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

SUBMISSIONS ON BEHALF OF JAMES KNAGGS (D6): A1P1

INTRODUCTION

1. These short submissions are made on the Claimants' reliance on Article 1 of Protocol 1 ('A1P1') of the European Convention on Human Rights ('ECHR') in the present case.

2. It is the Sixth Defendant's submissions that:

   i) The Claimants in the present case cannot rely on A1P1 rights in support of their application for an injunction.

   ii) The Sixth Defendant does not dispute that the Claimants can rely on domestic private law rights (where established) however, these are not to be given the elevated status of an ECHR right.

   iii) This issue has not received proper attention in previous cases concerning the present Claimants and previous case law suggesting that the Claimants may rely on A1P1 rights is either wrongly decided or distinguishable.

BACKGROUND

Reliance on A1P1 Rights

3. No refence is made to reliance on A1P1 rights in the Amended Particulars of Claim dated 26.04.22.

4. The status of the Claimants was put in issue in the Defence of the Sixth Defendant filed on 16.05.22 which states:

> 3. …The Claimants are public authorities for the purposes of the Human Rights Act 1998

5. The Claimants' skeleton argument on Legal Principles sets out A1P1 in full at [26]. It is the first of the rights listed under the heading 'Injunctive Relief and Convention Rights'. The Claimants skeleton argument on the Merits dated 20.05.22 states:

> "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 threatened to continue." (at [41])

6. A1P1 is not further referred to in either document.

7. The Sixth Defendant's skeleton argument states:

> "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." (at [19])

8. Nonetheless in oral submissions the Claimants asserted that the First Claimant was entitled to rely on A1P1 Rights in the present case. It is understood that reliance is put on A1P1 not as a cause of action, but as a balancing factor in any assessment of proportionality when set alongside Articles 10 and 11 ECHR.

Status of the First Claimant

9. It is not suggested that the Second Claimant may rely on A1P1 rights, the issue concerns the First Claimant.

10. The First Claimant is described in the Framework Document between the Secretary of State for Transport and High Speed 2 Limited (2018) in the following terms:

> "2. HS2 Ltd is a corporate body established on 14 January 2009 by incorporation under the Companies Act 2006, and limited by guarantee. It is an Executive Non-Departmental Public Body tasked with delivering the High Speed 2 project. The Secretary of State is its 'sole member', for whom it is remitted to undertake work (the Secretary of State's sole member status is referred to as the 'shareholder' function throughout this document, as it is equivalent to the rights of a sole shareholder). HS2 Ltd is a separate legal entity from the Crown and is therefore not a Crown Body." (emphasis added)

11. The purpose of HS2 Ltd is defined as:

> 2.1 HS2 Ltd has been established to develop, promote and deliver the UK's new high speed rail network. HS2 Ltd's main duties and powers are specified in Section 4 of the Company's constitution (which is available from Companies House on payment of a fee) and in the Development Agreement (see 2.2 below).

12. It also states:

> Ministerial responsibility
>
> 4. The Secretary of State for Transport will account for HS2 Ltd business in Parliament, and keep Parliament informed about the performance of HS2 Ltd by ensuring HS2 Ltd's Annual Report and Accounts are laid before Parliament each year.
>
> 4.1 As sole shareholder in HS2 Ltd the Secretary of State also has specific shareholding responsibilities that include:
>
> - Ensuring that HS2 Ltd is guided and monitored in the public and taxpayer interest.
> - Approving the amount of capital contribution to be paid to HS2 Ltd and securing Parliamentary or HM Treasury approval if necessary.
> - Holding the HS2 Ltd Board to account for its governance of the Company and its performance.
> - Appointing the HS2 Ltd Chair and annually reviewing their performance, and appointing Non-Executive Directors.
> - Removing a member of the Board from their position if given due cause in accordance with the relevant provisions of the Companies Act 2006 and/or subject to the terms of their appointment letter.
> - Exercising the right to amend the Memorandum and Articles of the Company at any time.

13. It is therefore clear that:

    i) The legal nature of HS2 Ltd is a company;

    ii) HS2 Ltd is wholly owned by the state (the Secretary of State for Transport is its sole shareholder);

    iii) HS2 Ltd is entirely publicly funded;

iv) HS2 Ltd has a specific public purpose: "to develop, promote and deliver the UK's new high speed rail network";

v) The Secretary of State retains control over HS2 Ltd in relation to funding, governance, composition of the managing board etc; and,

vi) HS2 Ltd exercises specific statutory powers granted by primary legislation. Of particular relevance to the present claim are those powers of both compulsory purchase of land, temporary possession of land, the extinction of rights over land and specific powers in relation to planning permission, controls on listed buildings and similar (see sections 4, 10, 13 and related schedules)

LEGAL FRAMEWORK

14. The starting point under domestic law is the case of *Aston Cantlow v Wallbank* [2003] UKHL 37; [2003] 3 W.L.R. 283 in which Lord Nicholls stated:

> 6. The expression "public authority" is not defined in the Act, nor is it a recognised term of art in English law, that is, an expression with a specific recognised meaning. The word "public" is a term of uncertain import, used with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893 (56 & 57 Vict c 61)), public nuisance, public house, public school, public company. So in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg.
>
> 7. Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act 1998 a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476.
>
> 8. A further, general point should be noted. One consequence of being a "core" public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of

Convention rights. A core public authority seems inherently incapable of satisfying the Convention description of a victim: "any person, non-governmental organisation or group of individuals" (article 34 , with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act 1998, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression "public authority" should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.

9. In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society. Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase "public authority" any person whose functions include "functions of a public nature". This extension of the expression "public authority" does not apply to a person if the nature of the act in question is "private".

10. Again, the statute does not amplify what the expression "public" and its counterpart "private" mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description "public", essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

11. Unlike a core public authority, a "hybrid" public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1) , this feature throws some light on the approach to be adopted when interpreting section 6(3)(b) . Giving a generously wide scope to the expression "public function" in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." (emphasis added)

15. The position of a hybrid authority when exercising public functions (and therefore subject to claims under s6(3)(b) HRA 1998) was considered by the Court of Appeal in *YL v Birmingham City Council and others* [2007] EWCA Civ 26; [2007] EWCA Civ 27 [2008] Q.B. 1 by Buxton LJ:

> "75. A particular difficulty has been seen in this connection in respect of the right of the care home to protect its own position, for instance by asserting its right to control its

> property under article 1 of the First Protocol . That difficulty arises as follows. When addressing the position of core public authorities, Lord Nicholls in the *Aston Cantlow case [2004] 1 AC 546* , at para 8 (a passage relied on by Mr Sales as in some way undermining the *Leonard Cheshire Foundation case [2002] 2 All ER 936*), pointed to the definition of "victim" in article 34 of the Convention: "any person, non-governmental organisation or group of individuals" (Lord Nicholls's emphasis). It therefore followed that a core public authority would be, or was likely to be, a body that was not a victim, and thus had no Convention rights of its own. But if that is so of core public authorities, it is very difficult to see why that is not so of hybrid public authorities in relation to the activities that confer on them their public status. True it is that in the Aston Cantlow case Lord Nicholls said, at para 11: "Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights." But, with deference, that does not meet the objection in relation to those functions of the hybrid, in the present case the care of section 26 residents, that confer the status of a public authority. And it would therefore seem to follow that when making decisions of the sort indicated above the care home cannot take into account, under the rubric of the rights of others, its own Convention rights, because when discharging its public functions it has no such rights." (emphasis added)

16. The cases of *Aston Cantlow* and *YL* are therefore authority that where a party to litigation is either a core public authority or is exercising functions of a public nature for the purposes of s6(3)(b) HRA 1998 such a party cannot rely on its own Convention Rights either as a cause of action or to be weighed in the balance when assessing the proportionality of interference with the Convention Rights of another.

ECHR Caselaw

17. The issue may also be approached from the perspective of the ECHR case law. Article 34 ECHR states:

> Article 34 ECHR: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

18. As the Practical Guide on Admissibility Criteria (01.02.22) states:

> 11. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention.
>
> 12. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, applies not only to the central organs of the State, but also to decentralised authorities that exercise "public functions", regardless of their autonomy *vis-à-vis* the central organs; likewise it applies to local and regional authorities (*Radio France and Others v. France* (dec.), § 26), a municipality (*Ayuntamiento de Mula v. Spain* (dec.)), or part of a municipality which participates in the exercise of public authority (*Municipal Section of Antilly v. France* (dec.)), none of which

are entitled to make an application on the basis of Article 34 (see also *Döşemealtı Belediyesi v. Turkey* (dec.)). A State not party to the Convention cannot be qualified as a "non-governmental organisation" and is therefore not entitled bring a case to the Court under Article 34 (*Democratic Republic of the Congo v. Belgium* (dec.), §§ 13-21).

13. The category of "governmental organisation" includes legal entities which participate in the exercise of governmental powers or run a public service under government control (*JKP Vodovod Kraljevo v. Serbia* (déc.), §§ 23-28, concerning a water and sewerage company established by a municipality; *İhsan Doğramacı Bilkent Üniversitesi v. Turkey* (dec.), §§ 35-47, concerning a university established by a foundation). The private nature of the act complained of is not relevant in this respect (§ 38).

19. In the Case of *Islamic Republic of Iran Shipping Lines v Turkey* (Application no. 40998/98) the ECtHR stated:

79. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see Radio France and Others, cited above)." (emphasis added)

20. In *JKP Vodovod Kraljevo v. Serbia* (applications nos. 57691/09 and 19719/10) the Court stated:

"23. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The category of "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see Radio France and Others v. France (dec.), no. 53984/00, § 26, ECHR 2003-X (extracts)).

…

25. The Court notes that the applicant company is incorporated under the domestic law as a separate legal entity. However, the company's legal status under domestic law is not decisive in determining whether it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The Court has held on several occasions that companies lacked locus standi under Article 34, regardless of their formal classification under domestic law (see, for example, *State Holding Company Luganksvugillya v. Ukraine* (dec.), no. 23938/05, 27 January 2009; *Transpetrol, a.s. v. Slovakia* (dec.), no. 28502/08, 15 November 2011; and *Zastava It Turs*, cited above).

26. What is more relevant is the special nature of the applicant company's activity. As the only water and sewerage company in the municipality of Kraljevo, it provides a public service of vital importance to the municipality population (see, *mutatis mutandis, Yershova v. Russia*, no. 1387/04, § 58, 8 April 2010,

and *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, § 209, 9 October 2014). The assets used by the company for those purposes (notably, water, the water supply system and the sewerage system) were (and continue to be) public assets (see paragraph 16 above). Furthermore, it has not been disputed that the tariffs of the water and sewerage services provided by the applicant company required the consent of the local authorities (see paragraph 15 above). Because of the special nature of those services, only statutory utility companies were (and continue to be) allowed to provide them (see paragraph 14 above). The applicant company's claim that water and sewerage services could have been operated by private actors, which would have been subject to the same rules, does not seem to properly reflect the content of the domestic law. The present case should therefore be distinguished from *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 80, ECHR 2007-V, in which the Court found that the applicant company was a "non-governmental organisation" within the meaning of Article 34 of the Convention, despite the fact that it was wholly owned by the Iranian State and that a majority of the members of the board of directors were appointed by the State, because, among other reasons, it did not have a public-service role or a monopoly. It should further be distinguished from *Radio France and Others*, cited above, in which the Court held that the applicant company was a "non-governmental organisation" within the meaning of Article 34, although it was wholly owned by the French State and performed "public-service missions in the general interest", because, inter alia, it did not hold a monopoly over radio broadcasting and there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints.

27. Lastly, the Court observes that the applicant company was required to write off its large claims against State- and socially-owned companies (see paragraphs 10 and 13 above). The State thus disposed of the applicant's assets as it saw fit. This shows that the applicant company does not enjoy sufficient independence from the political authorities (compare *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 117, ECHR 2014, and *Liseytseva and Maslov*, cited above, §§ 211 and 217).

28. In view of the above, the applicant company cannot be regarded as a "non-governmental organisation" within the meaning of Article 34 of the Convention (compare *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, Decisions and Reports 90-B)." (emphasis added)

SUBMISSIONS

21. It is submitted that the burden lies on the Claimants to establish in both law and fact that they may rely on A1P1 Rights.

22. It is further submitted that HS2 Ltd is a core public body or, alternatively, a hybrid public authority for the purposes of s.6 HRA 1998. Similarly, it is submitted that it is a "governmental organisation" for the purposes of Article 34 ECHR.

23. This is for the following reasons:

i) The Framework document defines HS2 Ltd as: "It is an Executive Non-Departmental Public Body tasked with delivering the High Speed 2 project." (emphasis added);

ii) The fact that HS2 Ltd is formally a company is not determinative of its status;

iii) HS2 Ltd is wholly owned by the state (the Secretary of State for Transport is its sole shareholder) and is entirely publicly funded;

iv) The state retains control over HS2 Ltd in relation to key areas of funding, governance, composition of the managing board etc.;

v) HS2 Ltd has a specific public service role: "to develop, promote and deliver the UK's new high speed rail network";

vi) HS2 Ltd effectively holds a monopoly position in the delivery of the HS2 project;

vii) HS2 Ltd exercises specific statutory powers granted by primary legislation; and,

viii) Of particular relevance to the present claim are those powers of both compulsory purchase of land, temporary possession of land, the extinction of rights over land and specific powers in relation to planning permission, controls on listed buildings and similar (see sections 4, 10, 13 and related schedules)

24. If HS2 Ltd is held to be a hybrid public authority then it is submitted that the exercise of powers relevant to the present claim fall within "functions of a public nature". The present claims are founded on rights to land which are based on statutorily conferred powers of compulsory purchase and, importantly, temporary possession. These statutory powers lie at the heart of the Claimants' claims in trespass and the related claims in private nuisance arising from land to which a right to possession is asserted. Without such statutory powers the Claimants would not be in a position to bring the present claim and would have no basis on which to seek an injunction.

CONCLUSION

25. It is respectfully submitted that the Claimants are unable to rely on A1P1 Rights in support of the application for an injunction.

26. For the avoidance of doubt, the Sixth Defendant does not dispute that the Claimants can rely on domestic private law rights (where established). However, these are not to be given any elevated status as an ECHR right.

Tim Moloney QC
Doughty Street Chambers
Owen Greenhall
Garden Court Chambers

30 May 2022