunctions were to be continued against the first and second defendants, what would be the appropriate temporal limit (post, paras 29–34, 35, 39–42, 43, 47–51, 52, 53).

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471, SC(E) considered.

Decision of Morgan J [2017] EWHC 2945 (Ch) reversed in part.

APPEAL from Morgan J

The claimants, Ineos Upstream Ltd, Ineos 120 Exploration Ltd, Ineos Properties Ltd, Ineos Industries Ltd, John Barrie Palfreyman, Alan John Skepper, Janette Mary Skepper, Steven John Skepper, John Ambrose Hollingworth and Linda Katharina Hollingworth, were a group of companies and individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions to restrain potentially unlawful conduct against the first to fifth defendants, each described as a group of persons unknown engaging in various defined activities, the sixth defendant, Joseph Boyd, and the seventh defendant, Joseph Corré. By a decision dated 23 November 2017 Morgan J, sitting in the Chancery Division (Property, Trusts and Probate), granted injunctions against the first to third and the fifth defendants so identified [2017] EWHC 2945 (Ch). No order was made against the sixth and seventh defendants.

By an appellant's notice and with the permission of the Court of Appeal the sixth and seventh defendants appealed on the grounds: (1) whether the judge had been right to grant injunctions against persons unknown; (2) whether the judge had failed adequately or at all to apply section 12(3) of the Human Rights Act 1998, which required a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and (3) whether the judge had been right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Friends of the Earth were given permission to intervene by written submissions only.

The facts are stated in the judgment of Longmore LJ, post, para 1–11.

Heather Williams QC, Blinne Ní Ghrálaigh and *Jennifer Robinson* (instructed by *Leigh Day*) for the sixth defendant.

Stephanie Harrison QC and *Stephen Simblet* (instructed by *Bhatt Murphy Solicitors*) for the seventh defendant.

Alan Maclean QC and *Jason Pobjoy* (instructed by *Fieldfisher llp*) for the claimants.

Henry Blaxland QC and *Stephen Clark* (instructed by *Bhatt Murphy*) for the intervener, by written submissions only.

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

1 This is an appeal from Morgan J [2017] EWHC 2945 (Ch) who has granted injunctions to Ineos Upstream Ltd and various subsidiaries of the Ineos Group ("the Ineos companies") as well as certain individuals. The injunctions were granted against persons unknown who are thought to be likely to become protesters at sites selected by those companies for the purpose of exploration for shale gas by hydraulic fracturing of rock formations, a procedure more commonly known as "fracking".

2 Fracking, which is lawful in England but not in every country in the world, is a controversial process partly because it is said to give rise to (inter alia) seismic activity, water contamination and methane clouds, and to be liable to injure people and buildings, but also because shale gas, which is a fossil fuel considered by many to contribute to global warming and in due course unsustainable climate change. For these reasons (and no doubt others) people want to protest against any fracking activity both where it may be taking place and elsewhere. In the view of the Ineos companies these protests will often cross the boundary between legitimate and illegitimate activity as indeed they have in the past when other companies have sought to operate planning permissions which they have obtained for exploration for shale gas by fracking. The Ineos companies have therefore sought injunctions to restrain potentially unlawful acts of protest before they have occurred.

3 The judge's order extends to 8 relevant sites described in detail in paras 4–7 of his judgment [2017] EWHC 2945 (Ch); sites 1–4 and 7 consist of agricultural or other land where it is intended that fracking will take place; sites 5, 6 and 8 are office buildings from which the Ineos companies conduct their business.

The claimants

4 There are ten claimants. The first claimant is a subsidiary company of the Ineos corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The first claimant's commercial activities include shale gas exploration in the United Kingdom. It is the lessee of four of the sites which are the subject of the claimants' application (sites 1, 2, 3 and 7). The lessors in relation to these four sites include the fifth to tenth claimants. The second to fourth claimants are companies within the Ineos corporate group. They are the proprietors of sites 4, 5 and 6 respectively. The fourth claimant is the lessee of site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the first to fourth claimants as "Ineos" without distinguishing between them. The fifth to tenth claimants are all individuals. The fifth claimant is the freeholder of site 1. The sixth to eighth claimants are the freeholders of site 2. The ninth to tenth claimants are the freeholders of site 7.

The defendants

5 The first five defendants are described as groups of "Persons unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6 The second defendant is described as:

> "Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)."

7 The third defendant is described as:

> "Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form."

8 The fourth defendant is described as: "Persons unknown pursuing conduct amounting to harassment". The judge declined to make any order against this group which, accordingly, falls out of the picture.

9 The fifth defendant is described as: "Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order."

10 The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12 September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28 July 2017 against the first five defendants until a return date fixed for 12 September 2017. On that date a new return date with a three-day estimate was then fixed for 31 October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

11 As is to some extent evident from the descriptions of the respective defendants, the potentially unlawful activities which Ineos wishes to restrain are: (1) trespass to land; (2) private nuisance; (3) public nuisance; and (4) conspiracy to injure by unlawful means. This last group is included because protesters have in the past targeted companies which form part of the supply chain to the operators who carry on shale gas exploration. The protesters' aim has been to cause those companies to withdraw from supplying the operators with equipment or other items for the supply of which the operators have entered into contracts with such companies.

The judgment

12 The judge (to whose command of the voluminous documentation before him I would pay tribute) absorbed a considerable body of evidence contained in 28 lever arch files including at least 16 witness statements and their accompanying exhibits. He said of this evidence, at para 18 [2017] EWHC 2945 (Ch), which related largely to the experiences of fracking companies other than Ineos, which is a newcomer to the field:

> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

In the light of this comment and the limited grounds of appeal for which permission has been granted, we have been spared much of this voluminous documentation.

13 The judge then commented, at para 21:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

14 The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that: (1) the first defendants were restrained from trespassing at any of the sites; (2) the second defendants were restrained from interfering with access to sites 3 and 4, which were accessed by identified private access roads; (3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to sites 1–4 and 7–8, such interference being defined as (a) blocking the highway; (b) slow walking; (c) climbing onto vehicles; (d) unreasonably preventing access to or egress from the Sites; and (e) unreasonably obstructing the highway; (4) the fifth defendants were restrained from combining together to (a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992; (b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968; (c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and (d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment "in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous" all with the intention of damaging the claimants.

15 These separate orders related, therefore, to causes of action in trespass, private nuisance, public nuisance and causing loss by unlawful means.

16 It is a curiosity of the case that the judge made no order against either Mr Boyd or Mr Corré but they have each sought and obtained permission to appeal against the orders made in respect of the persons unknown and they have each instructed separate solicitors, junior counsel and leading counsel to challenge the orders. They profess to be concerned about the width of the orders and seek to be heard on behalf of the unknown persons who are the subject matters of the judge's order. Friends of the Earth are similarly concerned and have been permitted to intervene by way of written submissions. Any concern about the locus standi of Mr Boyd and Mr Corré to make submissions to the court has been dissipated by the assistance to the court which Ms Heather Williams QC and Ms Stephanie Harrison QC have been able to provide.

This appeal

17 Permission to appeal has been granted on three grounds:

(1) whether the judge was correct to grant injunctions against persons unknown;

(2) whether the judge failed adequately or at all to apply section 12(3) of the Human Rights Act 1998 ("HRA") which requires a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and

(3) whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Persons unknown: the law

18 Under the Rules of the Supreme Court ("RSC"), a writ had to name a defendant: see *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. Accordingly, Stamp J held in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204 that no proceedings could take place for recovery of possession of land occupied by squatters unless they were named as defendants. RSC Ord 113 was then introduced to ensure that such relief could be granted: see *McPhail v Persons, Names Unknown* [1973] Ch 447, 458 per Lord Denning MR. There are also statutory provisions enabling local authorities to take enforcement proceedings against persons such as squatters or travellers contained in section 187B of the Town and Country Planning Act 1990 ("the 1990 Act").

19 Since the advent of the Civil Procedure Rules, there has been no requirement to name a defendant in a claim form and orders have been made against "Persons Unknown" in appropriate cases. The first such case seems to have been *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 in which unknown persons had illicitly obtained copies of the yet to be published book "Harry Potter and the Order of the Phoenix" and were trying to sell them (or parts of them) to various newspapers. Sir Andrew Morritt V-C made an order against the person or persons who had offered the publishers of the Sun, the Daily Mail and the Daily Mirror copies of the book or any part thereof and the person or persons who had physical possession of a copy of the book. The theft and touting of the copies had, of course, already happened and the injunction was therefore aimed at persons who had already obtained copies of the book illicitly.

20 Sir Andrew Morritt V-C followed his own decision in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action Against Incinerators" on 14 July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

21 Both these authorities were referred to without disapproval in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, para 2.

22 In the present case, the judge held, at para 121, that since *Bloomsbury* there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the 1990 Act (section 187B, as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) or by the Civil Procedure Rules (eg CPR r 19.6 dealing with representative actions or CPR r 55.3(4), the successor to the RSC Ord 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

23 She pointed out that when the statutory powers of the 1990 Act were invoked that was precisely the position and she submitted that that could only be explained by the existence of the statute. This was most clearly apparent from the South Cambridgeshire litigation in which the Court of Appeal in September 2004 granted an injunction against persons unknown restraining them from (inter alia) causing or permitting the deposit of hardcore or other materials at Smithy Fen, Cottenham or causing or permitting the entry of caravans or mobile accommodation on that land for residential or other non-agricultural purposes, see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P LR 88. Brooke LJ cited both *Bloomsbury* and

Hampshire Waste as illustrations of the way in which the power to grant relief against persons unknown had been used under the CPR.

24 On 20 April 2005 Ms Gammell stationed her caravan on the site; the injunction was served on her and its effect was explained to her on 21 April 2005; she did not leave and the council applied to commit her for contempt. Judge Plumstead on 11 July 2005 joined her as a defendant to the action and held that she was in contempt, refusing to consider Ms Gammell's rights under article 8 of the ECHR at that stage and adjourned sentence pending an appeal. On 31 October 2005 the Court of Appeal dismissed her appeal and upheld the finding of contempt, holding that the authority of *South Buckinghamshire District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, which required the court to consider the personal circumstances of the defendant under article 8 before an injunction was granted, only applied when the defendants were in occupation of a site and were named as defendants in the original proceedings: see *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) held, at para 32, that Ms Gammell became a party to the proceedings when she did an act which brought her within the definition of the defendant in the particular case and, at para 33, that, by the time of the committal proceedings she was a defendant, was in breach of the injunction and, given her state of knowledge, was in contempt of court. He then summarised the legal position:

> "(1) The principles in the *South Buckinghamshire* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the principles in the *South Buckinghamshire* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Buckinghamshire* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Buckinghamshire* case and in the *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Buckinghamshire* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

25 Ms Harrison said that this was unacceptable unless sanctioned by statute or rules of court contained in the CPR, because the persons unknown had no opportunity, before the injunction was granted, to submit that no order should be made on the grounds of possible infringements of the right to freedom of expression and the right peaceably to assemble granted by articles 10 and 11 of the ECHR or, indeed, any other grounds.

26 Ms Harrison further relied on the recent case of *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that

unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed DPSC, Lord Carnwath, Lord Hodge and Lady Black JJSC agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding, at para 26, that a person, such as the driver of the Micra car in that case, "who is not just anonymous but cannot be identified with any 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".

27 In the course of his judgment he said, at para 12, that the CPR neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers; the critical question was what, as a matter of law, was the basis of the court's jurisdiction over parties and in what (if any) circumstances jurisdiction can be exercised on that basis against persons who cannot be named. He then said, at para 13, that it was necessary to distinguish two categories of cases to which different considerations applied: the first category being anonymous defendants who are identifiable but whose names are unknown; the second being anonymous defendants who cannot even be identified, such as most hit and run drivers.

> "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."

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard: para 17.

28 Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

> "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*, 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*, 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."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.

31 That is by no means to say that the injunctions granted by Morgan J should be upheld without more ado. A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance.

32 It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations, Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

33 Ms Williams for Mr Boyd, in addition to submitting that the judge had failed to apply properly or at all section 12(3) of the HRA, submitted that the injunction should not, in any event, have been granted against the fifth defendants (conspiring to cause damage to the claimants by unlawful means) because the term of the injunctions were neither framed to catch only those who were committing the tort nor clear and precise in their scope. There is, to my mind, considerable force in this submission and the principles behind that submission can usefully be built into the requirements necessary for the grant of the injunction against unknown persons, whether in the context of the common law or in the context of the ECHR.

34 I would tentatively frame those requirements in the following way: (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

Application of the law to this case

35 In the present case there is no difficulty about the first three requirements. The judge held that there was a real and imminent risk of the commission of the relevant torts and permission has not been granted to challenge that on appeal. He also found that there were persons likely to commit the torts who could not be named and was right to do so; there are clear provisions in the order about service of the injunctions and there is no reason to suppose that these provisions will not constitute effective notice of the injunction. The remaining requirements are more problematic.

Width and clarity of the injunctions granted by the judge

36 The right to freedom of peaceful assembly is guaranteed by both the common law and article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on private property. Professor Dicey in his *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at p 271:

> "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."

37 This neatly states the common law as it was in 195: see Oxford Edition (2013), p 154, I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said, at para 149, that it was not appropriate to do so since the concept of substantial interference was simple enough and well established. I agree.

38 The one possible drafting point that arises is that it was said by Ms Harrison that, as drafted, the injunctions would catch an innocent dog-walker exercising a public right of way over the claimants' land whose dog escaped onto the land and had to be recovered by its owner trespassing on that land. It was accepted that this was not a particularly likely scenario in the context of a fracking protest but it was said that the injunction might well have a chilling effect so as to prevent dog-walkers exercising their rights in the first place. I regard this as fanciful. I can see that an ordinary dog-walker exercising a public right of way might be chilled by the existence of an anti-fracking protest and thus be deterred from exercising his normal rights but, if he is not deterred by that, he is not going to be deterred instead by thoughts of possible proceedings for contempt for an inadvertent trespass while he is recovering his wandering animal. If this were really considered an important point, it could, no doubt, be cured by adding some such words as "in connection with the activities of the claimants" to the order but like the judge (in para 146) I do not consider it necessary to deal with this minor problem. Overall, this case raises much more important points than wandering dogs.

39 Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by ((c)(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or ((c)(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the

order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

41 Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order, which comprise public access ways to sites 1–4, 7 and 8 and public footpaths or bridleways over sites 2 and 7. The defendants are restrained from: (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of quia timet relief.

42 Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example.

Geographical and temporal limits

43 The injunctions granted by the judge against the first and second defendants have acceptable geographical limits but there is no temporal limit. That is unsatisfactory.

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 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."

45 Ms Williams submitted that the judge had failed to apply section 12(3) because the claimants had failed to establish that they would be likely to establish at trial that publication should not be allowed. She relied in particular on the manner in which the judge had expressed himself [2017] EWHC 2945 (Ch), para 98:

> "I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm'). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants."

She submitted that it was not correct to ask what a trial judge would be likely to do "if the court accepted the evidence put forward by the claimants". The whole point of the subsection is that it was the duty of the court to test the claimants' evidence, not to assume that it would be accepted.

46 Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual evidence of the claimants was not contradicted by the defendants because he had added: "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

47 This submission has to be assessed on the basis (if my Lords agree) that the injunctions relating to public nuisance and the supply chain will be discharged. The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish that at trial publication of views by trespassers on the claimants' property should not be allowed.

48 Nevertheless, I consider that there is force in Ms Williams's submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought.

49 A number of other matters are identified in para 8 of Ms Williams's skeleton argument. We did not permit Ms Williams to advance any argument on the facts which contravened the judge's findings on the matters relevant to the grant of interim relief, apart from section 12(3) HRA considerations, and those findings will stand. Nevertheless, some of those matters may in addition be relevant to the likelihood of the trial court granting final relief. It is accepted that this court is in no position to apply the section 12(3) HRA test and that, if Ms Williams's submissions of principle are accepted, the matter will have to be remitted to the judge for him to re-consider, in the light of our judgments, whether the court at trial is likely to establish that publication should not be allowed.

Disposal

50 I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants pending remission to the judge to reconsider: (1) whether interim relief should be granted in the light of section 12(3) HRA; and (2) if the injunctions are to be continued against the first and second defendants what temporal limit is appropriate.

Conclusion

51 To the extent indicated above, I would allow this appeal.

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

Court of Appeal

*Canada Goose UK Retail Ltd and another *v* Persons Unknown and another

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5

Sir Terence Etherton MR, David Richards, Coulson LJJ

Practice — Parties — Unnamed defendant — Claimants applying for injunction against protestors to restrain harassment and other wrongdoing — Without notice interim injunction granted against "persons unknown" — Numerous protestors served with injunction but none served with claim form — Whether service defective — Guidance on proper formulation of interim injunctions — Limitations on grant of final injunction against persons unknown — Whether claimants entitled to summary judgment — CPR rr 6.15, 6.16

The claimants, a retail clothing company and the manager of its London store, brought a claim seeking injunctions against people demonstrating outside the store on the grounds that their actions amounted to harassment, trespass and/or nuisance. A without notice interim injunction was granted against the first defendants, described in the claim form and the injunction as persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the store. The terms of the court's order did not impose any requirement on the claimants to serve the claim form on the "persons unknown" but merely permitted service of the interim injunction by handing or attempting to hand it to "any person demonstrating at or in the vicinity of the store" or, alternatively, by e-mail service at two stated e-mail addresses, that of an activist group and that of an animal rights organisation which was subsequently added as second defendant to the claim at its own request. The claimants served 385 copies of the interim injunction, including on 121 identifiable individuals, 37 of whom were identified by name, but the claimants did not attempt to join any of those individuals as parties to the proceedings whether by serving them with the claim form or otherwise. The claim form was served only by e-mail to the two addresses specified for service of the interim injunction and to one other individual who had requested a copy. On the claimants' application for summary judgment on their claim the judge: (i) held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service of the claim form pursuant to CPR r 6.16[1]; (ii) discharged the interim injunction; and (iii) refused to grant a final injunction.

On the claimants' appeal—

Held, dismissing the appeal, (1) that since service was the act by which a defendant was subjected to the court's jurisdiction, the court had to be satisfied that the method used for service either had put the defendant in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time; that given that sending the claim form by e-mail to the

[1] CPR r 6.15: "(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."

R 6.16: "(1) The court may dispense with service of a claim form in exceptional circumstances. (2) An application for an order to dispense with service may be made at any time and— (a) must be supported by evidence; and (b) may be made without notice."

activist group could not reasonably be expected to have brought the proceedings to the attention of the "persons unknown" defendants, the judge had been correct to refuse to order pursuant to CPR r 6.15(2) that such steps constituted good service; and that neither speculative estimates of the number of protestors who were likely to have learned of the proceedings without ever having been served with the interim injunction nor the fact that of the 121 persons served with the injunction none had applied to vary or discharge the injunction or be joined as a party, could provide a warrant for dispensation from service under rule 6.16 (post, paras 45–52).

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] 1 WLR 1471, SC(E) applied.

(2) That since an interim injunction could be granted in appropriate circumstances against persons unknown who wished to join an ongoing protest, it was in principle open to the court in appropriate circumstances to limit even lawful activity where there was no other proportionate means of protecting the claimant's rights; that, further, although it was better practice to formulate an injunction without reference to the defendant's intention if the prohibited tortious act could be described in ordinary language without doing so, it was permissible in principle to refer in an injunction to the defendant's intention provided that was done in non-technical language which a defendant was capable of understanding and the intention was capable of proof without undue complexity; that, however, in the present case the claim form was defective and the interim injunction was impermissible since (i) the description of the "persons unknown" defendants in both was impermissibly wide, being capable of applying to a person who had never been to the store and had no intention of ever going there, (ii) the prohibited acts specified in the interim injunction were not inevitably confined to unlawful acts and (iii) the interim injunction failed to provide a method of alternative service that was likely to bring the order to the attention of persons unknown; and that, accordingly, the judge had been right to discharge the interim injunction (post, paras 78–81, 85–86, 97).

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] 4 WLR 100, CA and *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, SC(E) applied.

Hubbard v Pitt [1976] QB 142, CA, *Burris v Azadani* [1995] 1 WLR 1372, CA and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, CA considered.

(3) That it was perfectly legitimate to make a final injunction against "persons unknown" provided they were anonymous defendants who were identifiable as having committed the relevant unlawful acts prior to the date of the final order and had been served prior to that date; but that a final injunction could not be granted in a protestor case against persons unknown who were not parties at the date of the final order, in other words persons joining an ongoing protest who had not by that time committed the prohibited acts and so did not fall within the description of the persons unknown and who had not been served with the claim form; and that, accordingly, since the final injunction proposed by the claimants in the present case was not so limited and since it suffered from some of the same defects as the interim injunction, the judge had been right to dismiss the claim for summary judgment (post, paras 89–91, 94, 95, 97).

Birmingham City Council v Afsar [2019] EWHC 3217 (QB) approved.

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 distinguished.

Per curiam. (i) It would have been open to the claimants at any time since the commencement of proceedings to obtain an order under CPR r 6.15(1) for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media to reach a wide audience of potential protestors and by attaching and otherwise exhibiting copies of the order and of the claim form at or nearby those premises. The court's power to dispense with service under CPR r 6.16 should not be used to overcome that failure (post, para 50).

(ii) Private law remedies are not well suited to the task of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. What are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. 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 (post, para 93).

Procedural guidelines for interim relief proceedings against "persons unknown" in cases concerning protestors (post, para 82).

Decision of Nicklin J [2019] EWHC 2459 (QB); [2020] 1 WLR 417 affirmed.

The following cases are referred to in the judgment of the court:

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Birmingham City Council v Afsar [2019] EWHC 3217 (QB)

Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2) [2001] EWCA Civ 414; [2001] RPC 45, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802; [1996] 1 FLR 266, CA

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA

Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79, CA

Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

The following additional cases were cited in argument:

Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA

Attorney General v Punch Ltd [2001] EWCA Civ 403; [2001] QB 1028; [2001] 2 WLR 1713; [2001] 2 All ER 655, CA

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA

Jockey Club v Buffham [2002] EWHC 1866 (QB); [2003] QB 462; [2003] 2 WLR 178

Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583; [2014] 1 WLR 1264, CA

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2009] PTSR 547; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stone v WXY [2012] EWHC 3184 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

The following additional cases, although not cited, were referred to in the skeleton arguments:

Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Arch Co Properties Ltd v Persons Unknown [2019] EWHC 2298 (QB)
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Epsom and Ewell Borough Council v Persons Unknown (unreported) 20 May 2019, Leigh-ann Mulcahy QC
Grant v Dawn Meats (UK) [2018] EWCA Civ 2212, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Huntingdon Life Sciences Group plc v Stop Huntingdon Animal Cruelty [2007] EWHC 522 (QB)
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

APPEAL from Nicklin J

By a claim form issued on 29 November 2017 the claimants, Canada Goose UK Retail Ltd, the United Kingdom trading arm of an international retail clothing company, and James Hayton, the manager of the first claimant's London store acting pursuant to CPR r 19.6 for and on behalf of employees, security personnel and customers and other visitors to the store, sought injunctions against the first defendants, persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the first claimant's store, on the grounds that their actions amounted to, inter alia, harassment, trespass and/or nuisance. On the same date Teare J granted a without notice interim injunction. On 13 December 2017 Judge Moloney QC sitting as a judge of the Queen's Bench Division [2017] EWHC 3735 (QB) granted an application by the People for the Ethical Treatment of Animals (PETA) Foundation, to be added as second defendant to the proceedings in order to represent its "employees and members" under CPR r 19. By order dated 15 December 2017 Judge Moloney QC granted the claimants' application for a continuation of the interim injunction but made limited modifications to its terms and stayed the proceedings, with the stay to continue unless a named party gave notice to re-activate the proceedings, in which event the claimants, within 21 days thereafter, were to apply for summary judgment. By an application notice dated 30 November 2018 the claimants sought summary judgment on their claim, pursuant to CPR r 24.2, and a final injunction. By a judgment dated 20 September 2019 Nicklin J [2019] EWHC 2459 (QB); [2002] 1 WLR 417 refused the application for summary judgment and a final

injunction and discharged the interim injunction, staying part of the order for discharge.

By an appellant's notice filed on 18 October 2019 and with permission granted by Nicklin J the claimants appealed on the following grounds. (1) The judge had erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively the judge had erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively the judge had adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively had erred in law in refusing to exercise that power of dispensation. (2) The judge had erred in law in holding that the claimants' proposed reformulation of the description of the first defendants was impermissible. (3) In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first defendants (as described in the proposed reformulation of persons unknown) the judge had erred in law in the approach he took. In particular, the judge had erred in concluding that the proper approach was to focus only on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or had erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first defendants, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or had erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first defendants could not form the basis for a case for injunctive relief against the class as a whole. (4) The judge had erred in his approach to his assessment of the evidence before him, reaching conclusions which he was not permitted to reach.

The facts are stated in the judgment of the court, post, paras 5–8.

Ranjit Bhose QC and *Michael Buckpitt* (instructed by *Lewis Silkin llp*) for the claimants.

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration.

5 March 2020. **SIR TERENCE ETHERTON MR, DAVID RICHARDS** and **COULSON LJJ** delivered the following judgment of the court.

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

2 The first appellant, Canada Goose UK Retail Ltd ("Canada Goose"), is the United Kingdom trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in

A London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

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

4 This is an appeal from the order of Nicklin J of 20 September 2019 by C which he dismissed the application of the claimants for summary judgment for injunctive relief against the defendants and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney QC (sitting as a judge of the Queen's Bench Division) on 15 December 2017.

Factual background

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

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

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

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

The proceedings

9 Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

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

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

(1) Assaulting, molesting, or threatening the protected persons (defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards protected persons;

(3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the protected persons;

(4) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the protected persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the first claimant's retail business to or with employees by telephone, e-mail or letter;

(7) Entering the Store;

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

(9) Demonstrating at the Stores within the inner exclusion zone;

(10) Demonstrating at the Stores within the outer exclusion zone save that no more than three protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a loudhailer within the inner exclusion zone and outer exclusion zone or otherwise within 50 metres of the building line of the Store.

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

> "(1) Assaulting, molesting, or threatening the protected persons [defined as including Canada Goose's employees, security personnel working at the store, customers and any other person visiting or seeking to visit the store];

A "(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of 'protected persons';

"(3) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of animal
B products;

"(4) Making in any way whatsoever any abusive or threatening electronic communication to the protected persons;

"(5) Entering the Store;

"(6) Blocking or otherwise obstructing the entrance to the Store;

"(7) Banging on the windows of the Store;

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

"(9) Projecting images on the outside of the Store;

"(10) Demonstrating at the Store within the inner exclusion zone;

"(11) Demonstrating at the Store within the outer exclusion zone A, save that no more than three protestors may at any one time demonstrate and hand out leaflets within the outer exclusion zone A (but not within
D the inner exclusion zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

"(12) Demonstrating at the Store within the outer exclusion zone B [as defined in the order] save that no more than five protestors may at any one time demonstrate and hand out leaflets within outer exclusion zone B (but not within the inner exclusion zone) provided that no obstruction occurs
E other than that which is implicit in handing out leaflets;

"(13) Using at any time a loudhailer [as defined] within the inner exclusion zone and outer exclusion zones or otherwise within ten metres of the building line of the Store;

"(14) Using a loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

F **13** A plan attached to the order showed the inner and outer exclusion zones. Essentially those zones (with a combined width of 7·5 metres) covered roughly a 180-degree radius around the entrance to the store. The inner exclusion zone extended out from the store front for 2·5 metres. The outer exclusion zone extended a further five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent
G Street) and zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined exclusion zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

H **14** The order permitted the claimant to serve the order on

"any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order."

It provided for alternative service of the order, stating that "the claimants shall serve this order by the following alternative method namely by serving the same by e-mail to 'contact@surgeactivism.com' and 'info@peta.org.uk' ".

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

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

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

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

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

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

> "using at any time a loudhailer within the inner exclusion zone and outer exclusion zone . . . [and] using a loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2 p m and 8 p m a single loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

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

The summary judgment application

22 Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred

A before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23 On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Pt 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the B restrictions applicable to the zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

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

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

25 Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, and *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further E sets of written submissions on behalf of Canada Goose.

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

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

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

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

30 He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37

protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

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

32 Nicklin J said the following (at para 163) in conclusion on the form of the proposed final injunction:

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

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

> "164. The second defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the second defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> "165. In relation to the first defendants, and those for whom the second defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the claimants have demonstrated that the defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of 'persons unknown' who have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

A 34 For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said (at para 167):

"I am also satisfied that, applying the principles from *Cameron* [2019] B 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the claimants need to address regarding the validity of the claim form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not C a claim can be properly maintained against 'persons unknown' for particular civil wrongs (e g trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the particulars of claim and any interim injunction granted against 'persons unknown' must comply with the D requirements suggested in *Ineos*."

The grounds of appeal

35 The grounds of appeal are as follows.

"Ground 1 (Service of the Claim Form): In relation to the service of the claim form, the judge: E

"Erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively

"Erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to F Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively

"Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively erred in law in refusing to exercise that power of dispensation.

"Ground 2 (Description of First Respondents): The judge erred in law G in holding that the claimants' proposed reformulation of the description of the first respondents was an impermissible one.

"Ground 3 (Approach to Summary Judgment): In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first respondents (as described in accordance with the proposed reformulation) the judge erred in law in the approach he H took. In particular, and without derogating from the generality of this, the judge:

"Erred in concluding that the proper approach was to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or

"Erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first respondents, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or

"Erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first respondents could not form the basis for a case for injunctive relief against the class as a whole.

"Ground 4 (Approach to and assessment of the evidence): The judge erred in his approach to alternatively his assessment of the evidence before him, reaching conclusions which he was not permitted to reach."

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

Discussion

Appeal ground 1: service

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

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

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

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

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

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

43 CPR r 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that

this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] RPC 45.

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

45 Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR r 6.15(2) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* [2019] 1 WLR 1471, para 14, the general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and (at para 17): "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

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

> "subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant."

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

48 The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR r 6.16 to

dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR r 6.16.

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

50 Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protestors and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

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

52 We have already mentioned, by reference to Lord Sumption's comments in *Cameron* [2019] 1 WLR 1471, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protestors who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to be joined as a party, can justify using the power under CPR r 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protestors to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR r 6.16.

53 In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was

A plainly the case, that service of the claim form by sending it to PETA's e-mail address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR r 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR r 6.16 dispensing with service on PETA.

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

E **55** For those reasons we dismiss appeal ground 1.

Appeal ground 2 and appeal ground 3: interim and final injunctions

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

G Interim relief against "persons unknown"

57 It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* [2019] 1 WLR 1471 and put into effect by the Court of Appeal in the context of protestors in *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

H **58** In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving

vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013." The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59 Lord Sumption, referred (at para 9) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR r 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at para 10) that English judges had allowed some exceptions to the general rule, he said (at para 11) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protestors, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance [2017] EWHC 2945 (Ch).

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

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

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

63 It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a quia timet injunction is sought. He did, however, refer (at para 15) with approval to *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the

A grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

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

65 The claimants in *Ineos* [2019] 4 WLR 100 were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protestors. Each of the first five defendants was a group C of persons described as "Persons unknown" followed by an unlawful activity, such as "Entering or remaining without the consent of the claimant(s) on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass . . . over private access roads", or "interfering with the right of way enjoyed by the claimants . . . over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 11 D of the [relevant] order with the intention set out in paragraph 11 of the [relevant] order". The first instance judge made interim injunctions, as requested, apart from one relating to harassment.

66 One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgment, E with which the other two members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at para 29) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only F come into existence in the future. Longmore LJ concluded (at para 30) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67 Longmore LJ said (at para 31) that a court should be inherently cautious about granting injunctions against unknown persons since the G reach of such an injunction is necessarily difficult to assess in advance. He also referred (para 33) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that H publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at

para 34) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

68 Applying those requirements to the order of the first instance judge, Longmore LJ said that there was no difficulty with the first three requirements. He considered, however, against the background of the right to freedom of peaceful assembly guaranteed by both the common law and article 11 of the ECHR, that the order was both too wide and insufficiently clear in, for example, restraining the fifth defendants from combining together to commit the act or offence of obstructing free passage along the public highway (or to access to or from a public highway) by slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

69 Longmore LJ said (at para 40) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at para 40) that it was unsatisfactory that the injunctions contained no temporal limit.

70 The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.

71 *Cuadrilla* [2020] 4 WLR 29 was another case concerning injunctions restraining the unlawful actions of fracking protestors. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful

A interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72 The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising B the jurisdiction to grant a quia timet interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth C *Ineos* requirements required some qualification.

73 Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] QB D 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74 Although the point did not arise for decision in *Cuadrilla*, the point E is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited demonstrating within the inner exclusion zone and limited the number of protestors at any one time and their actions within the outer exclusion zone.

75 In *Hubbard v Pitt* [1976] QB 142 the issue was whether the first F instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp 187–188) that the injunction was not wider than was necessary for the G purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p 190):

> "Mr Turner-Samuels, however, also advanced an alternative argument that, even if he was wrong in his submission that no interlocutory relief should have been granted, the terms of the injunction were too wide in that it would prevent the defendants from doing that which, as he claimed H and as I am for the present purposes prepared to accept, it was not unlawful for them to do, namely, to assemble outside the plaintiffs' premises for the sole purpose of imparting or receiving information. I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but

I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76 In *Burris* [1995] 1 WLR 1372 the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp 1377 and 1380–1381):

"It would not seem to me to be a valid objection to the making of an 'exclusion zone' order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest.

"Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest—and also, but indirectly, the defendant's—a wider measure of restraint is called for."

77 Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

78 It is open to us, as suggested by the Court of Appeal in *Cuadrilla* [2020] 4 WLR 29, to qualify the fourth *Ineos* requirement in the light of *Hubbard* [1976] QB 142 and *Burris* [1995] 1 WLR 1372, as neither of those cases was cited in *Ineos* [2019] 4 WLR 100. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a

A potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.

79 The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* [2020] 4 WLR 29 was the fifth requirement—
B that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such
C references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance . . . with a view to slowing down or stopping the traffic" "with the intention of causing inconvenience or delay to the claimants".

80 Leggatt LJ said (at para 65) that he could not accept that there is anything objectionable in principle about including a requirement of
D intention in an injunction. He acknowledged (at para 67) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at para 68) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's
E reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at para 74) that there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

F 81 We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by
G reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

H 82 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 must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

83 Applying those principles to the present proceedings, it is clear that the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible.

84 As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

85 This description is impermissibly wide. As Nicklin J said (at paras 23(iii) and 146) it is capable of applying to a person who has never been at the store and has no intention of ever going there. It would, as the judge pointedly observed, include a peaceful protestor in Penzance.

86 The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by

A the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the inner zone or the outer zone, using a B loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to ground 1 above) by the specified method of e-mailing the order to the respective e-mail addresses of Surge and PETA. The order of C Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87 Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary judgment by 1 December 2018, the D claim would stand dismissed and the injunction discharged without further order.

88 Nicklin J was bound to dismiss Canada Goose's application for summary judgment, both because of non-service of the proceedings and for the further reasons we set out below. For the reasons we have given above, he was correct at the same time to discharge the interim injunctions granted E by Teare J and Judge Moloney.

Final order against "persons unknown"

89 A final injunction cannot be granted in a protestor case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who F have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the G proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471, para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90 In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 H (Marcus Smith J) is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 and the decision of the Supreme Court in *Cameron*. Furthermore, there was no

reference in *Vastint* to the confirmation in *Attorney General v Times Newspapers (No 3)* of the usual principle that a final injunction operates only between the parties to the proceedings.

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

92 In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93 As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of 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.

A **94** In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

B **95** In all those circumstances, Nicklin J having concluded (at paras 145 and 164) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

C *Appeal Ground 4: Evidence*

96 This ground of appeal was not developed by Mr Bhose in his oral submissions. In any event, in the light of our conclusions on the other grounds of appeal, it is not necessary for us to address it.

Conclusion

D **97** For all those reasons, we dismiss this appeal.

Appeal dismissed.
No order as to costs.

SUSAN DENNY, Barrister

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Neutral Citation Number: [2022] EWCA Civ 13

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

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/01/2022

Before:

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

BETWEEN:

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

Claimants/Appellants

-and –

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

Defendants/Respondents

-and -

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

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A159

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

Interveners

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

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

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

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

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

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

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

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

Hearing dates: 30 November and 1 and 2 December 2021

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JUDGMENT

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

Sir Geoffrey Vos, Master of the Rolls:

Introduction

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

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

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

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

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

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

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

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

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

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

The essential factual and procedural background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The main authorities preceding the judge's decision

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

Bloomsbury: judgment 23 May 2003

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

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

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

South Cambridgeshire: judgment 17 September 2004

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

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

Gammell: judgment 31 October 2005

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

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

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

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

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

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

30. These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

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

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

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

Cameron: judgment 20 February 2019

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

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

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

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

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

37. Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

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

39. Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the

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

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

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

Ineos: judgment 3 April 2019

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

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

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

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

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

Bromley: judgment 21 January 2020

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

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

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

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

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

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

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

Cuadrilla: judgment 23 January 2020

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

Canada Goose: judgment 5 March 2020

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

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

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

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

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

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the

proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

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

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

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

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

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

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

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

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

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v. News Group Newspapers Ltd* [2001] Fam 430 [*Venables*], in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v. Times Newspapers Ltd* [1992] 1 AC 191, 224 [*Spycatcher*]. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

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

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

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

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

The reasons given by the judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction to the main issue

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

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

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

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

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

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

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

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

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

[89] of *Canada Goose*

79. The first sentence of [89] said that "a final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to

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

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

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

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

[90] of *Canada Goose*

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

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

[91] of *Canada Goose*

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

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

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

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

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

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

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

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

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

Paragraph [92] of *Canada Goose*

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

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

The judge's reasoning in this case

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

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

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

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

The doctrine of precedent

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

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

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

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

Conclusion on the main issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

Lord Justice Lewison:

125. I agree.

Lady Justice Elisabeth Laing:

126. I also agree.

Court of Appeal

*South Cambridgeshire District Council *v* Gammell and others

Bromley London Borough Council *v* Maughan and others

[2005] EWCA Civ 1429

2005 Oct 31 Sir Anthony Clarke MR, Rix and Moore-Bick LJJ

Planning — Planning control — Breach — Occupation of land by gipsy caravans without planning permission — Local planning authorities granted injunctions against unnamed landowners and persons unknown to restrain further occupation of land by others — Further caravans stationed on land in breach of injunctions and planning control — Whether persons bringing caravans onto land in breach of injunctions thereby becoming defendants to injunction proceedings — Whether in contempt of court — Whether court required to balance personal circumstances against public interest considerations — Town and Country Planning Act 1990 (c 8), s 187B (as inserted by Planning and Compensation Act 1991 (c 34), s 3)

In each of two cases a number of gipsy caravans were brought onto land without planning permission having been granted for such use. The local planning authorities obtained an injunction under section 187B of the Town and Country Planning Act 1990[1] restraining, in one case, the unnamed owners of plots of the land and, in the other, persons unknown from stationing such caravans on the land or from causing or permitting them to be so stationed. G and M subsequently entered onto the land with their caravans and the terms of the injunctions were explained to them. On committal proceedings brought by the local planning authorities for contempt of court G and M each asked the court in joining her as defendant to take into account her personal circumstances and to balance them against the public interest considerations, but no application was made to vary or discharge either injunction. The judges each held that balancing considerations did not apply to the issues before the court until the question of sentence for breach of the injunction arose, and they committed G and M for contempt of court.

On appeals by G and M—

Held, dismissing the appeals, that a person who entered onto land and occupied it in breach of an injunction granted against unnamed persons or persons unknown thereby became a person to whom the injunction was addressed and a defendant to the proceedings, so that it was not necessary to join her as a defendant at a later date; that, on the facts, by the time of the committal proceedings G and M each had become a defendant, was in breach of the relevant injunction and had the requisite knowledge to be in contempt of court; that there was no discretion to be exercised nor any balancing exercise to be carried out by the judge in concluding that she was in breach and in contempt of court; that such discretion or balancing exercise only arose on an original application by a claimant for an injunction against a named party, on any subsequent application to vary or discharge by a person named as a defendant and affected by the injunction, and to some extent in the course of sentencing; and that, accordingly, the judges had properly declined to carry out any balancing exercise in committing the defendants for contempt of court (post, paras 32–35, 38–39).

Mid Bedfordshire District Council v Brown [2005] 1 WLR 1460, CA applied.

South Bucks District Council v Porter [2003] 2 AC 558, HL(E) distinguished.

[1] Town and Country Planning Act 1990, s 187B as inserted: see post, para 1.

A Observations as to the application of the considerations set out in *South Bucks District Council v Porter* [2003] 2 AC 558 (post, para 33).

The following cases are referred to in the judgment of Sir Anthony Clarke MR:

Coates v South Bucks District Council [2004] EWCA Civ 1378; [2005] LGR 626, CA

Davis v Tonbridge and Malling Borough Council [2004] EWCA Civ 194; The Times, 5 March 2004, CA

B *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA

South Bucks District Council v Porter [2001] EWCA Civ 1549; [2002] 1 WLR 1359; [2002] 1 All ER 425, CA; [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; The Times, 11 November 2004, CA

C No additional cases were cited in argument.

The following additional case, although not cited, was referred to in the skeleton arguments:

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

D

South Cambridgeshire District Council v Gammell and others

APPEAL from Judge Plumstead sitting in the Cambridge County Court

The claimant, South Cambridgeshire District Council, applied for an injunction under section 187B of the Town and Country Planning Act 1990 (as inserted by section 3 of the Planning and Compensation Act 1991), inter E alia, restraining the stationing of gipsy caravans on land known as Victoria View, Smithy Fen, Cottenham, Cambridgeshire. On 4 May 2004 the claimant was granted an injunction against the owners of plots on the land restraining occupation of vacant plots and requiring removal of hardcore from vacant plots. On 17 July 2004 Judge O'Brien refused to grant an injunction against persons unknown, gave permission to appeal and F transferred the appeal to the Court of Appeal. On 17 September 2004, the Court of Appeal allowed the council's appeal and granted an injunction against persons unknown, inter alia, restraining the deposit of hardcore other than for agricultural purposes on plots 1–11 Victoria View, Smithy Fen and the stationing of caravans, mobile homes or other forms of residential accommodation on the land other than for agricultural purposes. The injunction excluded from its ambit certain individuals already on the site. In G February 2005 the council served an enforcement notice requiring the cessation of use of the site for the stationing of caravans, against which an appeal was lodged. The defendant, Kathleen Gammell, was served with the injunction and its effect was explained to her on 21 April 2005 after she had stationed caravans on plot 10. By an application notice dated 19 May 2005 the council applied to commit the defendant for contempt. On 11 July 2005 H Judge Plumstead joined Kathleen Gammell as a defendant, committed her, adjourned sentence until 7 November 2005 and gave permission to appeal against her ruling that the defendant was bound by the injunction from the time that she first knew about it, and that it had direct effect against her.

By an appellant's notice the defendant appealed on the grounds, inter alia, that (1) the House of Lords in *South Bucks District Council v Porter* [2003]

2 AC 558 had held that when asked to grant injunctive relief under section 187B of the Town and Country Planning Act 1990 as amended the court had to consider whether on the facts of the case such relief was proportionate within the sense of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and to grant relief only if it judged it to be so; (2) the House of Lords had specifically affirmed the judgment of Simon Brown LJ [2002] 1 WLR 1359 that a judge should not grant injunctive relief unless he would be prepared to contemplate committing the defendant for breach of the order and that he would not be of that mind unless he had considered all the questions of hardship for the defendant and his family if required to move including the availability of suitable accommodation; and (3) that those arguments should apply to this case since at the time the injunction was granted the defendant had been unaware of it.

The facts are stated in the judgment of Sir Anthony Clarke MR.

Bromley London Borough Council v Maughan and others

APPEAL from Judge Hamilton QC sitting in the Bromley County Court

The claimant, Bromley London Borough Council, applied for and was granted on 8 July 2004 an order, directed to the owners of plots 1 to 804 at Waldens Farm, Crockenhill Road, Orpington, inter alia (1) granting an injunction under section 187B of the Town and Country Planning Act 1990 (as inserted by section 3 of the Planning and Compensation Act 1991) forbidding them from stationing or causing to be stationed any caravans on any part of Waldens Farm other than those in position on 1 July 2004 or placed pursuant to planning permission granted either by the claimant or the Secretary of State; (2) permitting the claimants to serve the claim form by placing a copy of it on a conspicuous part of the entrances to the site and placing a copy next to each of the caravans currently on site; (3) that the defendants to be identified by reference to their ownership of the plots comprising Waldens Farm; (4) that the order to remain in force until further order; and (5) granting liberty to apply at any time to vary or discharge the order with 48 hours' notice to the claimant's solicitor. On 25 November 2004 a further injunction addressed to owners, occupiers and persons unknown forbidding, inter alia, the stationing of caravans at Waldens Farm, was granted without prejudice to the order of 8 July which remained in force. The council applied to join as a defendant Winnie Maughan, who had entered on to plot 469 of Waldens Farm and stationed caravans on it on 26 September 2004, and to commit her for contempt for breach of the injunctions. On 11 March 2005 Judge Hamilton QC heard the applications, and made orders for joinder and committal. The defendant was committed to prison for one month suspended until 11 May 2005, which order was not to be put in force if during that time she removed all caravans she owned or occupied from any part of Waldens Farm. The Court of Appeal (Tuckey LJ) granted the defendant permission to appeal and stayed the committal order pending appeal.

By an appellant's notice dated 2 June 2005 the defendant appealed on the grounds, inter alia, that the committal order had been made only after the defendant had been joined as the seventh defendant to the proceedings, and the judge had failed to consider all the factors in *South Bucks District Council v Porter* [2003] 2 AC 558 prior to joining the defendant, who had

A been incorrectly joined and consequently the committal order should be stayed.

The facts are stated in the judgment of Sir Anthony Clarke MR.

Michael Paget for the defendant in the each case.
David Elvin QC and *Richard Langham* for the district council.
Patrick Darby for the London borough council.

B

SIR ANTHONY CLARKE MR

Introduction

1 Section 187B of the Town and Country Planning Act 1990 (as inserted by section 3 of the Planning and Compensation Act 1991) provides:

C

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

E

2 Given the express terms of section 187B(3) and the rules made under this section, it is not in dispute that in appropriate circumstances the section gives the court power to grant an injunction against a person who is unknown. These appeals arise out of injunctions granted against individuals whose identities were unknown when the injunctions were granted. They are two linked appeals. Each is an appeal from an order by which the
F appellant was held to be in breach of the injunction and to be in contempt of court.

3 The first appeal ("the Maughan appeal") arises out of two orders of Judge Hamilton QC in the Bromley County Court, dated 11 March 2005, in which she ordered, among other things that: (1) Bromley London Borough Council ("BLBC") have leave to add Winnie Maughan ("WM") and a
G number of other persons to committal proceedings pursuant to CPR r 19.4; (2) WM be committed for contempt of court to serve a term of one month's imprisonment unless she removed all caravans she owned or occupied from any part of a farm called Waldens Farm.

4 The second appeal ("the Gammell appeal") is from the committal order of Judge Plumstead in the Cambridge County Court, dated 11 July 2005, which ordered, among other things, that: (a) Kathleen Gammell
H ("KG") was bound by an injunction granted by the Court of Appeal to the South Cambridgeshire District Council ("SCDC") on 17 September 2004; (b) KG was in breach of the injunction; (c) KG be joined as a respondent to the committal proceedings; and (d) sentencing be adjourned to the week beginning 7 November 2005.

5 Both appellants are represented by the same counsel, Mr Michael Paget. The Maughan appeal is brought pursuant to permission being given by Tuckey LJ, who stayed the operation of the committal order, and the Gammell appeal is brought with the permission of the judge.

6 The issue in both appeals is essentially the same. It is whether and in what circumstances the approach laid down by the House of Lords in *South Bucks District Council v Porter* [2003] 2 AC 558 applies to cases like these where an injunction is granted, not against named individuals occupying caravans on land without relevant planning consent, but against unnamed individuals who were not in such occupation when the injunctions were granted. In each case the judge declined to apply the principles in the *South Bucks* case to the case before her and in each case she held that there was a crucial distinction between the two classes of case. The question in both appeals is whether the judge was right to do so.

South Bucks District Council v Porter

7 The House of Lords considered three appeals involving different parties. In each case local planning authorities applied successfully to the court under section 187B of the 1990 Act for injunctive relief against the defendants, who are gipsies, to prevent them from living in mobile homes and caravans on land acquired by them for that purpose, but for which planning consent had been refused. The defendants appealed on the ground that, in granting the injunctions, the court had failed to consider, in addition to any relevant planning considerations, the likely effect of the orders on their human rights in accordance with section 6(1) of the Human Rights Act 1998 and the Convention for the Protection of Human Rights and Fundamental Freedoms scheduled to that Act.

8 The Court of Appeal allowed their appeals and the planning authorities appealed to the House of Lords. All the appeals were dismissed. The House of Lords held that section 187B of the 1990 Act conferred on the court an original and discretionary, not a supervisory, jurisdiction, to be exercised with due regard to the purpose for which it was conferred, to restrain actual or threatened breaches of planning control; that it was inherent in the injunctive remedy that its grant depended on the court's judgment of all the circumstances of the case; that, although the court would not examine matters of planning policy and judgment which lay within the exclusive purview of the authorities responsible for administering the planning regime, the court was not obliged to grant relief because a planning authority considered it necessary or expedient to restrain a planning breach; that the court would have regard to all, including the personal, circumstances of the case, and, since section 6 of the 1998 Act required the court to act compatibly with a Convention right (as so defined), and having regard to the right guaranteed in article 8, the court would only grant an injunction where it was just and proportionate to do so; and that, accordingly, the planning authorities' applications should be determined on that basis.

9 Article 8(1) of the Convention is entitled "Right to respect for private and family life" and provides: "Everyone has the right to respect for his private and family life, his home and his correspondence." Article 8(2) contains the familiar exception.

A 10 It is important to note that, in each of the cases before the House of Lords, when the injunction was granted the respondent was in occupation of mobile homes or caravans in breach of planning law. As I read the speeches of the Appellate Committee, they endorsed the approach of Simon Brown LJ in the Court of Appeal [2002] 1 WLR 1359. Lord Bingham of Cornhill [2003] 2 AC 558, para 20 set out paras 38–42 of Simon Brown LJ's
B judgment and approved them. I refer only to what Simon Brown LJ said [2002] 1 WLR 1359, paras 41, 42, which included the following:

> "41. True it is, as Mr McCracken points out, that, once the planning decision is taken as final, the legitimate aim of preserving the environment is only achievable by removing the gipsies from site. That is not to say, however, that the achievement of that aim must always be accepted by the
C court to outweigh whatever countervailing rights the gipsies may have, still less that the court is bound to grant injunctive (least of all immediate injunctive) relief. Rather I prefer the approach suggested by the 1991 Circular [Department of the Environment Circular No 21/91: "Planning and Compensation Act 1991: Implementation of the Main Provisions" (16 December 1991)]: the court's discretion is absolute and injunctive relief is unlikely unless properly thought to be 'commensurate'—in
D today's language, proportionate . . . Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gipsy's private life and home and the retention of his ethnic identity—are at stake.
>
> E "42. I do not pretend that it will always be easy in any particular case to strike the necessary balance between these competing interests, interests of so different a character that weighing one against the other must inevitably be problematic. This, however, is the task to be undertaken by the court and, provided it is undertaken in a structured and articulated way, the appropriate conclusion should emerge."

F In each of the appeals the matter was remitted to the judge to carry out that balancing exercise.

11 In *Davis v Tonbridge and Malling Borough Council* [2004] EWCA Civ 194 at [34] Auld LJ, with whom Arden and Jacob LJJ agreed, summarised the effect of the *South Bucks* case as follows:

> "The effect of the various speeches—set out most comprehensively in
G the leading speech of Lord Bingham of Cornhill, was as follows: (1) section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds; (2) it is questionable whether article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B; (3) the jurisdiction is to be exercised with due regard to the purpose for which was conferred,
H namely to restrain breaches of planning control, and flagrant and prolonged defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief; (4) however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case; (5) although a court would

not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply because a planning authority considered it necessary or expedient to restrain a planning breach; (6) having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply."

Auld LJ put the point clearly in this way in para 37 of his judgment:

"Thus, Lord Bingham's reasoning, and that of the other Law Lords, in endorsing Simon Brown LJ's analysis of the balance to be sought between public and private interest in such cases, was to recognise two stages before, or certainly by the time, injunctive relief is sought: first, to look at the planning merits of the matter, and, in doing so, to accord respect to the local planning authority's conclusions; and second to consider for itself, in the light of the planning merits and any other circumstances, in particular, those of the defendant, whether to grant injunctive relief."

(See also *Coates v South Bucks District Council* [2005] LGR 626.)

12 The question is whether those principles apply to this class of case. The facts in these appeals can be shortly stated.

The Maughan appeal

13 In the early 1970s a 70-acre green belt site at Waldens Farm near Orpington was split into 804 lots and individually sold off principally to members of the Greek Cypriot community. Unfortunately over the years many of the plots were not maintained and became overgrown. In 2001 a number of plots were acquired by travellers, who erected hardstanding, roadways and fencing and put mobile homes and caravans on the site. All that was done without planning permission. Enforcement action was commenced by BLBC and some of the occupiers applied for retrospective planning permission. The application was refused by BLBC but an appeal to the Secretary of State succeeded in part. He granted temporary planning permission for a period of two years from January 2003. The Secretary of State's determination included the following:

"The Secretary of State agrees with the inspector that the unmet needs of gipsies generally in the area and the lack of suitable alternative sites, together with the appellant's limited financial means and some of the children's special educational needs cumulatively amount to very special circumstances that outweigh the harm to the purposes of the green belt if the development were to be allowed. The Secretary of State agrees also that, so long as these circumstances exist, they justify the grant of temporary planning permission. The Secretary of State agrees that, although the special needs of some children do not apply to all residents, the lack of alternative site applies to them all."

A One of the reasons that planning permission was granted was that no assessment of gipsy need had been made by BLBC. The Secretary of State further noted:

> "The council has proposed to advertise a limited tender for consultants to carry out a quantitative assessment of need for gipsy sites. However, the council in this case had not, at the time of the inquiry, carried out such
B an assessment, as required by government policy and its own policy."

The Secretary of State concluded:

> "The Secretary of State considers that a temporary permission of two years is a sufficient period for the council to carry out a quantitative assessment of the need for gipsy sites. This would then provide an opportunity to bring forward the identification and availability of
C alternative sites."

No completed quantitative assessment has, so far as I am aware, been conducted. At any rate it had not been conducted at the time of the decisions against which these appeals were brought.

14 It should be noted that the temporary permission was limited to one residential and one touring caravan on each of four plots, making a total of
D eight caravans in all. Further, the permissions had not been renewed and neither BLBC nor the Secretary of State has granted any further planning permission for the stationing of caravans on any part of Waldens Farm. The number of caravans on Waldens Farm increased from eight in 2001 to about 50 in December 2004.

15 On 8 July 2004 BLBC sought and obtained an injunction under
E section 187B of the 1990 Act. It was not directed to named individuals, but to the owners of plots 1 to 804 at Waldens Farm. It was in these terms:

> "The owners are forbidden (whether by himself or by instructing or encouraging any other person) from: (1) stationing or causing to be stationed any caravans on any part of Waldens Farm . . . other than those which are in position on 1 July 2004 or which may be placed on the land
F pursuant to a planning permission granted by the claimant or by the First Secretary of State. (2) That the claimants have permission to effect alternative service of the claim form by placing a copy of the claim form on a conspicuous part of the entrances to the site and by placing a copy of the claim form next to each of the caravans currently on site. (3) That the defendants be identified for the purpose of this claim by reference to their ownership of the plots comprising Waldens Farm . . . (4) This order shall
G remain in force until further order. (5) The defendants may apply to the court at any time to vary or discharge this order but if they wish to do so they must first inform the claimant's solicitor in writing at least 48 hours beforehand. (6) Costs in the case. This order shall remain in force until further order of the court."

H The LBB served the claim form in accordance with para 2 of the order. It also served the order in the same way. No one, including WM, applied to vary or discharge the order in accordance with the liberty in para 5 of the order.

16 Plot 469 is owned by WM either alone or jointly with her husband, Patrick Maughan. Her case is that she became the owner of the plot in

September 2004. It follows, as is not in dispute, that the injunction was directed to her, among many others. She and her family of five moved on to plot 469 on 26 September 2004. WM accepts that three caravans were brought onto the plot on that day. She instructed Miss Sharon Baxter of the Community Law Partnership in Birmingham on 4 October 2004. Miss Baxter spoke to Mr Bloomfield of BLBC on the same day and was told both that BLBC had served an enforcement notice on the plot which took effect on 30 September and that an injunction had been granted in respect of it. At Miss Baxter's request he sent a copy of each to her. In these circumstances there is not, and could not be, any dispute but that WM was one of those to which the injunction was directed. Moreover, it is expressly conceded that she was aware of the injunction before the matter came before the judge in March 2005. The precise date on which she acquired that knowledge is not clear, but it is not relevant to the determination of the issues in this appeal.

17 In the meantime, on WM's instructions, a planning application was submitted on 26 October 2004. No application was, however, made on her behalf to vary or discharge the injunction. There is a dispute as to the validity of the planning application which had not been determined at the time of the order, which is the subject of the appeal; nor, so far as I am aware, has it progressed in any meaningful way since then.

18 A further injunction was granted on 25 November 2004 in somewhat wider terms than that of 8 July. The injunction of 25 November was expressed to be "without prejudice to the order dated 8 July 2004 which is to continue in force as at that date". It is therefore clear that the order of 8 July remained and remains in full force and effect and, in my opinion, the order of 25 November does not affect the issues in this appeal one way or the other.

19 In short, the position in the case of WM is that she and her family came on to the site with three caravans after the date of the injunction. The judge held that WM remained in occupation of the caravans on the plot in breach of the injunction in the circumstances in which she was well aware of it. In these circumstances she permitted WM to be added to the proceedings by name, declared that she was in contempt of court and imposed the suspended sentence of imprisonment to which I have referred.

The Gammell appeal

20 This appeal is concerned with plot 10, Victoria View, which is part of Smithy Fen, Cottenham in Cambridge. It is adjacent to an authorised gipsy caravan site known as Setchel Drove and is one of 11 plots at Victoria View. It is not in the green belt. The history of the matter is broadly as follows. The present occupation of parts of the site by gipsy caravans began some time in 2003. Some time in 2004 plot 10 was purchased by KG's son, John. On 27 March 2004 SCDC received a planning application in relation to plots 1 to 11 seeking permission to use the plots as a gipsy caravan site. Planning permission was refused. An appeal was lodged on 13 October 2004 and the appeal was heard for eight days from 12 July 2005. A decision is pending.

21 On 4 May 2004 SCDC obtained an injunction pursuant to section 187B of the 1990 Act against the planning permission applicants, which included a J Gemill but not KG. In June 2004 SCDC noticed that further

people had come onto the site and therefore sought an injunction against persons unknown. At first instance the judge declined to grant the injunction because of a perceived want of jurisdiction. SCDC appealed to this court and, as it happens, the appeal was heard by Brooke LJ and myself: *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280. We granted an injunction addressed to:

> "Persons unknown (being persons other than those listed in the schedule to the claim form dated 14 July 2004 therein) causing or permitting hardcore to be deposited other than for agricultural purposes on land known as plots 1–11, Victoria View . . . caravans, mobile homes or other forms of residential accommodation to be stationed other than for agricultural purposes on the said land; or existing caravans, mobile homes or other forms of residential accommodation on the said land to be occupied other than for agricultural purposes."

The order (which was endorsed with a penal notice) was in these terms: "The respondents shall be restrained until trial or further order from causing or permitting—(1) Hardcore to be deposited other than for agricultural purposes on land known as plots 1–11 . . ." Paras 2 and 3 are in the same form as the same paragraphs in the definition of the defendants quoted above. There followed provisions for service of the order and claim form, which were subsequently complied with, to the effect that copies should be placed and replaced as necessary in a prominent position on each plot.

22 The schedule to the claim form identified 18 individuals, together with the wives of two of them, who were variously associated with 10 of the 11 plots. The schedule included "J Gemill at plot 1" and "John Gamill at plot 1", although the SCDC do not know whether either is related to KG. In any event, the schedule did not include KG or anyone at plot 10. Indeed plot 10 is not referred to in the schedule at all.

23 The reasons for the decision were set out in a judgment of Brooke LJ with which I agreed. No application has been made by KG or anyone else to vary or set aside the order, although such an application could have been made at any time under CPR r 23.10(1). That is so even though the right to do so was not expressed in the order itself.

24 In February 2005 an enforcement notice was served requiring the cessation of use of the site by the stationing of caravans. An appeal was subsequently lodged against that notice. As I understand it, a decision on that appeal and on the appeal against the refusal of planning permission is expected in December of this year. KG moved on to plot 10 on 20 April 2005 with her caravan. It is correctly conceded by Mr Paget on behalf of KG that proper service of the injunction was effected on her; and that although, like WM, she cannot read or write the effect of it was explained to her on the next day, 21 April 2005. It is thus not in dispute, as indeed was held by the judge, that as from 21 April KG was in contempt of court by infringing the injunction.

25 However, at the application by SCDC for her committal, on 11 July 2005, KG applied to be joined as a defendant in order, as Mr Paget puts it in his skeleton argument, that she could ask the court to determine whether the injunction should apply to her following what he calls the *Porter* process. The judge held that the principles in that case did not apply to a person in her

position before any question of sentence for breach arose. The judge said, at para 5 of her judgment:

> "Having read [*South Bucks District Council v Porter* [2003] 2 AC 558], Mr Paget, it seems to me that it is a step even further to say that once an injunction has been granted, if someone comes to the injunction as it were, their personal circumstances ought to be taken into the balance, before deciding whether the injunction applies to them. It is another matter whether their circumstances should be taken into account when deciding, having decided as a matter of fact that they are in breach, whether and what sanctions should be applied."

A little later, after an analysis of the cases, the judge said, at paras 12 and 13:

> "12. It seems to me that it is not open to me at this stage to reopen the injunction, because it would in effect, as their Lordships said, be contemplating that those who are prepared to commit an unlawful act could, even though they knew it to be unlawful, come and ask, as it were, to be relieved from sanction, when the court has already considered it appropriate, having undertaken the more general balancing exercise to grant an injunction. When I say 'the more general balancing exercise', it is absolutely clear that the Court of Appeal were acutely aware of the tensions in South Cambridgeshire, that there are a number of people of gipsy or traveller origin who wish to set up homes, that there is land on which they wish to set up homes but which the local authority has determined is not appropriate in planning terms for that purpose, and this is one of those areas where that stand-off has been evident for many years. But so far as this person is concerned, Mrs Gammell, she is not a party to that long-standing dispute, but simply someone who has come on to the site after the Court of Appeal has determined that it is appropriate that further incursions on the site should be restrained by an injunction.
>
> "13. In my opinion, the court has jurisdiction to attach her, whether or not she is joined as a respondent. The question then is to whether I should join her as a respondent. If Mr Paget seeks that I do, I will, because it is appropriate that she should have opportunity to argue her case as to whether being in breach she should be the subject of sanction, what sanction and when. The factors that I may take into account then are her personal position, the position of someone who needs a plot if she is to remove from that site, and therefore local site availability, and more broadly East Anglian site availability, and also the question of the likelihood of there being any change in the planning status of the site as a result of the inspector's inquiry which is commencing this week."

In the event, she adjourned the question of sentence until 7 November 2005 (next Monday) in order to enable this appeal to be heard.

26 It is clear that the judge will take KG's personal position into account when deciding what is an appropriate sentence. Mr Elvin correctly concedes on behalf of SCDC that she would be right to do so. The question in these appeals is whether the judge should have done so at an earlier stage.

Discussion

27 Although there are factual differences between the two cases the question of principle identified by Mr Paget is the same in each case. He

A submitted to the judge in each case and to us that the court should carry out the balancing exercise in the *South Bucks* case [2003] 2 AC 558 when, as he would put it, the particular person becomes a defendant in each case. I am unable to accept that submission.

28 The crucial distinction between these cases and the *South Bucks* case is that, whereas in the *South Bucks* case each of the respondents was in occupation of the land when the injunction was granted, that was not true in this case. In these appeals each of the appellants became an occupier of the land after the injunction was granted. It follows that the ratio of the decision in the *South Bucks* case does not apply directly to the facts of these appeals.

29 Does it apply in some way by analogy? In my opinion the answer to that question is no. Before expressing my conclusion on the particular points advanced by Mr Paget, I should refer to the important decision of this court in *Mid Bedfordshire District Council v Brown* [2005] 1 WLR 1460, where the court comprised Lord Phillips of Worth Matravers MR, Mummery and Jonathan Parker LJJ. The facts can be taken from the headnote:

> "The first defendant, a gipsy, bought a parcel of land adjacent to a village where he planned to settle with other members of his extended family, who included several children. The land was designated agricultural land in an area of great landscape beauty within the green belt. Alerted to the fact that unauthorised works were being carried out on the land, the claimant council obtained an interim injunction under section 187B of the Town and Country Planning Act 1990 to restrain its use for residential purposes. In breach of that injunction the defendants moved their caravans onto the land. They subsequently submitted an application for planning permission for a change of use to a gipsy residential site. The council applied for a final injunction prohibiting the change of use in breach of planning control. The judge granted a final prohibitory order but suspended it pending the determination of the planning application on the ground that the interests of the safety and stability of the young children on the site overrode the objective of safeguarding the environment."

30 This court allowed the council's appeal. The correct approach can clearly be seen from the concluding paragraphs in the judgment of Mummery LJ, who gave the judgment of the court. He said, at paras 23–28:

> "*The balancing act*
>
> "23. In his careful judgment the judge cited the relevant authorities and he considered the evidence in detail, including the fact that the defendants had acted in flagrant breach of the planning control and of the injunction by bringing caravans on to the land and living there, which it was accepted counted against the defendants. He said that it could not be disputed that the council's decision to make the application was 'entirely appropriate'. As the council pointed out, the violations were deliberate, no attempt had been made to discuss the matter with the council and 'the breaches of the law had been persistent and serious, albeit only over a few days'.
>
> "24. On the issue of the justice and proportionality of granting an immediate injunction the judge considered the countervailing factors,

which, applying the principles laid down in *South Bucks District Council v Porter* [2003] 2 AC 558, he thought were against the grant of an immediate injunction: although the council had indicated that the permission was unlikely to be granted, the judge placed little weight on a view which he thought had been expressed without detailed consideration, and there was a possibility that the council would make a different planning decision, the time for making a decision expiring on 27 October 2004; although the judge found that there would be some environmental damage caused by the breach of planning control, it would not be serious and the injunction would not remove it; there were no alternative local official or private sites to which the defendants could move; and there would be hardship if the defendants were required to move, as that would affect the safety and stability of the defendant's small children. He thought that an injunction would not bring the defendant's unlawful activities to an end.

"*Conclusion*

"25. In our judgment, the judge's decision to suspend the injunction pending the determination of the planning application did not take proper account of the vital role of the court in upholding the important principle that the orders of the court are meant to be obeyed and not to be ignored with impunity. The order itself indicated to the defendants the correct way in which to challenge the injunction. It contained an express provision giving the defendants liberty to apply, on prior notice, to discharge or modify the order. The proper course for the defendants to take, if they wished to challenge the order, was to apply to the court to discharge or vary it. If that failed, the proper course was to seek to appeal. Instead of even attempting to follow the correct procedure, the defendants decided to press on as originally planned and as if no court order had ever been made. They cocked a snook at the court. They did so in order to steal a march on the council and to achieve the very state of affairs which the order was designed to prevent. No explanation or apology for the breaches of the court order was offered to the judge or to this court.

"26. The practical effect of suspending the injunction has been to allow the defendants to change the use of the land and to retain the benefit of occupation of the land with caravans for residential purposes. This was in defiance of a court order properly served on them and correctly explained to them. In those circumstances there is a real risk that the suspension of the injunction would be perceived as condoning the breach. This would send out the wrong signal, both to others tempted to do the same and to law-abiding members of the public. The message would be that the court is prepared to tolerate contempt of its orders and to permit those who break them to profit from their contempt.

"27. The effect of that message would be to diminish respect for court orders, to undermine the authority of the court and to subvert the rule of law. In our judgment, those overarching public interest considerations far outweigh the factors which favour the essential suspension of the injunction so as to allow the defendants to keep their caravans on the land and to continue to reside there in breach of planning control.

"28. We would add that the defendants would have attracted more sympathy from the court for their plight, if they had embarked on their

A plans to purchase and establish a caravan site, so that they could integrate with the community, by taking steps to obtain a site which had a reasonable prospect of being granted planning permission, by following the proper procedures for obtaining the necessary permission and by awaiting the outcome of the planning application, instead of taking the law into their own hands, flouting orders of the court and asking the court to suspend the injunction in order to relieve them of the consequences of their unlawful conduct."

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31 Those principles inform the correct approach of the courts to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. As I see it, those principles are relevant, or potentially relevant, in circumstances in which a defendant seeks to vary or set aside an order of the court. However in this case Mr Paget seeks to apply the principles in the *South Bucks* case [2003] 2 AC 558, and perhaps also *Mid Bedfordshire District Council v Brown* [2005] 1 WLR 1460, on an application to add a person such as each of the appellants here as a defendant to the action.

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32 In my opinion that submission cannot be accepted. 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 caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later.

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E

33 By the time of the committal proceedings, in each case the appellant was a defendant to the proceedings, was in breach of the injunction and, given her state of knowledge, was in contempt of court. Those conclusions follow in each case from the terms of the injunction, the actions of the appellant and the state of knowledge of the appellant. The conclusions do not depend upon any judicial decision involving the exercise of any discretion or balance on the part of a judge. The exercise of such a discretion or balance only arises on an original application by a claimant for an injunction against a named party, on any subsequent application to vary or discharge by a person named as a defendant, and affected by the injunction, and to some extent at least in the course of a sentencing exercise. In the light of the principles in the authorities and those conclusions I would summarise the position as follows. (1) The principles in the *South Bucks* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the

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principles in the *South Bucks* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Bucks* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Bucks* case and in the *Mid Bedfordshire* case. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Bucks* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court. It should be noted that neither appellant applied to the judge for an order varying the injunction for the future. It follows that the judge had no proper opportunity in each case to apply those principles to the case before her.

Result

34 It follows that the judge in each case was correct to hold that the appellant was in breach of the injunction and in contempt of court. She was also correct to hold that the principles in the *South Bucks* case were not relevant to those questions. She was further correct not to apply those principles to the application that the applicant be joined as a defendant. Each applicant was already a defendant.

Disposal—KG

35 It follows from the above conclusions that the appeal of KG must be dismissed. I would add only this. As I understand it, she is to be sentenced next week for contempt of court. On that occasion, the court will have regard to all relevant circumstances, including KG's personal circumstances. I noted earlier that no application has been made to the judge to seek a variation of the injunction for the future. Whether such an application might succeed would depend on all the circumstances of the case. But if KG were to make such an application, it should surely be made before the sentencing process is completed.

Disposal—WM

36 The position here is different. The judge heard detailed evidence and submissions in relation to a wide variety of factors, including the personal

A circumstances of WM and her family before deciding what was the appropriate sentence to pass. She reached the conclusion, to which I have already referred, that there should be a sentence of 28 days' imprisonment, such sentence not to take effect if the caravans were removed within two months. WM did not appeal against that decision. As a result, we do not have the judge's sentencing remarks. In these circumstances, we cannot properly entertain an appeal against sentence. There is no sensible basis upon which we could allow such an appeal.

B

37 As to the possibility of a variation of the injunction for the future, it is, I suppose, possible that an application for a variation could be made. But it has to be recognised that it would be fraught with difficulties in the light of the principles set out in the judgment of Mummery LJ in the *Mid Bedfordshire* case. However, WM's appeal, too, must be dismissed, subject only to this. When Tuckey LJ granted permission to appeal he also stayed the committal order. It appears to us that, given the particular circumstances of WM, it would be appropriate for us to suspend the committal order for a period of two months from today in order to give her an opportunity to remove the caravans and avoid the activation of the prison sentence.

C

D **RIX LJ**

38 I agree.

MOORE-BICK LJ

39 I also agree.

Appeals dismissed.

E

Solicitors: Archer & Archer, Ely; Community Law Partnership, Birmingham; Head of Legal Services, South Cambridgeshire District Council, Cambridge; Acting Head of Legal Services, Bromley London Borough Council, Bromley.

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H

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

203

A205

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.

Supreme Court

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25

Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC

Human rights — Freedom of expression and assembly — Interference with — Defendants charged with obstructing highway during demonstration against arms fair — Whether defendants lawfully exercising Convention rights so as to have "lawful . . . excuse" — Whether interference with defendants' Convention rights proportionate — Proper approach to proportionality by appellate court on appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the middle of the approach road to the conference centre and attaching themselves to two lock boxes with pipes sticking out from either side, making it difficult for police to remove them from the highway. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted "without lawful . . . excuse" within the meaning of section 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The prosecution appealed by way of case stated, pursuant to section 111 of the Magistrates' Courts Act 1980[3]. The Divisional Court of the Queen's Bench Division allowed the appeal, holding that the district judge's assessment of proportionality had been wrong. The defendants appealed. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under articles 10 or 11.

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with the protesters' rights was proportionate for the purposes of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that, rather, there had to be an assessment of the facts in each individual case to determine whether the interference was "necessary in a democratic society" for the purposes of articles 10(2) and 11(2); that, therefore, deliberate physically obstructive conduct by protesters was capable of being something for which there was a "lawful . . . excuse" for the purposes of section 137(1) of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users was more than de minimis and

[1] Highways Act 1980, s 137: see post, para 8.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 14. Art 11: see post, para 15.
[3] Magistrates' Courts Act 1980, s 111(2): see post, para 36.

prevented them, or was capable of preventing them, from passing along the highway; and that whether or not the protesters had a lawful excuse would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether the protesters' convictions for offences under section 137(1) were justified restrictions on their Convention rights or (per Lord Hodge DPSC and Lord Sales JSC) whether the police response in seeking to remove the obstruction involved the exercise of their powers in a proportionate manner (post, paras 63–70, 94, 99, 121, 154).

(2) (Lord Hodge DPSC and Lord Sales JSC dissenting) that, on an appeal by way of case stated under section 111 of the Magistrates' Courts Act 1980, the test to be applied by the appellate court to an assessment of the decision of the trial court in respect of a defence of lawful excuse under section 137 of the Highways Act 1980 when Convention rights were engaged was the same as that applicable generally to appeals on questions of law in a case stated, namely that an appeal would be allowed where there was an error of law material to the decision reached which was apparent on the face of the case stated or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found; that, in accordance with that test, where the defence of lawful excuse depended upon an assessment of proportionality, an appeal would lie if there had been an error or flaw in the court's reasoning on the face of the case stated which undermined the cogency of its conclusion on proportionality; that such assessment fell to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached; and that, therefore, the Divisional Court in the present case had applied an incorrect test by asking itself whether the district judge's assessment of proportionality had been wrong (post, paras 42–45, 49–54, 99, 106–108).

Edwards v Bairstow [1956] AC 14, HL(E) and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, SC(E) considered.

(3) (Lord Hodge DPSC and Lord Sales JSC dissenting in part, but agreeing in allowing the appeal) that there had been no error or flaw in the district judge's reasoning on the face of the case stated such as as to undermine the cogency of his conclusion on proportionality; that, in particular, he had not erred in considering as relevant factors the facts that the defendants' actions (a) had been entirely peaceful, (b) had not given rise either directly or indirectly to any form of disorder, (c) had not involved the commission of any other criminal offence, (d) had been aimed only at obstructing vehicles headed to the arms fair, (e) had related to a matter of general concern, namely the legitimacy of the arms fair, (f) had been limited in duration, (g) had not given rise to any complaint by anyone other than the police and (h) had stemmed from the defendants' long-standing commitment to opposing the arms trade; and that, accordingly, the convictions should be set aside and the dismissal of the charges against the defendants restored (post, paras 71–78, 80–88, 99, 109–113, 115–118).

Nagy v Weston [1965] 1 WLR 280, DC and *City of London Corpn v Samede* [2012] PTSR 1624, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 reversed.

The following cases are referred to in the judgments:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bracegirdle v Oxley [1947] KB 349; [1947] 1 All ER 126, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7; [2017] NI 301, SC(NI)
D'Souza v Director of Public Prosecutions [1992] 1 WLR 1073; [1992] 4 All ER 545; 96 Cr App R 278, HL(E)
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Garry v Crown Prosecution Service [2019] EWHC 636 (Admin); [2019] 1 WLR 3630; [2019] 2 Cr App R 4, DC
Google LLC v Oracle America Inc (2021) 141 S Ct 1183
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
H v Director of Public Prosecutions [2007] EWHC 2192 (Admin), DC
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lashmankin v Russia (Application No 57818/09) (unreported) 7 February 2017, ECtHR
Love v Government of the United States of America [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Molnár v Hungary (Application No 10346/05) (unreported) 7 October 2008, ECtHR
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
New Windsor Corpn v Mellor [1974] 1 WLR 1504; [1974] 2 All ER 510
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Oladimeji v Director of Public Prosecutions [2006] EWHC 1199 (Admin)
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, HL(E)
Primov v Russia (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest Heath District Council [1998] Env LR 9, CA
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2011] 1 All ER 1011, SC(E)

A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin); 170 JP 453
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Z) v Hackney London Borough Council [2019] EWCA Civ 1099; [2019] PTSR 2272, CA; [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
C *Smith and Grady v United Kingdom* (Application Nos 33985/96, 33986/96) (1999) 29 EHRR 493, ECtHR
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205, ECtHR (GC)

No additional cases were cited in argument.

D **APPEAL** from the Divisional Court of the Queen's Bench Division

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court, acquitted the defendants, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstructing the highway, contrary to section 137 of the Highways Act 1980. By a case stated that was served on the defendants on E 20 March 2018, the prosecution appealed. By a judgment dated 22 January 2019 the Divisional Court of the Queen's Bench Division (Singh LJ and Farbey J) [2019] EWHC 71 (Admin); [2020] QB 253 allowed the appeal.

With permission of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted on 3 December 2019, the defendants appealed.

F The issues in the appeal, as stated in the parties' agreed statement of facts and issues, were: (1) What was the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights were engaged in a criminal matter? (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate G obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

The facts are stated in the judgment of Lord Hamblen and Lord Stephens JJSC, post, paras 1–6.

H *Henry Blaxland QC*, *Blinne Ní Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

As far back as 1965 the courts explained "lawful authority or excuse" as encompassing the concept of "reasonableness": see *Nagy v Weston* [1965] 1 WLR 280. In respect of the offence of obstruction of the highway contrary to section 137 of the Highways Act 1980, reasonableness is a question of

fact to be assessed having regard to all the prevailing circumstances, including the duration of the obstruction, its location and purpose and whether it did in fact cause an actual, as opposed to a potential, obstruction. A defendant will not be guilty of deliberately obstructing the highway unless it is proved that such obstruction was not reasonable.

Even before the coming into force of the Human Rights Act 1998, it was possible for protesters engaged in an obstructive protest on the highway to argue successfully that they were exercising a lawful right to protest and therefore had a "lawful" right to protest.

The Convention rights which are in issue in this appeal are the rights contained in article 10 (concerning the right to freedom of expression) and article 11 (concerning the right to freedom of peaceful assembly) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those two articles and the parallel rights and obligations arising under common law must be considered when assessing the reasonableness of any obstruction of the highway and the proportionality of any interference with a right to protest.

The assessment of whether an obstruction of the highway was reasonable in the context of articles 10 and 11 is inevitably a fact-sensitive one that will depend on factors including the extent to which the continuation of the protest would breach domestic law, the importance to protesters of the precise protest location, the duration of the protest, and the extent of the actual interference caused to the rights of others: see *City of London Corpn v Samede* [2012] PTSR 1624.

The actions of the defendants in the present case were no more than symbolic. They could not have prevented arms being delivered to the arms fair, nor could they have prevented the arms fair taking place. Their protest was aimed at raising awareness of their cause. There was no evidence led by the prosecution that the protest caused disruption to traffic, or to the venue where the arms fair was being held, or to other people. It was entirely speculative whether there was obstructive conduct on the part of the protesters. There was evidence of potential interference but not of actual interference. There was no material which showed to the criminal standard that traffic was disrupted.

[Reference was made to *Kudrevičius v Lithuania* (2015) 62 EHRR 34.]

Even deliberate interference with the activities of others can fall within the protection of article 11. It must be shown by the prosecution that there was interference with the rights of others. Article 11 must be construed in a way which does not limit free speech and peaceful assembly. The defendants' intention was to cause some disruption but it did not take them outside article 11.

The trial judge's decision was impeccable and contained no legal error. The Divisional Court failed to accord due weight to the trial judge's findings, contrary to the need for appellate caution in relation to both findings of fact and value judgments. The Divisional Court substituted its own view of the evidence for that of the trial judge despite the fact it had not seen the live evidence and the video footage of the protest which was the material on which the trial judge had assessed the nature of the protest and the disruption it caused.

Where a statutory defence such as that arising under section 137 of the Highways Act 1980 encompasses the engagement of one or more

A Convention rights, the assessment of whether the prosecution has disproved that a defendant's use of the highway was reasonable constitutes an evaluative assessment within the province of the tribunal of fact. Therefore the approach to be taken by an appellate court is not simply to consider whether in its view the conclusion of the court below was "wrong", but rather whether that conclusion was reached either as a result of an identifiable flaw in the court's logic or reasoning or whether it was a B conclusion which no properly directed tribunal could have reached. The Divisional Court fell into error in determining otherwise.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The Divisional Court did not conclude as a matter of law that, in a prosecution under section 137 of the Highways Act 1980, findings of fact of C a complete obstruction of the highway for a significant period of time can never constitute a "lawful . . . excuse" for wilful obstruction within the meaning of section 137(1) of the Highways Act 1980. The Divisional Court held that those facts were "highly relevant" and "highly significant" to the assessment of proportionality in this case and concluded that the trial judge had given insufficient consideration to them in striking a fair balance D between the defendants' Convention rights and the rights and interests of others.

The essential facts can be ascertained from the case stated. It was clear that there was a deliberate or "wilful" obstruction of the highway which was planned rather than spontaneous. Its specific purpose was disruption of the traffic to the venue at which the arms fair was being held. It was aimed at a particular type of traffic which was delivering material to the arms fair. E The disruption lasted 90 minutes, which was a period of some length in the circumstances. The defendants used apparatus which was hard to disassemble in order to lock themselves together. They refused to unlock themselves and it can be inferred that they knew there would be a delay in removing them from the highway because police removal experts and specialist cutting equipment were needed. The reality was that the defendants knew they would remain on the road until the police were able, F with difficulty, to remove them.

In essence the primary facts were not in issue. But whether the facts as found did or may have constituted a lawful excuse called for a value judgment by the trial judge: see *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin). The tribunal of fact was dealing with the balancing act.

G The decision depended on the proportionality between the offence and the defendants' Convention rights. The Divisional Court concluded that the trial judge had erred in its assessment of proportionality and had not struck the fair balance necessary in that assessment.

On an appeal by way of case stated the High Court has a very wide discretion: see section 28A of the Senior Courts Act 1981. In the fact-specific circumstances of this case, the Divisional Court's review did accord due H weight to the assessment made by the trial judge, and correctly concluded that it was wrong.

Blaxland QC replied.

The court took time for consideration.

25 June 2021. The following judgments were handed down.

LORD HAMBLEN and **LORD STEPHENS JJSC**

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the "five-stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

4 The appellants were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable".

5 The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2018, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted permission to appeal.

A 7 The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?

B (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

C 8 Section 137 of the 1980 Act provides:

"137 *Penalty for wilful obstruction*

"(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale."

D 9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

"there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, E the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

10 In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ("the HRA") needs to be read in the light of the HRA.

F 11 Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

12 Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (section 6(3)(a)), as are the police.

G 13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

"1. Everyone has the right to freedom of expression. This right shall H 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."

15 Article 11 ECHR materially provides:

"1. Everyone has the right to freedom of peaceful assembly . . .

"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."

16 In the present case the Divisional Court explained how section 137(1) of the 1980 Act can be interpreted compatibly with the rights in articles 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows:

"62. The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

"(2) If so, is there an interference by a public authority with that right?

"(3) If there is an interference, is it 'prescribed by law'?

"(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

"(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

"64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

"(2) Is there a rational connection between the means chosen and the aim in view?

"(3) Are there less restrictive alternative means available to achieve that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community including the rights of others?

A "65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry."

17 Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of* B *London Corpn v Samede* [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul's Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras 39–41:

"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 C 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 D 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 E 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 F 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 G 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 H Strasbourg court said in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, 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."

3. The case stated

18 The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

19 All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

"All . . . defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route."

20 The district judge identified the issue for decision at para 37 of the case stated, as being:

"whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway."

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

"(a) The actions were entirely peaceful—they were the very epitome of a peaceful protests [sic].

"(b) The defendants' actions did not give rise either directly or indirectly to any form of disorder.

"(c) The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

A "(d) The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair . . . I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether 'non-DSEI traffic' was or was not in fact obstructed since the authorities cited above appeared to envisage 'reasonable' obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration . . .

"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the long-standing commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble."

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

H "The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

4. The decision of the Divisional Court

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see e g per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)."

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103:

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the

A assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law."

26 Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong "because (i) he took into account certain considerations which were irrelevant; B and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes" (para 129).

27 Of the factors listed at paras 38(a) to (h) of the case stated as cited in para 21 above, the Divisional Court considered those set out at paras 38(a), C (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of "limited duration". The Divisional Court considered that to be a "significant period of time". Its core criticism was of para 38(d), in relation to which it stated as follows at para 112:

D "At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of E proportionality. This is not a case where, as commonly occurs, *some part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said F (depending on the facts) that a 'fair balance' is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*." (Emphasis added.)

G **28** The Divisional Court explained at para 117 that the "fundamental reason" why it considered the district judge's assessment of proportionality to be wrong was that:

"there was no 'fair balance' struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the H highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows:

> "the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them."

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows:

> "Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do."

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse" defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows:

> "On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse . . . : *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse."

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in

which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it—see, for example, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) at [40] (Auld LJ) (article 10 ECHR); *Hammond v Director of Public Prosecutions* (2004) 168 JP 601, para 33 (May LJ) (articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

34 *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on

questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an "adventure . . . in the nature of trade". The commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law . . . the true and only reasonable conclusion contradicts the determination."

38 This approach has been followed for other case stated appeal procedures—see, for example, *New Windsor Corpn v Mellor* [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 the question arose as to the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at pp 752–753:

> "My Lords, in *Edwards v Bairstow* [1956] AC 14, 36, Lord Radcliffe made it plain that the court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

A 39 The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

B 40 In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] KB 349, 353:

> C "It is said that this court is bound by the findings of fact set out in the cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived . . . if magistrates come to a decision to D which no reasonable bench of magistrates, applying their minds to proper considerations, and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it."

In *R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest* E *Heath District Council* [1998] Env LR 9, 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

> "It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley*. But it is not perverse, even if it may be mistaken, to prefer the F evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court."

41 In *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way G of case stated in criminal proceedings concerning whether the appellant, who had absconded from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was "unlawfully at large and whom [the police constables were] pursuing" under section 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as "a question of fact" but one which "must be answered within the relevant H legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> "I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the

constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

In re B

42 In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under section 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

43 *In re B* [2013] 1 WLR 1911 was a family law case and involved the appellate test under CPR r 52.11(3) that an appeal will be allowed where the decision of the lower court is "wrong", whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* [2018] 1 WLR 2889 but that too involves a wide right of appeal "on a question of law or fact" (sections 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if "the district judge ought to have decided a question before him differently" and "had he decided it as he ought to have done, he would have been required to discharge the appellant"—see sections 27(3) and 104(3). In argument, reliance was also placed on the application of *In re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a magistrates' court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review—see, for example, *R (P) v Liverpool City Magistrates' Court* (2006) 170 JP 453, para 5.

44 It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

45 A prosecution under section 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful authority or excuse. Some cases stated in relation to section 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

46 Whilst we do not consider that *In re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *In re B* has been

developed in later cases. In *In re B* at para 88 Lord Neuberger PSC stated as follows:

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

47 This approach was qualified by the Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. In that case Lord Carnwath JSC (with whom the other justices agreed) said at para 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the factors which the court considers to be relevant to that assessment are likely to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the

face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not "any relevant evidence".

50 In his judgment Lord Sales JSC sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

51 As Lady Arden JSC's analysis at para 101 of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

52 Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *In re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

53 In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

54 For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under section 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *In re B*, where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

A *6. Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?*

The second certified question

B **55** As the Divisional Court explained, (see para 28 above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time". That fundamental reason led the Divisional C Court to certify the second question which the parties agreed as being in the terms set out in para 7(2) above ("the second certified question"). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of D preventing users, from passing along the highway. In those circumstances, the interference with the protesters' article 10 and article 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to section 137 of the 1980 Act.

56 On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of E constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's order directing convictions should be set aside and that this court should F issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

57 The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) G and 11(2): see paras 14–15 above. Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society". In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as H punitive measures, taken afterwards" so that it accepted at para 101 "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest,

which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales JSC (see for instance para 120, 153 and 154) who considers that the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden JSC at para 94 that "the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not" (emphasis added).

58 As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

59 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.

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

61 In this case both articles 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under article 10 or article 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the court. In *Kudrevčius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis

A pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

B *Deliberate obstruction with more than a de minimis impact*

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, C paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevičius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first D applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She E complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the* F *activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' G freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the H proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those

separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

65 The case of *Hashman and Harrup v United Kingdom* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their article 10 rights. At para 28 the ECtHR noted that "the protest took the form of impeding the activities of which they disapproved" but considered "nonetheless that it constituted an expression of opinion within the meaning of article 10" and that "The measures taken against the applicants were, therefore, an interference with their right to freedom of expression". Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

66 In *Kudrevičius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to article 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by articles 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that

heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage had not been calculated.

67 The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevičius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usukhchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance (see *Galstyan* [*Galstyan v Armenia* (2007) 50 EHRR [illegible], paras 116–117, and *Bukta* [*Bukta v*

Hungary (2007) 51 EHRR 25], para 37). The appropriate 'degree of tolerance' cannot be defined in abstracto: the court must look at the particular circumstances of the case and particularly to the extent of the 'disruption of ordinary life'."

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

69 This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of article 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to "peaceful assembly". As the ECtHR stated at para 92 of *Kudrevičius*:

> "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevičius*. At para 155 of its judgment in *Primov and v Russia* the ECtHR stated that "article 11 does not cover demonstrations where the organisers and participants have violent intentions . . . However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour". Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

70 It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society".

Factors in the evaluation of proportionality

71 In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

72 A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] PTSR 1624 (see para 17 above). The factors included "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

A 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". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is B hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

73 In *Nagy v Weston* [1965] 1 WLR 280 (see para 9 above) one of the factors identified was "the place where [the obstruction] occurs". It is apparent, as in this case, that an obstruction can have different impacts C depending on the commercial or residential nature of the location of the highway.

74 A factor listed in *City of London Corpn v Samede* was "the extent of the actual interference the protest causes to the rights of others". Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in D relation to proportionality by the ECtHR was the availability of "alternative thoroughfares where the traffic could have been diverted by the police".

75 Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevičius* in that it took into account that "the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of E another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products". So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

76 Another factor identified in *City of London Corpn v Samede* was "the importance of the precise location to the protesters". In *Mayor of* F *London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 37 it was acknowledged by Lord Neuberger MR, with whom Arden and Stanley Burnton LJJ agreed, that "The right to express views publicly . . . and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends . . . to the location where they wish to express and exchange their views". In *Sáska v Hungary* G (Application No 58050/08) (unreported) 27 November 2012, at para 21 the ECtHR stated that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11". This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia*, 7 February 2017. At para 405 it was stated that:

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> "the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target*

object and at a time when the message may have the strongest impact." (Emphasis added.)

In this case the appellants ascribed a particular "symbolic force" to the location of their protest, in the road, leading to the Excel Centre.

77 It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corpn v Samede*, namely "the extent to which the continuation of the protest would breach domestic law". So, the manner and form of a protest on a highway will potentially involve the commission of an offence contrary to section 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (Application No 25/02) (unreported) 29 November 2007, at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case "presented a danger to public order, apart from possibly blocking the tram line". So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

78 Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, paras 34–38 and *DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301, para 61.

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

79 A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the case stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the articles 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

80 The Divisional Court at paras 111–118 considered the assessment of proportionality carried out by the district judge (see para 21 above). The

A Divisional Court considered that the factors at paras 38(a) to (c) were of little or no relevance. We disagree. In relation to the factor at para 38(a), article 11 protects peaceful assembly. The ECtHR requires "a certain degree of tolerance towards peaceful gatherings", see *Primov v Russia* at para 68 above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in para 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. B There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest C was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no "clashes" with the police. The factor taken into account by the district judge at para 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corpn v Samede* (see para 17 above) in which one of the factors listed was "the extent to which the continuation of the protest would breach domestic law". The Divisional Court considered that none of these factors prevented the offence of D obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether E the appellants should be convicted under section 137 of the 1980 Act.

81 The Divisional Court's core criticism related to the factor considered by the district judge at para 38(d). We have set out in para 27 above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para 112 the Divisional Court stated that the "highway *to and from* the Excel Centre was completely obstructed" but later stated F that "members of the public were *completely prevented* from" using "the highway for passage *to* get to the Excel Centre" (emphasis added). We also note that at para 114 the Divisional Court again stated that there was there was "*a complete obstruction of the highway*" (emphasis added). In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be G used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not "completely prevented" from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that "actions" were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair was relevant: see para 75 H above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed

since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

A As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the B district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any C longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot . . . be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which D potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a E fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

F **85** The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated was "of little if any relevance to the assessment of proportionality". The factor was that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In G relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of H demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no

substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a "relatively minor issue", noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that "This was not a group of people who randomly chose to attend this event hoping to cause trouble". The Divisional Court held that this factor had "no relevance to the assessment which the court was required to carry out when applying the principle of proportionality" and that "It came perilously close to expressing approval of the viewpoint of the defendants, something which . . . is not appropriate for a neutral court to do in a democratic society". However, as set out at para 72 above, whether the appellants "believed in the views they were expressing" was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike "vapid tittle-tattle" are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

87 We would answer the second certified question "yes". The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under section 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. Overall conclusion

88 For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para 54 above; answering the certified question set out in para 7(2) "yes"; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN JSC

The context in which the certified questions arise

89 This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two

A certified questions set out in para 7 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by the Human Rights Act 1998. The European Court of Human Rights ("the B Strasbourg court") has described this important right as follows:

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted restrictively." (*Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 91.)

C

90 The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

> "1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ('DSEI') weapons fair taking D place at the centre.
>
> "2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ('lock box'), using a carabiner.
>
> "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', intended to persuade them to remove themselves voluntarily from the E public highway.
>
> "4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).
>
> "5. The left-hand dual lane carriageway of the public highway leading to F the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.
>
> "6. The appellants were charged with obstructing the highway contrary to section 137 of the Highways Act 1980. G
>
> "7. They were tried before District Judge (Magistrates' Court) ('DJ(MC)') Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.
>
> "8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under articles 10 and 11, 'on the specific facts of these H particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'." (Case stated, para 40.)

91 Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free

passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale]."

92 As Lord Sales JSC, with whom Lord Hodge DPSC agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by articles 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful. As Lord Bingham of Cornhill observed in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 127: "The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a 'constitutional shift'."

93 Article 11, which I set out in para 95 below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to article 10 of the Convention (freedom of expression), as well as article 11, but its importance as a Convention right must also be acknowledged.

94 I pause here to address a point made by Lord Sales JSC and Lord Hodge DPSC that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is article 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself article 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair—a high profile and controversial event—and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was article 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under article 11 or not.

95 Article 11 provides:

"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.

A "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 B administration of the state."

96 Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an C end marks the end of the duration of any offence under section 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under section 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales JSC and Lord Hodge DPSC in Lord Sales JSC's judgment, the appellants did not in fact intend that their protest D should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

97 It follows from the structure of article 11 and the importance of the E right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (2018) 68 EHRR 25:

F "137. The court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the G notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

The certified questions

H **98** The issues of law in the appeal, as certified by the Divisional Court, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in

particular the lower court's assessment of whether an interference with Convention rights was proportionate?

(2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time?

Overview of my answers to the two certified questions

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("*R (R)*"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("*In re B*"), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49).

(2) *Whether the exercise of articles 10 and 11 rights may involve legitimate levels of obstruction.* My answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens JJSC on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did.

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these types of appellate review is clear.

101 But there are many other standards. In appeals by case stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, section 111). As Lord Hamblen and Lord Stephens JJSC have explained, the standard of review is

A that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone* [2001] STC 214.

B

102 Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one C end of the gamut of possibilities, there is the de novo hearing and the pure correctness standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because D there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, which even though for well-intentioned reasons may also be inconsistent E with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the F evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

103 I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to G disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the H recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for

example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court.

104 As to the standard of appellate review of proportionality assessments, no one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *In re B* [2013] 1 WLR 1911, a family case. However, in *R (R)* [2018] 1 WLR 4079 this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para 64 of the judgment of Lord Carnwath JSC with whom the other members of this court agreed:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'."

105 The refinement by this court of the *In re B* test in *R (R)* as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations.

106 In short, I would hold that the standard of appellate review applicable in judicial review following *R (R)* should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it.

107 Since circulating the first draft of this judgment I have had the privilege of reading paras 49–54 and 78 of the joint judgment of Lord Hamblen and Lord Stephens JJSC. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R (R)* which I have already set

A out in para 104 of this judgment, Lord Carnwath JSC was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for B example, what actually was the legitimate aim and how far was it furthered by the action of the state and was there any less restrictive means of achieving the legitimate end.

108 In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to C analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para 102 above).

109 As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales JSC and Lord Hodge DPSC for two reasons. First, they hold that the district judge was in D error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was "completely blocked" by the appellants' actions (Lord Sales JSC's judgment, para 144). But, as para 5 of the statement of facts and issues set out in para 90 above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute E that such routes were available. As the district judge said at para 16 of the case stated:

> "All eight defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not* F *in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route*." (Emphasis added.)

110 The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge G could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete impediment to other road-users that that conclusion could be challenged H under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality

assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para 96 above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under section 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

112 This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the case stated which reads:

> "The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

> "Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance."

115 In the case stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of articles 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

116 I agree with Lord Hamblen and Lord Stephens JJSC's thorough review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales JSC and Lord Hodge DPSC consider were rightly made. So, I make only some brief concluding points at this stage.

117 Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Crim PR r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales JSC and Lord Hodge DPSC, which could enable the prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the case stated.

Conclusion

118 For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens JJSC.

LORD SALES JSC (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton

("the district judge") in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under section 137 of the Highways Act 1980 ("section 137"). The case stated procedure is governed by section 111 of the Magistrates' Courts Act 1980 and section 28A of the Senior Courts Act 1981. So far as relevant, section 111 only permits the appeal court to allow an appeal if the decision is "wrong in law": section 111(1).

120 I respectfully disagree with what Lord Hamblen and Lord Stephens JJSC say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" under section 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the

duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

125 This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (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) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and article 11, alleging that their arrest and removal by the police would be in breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an

alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

129 The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under section 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of article 10 and article 11 and therefore held that a protester had no "lawful excuse" defence under section 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

130 It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40–42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29–31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the

A proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of
B appeal from the tribunal in that case only on a point of law. Lord Bingham noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat
C greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality
D as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

E **132** Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from
F the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate court is entitled to find an error of law if the decision of the lower court or tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC,
G explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same
H approach applies whether or not CPR Pt 52.21 applies. This is an approach which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do.

In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *In re B (A Child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London Borough Council*.

133 In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with article 10 or article 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was "wrong" according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

134 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

135 By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against the police, to enforce their obligation under section 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of section 137. The approach on an appeal in such judicial review proceedings would be that set out in *In re B (A Child)* and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

136 To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *In re B (A Child)* is not inconsistent with the leading authority of *Edwards v Bairstow* [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said (p 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word "trade" or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits "within which it would be permissible to say that a 'trade' [within the meaning of the statutory rule] does or does not

A exist". If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows (p 36):

> "If the case [as stated] contains anything ex facie which is bad law and
B which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too,
C there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.
D For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

137 In a well-known passage in *Council of Civil Service Unions v*
E *Minister for the Civil Service* [1985] AC 374, 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law.
F However, as stated by Lord Bingham in the *Belmarsh* case and other authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it
G may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of proportionality.

H 138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester*

Police [2018] 1 WLR 4079 at para 64 (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens JJSC also draw attention:

> "to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

139 I find myself in respectful disagreement with para 44 of the judgment of Lord Hamblen and Lord Stephens JJSC. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow*. The effect of the rights-compatible interpretation of section 137 pursuant to section 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of "lawful excuse" in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

140 It is clearly right to say, as Lady Arden JSC emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under article 10 (para 52(iii), omitting footnotes):

> "The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and

A determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."

B Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

The decision of the district judge

141 I turn, then, to the decision of the district judge in applying C section 137, in order to assess whether the case stated discloses any error of law.

142 Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective D way: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97. The district judge directed himself correctly as to the interpretation of section 137 and the significance of an assessment of the proportionality of the intervention by the police.

143 However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at E para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para 112 of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the F proportionality of police action to clear the highway, this was a highly material feature of the case. Since it was not referred to by the district judge, he failed to take account of "a material factor" (in the words of Lord Carnwath JSC) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

G **144** Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para 114 of its judgment, the Divisional Court said:

> "In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the H police intervened to make arrests and to remove the respondents from the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not

> insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality."

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce.

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

> "The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of

A section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

B **150** In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to C have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the D Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect E would have been that there was a mistrial and further examination of the facts would have to be by way of a retrial.

151 I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the F convictions which the Divisional Court ordered should be entered.

152 In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the protesters had committed the offences under section 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens JJSC, I do not myself read the Divisional Court as saying that G points (a) to (c) in para 38 of the case stated were of little or no relevance; at para 111 of its judgment the court only said that none of those points "prevents the offence of obstruction of the highway being committed in a case such as this". The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens JJSC that the Divisional Court's assessment of point (h) at para 116 was flawed: para 80 above and *City of* H *London Corpn v Samede* [2012] PTSR 1624, paras 39–41. This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

153 I would answer the first question certified by the Divisional Court (para 7(1) above) as follows: in a case like the present, where the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *In re B (A Child)* and the cases which follow and apply it.

154 I would answer the second question certified by the Divisional Court (para 7(2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a "lawful excuse" for the purposes of section 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister

Neutral Citation Number: [2021] EWCA Civ 357

Appeal No: A3/2020/1909/CHANF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST
BIRMINGHAM DICTRICT REGISTRY
Mr Justice Marcus Smith
PT-2020-BHM-00001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2021

Before:

THE RT. HON. LORD JUSTICE LEWISON
THE RT. HON. LORD JUSTICE EDIS
and
THE RT. HON. LORD JUSTICE WARBY

- -

Between:

Elliott Cuciurean	**Appellant/ Defendant**
- and –	
(1) The Secretary of State for Transport **(2) High Speed Two (HS2) Limited**	**Respondents/ Claimants**

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- -

Heather Williams QC and Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Appellant**
Richard Kimblin QC and Michael Fry (instructed by **DLA Piper UK LLP**) **for the Respondents**

Hearing dates: 16-17 February 2021

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Approved Judgment

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Lord Justice Warby:

Introduction

1. This is an appeal against findings of contempt of court by breach of an injunction prohibiting trespass on land, and against the sanctions imposed.

2. The land is woodland near Kenilworth, Warwickshire, which has been defined for the purposes of these proceedings as "the Crackley Land". It is held by the claimants in these proceedings for the purposes of the well-known high-speed rail transport infrastructure project known for short as HS2.

3. The first claimant, and first respondent to the appeal, is the Secretary of State for Transport ("the SST"). The second claimant/respondent is the company responsible for the HS2 project ("HS2 Ltd"). The appellant is Elliott Cuciurean, an objector to the environmental impact of the HS2 project.

4. The injunction ("the March Order") was granted on 17 March 2020 by Andrews J, DBE, as she then was, on the application of the SST and HS2 Ltd. It was, in its material part, an injunction against Persons Unknown. Andrews J gave her reasons in a reserved judgment dated 20 March 2020 ("the Andrews Judgment", [2020] EWHC 671 (Ch)).

5. The appellant was not a named defendant to the claim. On 9 June 2020, however, the SST and HS2 issued a contempt application against him ("the Application"), alleging that he was one of the Persons Unknown against whom the claim was brought, and that he had wilfully broken the injunction on at least 17 occasions by entering and remaining on the Crackley Land.

6. The Application was heard by Marcus Smith J over three days, on 30 and 31 July and 17 September 2020. In his reserved judgment dated 13 October 2020 ("the Liability Judgment", [2020] EWHC 2614 (Ch)), the Judge found the appellant in breach in 12 respects. On 16 October 2020, there was a hearing on sanction. In respect of each breach the Judge made an order for committal to prison for six months, suspended for 12 months, all such orders to run concurrently. His reasoning was explained in a further judgment, dated 16 October 2020 ("the Sanctions Judgment", [2020] EWHC 2723 (Ch)).

7. The appellant's case before this Court is that the findings of contempt were wrong in law. He has four grounds of appeal. I shall come to the detail, but in summary the appellant's case is that the evidence before the Judge was incapable of establishing (1) that he encroached on the Crackley Land on any of the 12 occasions, or (2) that he had sufficient notice of the March Order to justify a finding that any such encroachment amounted to contempt. He further submits that the Judge erred in law in two respects: by requiring the appellant to establish that the position on notice was such that it would be unjust to find him in contempt, thereby reversing the burden of proof; and by leaving out of account the claimants' failure to comply with one of the service provisions of the March Order. In the alternative, the appellant contends that the penalties imposed were wrong in principle and/or excessive and disproportionate.

8. We heard argument on the appeal on 16 and 17 February 2021, following which we reserved judgment. I wish to pay tribute to the high quality of the submissions on both sides. Having reflected on the arguments, and for the reasons that follow, my conclusion is that the liability appeal should be dismissed. I would also reject the appellant's contention that his conduct did not justify any custodial sanction. But in my judgement, we should allow the sanctions appeal to the extent of reducing the sanction to one of committal for three months, suspended for the same period and on the same conditions as were set by the Judge.

The legal framework

Context

9. The following general principles are well-settled, and uncontroversial on this appeal.

(1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.

(2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol ("A1P1"). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has the right to possession, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest. Like Marcus Smith J, I would adopt paragraph [35] of the Andrews Judgment, where she said:

> "…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…"

(3) It is established that proceedings may be brought, and an interim injunction granted against Persons Unknown in certain circumstances: *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 280 [57], and cases there cited. This is a tool that can properly be used in support of the legitimate aim of protecting property rights The Court must keep a watchful eye on the use of this jurisdiction, and it may not be used where the defendants' identities are known: *GYH v Persons Unknown* [2017] EWHC 3360 (QB) [10], *Canada Goose* [82(1), (5)]. But this is a common and, in principle, an

unobjectionable mechanism for bringing proceedings against unidentified persons who will or are likely in the future to trespass on land (or commit another civil wrong), against whom a *quia timet* injunction is sought: *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429 [32], *Canada Goose* [63].

(4) Where the Court, having conducted the necessary balancing process, has granted an injunction, that order must be obeyed unless and until it has been set aside. The issue was examined, and this principle was re-affirmed, by the Divisional Court in *Re Yaxley-Lennon (No 2)* [2019] EWHC 1791 (QB) [2020] 3 All ER 477 [49]. It follows that a person accused of contempt by disobedience to an order may not seek to revisit the merits of the original injunction as a means of securing an acquittal, although these matters may in some cases be relevant to sanction.

(5) So, at the liability stage of a contempt application such as this, the underlying importance or merits of the HS2 project, the policy and the merits of the opposition to it are all irrelevant, as is the fact that the case involves speech or protest or assembly. As Marcus Smith J observed in the Liability Judgment at [10]:-

> "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.
>
> …
>
> why the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction."

The nature and purposes of the civil contempt jurisdiction

10. As the passage just cited emphasises, the essence of the wrong is disobedience to an order. Disobedience to an order made in civil proceedings is known as "civil contempt". The contempt proceedings are brought in the civil not the criminal courts. The procedure is regulated by common law and Part 81 of the Civil Procedure Rules. The proceedings are not brought by the state, through the Attorney General or otherwise, in the public interest. They are normally brought by the beneficiary of the order that is said to have been disobeyed, whose main if not sole purpose will be to uphold and ensure compliance with the order. In summary, this is "contempt which is not itself a crime": *R v O'Brien* [2014] UKSC 23 [2014] AC 1246 [42] (Lord Toulson). Hence the use of language such as "liability" and "sanction" rather than "conviction" and "sentence".

11. Sometimes, it may be possible to secure compliance by procedural means, such as striking out a case; but that will not always be possible. And the court also has an interest in deterring disobedience to its orders and upholding the rule of law. To advance these purposes the court has power in an appropriate case to impose a fine, or

a custodial order. Custody in cases of contempt is known as committal. It is not the same as a prison sentence – there are several ways in which those committed for contempt are treated differently from convicted criminals sentenced to a term of imprisonment. But it is probably for this reason that civil contempt is sometimes called *sui generis*. In no other context can proceedings classified as "civil" lead to a custodial sanction or even a fine (punitive damages are not the same thing). It is certainly for this reason that the law has imported some elements of criminal procedure.

Burden and standard of proof

12. The long-established rule is that the essential ingredients of civil contempt must be proved by the applicant to the criminal standard: *Re Bramblevale Ltd* [1970] Ch 128 (CA). The burden also lies on the applicant to satisfy the court to the criminal standard that the applicable procedural requirements have been met.

The ingredients of civil contempt

13. The ingredients of civil contempt are not laid down by statute but established by common law authorities. In this case, both parties have relied on the following summary by Proudman J, DBE in *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) [20], approved by this Court in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 [25]:

> "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."

It is accepted that the appellant had the intention required by element (b) which is, as Marcus Smith J held, an "attenuated" requirement; as indicated by the last sentence of this citation, it is enough that the alleged contemnor intended to perform the act, rather than doing it by accident. It is not in dispute that element (c) was satisfied here. It is element (a) that has been the focus of the argument before us.

Service

14. Rule 81.5 as it stood at the material time provided that a judgment or order could not be enforced by contempt proceedings unless "a copy of it has been served on the person required to … not do the act in question" or "the court dispenses with service under rule 81.8". The primary rule required personal service of the order, as defined in CPR 6.5(3). In the case of an individual, this is "(a) … leaving it with that individual". The exceptions were provided for in Rule 81.8 as follows:-

> "(1) 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.
>
> (2) 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."

15. In this case there was no question of dispensing with service. We are concerned with r 81.8(2)(b): service by an alternative method. Personal service on someone whose identity is unknown can pose difficulties. As the Court pointed out in *Canada Goose* at [82(1)], persons unknown defendants "are, by definition, people who have not been identified at the time of the commencement of the proceedings". But they must be

> "people who … 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."

The Court went on to state at [82(5)] that where alternative service is ordered, "the method … must be set out in the order." Methods of alternative service vary considerably but typically, in trespass cases, alternative service will involve the display of notices on the land, coupled with other measures such as online and other advertising.

Sanctions

16. The law as to sanctions for contempt is also *sui generis*: a mixture of common law and statute. By statute, the maximum sanction that may be imposed on any one occasion is committal to prison for a fixed term not exceeding 2 years: Contempt of Court Act 1981, s 14(1). The court retains its common law power to order that the execution of a committal order be suspended for such period or on such terms or conditions as it may specify. The only alternative sanctions of relevance are financial: a fine, or sequestration of assets. The Court may also order the contemnor to pay costs, and to do so on an indemnity basis, but this is compensation not a sanction.

17. In line with general principles, any sanction must be just and proportionate and not excessive. The purposes of sanction in cases of civil contempt are, however, different from those of criminal sentencing. They include punishment and rehabilitation, but an important aspect of the harm is the breach of the Court's order. An important objective of the sanction is to ensure future compliance with that order: *Willoughby v Solihull Metropolitan Borough Council* [2013] EWCA Civ 699 [20] (Pitchford LJ). This would explain why the laws and guidelines that govern criminal sentencing do

not apply directly, but only by analogy, and then with appropriate caution: see for instance *Venables v News Group Newspapers Ltd* [2019] EWHC 241 (QB). It would also explain why the custody threshold test is not the same (see, for instance, *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524 [40]), and why suspended committal orders feature prominently in the case law.

18. The approach to sanctions in protest cases has been considered in two cases about "fracking": the criminal appeal of *R v Roberts (Richard)* [2018] EWCA Crim 2739 [2019] 1 WLR 2577 and the contempt case of *Cuadrilla*.

(1) In *Roberts* (at [34]) Lord Burnett CJ said this:

> "… the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing."

(2) In *Cuadrilla* this Court gave guidance addressing (at [91-95]) the relevance of a contemnor's motives to the application of the custody threshold, and (at [97]) reasons for showing clemency in cases of "civil disobedience", which it defined (quoting the legal philosopher John Rawls) as

> "a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations)."

At [98], Lord Justice Leggatt referred to the "moral difference" between "ordinary law-breakers" and protestors, which would ordinarily mean that "less severe punishment is necessary to deter such a person from further law breaking". He also identified the need for judicial restraint, to help achieve one purpose of sanctions in such cases, namely

> "to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's activities are contrary to the protestor's own moral convictions."

<u>The standard of review on appeal</u>

19. An appeal of this kind is not a re-hearing, but a review of the decision of the lower court: CPR 52.21(1). This Court will interfere only if it is satisfied that the decision under appeal is "(a) wrong, or (b) unjust because of a serious procedural or other irregularity" in the proceedings below: r 52.21(3). If the lower court is found to have erred in law, the Court will be ready to intervene, if the error is material. The Court will not interfere with a finding of fact unless it determines that the "finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached": *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 [31]. The

approach to be taken is discussed in *Dupont de Nemours (EI) & Co v ST Dupont (Note)* [2003] EWCA Civ 1368 [2006] 1 WLR 2793 [94]. It will always be relevant to consider the extent to which the trial judge had an advantage by virtue of seeing and hearing witnesses give evidence. That is particularly so, where credibility was in issue.

20. A decision on sanction involves an exercise of judgment which is best made by the judge who deals with the case at first instance. An appeal court will be slow to interfere, and will generally only do so if the judge (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge: *Cuadrilla* [85].

The proceedings below

The March Order and the Andrews Judgment

21. The claim was brought, and the March Order was made, against four defendants. The third and fourth defendants were named individuals, each of whom was represented by Counsel at the hearing before Andrews J on 17 March 2020. The first and second defendants to the claim were groups of persons unknown, and unrepresented. Mr Wagner of Counsel appeared for the third defendant. He also assisted the court by drawing attention to points that might have been made on behalf of the absent persons unknown.

22. The land in respect of which the claimants sought relief was identified on two plans attached to the claim documents. Andrews J held that the claimants were "undoubtedly entitled to possession of the land" identified on these plans, and made a declaration accordingly stating, among other things, that "where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same." That having been done, the application against the named defendants was refused, on the grounds that there was "no evidence that either … was likely to trespass on the land in future if they were required by the Court to give possession back to the claimants".

23. The Judge considered *Cuadrilla* and *Canada Goose*, and directed herself as to the tests that had to be met in order to grant relief against the other defendants. She was satisfied that the defendants' identities were not known, that they were not identifiable, that there was enough evidence to demonstrate a real risk of further trespasses by persons opposed to the HS2 project, and that the claimants were likely to obtain final relief. Accordingly, she granted the injunctions sought against the second defendants, who were defined 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"

These are the parcels of land that were compendiously referred to for the purposes of the March Order as "the Crackley Land". As this wording indicates, a person could become a second defendant simply by entering on the Crackley Land without the

consent of the claimants. This is standard methodology, and no point is or could be taken upon it. Whether such a person would be in contempt is of course a separate matter.

24. The substantive elements of the March Order were contained in paragraphs 3 to 7. By paragraph 3, the second defendants were obliged forthwith to give the claimants vacant possession of all the Crackley Land. Paragraph 4 forbade the second defendants from entering or remaining upon the Crackley Land with effect from 4pm on 24 March 2020. To identify that land, a copy of Plan B was attached to the March Order. Paragraph 5 contained a limited "carve-out" to that prohibition, to protect those exercising private or public rights of way. Paragraph 6 provided that the prohibition should last until trial or further order, with a long-stop date of 17 December 2020, that is 9 months from the date of the Order. Paragraph 7.2 contained the declaration.

25. The Judge referred to the *Canada Goose* guidelines on service, and had regard to CPR 81.8. The March Order made provision for service by an alternative method, including as follows:-

> "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 …
>
> 8.4 …
>
> 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] remain in place and legible, and, if not, shall replace them as soon as practicable."

(Paragraphs 8.3 and 8.4 provided for notice to be given by email to a specified address and by advertisement on an HS2 website and a government website. There is

no suggestion that those provisions, though doubtless worthwhile, are relevant in this case.)

26. As required by the *Canada Goose* guidelines, paragraph 15 of the March Order made provision for the defendants or any person affected by it to apply to the Court at any time to vary or discharge it.

The Application

27. Part 81, as it stood at the time, required the applicant to file a Statement of Case. This alleged that the appellant had "on … 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the [March] Order by wilfully breaching paragraph 4.2 … by entering onto and remaining on the Crackley Land." A Schedule attached to the Statement of Case set out details of each of the 17 alleged acts of contempt. A Plan ("Plan E") and a photograph ("the Incident Location Photo") identified the location of each act alleged against the appellant.

The liability hearing

28. Mr Fry appeared for the respondents, Mr Wagner for the appellant. Over what he described in the Liability Judgment as two "very full days" at the end of July 2020 the Judge read, heard, and saw evidence. This included not only written and oral evidence from witnesses but also photographs, diagrams, plans, photographs, and video footage. A limited amount of further written evidence was submitted after the July hearing. Written submissions were filed, then elaborated on orally at the further 1-day hearing on 17 September 2020.

29. Two witnesses were called by the respondents, and cross-examined: Mr Bovan, a High Court Enforcement Officer, and Mr Sah, a project engineer retained by the claimants in connection with the HS2 project. Each had made one or more affidavits which stood as his evidence in chief. Among the exhibits to Mr Bovan's first affidavit was a witness statement from a process server, Mr Beim. He confirmed that service had been effected in accordance with paragraph 8 of the March Order, and his statement was not challenged. The appellant made two witness statements, which he confirmed on oath, and was then cross-examined. Evidence was adduced from a further seven witnesses in support of his case, each of whom had made a witness statement. All but one was cross-examined by Mr Fry.

The Liability Judgment

30. This contained a scrupulously careful review and assessment of the issues, evidence, and relevant law, and a clear statement of the Judge's conclusions. It is publicly available at www.bailii.org and on the judiciary website, and it is unnecessary to rehearse it in detail for present purposes. It is enough to record the following.

31. The Judge concluded that he could place "no weight" on the evidence of Mr Sah who "did not recognise the affidavit he had sworn", parts of which "appeared to have been written for him", and who "did not recognise" a plan and video exhibited to his affidavit, both provided to him by a Mr Maurice Stokes.

32. As to the other witnesses, the Judge's assessment was that with two exceptions all sought to give their evidence honestly and with the intention of doing their best to assist the court, as best they could. Mr Bovan was assessed as "a stolid witness, clearly telling what he considered to be the truth and doing his best to assist the court."

33. The relevant exception to this overall view was the evidence of Mr Cuciurean. The Judge described him as "a charming, funny but ultimately evasive witness". He was obviously very much committed to his opposition to the HS2 scheme and would go to "very considerable lengths in order to give his objections … as much force as they possibly could have". He would regard inconvenience to, or slowing down of, the scheme as positive not negative consequences of his conduct. The Judge's overall assessment was that

> "… (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. [He] 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."

34. In relation to all the witnesses, the Judge took account of the polarisation of views on the HS2 scheme, which he considered had led each side to read the worst not the best into the conduct of the other. He bore in mind that this would have affected all the evidence before him and treated the evidence with appropriate caution.

35. On the issues before him, Marcus Smith J reached the following relevant conclusions:-

(1) The procedural requirements of CPR 81 were satisfied by proof of service in accordance with the alternative method specified in paragraph 8 the March Order.

(2) (As was undisputed) the requirements of paragraph 8 of the March Order were complied with.

(3) It was not necessary, as Mr Wagner had submitted, for the claimants to prove "something more" than compliance with the service requirements of the order.

(4) It was in principle open to the appellant to assert that, despite compliance with the formal service requirements, he had not in fact had such notice of the Order as would make it just to find him liable for contempt, and to seek the setting aside of service accordingly.

(5) But the circumstances of the case did not warrant the setting aside of service or make it unjust to proceed with the committal. In this context, the Judge rejected Mr Wagner's submission that although the appellant knew there was an order in existence, he "was unaware of its terms, and that this was enough to render it unjust to proceed with the committal." The Judge found that the appellant "not only knew of the existence of the Order, but of its material terms… [which] were not to enter upon the Crackley Land." (Liability Judgment [63(11)(b)]).

(6) It was not necessary for the claimants to establish that there had been "continuing compliance" with the requirements of paragraph 10 of the March Order, nor was it relevant that compliance with those requirements had not been established to the criminal standard.

(7) The claimants had failed to prove any of the incursions that were alleged to have been made into an unfenced part of the Crackley Land, which the Judge referred to as "Area B" of "Crackley Land (East)".

(8) But the evidence established so that the Judge was sure that on 4, 5, 7 and 14 April 2020 the appellant had acted in breach of the injunction by making a total of 12 incursions into a fenced part of the Crackley Land which the Judge referred to as "Area A" of "Crackley Land (East)".

(9) The appellant had performed those acts consciously and deliberately. The law requires no more.

(10) In case that was wrong in law, the Judge made findings of fact, including findings that the appellant entered on the Crackley Land in knowledge of the order, which he "fully understood" to be that he was not to enter upon the Crackley Land.

The Sanctions Judgment

36. The Judge conducted a thorough and careful review of the authorities on the approach to sanction, of which no criticism has been advanced. He concluded that the custody threshold, as defined in the authorities, had "clearly" been crossed. He rejected Mr Wagner's submissions, that the appellant may have known he was trespassing, but did not know he was entering on land protected by the order, as having "an air of unreality". The appellant's conduct was described as a "persistent and sustained attempt to breach, and successfully to breach, the perimeter of the Land", which had forced HS2 and its staff to operate on a "high level of alert" on a 24-hour basis, leading to a considerable risk of injury and/or disturbance. This, said the Judge, was conduct which flouted the rule of law and required firm deterrence. He described the appellant's evidence as "very frank about his approach and about his motives, although less frank in other respects".

37. Having considered the harm, culpability and the aggravating and mitigating features of the case, the Judge concluded that "if this were an ordinary case" he would be minded to impose a sanction of 18 months custody. But he took account of the fact that the case was one of protest. He considered the approach of the Court of Appeal in *Roberts* and *Cuadrilla*. He characterised the case as "undoubtedly one of civil disobedience", but one that was only "just about" non-violent. Having asked himself whether the civil disobedience was "aiming to bring about a change in law or policy" his answer was "Perhaps, but only marginally or only by making the project so expensive that the political will to continue it evaporates or diminishes". In the light of this evaluation, he reduced the sanction to one of six months.

38. The Judge then considered whether this sanction should be suspended. He was satisfied that the appellant would comply with a condition, if one was imposed. He considered suspension to be an important part of the "dialogue" referred to by Lord

Burnett in *Roberts*. The committal was accordingly suspended for 12 months on condition that the appellant complied with "any order of a court in England and Wales endorsed with a penal notice and enjoining, however phrased, entry upon any land by persons including, whether named as a defendant or as a person unknown".

The appeal on liability

Grounds of appeal

39. The four grounds of appeal raise four distinct issues for review. I shall address them in the order they appear in the appeal documentation.

Ground 1: did the 12 incidents occur on the Crackley Land?

40. It is submitted on behalf of the appellant that the Judge was wrong in law to find that the 12 incidents took place on the Crackley Land as defined in the March Order. The written grounds of appeal assert that this conclusion "entailed a misapplication of the requisite standard of proof". In oral argument, Ms Williams QC clarified the appellant's position: his case is that there was no evidence capable of supporting the Judge's conclusion. It follows that we could only uphold this ground of appeal if we concluded that the Judge's findings of fact were unsustainable and perverse.

41. There are two main strands to the argument in support of this ground of appeal. First, it is said that the evidence of Mr Sah was the only evidence adduced by the claimants to establish the precise boundaries of the Crackley Land. The rejection of that evidence is said to have left the Judge with no basis for any finding to the criminal standard that Area A was within the boundaries of the Crackley Land. Secondly Ms Williams argues, on the basis of an elaborate dissection of the Liability Judgment, that the Judge failed to set out any cogent or sufficient reasons for concluding that the acts complained of were carried out on the Crackley Land. The reasons he did provide are said to be speculative and unfounded, and insufficient to satisfy the criminal standard of proof.

42. I am not persuaded by the first limb of the argument. It is true that Mr Sah was called to prove the boundaries of the Crackley Land. The demolition of his evidence was no doubt a forensic success for Mr Wagner. But it is not correct to say that his was the only evidence on the issue. Indeed, it does not seem to me that this is quite the way Mr Wagner himself approached the matter below. He did not submit, at the end of the claimants' case, that the appellant had no case to answer. In closing argument his submission was that there was no "authoritative" evidence to support this aspect of the claimants' case, or at least no sufficient evidence. This appropriately reflected the existence of evidence from Mr Bovan, and the plans, photographs, and video evidence exhibited by him, which addressed the issue quite extensively and in some detail.

43. As for the second limb of the appellant's argument, I see two difficulties with Ms Williams' approach. The first is that I find her semantic analysis artificial and ultimately unconvincing. The second is that this ground of appeal is not an attack on the sufficiency of the Judge's reasons for finding that the incidents took place on the Crackley Land. If that were the complaint, the right course would have been to ask the Judge for further reasons and/or to appeal on that ground: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409. That has not been done.

The challenge before us is a different one: that the finding was perverse, in the sense that it lacked any sufficient evidential basis; and in my judgement that is not a sustainable contention.

44. To put these points in context it is necessary to give some further explanation of the position as it stood before the Judge, and his findings.

(1) All of the incidents alleged by the respondents occurred within a section of the Crackley Land which the Judge called "Crackley Land (East)".

(2) The evidence that was before the court below, and is before us now, addressed the physical demarcation of that land. The evidence shows that – as the Judge held – Crackley Land (East) was divided by an internal boundary of Heras fencing, a form of temporary movable metal fencing. The significance of this was that to the West of the internal boundary, the land had no visible physical perimeter; there was no fence or other visible demarcation of its outer boundary. The Judge designated this Western area as Area B. The respondents' case that the appellant had breached the March Order by incursion into this area was dismissed by the Judge.

(3) To the East of the internal boundary, however, was a part of Crackley Land (East) which the Judge called Area A. This area had fencing to all sides. The fencing was of three kinds: Heras panels, 3-metre-high hoarding ("the Hoarding Fence"), and post-and-wire. The Hoarding Fence ran across the Southern boundary of Area A, close to the location of Camp 2. The case for the respondents was that this physical fencing reflected and corresponded with the boundaries edged in red on Plan B, as attached to the March Order. Thus, it was said, proof of an incursion by the appellant into areas that were fenced in on the ground was *prima facie* an incursion into the Crackley Land as defined in the March Order.

(4) There was a wrinkle, because of the "carve-out" in paragraph 5 of the Order, permitting the exercise of "rights over any public right of way over the Land". As the Judge explained in paragraphs [93-94], the respondents had provided for a temporary public right of way ("the TPROW") across Area A. This tracked the line of the Hoarding Fence. The intention had been to make it accessible from the South only, and Heras fencing was erected on either side of the TPROW to prevent users straying from it onto the prohibited part of the Crackley Land. So, if that intention had been put into effect at the material time it would have been possible to be present on the TPROW, within Area A, without breaching the March Order. But the Judge found that access to this area was not as a matter of fact available via the Southern entrance to the TPROW; the respondents had not made the TPROW available for use as a right of way. The Judge further rejected the appellant's case that, as a matter of law, he was nonetheless entitled to be on the TPROW. He found that the carve out was "not engaged". There is no appeal against these conclusions. Accordingly, the fact that several of the incidents relied on involved incursions onto or near the TPROW does not of itself assist the appellant.

(5) There is no challenge to the Judge's finding that he was "satisfied, so that I am sure", that the respondents had proved that each of these incidents, except for Incident 4, took place on "what the [respondents] contended was the Crackley

> Land." But that left the question of whether the respondents were correct to maintain that the fencing accurately designated the boundaries. The appellant was still entitled to say, however, that the incursions complained of all took place in the vicinity of the boundary fencing.

45. Mr Bovan was responsible for the security of aspects of the HS2 project. He was on site at the Crackley Land at all material times, in charge of a team. In his first affidavit, he stated that "day to day, 'on the ground' at the Crackley Land the perimeter of the land is generally marked by the three forms of fencing I have described, which he defined as "the Perimeter Fence". He went on to say that "… the Perimeter Fence marks the boundary of the Crackley Land …" and that the incidents relied on were occasions on which "the respondent crossed the Perimeter Fence without permission and was therefore entering upon the Crackley Land in breach of paragraph 4.2 of the [March] Order." It is clear from his affidavit that the land he was referring to as "the Crackley Land" is the land edged in red on the relevant plan. In his second affidavit Mr Bovan produced an incident location plan and an incident location photo, showing "the approximate location" of each incident and "an idea of where each incident occurred", in relation to the land and each other. Mr Cuciurean's case was, however, that the boundaries were wrongly demarcated and did not correspond to the land edged red on Plan B. He was unable to advance any positive evidential case on the issue, but he was entitled to put the respondents to proof.

46. So, at [103] and following the Judge went on to consider whether the respondents had proved their case, and disproved that of the appellant, to the criminal standard. Having held at [109(1)-(5)] that they had failed to do so when it came to the unfenced part of Crackley Land East (Area B), the Judge went on (at [109(6)]) to distinguish the incidents that took place in Area A. He held that that "these 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." At [109(7)] he considered and dismissed "the possibility of a mismatch between the physical perimeter of Area A … and the demarcation of the Crackley Land as set out in the order". His conclusion was that "… on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical".

47. The Judge provided this explanation of his overall conclusion:

> "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. 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.
>
> (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."

48. Ms Williams fastened on the language of likelihood in paragraph [109(7)(b)]. But the suggestion that the Judge did not apply the appropriate standard of proof cannot be accepted. At paragraph [20], early in the Liability Judgment, he directed himself as to the standard of proof. No criticism is or could be made of the terms in which he did so. The Judge later expressed himself as satisfied "so that I am sure" that the incidents took place in Area A. He expressly accepted the appellant's case that the respondents still bore the burden of proving to the criminal standard that they took place within the land edged red on Plan B. In this passage he was giving reasons for concluding that they had done so. The occasional use of language redolent of a lower standard is not enough to persuade me that the Judge did not faithfully apply the standard he had set himself, when reaching his conclusions on actual knowledge.

49. The point is reminiscent of an argument rejected by this Court in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 [2013] 1 WLR 1441 at [51-53] (in passages cited to the Judge by Mr Wagner). This Court observed that the issue for the Judge was whether the evidence, taken overall, established the ingredients of contempt to the necessary standard. The mere use of phrases which in form refer to some standard lower than certainty is not enough to cast doubt on his approach. A court may be sure of a circumstantial case, built on strands of evidence not all of which are made out to that standard. In this case, moreover, it must not be overlooked that the Judge used the words "very sure" in paragraph [109(7)(c)], and his ultimate conclusion was not that the appellant's case was improbable, but that it fell "within the realms of the theoretical".

50. In the light of Mr Bovan's affidavits, as described above, it is not possible to maintain that there was no evidence to support the Judge's conclusion. Whether Mr Bovan's evidence should be accepted and whether, if accepted, it was sufficient to prove the case, were issues for the Judge to resolve in the light of the other evidence in the case and any inferences that could safely be drawn. It cannot be said, in my judgement, that no reasonable Judge could have accepted that the respondents' case was made out. The issue for Marcus Smith J was whether he could be sure that the respondents had accurately marked the boundaries of their land, or whether they might, in a relevant respect, have made an error in doing so. It was plainly relevant to consider the inherent probabilities, so long as he kept in mind the standard of proof and did not stray from inference into the prohibited territory of speculation. In my judgement, he

observed those limits. The factors he addressed in paragraph [109(7)] were pertinent, and he was entitled to reach the conclusions he did.

51. The evidence on both sides made it perfectly clear that HS2 was a controversial project which had encountered considerable opposition, which caused disruption and expense. It was a legitimate conclusion that those responsible for the project would be scrupulous in their approach to the use of land, and take the utmost care in the enforcement of their legal rights. It was equally legitimate to suppose that opponents of the project would be quick to complain of any perceived abuse of position. There was no such contention at the hearing before Andrews J, and Marcus Smith J's observation that the boundary fences were in place at that time appears unimpeachable. The Judge was also fully entitled to infer that the owners of the land on which Camp 2 had been established were sympathetic to the protestors' cause, and for that reason would have been astute to complain if the Hoarding Fence had been erected on their land.

52. It was part of the appellant's case, as the Judge recorded, that the respondents had been asserting possessory rights over someone else's land. But trespass is an interference with possession, not with title. If, therefore, the respondents were in possession of the land, then even if they were exercising possession on someone else's land, they were still entitled to maintain an action for trespass. Ms Williams correctly submitted that the "Crackley Land" had no independent existence apart from its designation in the March Order. The extent of the land encompassed in the order is therefore a question of construction of the plan attached to that order.

53. As Lewison LJ pointed out in the course of argument, where the precise location of a boundary is disputed in a conveyancing context, the court will invariably look at the topographical features on the ground at the time of the conveyance; existing boundary features such as fences, hedges, or ditches would always be of weight: see, by way of example, *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894 (HL) at 987C (Lord Hoffmann, with whom the other Members of the Appellate Committee agreed), *Pennock v Hodgson* [2010] EWCA Civ 873 at [9(3)] (Mummery LJ). The standard of proof may differ, but there does not seem to be any reason why the fact that the point arises in the context of a contempt application should change that basic approach. On the Judge's findings, the boundary fences in place at the time of the incidents were also in place at the time of the March Order. It was therefore a legitimate interpretation of the plan attached to that order that the boundary fences were intended to demarcate the land included in the scope of the order.

Ground 2: was it incumbent on the claimants to prove "something more" than service in accordance with the March Order?

54. The Judge found that the service requirements of the March Order reflected an unimpeachable application by Andrews J of the *Canada Goose* guidance, and that those requirements were complied with. The Judge noted that neither Counsel had been able to identify any authority supporting the existence of any requirement of "knowledge" of the order, independent of the requirement that the order be served. He found it hard to see "how there is space" for the existence of any such requirement. He held that it was for the judge making the order to determine whether any and if so what order for service by an alternative means was appropriate. But he did not consider that the question of service could be "altogether disregarded" on an

application for committal. He concluded that, despite the absence of any rule or authority to this effect, the right approach in principle was that "provided the person alleged to be in contempt can show that the service provisions have operated unjustly … the service against that person must be set aside."

55. The complaint is that this involves an impermissible reversal of the burden of proof, requiring the appellant to prove a case for setting aside service on the grounds of injustice. The Grounds of Appeal assert that "The correct test is whether there was good service or not, which is for the claimant to prove beyond reasonable doubt, including negativing any suggestion of injustice raised by the defendant."

56. This is a problematic formulation. It assumes that in order to establish "good service" a claimant must prove not only that what was done complied with the rules or the relevant Court order but also something more, including (if the issue is raised by the defendant) that proceeding on that basis is not unjust. As the Judge observed, there is no authority to support any such proposition. More than that, the proposition appears to be contrary to authority. The effect of the authorities was summarised by Lord Oliver in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 181, 217-218:

> "One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order … it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited."

57. The proceedings in *Cuadrilla* were conducted on that basis. It was common ground that the ingredients of civil contempt were those identified in *Farnsworth* (above) but it was understood that proof that these were met would not necessarily establish knowing disobedience to the order. HHJ Pelling QC addressed the possibility that "the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed". He identified this as an issue "relevant to penalty if that stage is reached", observing that in such a case "it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…": [2019] E30MA3131 [14]. On appeal, this Court endorsed this as a "sensible approach": *Cuadrilla* (above) [25].

58. These authorities indicate that (1) in this context "notice" is equivalent to "service" and *vice versa*; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non-compliant with the order; (3) there is no further requirement of *mens rea*, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt. I agree also with the Judge's description of the

appellant's argument below: "it replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." But nor am I comfortable with the notion that service in accordance with an order properly made can be set aside if the respondent shows that it would be "unjust in the circumstances" to proceed. This is not how the Court saw the matter in *Cuadrilla*, nor is it a basis on which good service can generally be set aside. It also seems to me too nebulous a test.

59. Ms Williams may have harboured similar misgivings, as the argument she advanced at the hearing was not the same as the written ground of appeal. She accepted that the requirements of *knowledge* and *intention* in this context are limited in the ways I have indicated; but she invited us to find that the requirement of *notice* calls for more than proof that the order which it is sought to enforce was duly served. Her submission was that, the aim of service being to bring the nature and contents of the order to the attention of the respondent, it must be incumbent on the applicant to establish in addition (and to the criminal standard) that the steps taken were in fact effective for that purpose, or could reasonably be expected to be so. In support of this argument, Ms Williams referred us to *Cuadrilla* [57]ff. She cited the words of Lord Sumption in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 [2019] 1 WLR 1471 [21], those of Longmore LJ in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 [34(3)], and paragraphs [46], [82(1) and (4)] of *Canada Goose*.

60. I do not find these arguments persuasive. The cases cited were concerned with the form an order should take, and the criteria to be adopted when considering what, if any, provision to make for alternative forms of service in proceedings against persons unknown. The cases make it clear that any provision for alternative service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. But that is a standard to be applied prospectively. I can see that, in principle, a defendant joined as a person unknown might later seek to set aside or vary an order for service by alternative means, on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable. But that is not this case. It is accepted that the relevant criteria were correctly identified and faithfully applied by Andrews J. None of the cases cited supports the further proposition advanced by Ms Williams, that on a committal application such as this the applicant and the Court must revisit the position retrospectively. Nor does it seem to me that we should adopt such a criterion even if (which I doubt) we were free to do so. It seems most unsatisfactory. Indeed, the concept of a hindsight assessment of what could reasonably be expected to happen is hard to grasp. It seems to me that in substance and reality the submission is that the applicant must prove actual notice, which is not what the authorities say.

61. Nor do I find persuasive Ms Williams' reliance on *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (QB). In that case, Chamberlain J held that where the respondent to a contempt application raises the defence that compliance with the order was impossible the applicant bears the onus of proving the contrary, to the criminal standard. The present case is not one of alleged impossibility. Ms Williams has failed to identify anything on the facts here that is akin to a defence and might be regarded as analogous.

62. One can perhaps understand the unease referred to by the Judge at the notion that a person may be held in contempt of court even though he is not shown to have had

actual knowledge of the relevant order, or its relevant aspects. For my part, I doubt this is a dilemma to which a solution is required. The situation does not seem likely to occur often. And if it does then, as this Court indicated in *Cuadrilla*, no penalty would be imposed. I do not see that as problematic in principle, especially as this is a civil not a criminal jurisdiction. If there is a problem, my view is that it cannot properly be resolved by the adoption of Ms Williams' approach. Various other procedural mechanisms were canvassed as possibilities during argument in this case. They included an application to set aside the original order, with its deeming provision, and an application to stay or dismiss the contempt application as an abuse of process – both matters on which the onus would fall upon the respondent to the application. This all seems to me to be needlessly complex. But I do not think it necessary to reach a conclusion. On the evidence before the Judge, and in the light of his findings of fact, the appeal would fail even if we accepted Ms Williams' submissions on the requirement of notice.

Ground 3: did the appellant have sufficient knowledge or notice of the March Order?

63. In case he was wrong on the law, the Judge dealt with the issue of knowledge in paragraph [124] of the Liability Judgment, as follows:-

> "(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 … 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."

64. The Grounds of Appeal assert that these findings involved errors of law. It is said that the appellant could not have had sufficient knowledge to justify a finding of contempt unless he knew (1) the fact that he could not enter the Crackley Land; (2) the map of the Crackley Land; and (3) the penal notice. It is alleged that there was no basis for finding that he had knowledge of all such matters. The Grounds of Appeal also assert that the Judge "misapplied" the standard of proof insofar as he concluded that the appellant knew that the March Order prohibited entry on the Crackley Land.

65. Elaborating these grounds in oral submissions, Ms Williams advanced a detailed critique of paragraph [124] of the Liability Judgment. She submitted that paragraph (1) went only to trespass, paragraph (2) to intention, and only paragraph (3) dealt with knowledge. She argued that the Judge's conclusion as to the appellant's knowledge was ambiguous and insufficient. To the extent it was a finding of actual knowledge, it could not be supported. It was not possible to identify any findings about "events described in this judgment" that could support the conclusion. She drew attention to the words "may well have", in paragraph [124(3)] pointing out that this is not the language of the criminal standard of proof. She also referred us to passages in the Sanctions Judgment, of which the same observation could be made. Her overall submission was that on a proper analysis the Judge had not made any or any clear or sufficient findings to the appropriate standard.

66. In my judgement, the appellant's points are largely semantic ones and lack substantive cogency.

67. As for the standard of proof, it is sufficient to repeat what I have already said about the use of language. As for what had to be established, it is of course true that the Judge used the term "the Crackley Land" and that this is a defined term for the purposes of the March Order. But one should not be beguiled by these linguistic points. It by no means follows that, to avoid a knowing breach of the Order, a defendant needs to read the definitions or to study Plan B. It would be enough for such a person (a) to know that there was a Court order in existence, prohibiting him from entering certain land; and (b) to enter on land in the knowledge that it fell within the scope of the prohibition. Reading paragraph [124] in the context of the Liability Judgment as a whole, I consider that it expresses with sufficient clarity the Judge's conclusions that both these requirements were satisfied in the case of this appellant, on every occasion when the appellant encroached on what as a matter of fact and law was "the Crackley Land" for the purposes of the March Order.

68. That leads to the issue of whether those findings were open to the Judge. As with Ground 1, this is not a question of whether his reasoning is open to criticism as insufficiently detailed. Again, as Ms Williams candidly accepted before us, the true issue is whether the Judge's findings were perverse; put another way, whether there was any evidence on the basis of which he *could have* made the necessary findings to the applicable standard. I have no doubt that there was sufficient evidence.

69. Some key features of the factual scenario were not in dispute. The appellant, concerned that the HS2 project was causing environmental damage, had joined activists at a camp at Harvil Road in the Midlands. Having learned more about the project, he arrived at Crackley Wood on the evening of 4 April 2020. By this time the original protest camp (Camp 1) had been removed. The appellant went to a protest camp (Camp 2) that was in a field on privately owned land, and remained, in his words, "the activist camp". His reason for being there was to make his views known, and he was one of a number of individuals who were there for that purpose. Adjacent to Camp 2, when he arrived, was the 3-metre- high Hoarding Fence. This could not be mistaken for anything but an outward and visible sign that those in possession of the land beyond it were asserting their rights to maintain that possession.

70. On the Judge's findings, the appellant entered the Crackley Land on 12 occasions, by climbing over the Hoarding Fence, or by getting round it by using a gap between the

Hoarding Fence and the adjacent Heras fencing which had been created by persons unknown.

71. The evidence before the Judge included the following:-

(1) There was uncontested evidence from Mr Beim (via Mr Bovan) that the service provisions contained in paragraph 8 of the March Order were complied with in the following ways:

(a) By 1.36pm on 25 March 2020, 17 bundles comprising copies of the March Order, Warning Notice, and A3 size colour maps were in place affixed to stakes, fences and entrance points on the perimeter of the Crackley Land. Mr Beim produced a map of the locations of these notices and gave unchallenged evidence that the documents "were displayed at all appropriate points via which any persons would usually seek to gain access" to the land. The plan was supplemented by photographs of these documents in place.

(b) At 12:40pm on the same day Mr Beim attended at the "encampment" and, in the presence of three adult males, placed one copy of a further bundle comprising the order and colour plans and Warning Notice in a prominent position on a piece of timber.

(c) Mr Beim took similar steps to serve the Order at the Cubbington Land as defined in the March Order.

(2) There was evidence of a random spot check of the Crackley Land signage on 14 June 2020, revealing that a substantial number of the notices remained in the relevant area, as the Judge found "perhaps fewer than originally placed but not materially so". Mr Bovan's evidence, which the Judge accepted, was that copies of the Order and A3 Injunction Warning notice remained in place, at that date: [72(5)].

(3) Mr Bovan's evidence was that in addition to fixing copies of the Order and the Warning Notices in accordance with the service requirements of the March Order, the respondents had positioned trespass notices around the Crackley Land at regular intervals. Photographs were exhibited. Mr Bovan's second affidavit stated that there were 56 Trespass signs on the perimeter of or throughout the Crackley Land.

(4) Mr Bovan's first affidavit asserted that he did not think it would have been possible to enter Camp 2 without seeing notices relating to the Order. His second affidavit explained that one of the photos exhibited was taken from a video of 26 March 2020, showing signs at the entrance to the camp, and that these remained up until at least 9 April 2020.

(5) Mr Bovan gave evidence that the Order was explained orally to the appellant on the evening of 4 April 2020 by the night shift team, and that on each of the further occasions on which the appellant made incursions onto the Crackley Land he was again reminded of the Order. In his second affidavit Mr Bovan asserted that he had personally and repeatedly informed the appellant of the injuncted land and his colleagues had done the same. He referred to one instance in which he had been

recorded doing so. By reference to other video footage (from 21 April 2020) Mr Bovan gave a detailed account of how he provided a detailed explanation of the injuncted land to others "within earshot of" the appellant, who was seated on the ground immediately next to him as he did so.

(6) Mr Bovan's evidence was that despite repeated warnings that he was breaching the injunction, the appellant had never approached Mr Bovan or his colleagues to ask for further detail, and had ignored them when they offered to explain things to him.

(7) Mr Bovan's second affidavit also contained evidence from video footage of the incident on 15 April 2020, to the effect that the appellant could be seen climbing over the post and wire fence on the perimeter of the Crackley Land, then walking past a red Trespass sign to which was attached an A3 Injunction Warning Notice, so positioned that the appellant would have seen it just before climbing over the fence. Mr Bovan asserted that there was "no reasonable basis upon which [the appellant] could have considered that he was not on the Crackley Land".

72. The appellant's written evidence included the proposition that Mr Bovan and his team used the phrase "writ land" to describe the HS2 land. He referred to the evidence of posts with "high court injunction in force" on them and a "small map". He denied that he had seen any of these "*around the camp*" and said "I think there may have been one on the other side of the site, but I did not see it *up close*" (my emphasis). He said he did not recall the injunction being explained to him by anybody on 4 April. He said he had asked for but been refused maps and plans. He had asked one individual whether he could tell him where the site boundaries were, and had been told that the person had a map at home which he would give the appellant next time. This never happened.

73. On behalf of the appellant, Counsel stressed that the respondents accepted that they could not prove that the appellant saw or read the order. Ms Williams accepted that the order itself was clear and unambiguous. She submitted however that the evidence did not go further than showing that the appellant had received a "brief garbled" account of its content from "someone who is not a lawyer". Ms Williams also highlighted a number of points and items of evidence that, she suggested, tended to undermine the respondents' case and support that of the appellant. She submitted that Mr Beim's plan showed there were gaps between the notices, such that a person could have walked past them without noticing. Mr Bovan accepted in cross-examination that some of the notices were taken down by protestors (though later replaced), and that it would be possible to walk into the site via the South boundary without seeing an injunction notice. The appellant's evidence was that "it is not right to suggest that there are copies of the order clearly put up", or any that could be seen by anyone entering the field.

74. In the final analysis none of these, or the other points raised on the evidence, can be enough to show that the Judge's findings were perverse. The fact that the Judge did not find the appellant's evidence to be dishonest does not mean he was bound to accept the appellant's account of events. He clearly rejected that account in certain respects, preferring the evidence of Mr Bovan on matters in dispute. That is entirely consistent with the Judge's careful evaluation of the reliability of these and other witnesses. Mr Bovan's concession in evidence that something *could* have happened

did not compel the Judge to find that it did happen, or even that it could have. There was, in my judgement, not only sufficient but ample evidence to support the Judge's factual conclusions on actual knowledge.

75. I remind myself that even if all of the above were wrong, the Grounds of Appeal that I have been addressing reflect the appellant's original case, that the law requires proof of actual knowledge. On the appellant's present legal case the test is one of "notice" and it would be enough if, with hindsight, the steps taken pursuant to paragraph 8 of the March Order could reasonably be expected to bring to the appellant's attention the existence of the order and the substance of its terms. At one point in her submissions Ms Williams complained that the Judge had made no finding on that issue. As I think she recognised, however, that was unfair. This was not an issue raised before the Judge. In any event, in my judgement, there could only be one answer to the question. Andrews J had made the assessment prior to service. There was nothing in the evidence before the Judge to cast doubt on the reliability of her forecast. On the contrary, there was ample material to support it. It was undisputed that the respondent actually did what paragraph 8 of the March Order required, and it is plain to my mind that it remained reasonable at all relevant times to suppose that this would be sufficient to draw the appellant's attention to the fact of the order and to the nature, substance and effect of the relevant provisions.

76. Finally, on this ground of appeal, the Judge did not find that the appellant was aware of the penal notice. However, the contention in the Grounds of Appeal that this is a necessary finding was not, as I understood it, part of Ms Williams' eventual case as to the law. It is unsupported by authority, and I see no merit in it. This would go beyond the CPR which require proof that the order bore a penal notice, and that the order was served, and not more. The Judge's findings that both those requirements were satisfied are not contested, and clearly correct.

Ground 4: was it necessary or relevant to find that paragraph 10 of the March Order had been complied with?

77. I can deal with this more shortly. The written ground of appeal is that compliance with the checking requirements of paragraph 10 of the March Order was "a necessary condition of service". The Judge having found that he could not be sure there had been compliance, it followed that there was "no longer proper service". This is unsustainable. As Ms Williams accepted, the structure of the March Order is clear. Service had to be effected in the manner specified in paragraph 8. Paragraph 9 provided that if that was done, service was deemed to be good. Paragraph 10 is not a condition of good service, but a stand-alone requirement. It is not possible to construe the Order in any other way.

78. I believe this had been recognised in advance of the hearing before us, as the appellant's Skeleton Argument advanced a different contention. This was that "implicit in the grant of an alternative form of service to personal service is the understanding that it will only be effective if strictly complied with in all respects." This does not seem to me to be consistent with the appellant's revised version of Ground 3. No authority has been cited to support it. In any event, I cannot agree with it. Framed in terms of an implicit understanding, it is much too vague to be an acceptable principle of the law of service. At the same time, it places form above substance. As Ms Williams was driven to concede, on this approach a technical and

inconsequential default in the checking process would enable a contemnor who contravened an injunction with full knowledge of its precise terms to escape liability.

79. This does not mean that paragraph 10 is an unimportant provision. It was plainly inserted as a procedural mechanism to assist in ensuring that the Persons Unknown got to know of the order, and had the means of informing themselves of its content. Any shortfall in compliance was available to be relied on as evidence that the defendants did not gain actual knowledge, which at least goes to culpability and sanction. It may be that other consequences might in principle follow a serious case of non-compliance with such a procedural requirement. That could, for instance, make it an abuse to pursue a contempt application based on alternative service, or place the respondents themselves in contempt. But on the facts of this case, nothing of the kind can be suggested.

The appeal on sanction

80. There are two grounds of appeal. **Ground five** is that the sanction was disproportionate: there should not have been a custodial sanction, or alternatively the period of 6 months was in all the circumstances excessive. **Ground six** is that the Judge erred in principle, by drawing a distinction between the appellant's conduct, and the kind of civil disobedience referred to by Leggatt LJ in *Cuadrilla*.

81. I see no grounds for disagreement with the Judge's conclusion that the custody threshold was crossed in this case. Contrary to the submissions of Ms Williams, there is no precise read-across from the statutory custody threshold in criminal sentencing and the standard that applies in contempt: see [18] above. The Judge cited binding authority on the right approach in the present context, and applied it conscientiously. It is, with respect, untenable to suggest that this case could and should have been dealt with by some lesser sanction. The submission that a mere finding of contempt would have been sufficient pays no heed to the need for deterrence, and the importance of upholding the rule of law. I am not impressed with the submission that in arriving at the period of six months the Judge took too literal an approach to the number of contempts, given that there were several incidents close in time. Again, this is to examine the reasoning under a microscope, when what matters is the overall outcome.

82. I have however concluded that the Judge's approach was flawed in two respects. First, when assessing the overall seriousness of the contempts, before applying what might be called the "*Cuadrilla* discount", he took too high a starting point. Granted, there were multiple instances of deliberate defiance of the March Order. The Judge was entitled to regard this as a serious case of serial disobedience. But his conclusion that in an "ordinary" case the sanction would have been one of committal for 18 months strikes me as markedly too severe, in the context of a maximum penalty of two years. Secondly, I would accept that the Judge was rather too ready to draw distinctions between the present case and the paradigm identified by Leggatt LJ in *Cuadrilla*. I cannot agree that this appellant's aims or methods place him outside or at the very margins of the class of persons "aiming to bring about a change in law or policy". His behaviour was intended to obstruct the HS2 project. It was not engaged in for its own sake. I find it hard to agree that his conduct was likely or intended to make it financially or politically impossible to persevere with the HS2 project, or that this would take it outside the *Cuadrilla* category, if I can call it that. The appellant used a

degree of force to achieve his aims, but it would be a misuse of language to term it "violence".

83. The result of these two flaws is, in my judgement, a period of committal that is greater than necessary or proportionate for the purposes in view. I would reduce the starting point and afford a slightly greater discount, with the result that the sanction is one of 3 months' committal, suspended on the terms and for the period identified by the Judge.

Lord Justice Edis:

84. I agree.

Lord Justice Lewison:

85. I also agree.

IN THE HIGH COURT OF JUSTICE **Claim No. QBD-2022-BHM-000044**
BIRMINGHAM DISTRICT REGISTRY

B E T W E E N

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

Claimants

-and-

PERSONS UNKNOWN and Others

Defendants

CLAIMANTS' SKELETON ARGUMENT ON THE MERITS

For hearing at 10.30 am on 26th, 27th and 30th May 2022

INTRODUCTION

1. The Claimants' first skeleton argument sets out relevant legal principles relevant to this application, dated 18th May 2022. This second skeleton argument addresses the merits of the Claim and the substantive issues raised by Defendants. The aggregate length of the two documents exceeds 20 pages. Having regard to the nature of the case and the intention in setting out relevant legal principles in the first skeleton argument, the Court is asked to give permission to rely on both documents.

2. The Claimants seek:

    - An injunction, including an anticipatory injunction[1], to protect the HS2 Scheme.
    - Orders for alternative service; and
    - As the Claimants have previously been granted several orders prohibiting trespass and nuisance in relation to parts of the HS2 Land,[2] the Claimants ask that these be discharged (along with discontinuance of the underlying proceedings) upon the grant of the order that is now applied for[3].

[1] Formerly referred to as a *quia timet* injunction
[2] See Particulars of Claim, paragraph 7.
[3] A draft of which was filed with the application, and which has been amended following the Directions hearing.

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3. The Defendants who have been identified and joined individually as Defendants to these proceedings, are referred to as "**the Named Defendants**"; whilst reference to "**the Defendants**" generally, includes both the Named Defendants and those persons unknown who have not yet been individually identified. The names of all the persons engaged in unlawful trespass were not known at the date of filing the proceedings (and are still not known). That is why different categories of "persons unknown" are identified as Defendants 1 to 4. That was and remains an appropriate means of seeking relief against unknown categories of people in these circumstances.[4]

4. This skeleton argument deals with:

[1] Trespass
[2] Nuisance
[3] A real risk of continued unlawfulness
[4] Reasons to grant the order against known defendants
[5] Reasons to grant the order against persons unknown
[6] Scope
[7] Service and knowledge

5. In broad terms, the questions arising are: (1) have there been unlawful acts which justify the grant of relief; (2) do the circumstances and history further justify relief in anticipation of those acts continuing; (3) are the defendants correctly described? If the answer to those broad questions is 'yes', then the further issues are: (4) whether the proposed order would operate fairly and proportionately, and; (5) without unintended consequences for lawful activity?

6. The purpose of the order, if granted, is simply to allow the First and Second Claimant to get on with building a large piece of linear infrastructure. Its purpose is not to inhibit normal activities generally, nor to inhibit the expression of whatever views may be held. The fundamental disagreement with those who appear to defend these proceedings is as to what constitutes lawful protest. The Claimants say that they are faced with deliberate interference with their land and work with a view to bringing the HS2 Scheme to a halt.

[4] See *Boyd & Anor v Ineos Upstream Ltd & Ors* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose v Persons Unknown* [2020] EWCA Civ 303 at [82] (as we deal with in detail below in Part 5 of this skeleton argument).

7. That is not lawful, and it is not lawful protest.

8. A summary schedule of the points taken by Defendants is appended to this skeleton argument.

9. On Monday 23rd May the Claimants will provide the Court with an Administrative Note which will include a consolidated list of suggested reading, having regard to any skeleton argument received from any Defendant. It will also include an update of those Defendants who have, by then, signed undertakings that they will not trespass or otherwise continue to interfere with the HS2 Scheme and so have been removed from the list of named Defendants.[5]

[1] TRESPASS

The Claimant's Rights to the HS2 Land

10. As set out in **Dilcock 1 [B145 onwards] and Dilcock 4 [B179]**, the HS2 Scheme at present consists of Phases One and 2a, pursuant to the HS2 Acts. Section 4(1) of the Phase One Act gives the First Claimant power to acquire so much of the land within the Phase One Act limits as may be required for Phase One purposes. The First Claimant may acquire land by way of General Vesting Declaration ("GVD") or the Notice to Treat ("NTT") and Notice of Entry ("NoE") procedure. Section 15 and Schedule 16 of the Phase One Act give the First Claimant the power to take temporary possession of land within the Phase One Act limits for Phase One purposes.

11. In relation to Phase 2a, section 4(1) of the Phase 2a Act gives the First Claimant power to acquire so much of the land within the Phase 2a Act limits as may be required for Phase 2a purposes. As with Phase One, the First Claimant may acquire land by way of the GVD, and the NTT and NoE procedures. Section 13 and Schedule 15 of the Phase 2a Act give the First Claimant the power to take temporary possession of land within the Phase 2a Act limits for Phase 2a purposes.

12. In addition to the powers of acquisition and temporary possession under the Phase One Act and the Phase 2a Act, some of the HS2 Land has been acquired by the First Claimant under the statutory blight regime pursuant to Chapter II of the Town and Country

[5] Those undertakings, received to date, are at **[D/18; D/22]**.

Planning Act 1990. The First Claimant has acquired other parts of the HS2 Land via transactions under the various Discretionary HS2 Schemes set up by the Government to assist property owners affected by the HS2 Scheme.

13. Further parts of the HS2 Land have been acquired from landowners by consent and without the need to exercise powers. To be clear, there are no limits on the interests in land which HS2 Ltd may acquire by agreement. Finally, the Claimants hold some of the HS2 Land under leases – most notably, the First Claimant's registered office at Snowhill in Birmingham and its office at The Podium in Euston, both of which have been subject to trespass and (in the case of The Podium) criminal damage by activists opposed to the HS2 Scheme (the incident of trespass and criminal damage at The Podium on 6 May 2021 is described in more detail in **Jordan 1** [29.3.2; **B/10/095**]).

14. The entitlement to possession can be seen in the exhibits to **Dilcock 1**: **JAD1 [Bundle F]**, **JAD2 [Bundle E]**, **JAD3 [C/vol B/5/284 onwards]** (which are also provided through online links[6]). The land is coloured as follows:[7]

    a. Pink land: of which the Claimants are either owner with freehold or leasehold title. The basis of title is explained in **JAD2 [Bundle E]**, (Table 1 reflects land acquired by the GVD process, Table 3 that acquired by other means – e.g. private treaty).

    b. Green land: in respect of which the First Claimant is entitled to temporary possession pursuant to section 15 and Schedule 16 of the Phase One Act and section 13 and Schedule 15 of the Phase 2a Act. (Table 4 of **JAD2: E085-153**).

15. There is no doubt that the Claimants have the necessary rights in the HS2 Land to obtain the relief sought. The Court can therefore be satisfied that the Claimants are entitled to possession of all of the land comprising the HS2 Land.

[6] https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings
[7] Further detail is provided at **Dilcock 1**, paragraphs 28-33.

The evidence of trespass

16. **Jordan 1 [B/10/065 onwards]** contains ample evidence of trespass by (primarily) persons unknown both on the Cash's Pit Land, and elsewhere along the HS2 Scheme route. Whilst the focus of the trespass has been various 'protest camps', it has not been confined to those sites, and activists have ranged widely across the HS2 Land at times to carry out their direct-action activities.

[2] NUISANCE

17. The HS2 Scheme is specifically authorised by Acts of Parliament. Notwithstanding its democratic legitimacy and public interest, the HS2 Scheme has been subjected to a long running campaign of "direct action" – that is, action which interferes with the HS2 Scheme. These actions began in October 2017 and have continued. They have become more serious in terms of damage, danger, delay and financial impact.[8] Between Q4 of 2017 and December 20211, 1007 incidents have had an impact on operational activity. Up to December 2021, it had cost £121.62 million (for Phase One alone) to deal with anti-HS2 direct action. These costs are borne entirely by the public purse.[9]

18. There has been significant violence, criminality and risk to the life of the activists, HS2 staff and contractors.[10] This has given rise to very serious safety concerns.

19. As noted in **Jordan 1** at [12; **B/10/069**], the direct action has appeared less about expressing the activists' views about the HS2 Scheme and more about causing direct and repeated harm to the HS2 Scheme with the overall aim of "stopping" or "cancelling" the HS2 Scheme.[11] As a number of courts have observed when dealing with injunction applications related to the HS2 Scheme, that is not how decisions are made in a democratic society.[12]

20. Of the many incidents which have occurred over recent years, **Jordan 1** provides

[8] though the actual number is likely much higher (see **Jordan1**, para 13)
[9] **Jordan 1**, para. 15.
[10] 129 individuals were arrested for 407 offences from November 2019 - October 2020; **Jordan 1**, paras. 14 and 23.
[11] See for example the remarks of D5 quoted at **Jordan 1** [21.2].
[12] See for example, Andrews J. (as she then was), in the Cubbington and Crackley judgment: *SSfT and HS2 v Persons Unknown* [2020] EWHC 671 (Ch) at [36] and [42]. And see *DPP v Cuciurean* at [84].

examples of the unlawful conduct. These include incidents such as **[B/10/082 onwards]**:

i. Using lock-on devices to attach to tunnel shoring and to other activists to resist removal from within dangerous hand-dug tunnels on trespassed land at Euston Square Gardens (**Jordan 1** [29.1.8]), and attacking with a wooden stick those attempting to remove a protestor from the tunnels (**Jordan 1** [55.5]).

ii. Significant abuse including verbal abuse, slapping, punching and spitting in the face of HS2 security officers, in the height of the covid pandemic – (**Jordan 1** [29.1.10(c)]); assaulting a security officer resulting in hospital attention being required (**Jordan 1** [29.8.2]); throwing human waste and a smoke grenade at HS2 contractors (**Jordan 1** [29.8.3]); and carrying weapons including knives and machetes whilst trespassing on the HS2 Land (**Jordan 1** [29.8.4]).

iii. Obstruction of access to HS2 sites including lying down in front of compound gates (**Jordan 1** [29.2.1]), dumping a boat in front of a site entrance (**Jordan 1** [29.2.4.1]) and staging a "die-in" by lying on the ground blocking both lanes of a public highway near to a site entrance (**Jordan 1** [29.2.4.3]).

iv. Damage to buildings and equipment including: breaching and damaging fencing followed by assault of 2 security officers, starting of a fire in a skip, 6 vehicles and a marquee damaged, and a number of electronic items stolen (**Jordan 1** [29.1.1]); cutting hydraulic hoses risking spillage (**Jordan 1** [29.3.1]); and scaling one of HS2's offices in central London, graffitiing and smashing windows (**Jordan 1** [29.3.2]).

v. Climbing on a lorry of tarmac at a point which obstructed access to works being undertaken during a period of possession of the M42, bring work to a halt (**Jordan 1** [29.1.4])

vi. Environmental damage including 'spiking' trees with nails (both those scheduled for felling and others) (**Jordan 1** [29.4.1])(**Dilcock 4** [42] **[B/14/209]**; interference with ecological mitigation works (**Jordan 1** [29.4.2]); waste and fly tipping (**Jordan 1** [29.4.3]).

vii. An activist climbing underneath and attaching to a 13-ton tracked extraction vehicle stationed on soft ground, putting life at considerable risk through potential for crushing (**Jordan 1** [29.1.5]).

viii. Scaling a 150ft crane in the early hours of the morning with no safety equipment, causing danger to passing air traffic (**Jordan 1** [29.1.7]).

ix. Constructing a defensive tower on the HS2 Land at Small Dean to resist removal, protected with barbed wire and booby-trapped with expanding foam and razor wire to create danger and delay for those seeking to evict the camp (that eviction cost £5m and took over a month) (**Jordan 1** [29.6.3] and [58]).

x. Digging defensive tunnels and structures at Cash's Pit, entering and remaining in these tunnels to resist removal, in breach of the possession order and injunction recently granted over this land (latest update on attempts to remove activists from Cash's Pit Land set out in **Dilcock 4** [33]-[43] **[B/14/197]**).

These matters constitute a nuisance.

[3] A REAL RISK OF CONTINUED UNLAWFULNESS

21. The trespass and nuisance will continue, unless restrained, as shown by by **Jordan 1 [B/10/072 onwards]**:

15.1. D27, after being removed from the tunnels at Euston Square Gardens in February 2021 stated "*this is just a start*" (**Jordan 1** [21.3]).

15.2. D6 on 23 February 2022 stating that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they "*will just hit all the other gates*" and "*if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate*" (**Jordan 1** [21.12]).

15.3. D6 on 24 February 2022 stating if the Cash's Pit camp is evicted, "*we'll just move on. And we'll just do it again and again and again*" (**Jordan 1** [21.13]).

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15.4. D17 said in a video on 10 March 2022: "*let's keep…causing as much disruption and cost as possible. Coming to land near you*" (**Jordan 1** [21.14]).

15.5. Further detail is given of recent and future likely activities around Cash's Pit and other HS2 Land in the Swynnerton area at **Jordan 1** [72]-[79].

22. The possession order and injunction made by the Court on 11 April 2022 was sealed and sent to the Claimants for service. A number of individuals remain in occupation of the unauthorised encampment and there is evidence of breaches of the injunction discussed at **Dilcock 3** [46; **B/13/195**], and **Dilcock 4** [36; **B/14/208**]. This continues to demonstrate flagrant disregard for orders of the Court.

23. The Claimants reasonably anticipate that the activists will move their activities to another location along the route of the HS2 Scheme. Given the size of the HS2 Scheme, it is impossible for the Claimants to reasonably protect the entirety of the HS2 Land by active security patrol or even fencing.

Previous injunctive relief

24. The Claimants have obtained a number of other injunctions in respect of HS2 Land. These are detailed in **Dilcock 1** at [37] – [41] **[B/11/155]**.[13]

25. Generally, the Court expects its orders to be obeyed. The pursuit of contempt of court proceedings against D33, D32, D24, D25, D26, and D30 demonstrates that the Claimants are seeking to ensure compliance with the injunctions in order to protect their interests (and to uphold the authority of the Court).

26. D33 (Mr Cuciurean) was found in contempt by Marcus Smith J on 13 October 2020. Committal proceedings against the remainder listed above were settled following wide ranging undertakings from the Defendants to those proceedings, and the Court accepting the Defendants' sincere apologies for breaching those injunctions (see undertakings at

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

[C/5/474], and judgment at **[Auth/25]**). **Dilcock 4** explains that the Claimants are preparing further committal applications in respect of breaches of the Cash's Pit injunction **[B/14/209]**.

[4] REASONS TO GRANT THE ORDER AGAINST NAMED DEFENDANTS

27. The defences which have been filed, and representations received from non-Defendants, make points which are, in summary[14]:

    i. The actions complained of are justifiable because the HS2 Scheme causes environmental damage. This is incorrect and is a point which has been decided against these and other claimants in other proceedings **[A/14/274]**;
    ii. The order would interfere with rights under Art 10 and 11 ECHR. This order would not do so for the reasons given below;
    iii. Lawful protest would be prevented. It would not because the prohibited actions are defined, the protest would have to give rise to the unlawful consequences described, and the Order expressly states that such protest is unaffected;
    iv. Restriction of rights to use public highway and public rights of way. These are specifically carved out in the order (paragraph 4).
    v. Concern from those who occupy or use HS2 Land pursuant to a lease or licence with HS2. Those persons and their invitees are there with the Claimants' consent and therefore would not be defendants and would not otherwise fall within the terms of the order in any event.

28. The balance of the issues raised are addressed in the remainder of this skeleton argument and the legal principles skeleton argument.

[5] REASONS TO GRANT THE ORDER AGAINST PERSONS UNKNOWN

29. The activists engaged in direct action are a rolling and evolving group. The group is an unknown and fluctuating body of potential defendants. It is not effective to simply

[14] There is a schedule of the defences and responses in the Annex to this skeleton argument.

include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant.

30. The definitions of 'persons unknown' in this case are apt and appropriately narrow in scope. The definitions would not capture innocent or inadvertent trespass.

31. There would be no interference with Art 10 and 11 rights because there is no right to cause the type and level of disruption which would be restrained by the order, and there is no right of protest on private land. Turning to the *Zeigler* questions:

    i. The Defendants' action goes well beyond the exercise of Art 10 and 11 rights. There are many clear statements to the effect that the intention is to frustrate, delay and add cost to the works. That is not 'expression'.
    ii. Even if there is an interference with those rights, it is in pursuit of many legitimate aims: protecting private rights in property; preventing violence and intimidation; preventing the waste of public funds; enabling a lawfully considered and consented HS2 Scheme to be implemented for the public benefit, as determined by Parliament. The latter is fundamentally important in a democratic society.
    iii. The balance is fairly struck and is a rational means to do no more than prevent the unlawful activity as well as its calculated unlawful and disruptive consequences.

32. There is a real and imminent risk of torts being (or continuing to be) committed:

    a. The evidence has been summarised above and is provided more fully in **Jordan 1 [B/10].** There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour continuing in the way it has done in recent years across the HS2 Land.

    b. Protection is sought across all of the HS2 Land because, as has been shown, the direct action protests are ongoing and simply move from one location to another seeking to cause maximum disruption across a large geographical extent. Once a

particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new 'hub' from which to launch their protests elsewhere on HS2 Land.

c. Removal on each occasion from an established 'hub' requires considerable resource output, and more importantly poses considerable risks to personal safety of staff *and* the activists themselves (see, for example, the extreme risks to life for both involved in the Euston Square Gardens tunnel occupation of February 2021, as explained by Steyn J and Linden J **[Auth/25/472-4]**).

d. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.

33. This has been the pattern of behaviour which has continued over the last approximately 4 years and is well documented in **Jordan 1 [B/10]**. There is no reason to anticipate this pattern of behaviour ceasing (see for example **Dilcock 4** at [33] – [43] **[B/14/207-210]**).

34. In terms of the need for a geographically broad injunction to effectively restrain the tortious conduct, the Court has encountered a similar scenario recently: the 'Insulate Britain' protests in the autumn of 2021. Those protests displayed a similar strategy of seeking to cause disruption across a very wide area, leading to the need for National Highways to obtain interim injunctions in respect of the M25, other large areas of strategic road, and ultimately across the whole strategic road network. Lavender J held:

> "*If the claimant is entitled to an injunction, then I do not consider that it is appropriate to require the claimant to continue seeking separate injunctions for separate roads, effectively chasing the protestors from one location to another, not knowing where they will go next.*"[15]

35. Similarly, judicial notice may be taken of Transport for London's wide-ranging injunctions across a large number of roads in London – again, the scale of the coverage of the injunction was necessitated by the nature of the disruptive protest activity,[16] and the fact that if the injunction was limited to one area, the protesters would invariably simply

[15] Ibid., Lavender J at [24(7)(c)].
[16] See Orders in: QB-2021-003841; QB-2021-004122, both dated 15 December 2021.

move to another accessible and effective location.[17]

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

37. *Canada Goose* at [82] provides guidance.[18] The Claimants have sought to take a balanced approach, set out in **Dilcock 1** at [42] - [47]:

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

    b. In the case of D32, he has already given a wide-ranging undertaking[19] not to interfere with the HS2 Scheme, and the Claimants have only named him because he is a named defendant to the proceedings for both pre-existing injunctions. The same is true for other Defendants involved in the Euston Square Gardens incident as detailed below.

    c. The Claimants will remove the Defendants who have also more recently given undertakings to the Court.[20]

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

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

[18] (1) Name known Ds; (2) PU must be defined by reference to conduct; (3) sufficient real and imminent risk of the tort before granting interim relief; (4) alternative service must be set out in the order; (5) prohibitions to correspond to the tort; (6) clear terms; (7) interim injunction should have clear geographical and temporal limits. See further legal principles skeleton at §20

[19] Exhibited to Dilcock 2.

[20] These include D47 (Tom Dalton) [D/18/54] and D56 (Elizabeth Farbrother) [D/22/68]; the Claimants have made further invitations (as set out in the schedule of Defendants' responses, and Bundle D, Vol A) and will update the Court in advance of the hearing.

a. The definitions of the First to Fourth Defendants in these proceedings are sufficiently precise to target the relevant conduct.

b. There is a sufficient risk of a tort being committed to justify *quia timet* relief :

i. The Claimants have been subject to a long-running campaign of direct-action involving trespass on the HS2 Land, in opposition to the HS2 Scheme, as already explained.

ii. Various activists have expressed the intention to continue and to expand their activities in the future (as detailed above).

iii. The Defendants are motivated, resourceful and not deterred by traditional security measures. **Jordan 1 [B/10]** contains substantial evidence of the protestors removing security fencing, creating relatively elaborate camps and other structures and refusing to move promptly (and indeed resisting removal by locking-on to acrow-props within hand-dug tunnels, in the Euston Square Gardens incident) when challenged by security or contractors on the sites.

iv. The nature (especially size and varied terrain) of the sites are such that traditional security methods are unlikely, without more, to be successful.

v. The most extreme of the activists' activities show no signs of tailing off or reducing, indeed they are continuing as shown by the present situation at Cash's Pit (see **Dilcock 4** [33] – [43] **[B/14/207]**). The threats to continue such activities can therefore be taken seriously. They are not empty words.

c. The Court has indicated what is required by way of alternative service. As set out in **Dilcock 4 [B/14]**, these service provisions have been complied with.

d. The concern regarding the definition of unlawful conduct is not germane here as it is a case of trespass and nuisance, where defining the unlawful conduct is straightforward.

e. The description of persons unknown uses non-technical language, is clear in its scope and application, and is similar to language approved by the courts in similar cases.

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

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

Convention rights, generally

40. There remain a multitude of other forums for debating the merits of the HS2 Scheme, and the order sought would not deprive the Defendants of their right to exercise that voice. The order does not seek to prohibit lawful protest.

41. To the extent there would be interference with the Convention rights of the Defendants (which is not accepted), this interference must be balanced against the rights of the Claimants under Article 1 Protocol 1, insofar as the Claimants are entitled to possession of the HS2 Land and are being deprived of that by the unlawful protest, which is actively threated to continue. The proportionality balance struck in this jurisdiction between rights of owners and those with no permission to be on private land is embodied in the law of trespass, and it would be unattractive to disturb this position on the basis of sometimes violent direct action.

42. There is a strong public interest in the democratically consented HS2 Scheme being completed on time and in minimizing public expense on security. The Defendants' activities actively seek to increase such costs. The public expense to date as a result of unlawful direct action is substantial: £121.62 million to December 2021. But this is not only or even primarily about cost – it is also about safety and real risk to life.

43. Although each individual direct action may appear small in the context of the HS2 Scheme as a whole, that is not a reason to overlook its impact since, as the Divisional

Court put it in *DPP v Cuciurean*, "*that argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition*" (at [87]). The Claimants adopt the Divisional Court's dicta as their submission in this case.

44. If article 8 Convention rights are argued, the Claimants will rely on *Ackroyd v HS2 Ltd* [2020] EWHC 1460 (QB) (an application by protestors for an injunction to restrain from a building owned by HS2). The court held that it was "*inevitable that… a court would conclude that the removal… was justified. The steps taken to remove them were taken by an owner of land who is seeking to fulfil an important statutory purpose*" (at [11]).

[6] SCOPE

45. The geographical scope of the order which is sought is certainly extensive. The reason for a route-wide injunction is simple: the trespass and disruption progresses along the route. The alternative is to follow the protesters to wherever they chose to go next and to seek to obtain injunctive relief time after time. That has been the history to date. It is expensive both in its effect on the HS2 Scheme and in litigation costs. It is a greater burden on the Court than the single injunction.

46. There is no principled reason to object to the injunction on the grounds of its total length. If there is a reason in principle why a particular parcel of land should not be within the scope of the order, then those reasons can be given. That is not anybody's case, save for D36 (Mr Kier; **D/E/1468**). His 'Ground 1' is answered by **Dilcock 4 [B/14]**.

47. We draw attention to **[B/8/049]**:

    i. The order is time-limited. Paragraph 3 contains an injunction with a long stop date of 31 May 2023;
    ii. Paragraph 4 provides clarity on the HS2 Land, i.e. which land is affected;
    iii. Paragraphs 5 and 6 provide explicit guidance on what may constitute prohibited acts of obstruction and interference. The injunction contains express exceptions for use of public rights of way or private rights of access over HS2 Land, and lawful use of the public highway (paras. 4(a)-(c)).

48. These provisions are an answer to many of the points raised by those who have responded to the proceedings. They are further answered by the proposed service and knowledge requirements.

[7] SERVICE AND KNOWLEDGE

49. If the Court decides that the order should be made, how would it be served and what is the role of knowledge?

Service

50. The Service of the Application was considered at the directions hearing on 28 April 2022. At that hearing, Julian Knowles J Ordered that the steps contained at paragraph 2 of the Order would amount to good and sufficient service of the Application **[B/7/042]**. Those steps are proposed to be repeated.

51. The methods of service were based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this Application. The methods of service to date have been effective in publicising the Application.

52. There were 1,371 views (at 24 April 2022) by users of the Route Wide Injunction Website: **Dilcock 3** [11; **B/13/182**]. By 17th May 2022 there had been 2,315 page views of which 1469 were from unique users: **Dilcock 4** [17; **B/14/202**]. So, in round terms, there were an additional 1000 views since the Directions hearing.

53. Twitter accounts have shared information about the Application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: **Dilcock 3** [16; **B/12/183**]

54. A non-exhaustive review of Facebook shows that information about the injunction and / or the link to the fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: **Dilcock 3** [17; **B13/184**].

55. A similar point may be made in respect of YouTube: **Dilcock 3** [23; **B/13/188**].

56. **Dilcock 4** ([7] – [17]; **B/14/199**) sets out how the Claimants have complied with the additional service requirements pursuant to the directions of Julian Knowles J dated 28 April 2022. Those measures are not reliant on either notice via website or social media. They complement and add to the very wide broadcasting of the fact of the proceedings.

57. It is submitted that the totality of notice, publication and broadcasting is very extensive and effective. Service of the order by the same means would be similarly effective, and that is what the First Claimant proposes.

Knowledge

58. The First Claimant does not propose to rely only on the fact of service as just described. Together, these ensure the injunction would prohibit only unlawful and disruptive protest, with sufficient carve-outs to ensure that others are unaffected, namely:

    a. An individual who inadvertently strays onto the HS2 Land will not fall within the definition of the "Persons Unknown" caught by the injunction unless they also act with the consequence of causing disruption, interference, damage, delay etc.;

    b. Even *if* an individual inadvertently trespasses onto the HS2 Land and has the effect proscribed under the injunction (e.g. causing delay), they will only be fixed with liability for breach of the injunction where it can be proved to the criminal standard that they had knowledge of the injunction and that the breach was deliberate.

    c. There is an analogy here with the balance struck in the National Highways SRN-wide injunction which effectively required a personal warning.

59. The law guards against liability for inadvertent breach. The Court considered service

provisions in great detail in respect of the committal of Mr Cuciurean:[21]

> *"Given that, in the case of Category 3 Defendants, the service provisions in the order will have to deal with the question of notice to an unknown and fluctuating body of potential defendants, there may very well be cases where (i) the rules on service may have been complied with, but (ii) the person infringing the order knows nothing about even the existence of the order, when infringing it, or that he or she is doing anything wrong. In such a case, provided the person alleged to be in contempt can show that the service provisions have operated unjustly against him or her, the service against that person may be set aside.*
>
> *I stress that where it can be shown that the service provisions that apply in the case of a given order can be shown to have operated unjustly, this is a matter that goes not merely to sanction (although such matters might also be relevant to sanction). Where the person subject to the order can show that the service provisions have operated unjustly against him or her, then service ought to be set aside and the threat of committal removed altogether. It is not, to my mind, sufficient to say, in such a case, that there is a contempt, but that the punishment ought to be minimal or none."*

60. Arising from those committal proceedings, the Court of Appeal analysed the provisions for alternative service:[22]

> At [60]: *"The cases make it clear that any provision for alternative service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. But that is a standard to be applied prospectively. I can see that, in principle, a defendant joined as a person unknown might later seek to set aside or vary an order for service by alternative means, on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable."*
>
> At [69]: *"[regarding the Hoarding Fence] This could not be mistaken for*

[21] *SSfT and High Speed Two (HS2) Limited v Cuciurean* [2020] EWHC 2614 (Ch), Marcus Smith J at [63(7); [**Auth/17/310**]

[22] *Cuciurean v SSfT and High Speed Two (HS2) Limited* [2021] EWCA Civ 357 – at [14] – [15], [25] – 26] and [70] **[A/14/276]**

anything but an outward and visible sign that those in possession of the land beyond it were asserting their rights to maintain possession".

61. Paragraphs 12 - 14 discharge previous injunctions (which the Claimants consider are otiose if the draft order is granted in substantively the terms set out) and discontinue the underlying proceedings (the permission of the court is required for this where an interim injunction has been made – CPR 38.2). Consolidation would therefore simplify and clarify matters for the Defendants, by providing for the same terms across the whole route.[23]

CONCLUSION

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

RICHARD KIMBLIN QC
SIONED DAVIES
No5 Chambers

MICHAEL FRY
JONATHAN WELCH
Francis Taylor Building

20 May 2022

[23] At present the Harvil Road and Crackley injunction terms differ from one another.

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ANNEX

Summary of Responses to proceedings by Defendants and non-Defendants

Name	Received [ref]	Summary
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because no demonstrate immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land *and* existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) **[D/3]**	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) **[D/4]**	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) **[D/7]**	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) **[D/8]**	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) **[D/10]**	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) **[D/12]**	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20th May.
D29 – Jessica Maddison	Defence (16.05.22) **[D/14]**	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) **[D/15]**	Complaint about lack of time to prepare for initial hearing.
	Application for more time –	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he

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	N244 (04.04.22)	hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) **[D/36/179-D/37/2916]**	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) **[D/16]**	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) **[D/17]**	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) **[D/19]**	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – despite over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 **[D/20]**	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizbeth Farbrother	11.05.22 **[D/23]**	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) **[D/23]**	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) **[D/24]**	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRoW, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) **[D/25]**	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) **[D/26]**	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use

		their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) **[D/27]**	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) **[D/28]**	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) **[D/29]**	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) **[D/30]**	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) **[D/31]**	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) **[D/32]**	Consider themselves "persons unknown" by living nearby and using nearby PRoW. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) **[D/33]**	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) **[D/34]**	Concerns about public access to PRoW re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) **[D/35]**	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of house s purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		
Val Saunders "statement in support of the defence against the Claim QB-2022-BHM-00044"	Undated **[D/37/2493]** (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith "Witness statement" "statement in support of the defence…"	14.05.22 **[D/37/2509-2520]** (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – "statement in support of the defence…"	Undated **[D/37/2674-2691]** (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – "Seven arguments against HS2"	Undated **2692-2697**	Merits of scheme. Argues for scrapping.

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Brenda Bateman – "statement in support of the defence…"	Undated **2698-2699**	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – "statement in support of the Defence…"	Undated **2700-2701**	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – "Defence against the claim…"	Undated **2702-2703**	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – "Statement in support of the Defence…"	Undated **2704**	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – "Statement in support of the Defence…"	Undated **2705-2710**	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – "Witness Statement"; "Statement in support of the Defence…"	12.05.22 **2711-2714**	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2's land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – "statement in support of the Defence…"	Undated **2715-2716**	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – "statement in support of the Defence…"	9.05.22 **2717-2718**	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – "Statement in support of the Defence…"	Undated **2719**	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – "statement in support of the Defence…"	Undated **2724-2731**	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – "statement in support of the Defence…"	Undated **2735**	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – "Statement"	Undated **2737-2740**	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – "In support of the Defence…"	15.5.22 **2742**	Merits of scheme. Protests are therefore valid.

Ann Hayward – Letter regarding RWI	6.05.22 **2743-2744**	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – "statement in support of the Defence"	15.05.22 **2745-2746**	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 **2747-2751**	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.
Anonymous (near Cash's Pit occupant)	Undated **2752-2753**	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence…"	Undated **2754-2755**	Criticism of merits of Scheme, argument re right to protest.

IN THE HIGH COURT OF JUSTICE (QBD) **Claim no.: QB-2022-BHM-000044**

BIRMINGHAM DISTRICT REGISTRY

Between

(1) HIGH SPEED TWO (HS2) LIMITED

(2) THE SECRETARY OF STATE FOR TRANSPORT **Claimants**

and

(1) PERSONS UNKNOWN

(2) MR ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS

Defendants

DEFENCE OF JAMES KNAGGS (SIXTH DEFENDANT)

INTRODUCTION

1. The Sixth Defendant, James Knaggs is a longstanding campaigner and peaceful protestor concerned about the environmental impact of the HS2 rail project.

2. This Defence addresses the Claimants case as pleaded in the Amended Particulars of Claim dated 26 April 2022.

3. Paragraphs 1 and 2 of the Amended Particulars of Claim are admitted. The Claimants are public authorities for the purposes of the Human Rights Act 1998 and exercise public functions/services for the purposes of the Equality Act 2010.

4. Paragraph 3 is not admitted. The Claimants are required to establish the existence of a cause of action in trespass and nuisance in relation to the entirety of the HS2 Land and the existence and nature of the power to take action to prevent such allegedly unlawful activity.

5. It is accepted that the Sixth Defendant is a named defendant in these proceedings. No further admissions are made to Paragraph 4.

6. In relation to Paragraph 5, it is accepted that injunctive relief has been granted to the Claimants in the past. No further admission is made to the matters referred to in Paragraph 5 which are set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant.

7. Paragraph 6 is not disputed save that no admissions are made as to the existence of any legal rights of the Claimants that may be represented in the maps referred to in Paragraph 6.

8. Paragraph 7 is not disputed.

9. No admissions are made to Paragraph 8 save that it is accepted that a possession order and injunctive relief were granted by Mr Justice Cotter on 11 April 2022. It is denied that Cash's Pit Land is illustrative of wider issues in relation to the entirety of the HS2 Land.

10. In relation to Paragraph 9, it is accepted that Schedules 15 and 16 of the HS2 Acts provide a bespoke statutory power to the First Claimant in relation to certain identified land. The First Claimant is required to establish the specific legal consequences of the power and the purpose and circumstances in which it may be used.

11. Notwithstanding the intention of the Claimants as expressed in Paragraph 10 it is averred that the impact and effect of the injunction sought extends beyond the limited remit set out therein.

CASH'S PIT LAND

12. The Sixth Defendant was present with others on the Cash's Pit Land as part of a protest camp formed in or around March 2021 with the knowledge and permission of the landowner. The protest camp constituted a dwelling and was the sole or primary residence of several persons.

13. No further admissions are made in relation to Paragraphs 11.1 to 11.5 which are pleaded at such a level of generality so as to preclude a particularised response from the Sixth Defendant.

14. On 23.02.22 the First Claimant gave written notice pursuant to Section 13 and paragraphs 1(1) or 1(2) of Part 1 of Schedule 15 of the HS2 Act. Such statutory provisions require not less than 28 days' notice of an intention to enter and take possession of the land. The Sixth Defendant no longer remains on Cash's Pit Land and has removed himself in compliance with the order of Cotter J. No further admissions are made in relation to Paragraph 12.

HS2 LAND

15. In relation to Paragraph 14, the Claimants are required to establish their right to immediate possession of the entirety of the HS2 land.

16. The Claimants are required to establish the matters set out at Paragraph 15 including the unlawfulness of any actions alleged. The matters are set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant.

17. In relation to Paragraph 16, the Sixth Defendant denies creating any immediate threat to life or putting at risk the lives of any persons. No admissions are made to the matters which are set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant.

18. Regarding Paragraph 17, no admissions are made to the matters which are set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant.

    i) Paragraph 17.1 is set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant and no admissions are made.

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ii) In relation to Paragraph 17.2, it is denied that action by the Sixth Defendant has exceeded the public's right to use the public highway. Peaceful protest on the public highway engages the Sixth Defendant's rights under Articles 10 and 11 ECHR and is included within the public's right of access to the public highway. No claim in trespass has been brought by any local authority in relation to the Sixth Defendant's actions.

iii) In relation to Paragraph 17.3, it is denied that the Sixth Defendant's conduct amounts to a public nuisance. Acts of peaceful protest of the Sixth Defendant engage his rights under Articles 10 and 11 ECHR which may constitute a lawful excuse for protest on the public highway.

iv) In relation to Paragraph 17.4 it is denied that the Sixth Defendant's actions threaten to cause a private nuisance.

19. The Sixth Defendant no longer remains on Cash's Pit Land and has removed himself in compliance with the order of Cotter J. He does not intend to breach the order of Cotter J. No further admissions are made in relation to Paragraph 18.

20. No admissions are made to Paragraphs 19 to 21 which are set out at a level of generality which is not amenable to a particularised response from the Sixth Defendant. It is denied that there is a real and imminent risk of trespass and nuisance in relation to the HS2 Land such as to justify injunctive relief. No account is taken by the Claimants of the need to justify proportionate interference with the Sixth Defendant's right to protest as protected under Articles 10 and 11 ECHR.

21. It is denied that the Claimant is entitled to the relief sought in the form of final injunctive relief or otherwise.

Tim Moloney QC, Doughty Street Chambers
Owen Greenhall, Garden Court Chambers

STATEMENT OF TRUTH

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

I am duly authorised by the Defendant to sign this statement.

Signed:……*Nicola Hall*……

Dated: ……17th May 2022……

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IN THE HIGH COURT OF JUSTICE (QBD) **Claim no.: QB-2022-BHM-000044**

BIRMINGHAM DISTRICT REGISTRY

Between

(1) HIGH SPEED TWO (HS2) LIMITED

(2) THE SECRETARY OF STATE FOR TRANSPORT **Claimants**

and

(1) PERSONS UNKNOWN

(2) MR ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS

Defendants

SKELETON ARGUMENT ON BEHALF OF JAMES KNAGGS (D6):

HEARING 26-27 MAY 2022

Essential reading: D6 Skeleton argument, Witness statement of D6

INTRODUCTION

1. This skeleton argument sets out objections to the Injunction sought by the Claimants in the application dated 28.03.22 (as amended).

2. The Sixth Defendant raises concerns over the following matters:

   i) The Claimants seek injunctive relief on the basis of claims which do not establish such relief, including:

      a) Seeking to restrain trespass in relation to land to which there is no demonstrated immediate right of possession; and,

      b) Seeking to restrain lawful protest on the highway;

   ii) The test for a precautionary (*quia timet*) injunction is not met;

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iii) It is wrong in principle to make a final injunction in the present case;

iv) The test for a Precautionary Injunction is not met

v) The definition of 'Persons Unknown' is overly broad and does not comply with *Canada Goose* requirements;

vi) The service provisions are inadequate;

vii) The terms are overly broad and vague;

viii) Discretionary relief should not be granted; and

ix) The order has a disproportionate chilling effect.

3. The Court is respectfully invited to refuse the Claimants application for injunctive relief.

CHRONOLOGY

4. The following chronology has been extracted from the papers to assist the Court:

Spring 2021	Sixth Defendant and others establish camp at Cash's Pit.
23.02.22	Notice provided under Schedule 15 Phase 2a Act 2017 in relation to Cash's Pit Land.
25.03.22	Claimants file N5 Claim Form for Possession of Cash's Pit land and N244 Application Notice for interim injunction in relation to present claim
28.03.22	Claim form issued.
05.04.22	Initial hearing date.
11.04.22	Adjourned hearing date. Cotter J makes possession order and injunction in relation to Cash's Pit land. Directions made for hearing on service.
27.04.22	Hearing for application for alternative service before Knowles J. Order made for alternative service of Claimants' application

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	under CPR 6.27 in relation to named and unnamed defendants. Directions made for final hearing.
26-27.05.22	Final hearing or Claimants' application for injunctive relief.

SCOPE OF HS2 INJUNCTION

5. The HS2 Land is defined through a series of maps and plans which number more than 280 pages[1].

6. It should be noted that the HS2 Land is not limited to isolated areas of countryside. It covers a vast number of roads and urban areas right across the country. Given the limited time since service of the injunction application, it has been difficult to analyse the complete scope of the HS2 Land, but it is clear that:

   i) Some HS2 Land passes through high-density urban areas with multiple roads and public highways

   ii) Some HS2 Land covers woodland and other areas with public access and public rights of way.

   iii) Some HS2 Land remains in the possession of third parties and steps to secure even temporary possession have not been taken by the Claimants.

   iv) Most of the HS2 Land is not subject to any physical demarcation or barrier.

   v) The HS2 Land comprises a multitude of plots of land which do not cohere in any logical manner.

7. When combined with the wide definition of 'persons unknown' (see below) it is clear that the HS2 Order is not simply limited to protests which stop construction traffic accessing active HS2 Sites. It covers protests which interfere with the flow of traffic at areas of land across the country on which there is no activity by the Claimants. Importantly, the HS2 Order also covers conduct which may arise in

[1] The injunction sought shall be referred to as 'the HS2 Order/Injunction' and the land affected as the 'HS2 Land'.

any dispute between the Claimants and those resident or conducting business in the vicinity of the HS2 Land which falls outside the protest context.

8. Notwithstanding the 283 pages of maps which have been produced, the breadth scope and complexity of the land subject to the proposed injunction is such that it is in practical terms not possible for persons to reliably ascertain the scope of the injunction.

GENERAL LEGAL FRAMEWORK:

9. The general legal framework in relation to both injunctions and Articles 10 and 11 ECHR is set out below.

Injunctions

10. At paragraph 82 of *Canada Goose Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802, building on *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, the Court of Appeal laid down a series of "procedural guidelines applicable for proceedings for interim relief against "persons unknown" in protestor cases like the present case". These were as follows (emphasis added):

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

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

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

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

11. None of the above was disapproved of in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13.

Articles 10 and 11 ECHR

12. Articles 10 and 11 of the European Convention on Human Rights state:

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 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.

13. Articles 10 and 11 together protect the right to protest.

14. The Supreme Court recently considered the application of Articles 10 and 11 ECHR in relation to obstructive protests on the highway in the case of DPP v *Ziegler* [2021] UKSC 23. Of particular note are the Supreme Court's findings that:

    i) "intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11" [70];

    ii) no restrictions may be placed on the enjoyment of Articles 10 and 11 rights "except "such as are prescribed by law and are necessary in a democratic society"" [57];

    iii) "[a]rrest, prosecution, conviction, and sentence are all "restrictions" within both articles" (ibid.) and there is "a separate evaluation of proportionality in respect of each restriction" (para 67);

    iv) each of those restrictions will only be "necessary in a democratic society" if it is proportionate ([57]);

    v) the "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" [59];

    vi) "deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality" [67];

    vii) "both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality" [70];

    viii) however, "there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly" [68];

15. The Supreme Court in *Ziegler* set out *"various factors applicable to the evaluation of proportionality"* at [72-78]. However, the Court underscored that *"it is important to recognise that not all of them will be relevant to every conceivable situation"* and that, moreover, *"the examination of the factors must be open textured without being given any pre-ordained weight"* [71].

16. The non-exhaustive list of factors *"normally to be taken into account in an evaluation of proportionality"* [72], include:

    i) the extent to which the continuation of the protest would breach domestic law [72] and [77];

    ii) the importance of the precise location to the protesters [72], it being recognised that *"the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11"* (*Sáska v Hungary* (Application No 58050/08) at [21], as cited in *Ziegler* at [76];

    iii) the duration of the protest [72];

    iv) the degree to which the protesters occupy the land [72];

    v) 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"* (*ibid.*);

    vi) whether the views giving rise to the protest relate to *"very important issues"* and whether they are *"views which many would see as being of considerable breadth, depth and relevance"* (*ibid.*);

    vii) whether the protesters *"believed in the views they were expressing"* (*ibid.*);

    viii) the availability of alternative routes to that obstructed [74];

    ix) whether the obstruction was targeted at the object of the protest [75];

17. It is wrong to view the right of the public to pass and repass as having primacy over the right to protest on the highway, it is a need to "balance the different rights and interests at stake" (see the High Court ruling in *DPP v Ziegler* [2019] EWHC 71 (Admin) at [108]).

18. The present claim clearly engages the Article 10 and 11 rights of any person planning a protest that is subject to the injunction even if such a protest is deliberately disruptive to traffic to some degree.

19. Insofar as the Claimants purport to rely on Article 1 Protocol 1 rights, it is denied that public authorities are able to rely on such rights under the European Convention/Human Rights Act 1998. In fact, the relevant A1P1 rights to consider are those of residents and businesses in the vicinity of HS2 Land which may come into conflict of disputes with the Claimants over the conduct of HS2 works.

BASIS OF CLAIMS

20. The Claimants rely on claims in Trespass and Public and Private Nuisance[2].

Public highway

21. Insofar as the injunction covers land which is a public highway, it should be noted that all of these torts require the defendants' use of the highway to be unreasonable.

22. The public have a right of reasonable use of the highway which may include protest (*DPP v Jones* [1999] 2 AC 240). This is so even when protests deliberately obstruct other road users. Ultimately, the issue is one of the proportionality of interference with rights protected under ECHR 10 and 11 when prohibiting such protest (see the High Court decision in *DPP v Ziegler* [2019] EWHC 71 (Admin)). The Supreme Court in *DPP v Ziegler* [2021] UKSC 23 emphasised the fact specific nature of the assessment of proportionality. Similarly, the Court of Appeal in *INEOS* stated:

> "the concept of 'unreasonably' obstructing the highway is not susceptible of advance definition… that is a question of fact and degree that can only be assessed in an actual situation and not in advance" (at 40]).

23. Clearly it cannot be asserted any form of obstructive protest on the highway will constitute a trespass without regard to the degree and impact of the obstruction.

24. Similarly protests which do not cause undue interference with the rights of others do not fall within the definition of nuisance. Private nuisance is defined

[2] Other purported bases of claims in the claim form do not feature as heads of claim in the Particualrs of Claim dated 09.11.21.

as: "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) emphasis added). Public nuisance includes an act which obstructs the public in the exercise of rights common to all citizens (*R v Goldstein* [2003] EWCA Crim 3450). Where this is based on obstructing the public's right to pass on the highway the issue clearly falls back on the assessment of what constitutes an unreasonable obstruction.

25. The important point is that the claims relied on by the Claimant all rest on an assessment of disruptive protest on the highway as unreasonable. It is far from clear that protests which disrupt minor roads or footpaths passing over the HS2 Land, or where the extent of the interference with more major roads is not a total and extended halting of traffic, will lead to a viable civil claim.

26. In any event, in relation to the majority of the HS2 Land there is no evidence of plans for protests on the HS2 Land such as to justify a precautionary injunction against unnamed defendants.

Non-public highway land

27. Insofar as the injunction covers land which is not part of the public highway, the Claimants rely on claims in trespass. The basis of the right to possession on which the claim in trespass is founded varies according to the category of land affected.

    i) The Pink Land comprises land to which the Claimants hold freehold or leasehold title whether acquired under the GVD process or entering into leases voluntarily

    ii) The Green Land comprises land to which the First Claimant is entitled to temporary possession pursuant to Section 15 and Schedule 16 of the Phase One Act and Section 13 and Schedules 15 and 16 of the Phase 2a Act.

The Pink Land.

28. In relation to land to which the Claimants hold leasehold or freehold title, it is accepted that this provides a basis on which to found a possession claim subject to confirmation that no subsidiary lease or other legal right has been granted to any portion of the land.

The Green Land

29. The relevant provisions of the Phase 2a Act are set out in Schedule 15 (Temporary Possession and Use of Land) (the provisions of the Phase One Act are materially equivalent)

> *1. Right to enter on and take possession of land*
>
> (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.
>
> *3. Powers exercisable on land of which temporary possession has been taken*
>
> (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.
>
> *4. Procedure and compensation*
>
> (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….

30. The phrase "Phase 2a purposes" in s1(1)(c) is defined in s61 of the Phase 2a Act:

> *61"Phase 2a purposes"*
>
> References in this Act to anything being done or required for "Phase 2a purposes" are to the thing being done or required—
>
> (a) for the purposes of or in connection with the works authorised by this Act,
>
> (b) for the purposes of or in connection with trains all or part of whose journey is on Phase 2a of High Speed 2, or
>
> (c) otherwise for the purposes of or in connection with Phase 2a of High Speed 2 or any high speed railway transport system of which Phase 2a of High Speed 2 forms or is to form part.

31. Paragraph 1 of Schedule 15 creates a legal right to possession of land provided the conditions in s1 are met and the statutory notice requirements of paragraph (4)(1) are satisfied (*SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)).

32. It is clear that the right to enter land which is provided for under Schedule 15 only arises once notice requirements and satisfied and entry and possession of the land is needed for the purposes set out in Paragraph 1 of Schedule 15 (constructing specified works or other HS2 purposes) and similarly for the right to take possession of land.

33. Unless the purpose requirements of Schedule 1 are met there is no basis on which the Claimant may enter or take possession of land under Schedule 15. There is hence no basis on which a possession claim may be brought. The Claimant's right to possession does not crystalise until the possession of the land is needed for constructing specified works or other Phase 2a purposes.

34. To illustrate with an example, consider a plot of land contained in Schedule 16 of the Phase 2a Act on which no work is due to commence until 01.01.24. Were HS2 to serve a Notice under Schedule 15(4)(1) in relation to the plot of land on 01.01.22, the notice period would expire 28 days later on 29.01.22. However, since no work is due to take place on the land until 24 months later, then the right of entry under Schedule 15 cannot be exercised until such entry is genuinely required for the purposes of such works i.e. not until 01.01.24. Similarly, if the nature of the work required entry onto land only and not taking possession, the powers exercised under Schedule 15 would be similarly limited

to entry rather than possession. HS2 cannot rely on powers under Schedule 15 to bring a possession claim against a private landowner where access to the land is not genuinely required for specified work or Phase 2a Purposes at the point the claim is brought.

35. There is hence a fundamental difference between land where works are currently ongoing or due to commence imminently (for which, subject to notification requirements, the Claimants have a cause of action in trespass at the present date) and land where works are not due to commence for a considerable period (for which no cause of action in trespass currently arises for the Claimants). Cases in which injunctive relief has been granted to the Claimants relating to land where there is ongoing or imminent works are of no assistance in securing injunctive relief in relation to land in the second category above.

36. In the present case, the Claimants are required to establish that the Green land subject to the proposed injunction is genuinely required for specified works or Phase 2a purposes either currently or imminently. Absent such evidence the basis for the claim in trespass falls away and no injunctive relief may be founded upon it.

WRONG IN PRINCIPLE TO MAKE FINAL ORDER AGAINST PERSONS UNKNOWN

37. The matter is listed for a "final hearing of the Claimants' Application" (Case Management Directions, Order of Knowles J 27.04.22) and the Claimants seek a final injunction. Notwithstanding references to "Interim Injunctive Relief" in the Claimants Skeleton Argument on Legal Principles dated 18.05.22 (see [15-19]) later references are made to final injunctions against persons unknown (see [22]). There are no further provisions in the draft order for further case management beyond provision for yearly review. The claims are otherwise to be stayed (Draft Order at [19]). The Order sought is therefore in substance a final order.

38. As stated by the Court of Appeal in *Canada Goose v Persons Unknown*:

> "89 A final injunction cannot be granted in a protestor case against 'persons unknown' who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category."

39. Notwithstanding the decision of the Court of Appeal in *LB Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 that final injunctions may in principle be made against persons unknown, they remain inappropriate in protest cases in which the Article 10 and 11 rights of the individual must be finely balanced against the rights of the claimant. As the Court of Appeal stated in *Canada Goose* (which was not criticised in LB Barking and Dagenham):

> "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." (at [93])

40. A final injunction against persons unknown is therefore inappropriate in the present case.

41. Moreover, as highlighted by Bennathan J in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) it is not possible for a court to grant a final injunction without first determining the underlying claim. As Bennethan J stated:

> "25. An injunction is not a cause of action, it is a remedy. An application for an injunction can only succeed if it is advanced as a necessary relief for an underlying substantive claim. In my view this is basic and beyond debate:
>
> > (1) In Injunctions [Bean et al, Sweet and Maxwell, 14th Edition, at page 4] under the heading, " Requirement of a substantive claim " the authors write, " There is

> one overriding requirement: the applicant must normally have a cause of action in law entitling him to substantive relief. An injunction is not a cause of action (like a tort or a breach of contract) but a remedy (like damages) "
>
> (2) In *Fourie v Le Roux [2007] 1 WLR 320 [2]* Lord Bingham stated that injunctions " are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign ". In Lord Scott's speech in the same judgment [30], he also spoke of the need for an underlying cause of action, albeit as a rule of practice rather than a matter of jurisdiction.
>
> 26. Summary judgment under CPR part 24 is available for a cause of action or for an issue within that cause of action, but not for a remedy. This is not to say that Judge granting summary judgment may not also grant the consequent relief, but she or he can only do so after the cause of action has been resolved. Although the word " trial " is at times used to describe an assessment of a remedy [see, for example, White Book 2022 at 12.0.1] in both the CPR 24 and the accompanying Practice Direction the language is consistent with the narrower meaning, namely a trial of a cause of action. Further, in the context of this case it would make no sense to describe an injunction as " final " if the underlying cause of action was yet to be resolved."

42. Whilst couched in terms of summary judgment, the underlying principles in the passages above are of general application.

43. The Claimants do not appear to seek determination of the underlying claims. The Amended Particulars of Claim plead claims at such a level of generality so as to preclude a particularised response from individual defendants. In such circumstances, the application for a final injunction is premature.

INSUFFICIENT EVIDENCE FOR PRECAUTIONARY INJUNCTION

44. The present application is sought on a precautionary basis to restrain conduct by persons unknown who have not to date committed tortious acts, it remains a precautionary (*quia timet*) injunction notwithstanding that it is a final order.

45. Similarly, regarding any named defendants who may have been proven to have committed tortious acts at specified locations, the injunction sought goes well beyond what is reasonably necessary to prevent the repetition of such acts and is therefore is in substance a precautionary injunction.

46. Regarding injunctions granted on a precautionary basis, as stated in Snell's Equity , 30th ed (2000), p 719, para. 45–13 (approved by the Court of Appeal in *Secretary of State for Environment v Meier* [2008] EWCA Civ 903 at [16])

> "Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for "preventing justice excelleth punishing justice". This class of action, known as quia timet , has long been established, but the claimant must establish a strong case; "no one can obtain a quia timet order by merely saying ' timeo .' He must prove that there is an imminent danger of very substantial damage …" (emphasis added)

47. In *Elliot v Islington LBC* [2012] 7 EG 90 (Ch) the requirements were expressed as:

> "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." (at [29], emphasis added).

48. The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction.

49. In any event, there is no evidence of groups other than those already identified with a history or plans for protests against HS2 such as to justify injunctive relief against them on a precautionary basis either as named or unnamed defendants.

DEFINITION OF PERSONS UNKNOWN

50. The Claimants seek an interim injunction against four categories of persons unknown and 59 named defendants. The categories of persons unknown are defined as:

> (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 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 PERMIMETER 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

51. Identical definitions are provided in the Amended Particulars of Claim.

Scope of definition

52. Notwithstanding the amendments to the definitions of persons unknown at the hearing of 27.04.22, the Sixth Defendant has specific concerns in relation to Categories (2) and (3) above.

53. The HS2 land covers a massive area. The plans defining the land run to 280 pages.

54. Category (2) applies to anyone who enters HS2 Land without the consent of the Claimants whose presence has the effect of hindering anyone connected with the Claimants:

    i) It includes those present on HS2 land on public highways. A person who walks over HS2 land on a public footpath is covered by the definition (subject to the consent of the Claimants). A demonstration on a public footpath which had the effect (intended or not) of hindering those connected to the Claimants (for any degree) would be caught within the definition.

    ii) It includes those present on HS2 land which has been sublet. A person present on sublet HS2 land with the permission of the sublettor but without the consent of HS2 is covered by the definition.

55. Similarly, provisions within the recital that the Claimants do not intend to act against guests of any freeholder or leaseholder unless such persons undertake actions with the effect of hindering the HS2 Scheme do not alleviate the

problems identified above. First, a person present on HS2 Land as the guest of a freeholder is not trespassing and does not fall within the scope of the causes of action relied on. Second, it would also create anomalous scenarios, for example where a family reside on land, the parents (as freeholders) might have protection for acts which hindered HS2 but children or others living on the land would not.

56. Category (3) applies to anyone who does any act which interferes with access/egress from HS2 sites in whatever form and for whatever duration.

    i) It includes those participating in a small demonstration anywhere along the HS2 route which restricts access to an HS2 site for even a matter of minutes.

    ii) It includes those who interfere with all access points to HS2 land. Therefore it includes those whose actions interfere with access to HS2 land on any public highway, including public footpaths. A small demonstration on a public footpath which crosses HS2 land is therefore covered whatever the degree of interference with access/egress.

    iii) In includes those who interfere with access to HS2 land for all invitees of HS2. Given the vast area of land covered and the wide array of access rights concerned, this covers those who interfere with access to HS2 land for a wide-range of purposes.

57. There is no restriction on the purpose for which a person might interfere with access to HS2 land. It is not limited to direct-action protests or even to protests of any form. It includes any group, or individual, who protests anywhere on the HS2 land an interferes with traffic seeking access to the land. It would include a group of school children who marched along a country lane to demonstrate against the felling of a wood -or indeed, to protest about a matter unrelated to HS2 but which had the effect of interfering with traffic flow for whatever duration.

Need for unlawful conduct

58. The definition of Persons Unknown in the present claims fails to be defined in relation to conduct which is alleged to be unlawful and does not meet the requirements set out in *Canada Goose*. Clearly, given the guidance in *Ziegler*, not every protest which (even deliberately) causes interferes with access to HS2 Land for a short period will be unlawful. The definition therefore covers lawful conduct as well as unlawful conduct.

Legal requirements:

59. There is an important distinction between the requirements applicable to the definition of persons unknown in an interim injunction and the terms which may be applied. The definition of persons unknown must be "defined by reference to conduct which is alleged to be unlawful"; whereas the terms that may be included in an injunction which "may include lawful conduct if and only if there is no other proportionate means of protecting the claimant's rights".

60. This distinction is captured in the requirements set out in *Canada Goose* (CA) where the Court of Appeal stated:

> 82. Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases like the present one:
>
> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.
>
> …

> (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.
>
> …

61. It is clear from Clause (2) that the definition of persons unknown (when seeking to capture newcomers) must capture those who have committed tortious acts. When someone falls within that definition then, by virtue of Clause (5), they may be restrained from both tortious and lawful conduct (if the latter is necessary to protect the claimant's rights). What the definition of persons unknown must not do is prohibit those who do nothing unlawful from acts which are similarly not unlawful. That is prohibited on principle.

Clause (2)

62. The requirements on the definition of persons unknown in (1) and (2) above come from *Cameron*. The issuing and service of a claim form is a pre-requisite of making any person subject to the Court's jurisdiction. Without a valid underlying claim against a defendant no injunction can be granted. This applies as much to persons unknown as to named defendants.

63. An injunction against a named defendant can only be granted either to prevent a tort that has already been committed or, on a precautionary (*quia timet*) basis, to prevent a tort that is threatened. The same applies to persons unknown. It is therefore necessary to establish a viable claim (or threatened tort) against such persons in order to obtain injunctive relief. As Nicklin J states in *LB Barking and Dagenham*:

> "In cases where a claimant wishes to bring a claim against defendants who are (or include) 'Persons Unknown', then an interim injunction can be granted where the evidence demonstrates actual or threatened commission of a tort or other civil wrong by the 'Persons Unknown'." (at [189])

64. When persons unknown are defined by reference to unlawful activity then no issue arises because by definition all those falling with the scope of persons unknown will have committed a tort. The same does not hold if the definition of persons unknown covers entirely lawful activity unrelated to any torts threatened by others.

65. The way clause (2) in *Canada Goose* has been phrased is therefore not accidental. Persons unknown must be defined by reference to unlawful conduct.

Clause (5)

66. That "the prohibited acts" in (5) refers to the terms of the injunction and not the definition of persons unknown is supported by the genesis of this principle in the recent caselaw.

67. In *Ineos* (CA) the Court of Appeal set out the following requirements on persons unknown injunctions (at 34, emphasis added):

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief;
>
> (2) it is impossible to name the persons who are likely to commit the tort unless restrained;
>
> (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;
>
> (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;
>
> (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

68. The fourth *Ineos* requirement clearly relates to the terms of the injunction and not the definition of persons unknown.

69. In *Cuadrilla*, the Court of Appeal said the following regarding clause (4) relating to terms not prohibiting lawful conduct:

> "78. It is open to us, as suggested by the Court of Appeal in *Cuadrilla* , to qualify the fourth *Ineos* requirement in the light of *Hubbard* and *Burris* , as neither of those cases was cited in *Ineos*. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or Articles 10 and 11 of the ECHR , *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way."

70. It is therefore clear that in *Cuadrilla* the court was amending the requirement that the terms of an injunction prohibit unlawful conduct and not the conditions applicable to the definition of persons unknown.

71. This interpretation is adopted by Nicklin J in *London Borough of Barking and Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) where he refers to the "terms" of the injunction satisfying the Canada Goose requirements (5) to (7) (at [248]).

72. This requirement again accords with principle. A person who has committed an unlawful act, or who threatens to do so, can be restrained from lawful conduct if that is necessary to protect the Claimant. The commission or threat of the unlawful act can justify the proportionate restriction on that individual's rights. There is no corresponding justification for a restriction on the rights of a person who neither does an unlawful act, nor threatens to do so.

Conclusion

73. There is hence a distinction in principle between the definition of persons unknown -which must correspond to the conduct which is alleged to be unlawful- and the terms of the injunction -which can prohibit lawful and unlawful conduct. A person who commits or threatens an unlawful act may be prohibited from future lawful as well as unlawful conduct. However, an injunction cannot be used to prevent those who have neither done anything wrong, nor threatened to do so, from carrying out entirely lawful conduct.

Submissions

74. It is submitted that the definition of Persons Unknown in the present case fails to meet the requirements from *Canada Goose* and related cases in that is not defined by reference to the allegedly unlawful conduct.

75. In any event, it is clear that the definition of persons unknown in the present injunction is so wide that is covers persons entirely unrelated to the previous HS2 protests who have not previously protested in an unlawful manner and who do not threaten to do so. Nevertheless the present injunction prevents such

persons from what would otherwise be entirely lawful conduct. The present injunction is therefore flawed in its approach to persons unknown.

76. The difficulties with the definitions of persons unknown all stem from the approach that has been taken of casting a very wide net over the entirety of the HS2 land and seeking the use qualifying conditions (such as 'having the effect of hindering HS2 employees' etc). This approach will inevitably include within the scope of persons unknown those who has not committed tortious acts.

SERVICE

Legal framework

77. CPR 6.27 states:

> Service by an alternative method or at an alternative place
>
> 6.27 Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.

78. CPR 6.15 states:

> 6.15— Service of the claim form by an alternative method or at an alternative place
>
> **(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.

79. In relation to possession claims brought in trespass against persons unknown, CPR 55.6 states:

> 55.6 Service of claims against trespassers
>
> Where, in a possession claim against trespassers, the claim has been issued against "persons unknown", the claim form, particulars of claim and any witness statements must be served on those persons by—
>
> (a) (i) attaching copies of the claim form, particulars of claim and any witness statements to the main door or some other part of the land so that they are clearly visible; and
>
> (ii) if practicable, inserting copies of those documents in a sealed transparent envelope addressed to "the occupiers" through the letter box; or
>
> (b) placing stakes in the land in places where they are clearly visible and attaching to each stake copies of the claim form, particulars of claim and any witness statements in a sealed transparent envelope addressed to "the occupiers".

80. Whilst service of a final injunction is distinct from service of a claim form the principles underlying each step have the common element of requiring that those affected by litigation are given sufficient notice of proceedings at a stage by which they can regulate their conduct appropriately.

81. In *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 Lord Sumption stated:

> "… 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. " (at [17])
>
> "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. " (at [21], emphasis added)

82. Similar requirements were included in the Court of Appeal judgment in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303:

> "(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".

83. In *Barking and Dagenham LBC v Persons Unknown* [2021] EWHC 1201 (QB) Nicklin J stated:

> "45. I recognise that the method of service he [the claimant local authority in a Traveller injunction case] proposed reflected the well-established regime for possession claims against unknown trespassers (CPR 55.6). And there can be no real doubt that, in a claim against alleged trespassers in present occupation whose names are not known, displaying prominently the Claim Form (or copies of it), on or around the various sites in respect of which an injunction was to be sought, can usually be expected to bring the proceedings to the attention of the defendants. However, the whole point of Traveller Injunctions was to bind persons who turned up at the land only after the injunction had been granted. In respect of that category of defendant, posting copies of the Claim Form at the various sites was not likely to be an effective means of bringing the proceedings to their attention. To take an obvious example, displaying copies of the Claim Form at the Dagenham Road Car Park (or at any of the other sites covered by the injunction granted to LB Barking & Dagenham) was not likely to bring the proceedings to the attention of a family of Travellers in Rochdale. The first such a family was likely to discover about the proceedings, that had led to an injunction being granted against them, was when they subsequently pitched their caravan for an overnight stay in the Dagenham Road Car Park.

> 46. It may well be that the importance of this aspect of the decision in *Cameron* on claims against "Persons Unknown" has not been fully appreciated in the Cohort Claims. However, since the Supreme Court decision in *Cameron* the point has been authoritatively determined. In a claim against "Persons Unknown", the method of alternative service of the Claim Form that the Court permits must be one that can reasonably be expected to bring the proceedings to the notice of *all* of those who fall within the definition of "Persons Unknown". Without that safeguard, there is an obvious risk that the method of alternative service will not be effective in bringing the proceedings to a (perhaps significant) number of those in a broadly defined class of "Persons Unknown". By dint of the alternative service order, they would be deemed to have been served, when in fact they have not (a point that becomes important when the Court comes to consider granting final relief against "Persons Unknown"). Such an outcome offends the fundamental principle of justice that each person who is made subject to the jurisdiction of the court had sufficient notice of the proceedings to enable him to be heard (see *Cameron* principles (1) and (4) (see [11] above)).
>
> 47. …the Court must adopt a vigilant and more rigorous process when considering applications under CPR 6.15 for alternative service of the Claim Form on "Persons Unknown". If the requirements of *Cameron* cannot be met, permission for alternative service should be refused. …In practical terms, the advocate will be expected to demonstrate, by evidence filed in compliance with CPR 6.15(3)(a), how the proposed method of alternative service on the Person(s) Unknown can reasonably be expected to bring the proceedings to the attention of all of those who are sought to be made defendant(s). <u>The greater and more ambitious the width of the definition of "Persons Unknown" in the Claim Form correspondingly the more difficult it is likely to be to satisfy the requirements for an order for alternative service.</u>
>
> 48. Save in respect of the exceptional category of claims brought *contra mundum*, it is difficult to conceive of circumstances in which a Court would be prepared to grant an order dispensing with the requirement to serve the Claim Form upon "Persons Unknown" under CPR 6.16 (*Cameron* principle (5)). Consequently, if the Court refuses an order, under CPR 6.15, for alternative service of the Claim Form against "Persons Unknown", the jurisdiction of the Court cannot be established over the "Persons Unknown" defendants. Without having established jurisdiction, there will be no viable civil claim against them. With no civil claim, there can be no question of granting (or maintaining) interim injunctive relief against "Persons Unknown".
>
> …
>
> 166. These principles also apply equally to proceedings which are brought against (or include) "Persons Unknown". The Claim Form must be served on "Persons Unknown". Ordinarily, that will require an order for alternative service under CPR 6.15. If the claimant cannot obtain an order for alternative service – because no method can be devised that can reasonably be expected to bring the proceedings to the attention of all of those identified as the "Persons Unknown" – and the Court does not dispense with service of the Claim Form – then the Court's jurisdiction cannot be established over the "Persons Unknown". In that event, there will be no viable civil claim and there will be no question of any injunction being granted, whether interim or final."

84. None of the above principles were criticised by the Court of Appeal in *LB Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13.

85. Where an injunction is defined over a specified area of land, the default position ascertained from the caselaw is to mirror the requirements in CPR 55.6 and require service in the form of signs affixed to the property in question or to

stakes in the ground. The logic clearly being that: (i) the cause of action is based on an interest in land and therefore service provisions reflect that; and (ii) more importantly, this method has some prospect of bringing the existence of the injunction to the attention of those who enter the land (subject to sufficient signs being posted at appropriate points). This is reflected in the caselaw below.

86. Regarding protest cases, in *Secretary of State for Transport and HS2 v Cuciurean* [2020] EWHC 2614 (Ch) service provisions for an injunction order were considered:

> "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. " (at [62])

87. Service by way of signs on the land, can be supplemented (but not supplanted) by methods such as advertising/publicity both on social media and in print. In *Cuciurean v Secretary of State for Transport and HS2* [2021] EWCA Civ 357 The Court of Appeal further addressed the issue of service of an order:

> "…The Court went on to state at [82(5)] that where alternative service is ordered, "the method ... must be set out in the order." Methods of alternative service vary considerably but typically, in trespass cases, alternative service will involve the display of notices on the land, coupled with other measures such as online and other advertising."

88. Paragraph 70 sets out the extensive steps taken to serve the order in that case with extensive signs placed around the land affected -which was a relatively small area in comparison to the land in the present case- and other further steps.

89. In Gypsy and Traveller borough-wide injunction cases, which typically prohibit unauthorised encampments rather than any wider conduct, the following provisions on service of the application notice were adopted in *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 (QB).

> "...Directions were given by HHJ Cooke for the service of this application and notice of this application which provided for alternative means of service. I have been provided with a statement of Miss Danielle Taylor, which sets out the steps that have been taken to comply with those directions. In particular, Miss Taylor informs the court that the council, the claimant, published on a dedicated page on its website the documents which were detailed in the learned judge's order; posted a link to the dedicated website by pinning it to their social media pages on both Twitter and Facebook; issued a press

> release which was covered in the Express and Star newspaper; placed an editorial in the Wolverhampton edition of that paper publicising details of the application and today's hearing; and, with a view to those potentially affected who may use other social media or alternatively have issues reading the materials provided, uploaded to YouTube and the claimant's website and other social media pages a video outlining the nature of the application. Finally, copies of the relevant documents were affixed in transparent waterproof envelopes at a prominent position at each of the 60 sites proposed to be covered by the injunction and they have been checked on a weekly basis and replaced where necessary." (at [1], emphasis added)

90. It is understood that similar steps were taken to serve the injunction order itself (see [19])[3].

91. The Court of Appeal in the related case of *LB Bromley v Persons Unknown* [2020] EWCA Civ 12 approved the approach taken in Wolverhampton and stated:

> 32. Article 6 of the Convention provides that:
>
> > "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
>
> 33. This is reflective of a principle of English law that civil litigation is adversarial: "English civil courts act *in personam*. They adjudicate disputes between the parties to an action and make orders against those parties only" (*A-G v Newspaper Publishing Plc [1988] Ch 333* , per Sir John Donaldson MR at [369C]). This allows disputes to be decided fairly: a defendant is served with a claim, obtains disclosure of the evidence against them, and can substantially present their case before the Court (*Jacobsen v Frachon (1927) 138 LT 386* , per Atkins LJ at [393]). This allows arguments to be fully tested.
>
> 34. The principle that the court should hear both sides of the argument is therefore an elementary rule of procedural fairness. This has the consequence that a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they are not there to put their side of the case." (emphasis added)

92. It is therefore clear that the courts have little difficulty in imposing very onerous service requirements in the form of placing and maintaining signs on the land affected, if this is necessary to ensure that sufficient notice is provided of the existence of an injunction to meet the *Cameron/Canada Goose* requirements.

93. Moreover, in cases in which it has been held to be impossible to comply with such requirements for signs, the consequence has not been to fall back on service through publication/advertising but rather to refuse an order for

[3] In another Gypsy and Traveller case, the court required notices to be displayed at over 140 separate sites within a single borough (see reference to LB Barking and Dagenham in *LB Barking and Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) at [41]).

alternative service altogether. It is notable that the service provisions in relation to the National Highways Injunctions on which the Claimants rely required either personal service or an alternative form of postal service on named defendants (*National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [21]).

94. This approach was recently confirmed by Bennathan J who extended the interim orders in the related cases concerning the M25 injunction (see *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB)). Bennathan J rejected proposals by the claimants in that case that measures equivalent to the social media and other advertising methods proposed in the present case would be sufficient to comply with the *Cameron/Canada Goose* requirements.

> 50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.
>
> 51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.
>
> 52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction.

95. It is clear therefore, that there is no rule of law that a method of alternative service must exist for any given injunction. Where the Claimant seeks an injunction that covers too wide and imprecise an area of land, the court is entitled to find that there is no workable means of alternative service of the proposed injunction and to refuse to permit alternative service of the order.

Proposed Service Requirements in Draft Order

96. The provisions for service of the proposed injunction are:

> Service by Alternative Method – This Order
>
> …
>
> 8. Pursuant to CPR r6.27 and r.81.4:
>
> a. [service on Cash's Pitt defendants]
>
> b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
>
> i. Affixing 6 copies in prominent positions on each of the Cash's Pit Land…, the Harvil Road Land and the Cubbington and Crackley Land.
>
> ii. Advertising the existence of this Order in the Tiomes and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
>
> iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not grante, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
>
> iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Oreder and providing a link to the HS2 Proceedings website.
>
> c. [service on named defendants]
>
> d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.
>
> e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk.
>
> 9. Service in accordance with paragraph 8 above shall:
>
> a. be verified by certificates of service to be filed with Court;
>
> b. be deemed effective as at the date of the certificates of service; and
>
> c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.
>
> 10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.
>
> 11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant which it becomes aware is in attendance at the HS2 Land and shall verify any such service with further certificates (where possible if persons unknown can be identified) of service to be filed with Court.

Submissions

97. Given the nationwide scope of the present injunction it is quite clear that the provisions above are not sufficient to bring the present proceedings to the attention of all of those bound by the order.

98. A person planning a demonstration on HS2 Land which passes by the access point to a site is bound by the HS2 order; however, the steps for alternative service cannot reasonably be expected to bring the proceedings to his/her attention.

99. A person (other than a freeholder or leaseholder) who lives on a property with the HS2 land who does an act which has the effect of hindering HS2 employees (for example parking a car in a driveway used for access) is bound by the order. The steps for alternative service cannot reasonably be expected to bring the proceedings to his/her attention. Similarly concerns arise for businesses which operate in the vicinity of HS2 Land.

100. Whatever difficulties may arise from service on newcomers in the present case, the provisions for alternative service must comply with the law. The present provisions are not sufficient to bring this order to the attention of all of those who are bound by it and such an order for alternative service should not be made.

101. For the avoidance of doubt, the Sixth Defendant does not accept that the Lavender J/Bennathan J approach permitting personal service of the Order on persons unknown is a workable solution in the present case for the following reasons:

    i) Requiring personal service of the injunction creates a risk of arbitrary enforcement of the injunction in permitting the Claimant to pick and choose who to serve the order on.

    ii) Those who will be affected by the order are unable to know whether or not they will be served and therefore cannot regulate their behaviour in advance.

iii) The Claimant remains under an obligation to add all those personally served to the claim as named defendants (identified by name or description). This is inconsistent with the nature of a final injunction.

iv) There is a clear chilling effect on those seeking to protest against HS2 created by granting a power of service of an injunction to the Claimants to be used at their discretion without further oversight from the court.

TERMS OF INJUNCTION

Legal Framework

102. General principles of proportionality require that an injunction is targeted as closely as practicable on the conduct which constitutes the tortious behaviour. The terms of an order may only prohibit otherwise lawful conduct beyond the scope of the strict tort where it is necessary "in order to provide effective protection of the rights of the claimant in the particular case" (*Cuadrilla Bowland v Lawrie* [2020] EWCA Civ 9 at [50]) and "there is no other proportionate means of protecting the claimants' rights" (see *Canada Goose* at 78 and 82(5)). Clearly the extent to which an order prohibits lawful conduct must be kept to a minimum.

103. The terms of an injunction muse not be unduly vague. In *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 the Court of Appeal stated:

> **"**57. There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".

> 58. A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing."

104. Even where the strict terms of an order are limited, consideration must be given to any 'chilling effect' that the injunction has beyond conduct falling directly within its terms. This is particularly so for injunctions that are vague or broadly drawn (see *INEOS v Boyd* [2020] EWCA Civ 515 at [40]). The temporary nature of an order may still be disproportionate when the chilling effect is considered (see *Christian Democratic People's Party v Moldova* (2007) 45 EHRR 13).

Terms of HS2 Order

105. The HS2 Order prohibits:

> *Injunction in force*
>
> 3. With immediate effect until 23.59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
>
> a. entering or remaining upon the HS2 Land.
>
> b. obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or.
>
> c. interfering with any fence or gate on or at the perimeter of the HS2 Land.
>
> 4. Nothing in paragraph 3 of this Order:
>
> a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.
>
> b. Shall affect any private rights of access over the HS2 Land.
>
> c. Shall prevent any person from exercising their lawful rights over any public highway.
>
> d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.
>
> e. Shall extend to any interest in land held by statutory undertakers.
>
> 5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to):
>
> a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;

b. digging, erecting any structure or otherwise placing or leaving any object or thing on the carriageway which may slow or impede the safe and uninterrupted passage of vehicles or persons onto or from the HS2 Land;

c. affixing or attaching their person to the surface of the carriageway where it may slow or impede the safe and uninterrupted passage of vehicles onto or from the HS2 Land;

d. affixing any other object to the HS2 Land which may delay or impede the free passage of any vehicle or person to or from the HS2 Land;

e. climbing on to or affixing any object or person to any vehicle in the vicinity of the HS2 Land; and

f. slow walking in front of vehicles in the vicinity of the HS2 Land.

6. For the purposes of paragraph 3(c) prohibited acts of interference shall include (but not be limited to):

a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the HS2 Land;

b. the prohibition includes carrying out the aforementioned acts in respect of the fences and gates; and

c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate.

106. These are addressed in turn.

(3a) Forbidden from entering or remaining upon the HS2 Land.

107. This term imposes a blanket prohibition on entering HS2 land for whatever purpose.

108. Whilst paragraph 4 aims to restrict the impact to permit access to HS2 land via public or private rights of access; given the absolute prohibition in paragraph (3a) it is unclear how such an interpretation is to be arrived at.

109. The prohibition in paragraph (3a) includes entering the HS2 land even with the consent of the Claimants.

110. The prohibition in paragraph (3a) includes entering HS2 land with the consent of any person with a right to immediate possession. The caveat at (4d) disapplying the prohibition to the freeholder/leaseholder of HS2 Land does not alleviate issues that arise in relation to their guests, family or others residing on the HS2 Land who do not have a freehold/leasehold interest.

111. The wide scope of this term of the order is problematic. Given the extent of the HS2 Land, the term has a clear chilling effect on all forms of protest against HS2.

(3b) Forbidden from interfering with access or egress to HS2 Land.

112. This term prohibits conduct in relation to public highways which may be used for access/egress to HS2 land.

(4) References to legality/cause of action

113. The following passages in paragraph (4) raise concern:

> a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.
>
> b. Shall affect any private rights of access over the HS2 Land.
>
> c. Shall prevent any person from exercising their lawful rights over any public highway.
>
> d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.

114. In *Ineos v Persons Unknown* the Court of Appeal stated:

> "it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also." (at [40])

115. Similar concerns arise in the present case in relation to the phrases "exercising rights over… public rights of way", "private rights of access", "lawful rights over any public highway" and "lawful freehold or leasehold interest". These are all legal terms. An ordinary person is unlikely to have a clear idea of the limits of these terms and that brings an unacceptable chilling effect.

(5) Conduct stipulated to fall within (3b)

116. The following passages in paragraph (5) concerning conduct stipulated to fall within paragraph (3b) are problematic:

> a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;
>
> f. slow walking in front of vehicles in the vicinity of the HS2 Land

117. These are dealt with in turn below.

i) Obstructive protest in the carriageway.

118. As the UKSC confirmed in *Ziegler*, protests which intentionally disrupt the flow of traffic, even beyond a de minimis impact, nonetheless fall within the scope of Articles 10 and 11. A fact specific inquiry must be made in each case regarding the proportionality of restrictions on such protests. It is therefore impossible to state in advance whether such an obstructive protest will be unlawful. All will turn on fact-specific factors, including importantly: the importance of the issue, whether the protest targets the location affects, the degree of actual disruption caused, the availability of alternative routes and whether any public disorder arises.

ii) Slow-walking

119. Slow-walking is a well-recognised form of protest that has a historical connection to the environmental movement. It is a symbolic act of putting the human body before the articulated lorry and to prioritise human movement over mechanised transportation. The manner and form of such protest has therefore acquired a symbolic force inseparable from the protestors message (*Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23).

120. A similarly worded prohibition on slow walking was criticised by the Court of Appeal in *Ineos v Persons Unknown* [2019] EWCA Civ 515 in the following terms:

> "…the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. … slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know." (at [40])

121. In *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 the Court of Appeal stated:

> **"**Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short"." (at [57])

122. It is submitted that similar concerns arise in relation to the use of the phrase 'in the vicinity of' in the draft order. It is impossible to determine what distance will

bring a demonstration 'in the vicinity' of HS2 land in order to fall within the scope of paragraph (6f).

Generally

123. The impact of protests which block access to the HS2 Land will vary widely depending on the circumstances and the duration of the protest. It cannot be said in advance that any demonstration that slows the flow of traffic onto the HS2 Land will be unlawful.

124. Since a significant portion of the HS2 Land covers urbanised areas, the ban on demonstrations on adjacent roads will prohibit demonstrations that have some impact on the traffic flow (however benign) on relatively small roads. It cannot be said in advance that all such demonstrations would be unlawful.

125. As the above examples demonstrate, the Order appears to prohibit conduct which is not unlawful and is a clear exercise of Article 10 and 11 rights. There is no basis under which the order permits protests which have only a small impact on the flow of traffic. The HS2 Order prohibits all protests that interfere with the flow of traffic in any way. The effect of the order extends considerably beyond tortious conduct and the impact on Article 10 and 11 rights is therefore disproportionate.

126. There are also concerns about the clarity of the proposed order. Such a lack of clarity brings with it a 'chilling effect' which may found a separate ground of challenge to the order.

DURATION OF ORDER

127. The duration of the HS2 Order is stated as:

> "With immediate effect, and until 23.59hrs on 31 May 2023…"

128. For named defendants it is clear that they are bound by the terms of the order from the moment it was made until the end date.

129. A person who is not a named defendant will not bring themselves within the terms of the order unless they satisfy any of the 4 definitions of 'persons

unknown' including persons 'entering or remaining on the HS2 land without the consent of the Claimants with the effectof hindering HS2 employees' or 'persons obstructing and/or interfering with access or egress to the HS2 land'.

130. However, a person who *at any point and for any purpose* either enters HS2 Land without the consent of the Claimants with the required effect or interferes with access to HS2 Land, brings themselves within definition of persons unknown. Since the service provisions for persons unknown do not require any form of personal service such a person will be bound by the order. On a simple reading of the order, a person meeting the definition of persons unknown will become bound by the order at all times thereafter up until the end date: once bound, they are always bound. In this way they are treated in the same way as named defendants.

131. This interpretation of the order is significant since an individual can fall within the definition of persons unknown through the commission of relatively innocuous acts (a short go-slow demonstration on a low volume road covered by the injunction); however, the individual is then bound by all the terms of the order until the end date. Whilst this may not have been in the intention of the Claimant, it appears to be the consequence of the order. The fact that the order is *capable* of bearing this interpretation clearly a matter of concern for those not already named defendants.

PROPORTIONALITY AND EXERCISE OF COURT'S DISCRETION

132. The Court is required to consider the effect of the injunction order as a whole. Taken cumulatively the scope of the order and range of conduct restrained renders the order wholly disproportionate. The Order clears lacks "clear geographical and temporal limits" and fails to meet the *Canada Goose* requirements.

133. Moreover those seeking equitable relief in the form of an injunction are required to come to court with "clean hands" (*LB Bromley* at [104(d)]). The

history of disputes arising from heavy handed enforcement of previous injunctions is relevant to the courts assessment of this issue.

134. Alternatively, such history demonstrates the difficulties in enforcing injunctions which cover a wide area of undemarcated land and impose complex conditions on a large body of persons.

CONCLUSION

135. It is submitted that the present orders display many of the flaws identified in *Canada Goose*, as the Court of Appeal stated:

> "…Canada Goose's problem is that it seeks to invoke the civil jurisdiction f 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 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 protestors…." [at 93]

136. The Sixth Defendant respectfully asks that the court discharge/vary the interim injunction in accordance with the submissions above.

Tim Moloney QC, Doughty Street Chambers

Owen Greenhall, Garden Court Chambers

23.05.22