IN THE HIGH COURT OF JUSTICE (KBD) **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

APPLICATION FOR PERMISSION TO APPEAL

ON BEHALF OF JAMES KNAGGS (D6):

INTRODUCTION

1. The Sixth Defendant (D6) applies for permission to appeal on the following grounds:

   i) The learned judge erred in law in concluding that the Claimant had an immediate right to possession of the entirety of the land subject to the order capable of founding a claim in trespass.

   ii) The learned judge erred in concluding that the Claimants may rely on rights under Article 1 of Protocol 1 ECHR

   iii) The learned judge erred in law in defining the prohibited conducted in the injunction Order:

      a) By reference to a legal cause of action

b) By reference to vague/imprecise terms such as 'slow walking'

iv) The learned judge erred in law and/or reached a conclusion no reasonable judge could make in finding that the service provisions in the directions order of 28.04.22 and the draft injunction order are sufficient to bring the proceedings to the attention of all those affected.

2. Brief submissions are made in support of these grounds below.

i) Right to possession

3. It is submitted that the learned judge erred in law in concluding that the Claimant had an immediate right to possession of the entirety of the land subject to the order capable of founding a claim in trespass.

4. The judge's conclusion on this point is set out at Paragraph 78 of the draft judgment which states:

> "Mr Kimblin [counsel for the Claimant] was quite explicit that the Claimants do, as of now, have the right to immediate possession over the green land because the relevant statutory notices have been served, albeit (to speak colloquially) the diggers have not yet moved in. That does not matter, in my judgment. I am satisfied that the Claimants do, as a consequence, have a better title to possession that the current occupiers – and certainly any protesters who might wish to come on site. Actual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ's judgment at p151; the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled. That is what the First Claimant has in relation to the green land."

5. At paragraph 120 also states:

> "I am therefore satisfied that the Claimants are entitled to possession of all of the land comprising the HS2 Land. The fact they are not actually in possession (yet) of all of it does not matter, for the reasons I have already explained. The statutory notices have been served and they are entitled to immediate possession. That is all that is required."

6. It is accepted that actual possession of land is not required to found a claim for an injunction, a right to possession will suffice. However, it is submitted that the Claimants do not have even a right to possession of all the relevant land at the present time.

7. The statutory scheme on which the Claimants right to possession of the relevant land are set out in Schedule 15 (Temporary Possession and Use of Land) of the

Phase 2a Act (the provisions of the Phase One Act are materially equivalent). It states (emphasis added):

> *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.

8. 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.

9. Paragraph 1 of Schedule 15 therefore creates a legal right to possession of land provided the conditions in sub-paragraph 1(1) are met (and the statutory notice requirements are satisfied) (see *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)).

10. Paragraph 1(1) imposes a statutory limit on the right to possession: possession must be needed 'for Phase 2a purposes'. At any point in time where this statutory condition is not met the Claimants have no right to possession of the land whatsoever. Where works are not scheduled to take place on land imminently then the Claimants are not only not in actual possession but have no right to such possession either immediately or imminently. It is therefore wrong to conclude in relation to such land that the Claimants "are entitled to immediate possession" or that the Claimants have a better title to land than the current occupiers/Defendants. A person who is in actual occupation of land which is not needed imminently by the Claimants for Phase 2a purposes will

have a better title (actual possession) than the Claimants (no right to possession at all).

11. 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.

Claimants A1P1 Rights:

12. It is submitted that the learned judge erred in concluding that the Claimants may rely on rights under Article 1 of Protocol 1 ECHR in support of their claims.

13. The judge's finding on this point is set out at Paragraph 93 of the Draft Judgment.

> "I am satisfied that the First Claimant can pray in aid A1P1, and the common law values they reflect, and that the approach set out in *DPP v Cucirean* and other cases is binding upon me. The point raised by D6 was specifically dealt with by the Court of Appeal in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [28]…"

14. When assessing whether the interference with the Defendants' Article 10 and 11 rights was in pursuit of a legitimate aim, he said:

> "…The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained…" (at [169])

15. Two cases are cited where the point was not subject to any argument (in one of which the defendants were not legally represented). The only case in which this point has been subject to challenge is *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661 where the point was explicitly left open.

16. The Claimants arguments in submissions dated 30.05.22 and 01.06.22 are not addressed. It is clear that a core public body cannot ever rely on Convention Rights in domestic litigation and a hybrid-authority cannot rely on such rights when exercising public functions (see *Aston Cantlow v Wallbank* [2003] UKHL

37; [2003] 3 W.L.R. 283 at [6]-[12] and *YL v Birmingham City Council and others* [2007] EWCA Civ 26; [2007] EWCA Civ 27 [2008] Q.B. 1 at [75])). Similarly from the perspective of ECHR caselaw a governmental organisation cannot be a 'victim' for the purposes of remedies under the Convention (see Article 34 ECHR, *Islamic Republic of Iran Shipping Lines v Turkey* (Application no. 40998/98) at [79] and *JKP Vodovod Kraljevo v. Serbia* (applications nos. 57691/09 and 19719/10) at [23-28]).

17. It is submitted that the learned judge categorisation of the Claimants legal rights as Convention Rights under A1P1 is relevant to the relative weight to be afforded to such legal rights. In concluding that the Claimants could rely on rights under A1P1 ECHR the learned judge erred in law.

iii) Terms of the Order

18. It is submitted that the learned judge erred in law in defining the prohibited conducted in the injunction Order:

    a) By reference to a legal cause of action

    b) By reference to vague/imprecise terms such as 'slow walking'

19. The learned judge approved the Draft Order in the terms sought by the Claimants (with the exception of requiring the word 'deliberately' to be inserted at two points in the order). He stated:

> "Subject to two points [relating to the insertion of the word 'deliberately'] I consider these provisions [in the draft order] comply with *Canada Goose*, [82], in that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the Claimants seeks to prevent. I also consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. The 'carve-outs' in [4] make clear that ordinary lawful use of the highway is not prohibited. I do not agree with D6's submission (Skeleton Argument, [52], et seq."

20. 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."

21. 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. 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])

(a) References to legality/cause of action

22. Paragraph (4) of the draft order provides carve outs for conduct on public rights of way. It states (emphasis added):

> (4) Nothing in paragraph (3) or 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.

23. It is clear therefore that the scope of the prohibited conduct in Paragraph (3) and is restricted by Paragraph (4) using legal concepts of "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.

24. Moreover, the terms bring with them an unacceptable vagueness since the "lawful right over the public highway" includes any protest which does not unreasonably obstruct others. The provisions therefore fail to comply with the requirements in *Cuadrilla* on this basis as well.

(b) Slow walking

25. Paragraph (5) of the draft order (as amended) stipulates that prohibited conduct includes:

> f. Deliberate slow walking in front of vehicles in the vicinity of the HS2 Land

26. 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])

27. 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])

28. It is submitted that the insertion of the word 'deliberate' in paragraph 5(f) does not address these concerns. The prohibition remains unduly vague and fails to comply with the requirements in *Ineos* and *Cuadrilla* above.

Iv) Service

29. It is submitted that the learned judge erred in law and/or reached a conclusion no reasonable judge could make in finding that the service provisions in the directions order of 28.04.22 and the draft injunction order are sufficient to bring the proceedings to the attention of all those affected.

30. The service provisions are set out at Paragraph (8) of the Order (which mirrors requirements for service of the application for the injunction). Broadly summarised the provisions for service on persons unknown require notice to be given: by affixing copies of the Order at the Cash's Pit site, by placing an advertisement in the Times and Guardian newspapers, placing copies of the order in libraries every 10 miles along the route and publishing on social media.

31. The learned judge stated:

> "196. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.
>
> 197. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75]."

32. In an earlier discussion (at [115])of the legal requirements for service, reference was made to provisions required in *National Highways Limited v Persons Unknown and others* [2022] EWHC 1105 (QB) (Bennathan J) which in turn referred to *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB) (Lavender J). This was another wide-ranging injunction case in which the court found that it was impracticable to place notices on stakes in the ground on all the land effected.

33. In the *National Highways* case, the broad scope of the injunction was tempered by requiring personal service on persons unknown. Therefore no person could be in breach of the order without having actual knowledge of the order. No similar requirement was imposed in the present case. It is clear that the service provisions allow for the clear possibility that persons may fall within the definition of persons unknown and breach its terms without being aware of the

order itself. Importantly, the order is not limited to protestors, but captures others that may come into disputes with HS2. There vast scope of the land affected includes many businesses and residential properties the owners and occupiers of which may remain entirely unaware of these proceedings until a dispute arises when HS2 workers begin construction work in the vicinity of their properties. It is submitted that to impose injunctive prohibitions against such persons without advance notice is wrong in principle.

Permission to appeal

34. Insofar as is relevant, CPR 52.6 states:

> 52.6 Permission to appeal test – first appeals
>
> (1) Except where rule 52.7 applies, permission to appeal may be given only where—
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard.

35. It is submitted that each of the grounds of appeal identified have a real prospect of success; or alternatively, there is some other compelling reason for the appeal to be heard.

36. The grounds of appeal all raise issues of important principle or practice which are of general public importance. The background circumstances of the case concern a project of national importance. The explicit aim of the present application has been to avoid the need for repeated applications for site specific injunctions, the case therefore has a potentially wide impact. The status of the claim and the developing nature of the law in this area are also relevant factors. Furthermore, there are currently conflicting or indeterminate decisions of the higher courts relating to many of the grounds of appeal raised. For example, the status of purported A1P1 rights of public bodies in injunction claims was explicitly left open by the Court of Appeal in *Cuciurean*. Also, the service provisions relating to persons unknown in wide-ranging injunction cases have yet to be considered at Court of Appeal level despite the increasing number of such applications being sought in the High Court.

37. On the basis above it is submitted that permission to appeal should be granted.

Tim Moloney QC, Doughty Street Chambers
Owen Greenhall, Garden Court Chambers
16.09.22