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

-and-

PERSONS UNKNOWN and Others

Defendants

CLAIMANTS' NOTE
(1) DRAFT INJUNCTION ORDER
(2) PERMISSION TO APPEAL

DRAFT INJUCTION ORDER

Introduction

1. D6 makes an overarching submission about splitting the order. It is not accepted by the Claimants. It is raised far too late. The trial was on the basis of the amended draft order. Moreover, named defendants appear on the draft order. It is not accepted that such defendants would find it to be easier to understand two separate documents. The reverse is likely to be the case.

2. D6 seeks to modify the Draft Injunction Order ("the Draft Order") in the following terms, to add:
   (i) a need for there to be defined 'consequences' arising from the prohibited acts in §3(a)-(c) of the Draft Order, notably *'where such conduct has 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';

(ii) a provision that no person shall be in breach of §3 without a Defendant '*knowing of the existence of the Order and the terms of §3*'; and

(iii) to add a provision that where there are ongoing HS2 works on any portion or parcel of HS2 Land, interference with such works will not constitute a breach of §3 of the Draft Order, unless that portion or parcel of the HS2 Land is clearly demarcated.

3. In summary, we submit that:

(i) the 'consequence wording' is appropriately drafted within the definitions of 'persons unknown' in D2, D3 and D4. The issue has been appropriately dealt with by the learned Judge in the Draft Judgment. To introduce 'consequence wording' at §3 serves to significantly attenuate the force of the Draft Order, particularly in respect of D1 and D5-63.

(ii) an additional 'knowledge' provision is unnecessary and is contrary to established authority on the issue;

(iii) demarcation is also inappropriate, particularly when the learned Judge has made findings about the Claimants' right to possession and where the adequacy of notice of the Draft Order has been fully addressed in the Draft Judgment.

Legal principles

4. It is a 'fundamental principle of justice' that a person would not be made subject to the jurisdiction of the court, without having such notice of the proceedings as would enable him to be heard (*Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 [14]).

5. 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]).

6. The essence of the point now raised by D6 is that it is for the Claimants to prove 'something more' than service. That issue was canvassed in *Cuciurean* and was addressed by Warby LJ from [58]. He found:

    a. That in this context, 'notice' is equivalent to 'service' and *vice versa*;
    b. 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;
    c. There is no further requirement of *mens rea*, though the state of knowledge may be important in deciding what, if any, action to take in respect of the contempt.
    d. For a person to be held to be in contempt where they do not have actual knowledge of the relevant order, then no penalty would be imposed (*Cuciurean* [62] citing *Cuadrilla*).

7. In the recent decision of *MBR Acres v McGivern* [2022] EWHC 2072 (QB)[1], Nicklin J goes on to say that:

[1] This was a case where the alternative service order did not comply with the mandatory requirement under CPR 6.15(4) (see [10]).

> **"**70. ***Cuciurean*** is therefore authority for the proposition that, providing there has been compliance with the terms granting permission to serve the injunction order by alternative means, the respondent will be taken to have notice of the terms of the injunction. There is no requirement of knowledge. Ignorance of the terms of the injunction is relevant only to penalty, not liability, although where the Court was satisfied that the respondent was ignorant of the relevant order or its terms, then no penalty would be imposed for what would amount to a wholly technical breach. ***Cuciurean*** was not apparently cited to, or considered by, the Court of Appeal in ***Barking***."

8. In *London Borough of Barking and Dagenham v Persons Unknown & Ors* [2022] EWCA Civ 13, the Court found that 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 (at *Barking & Dagenham* [85] and [91], approving *South Cambridgeshire v Gammell* [2005] EWCA Civ 1429 at [34]).

Submissions

'Consequence' language being included in §3

9. D6 also seeks to insert language within §3 that the prohibited behaviour must also have a consequence, namely that of the:

   '*effect of damaging and/or delaying and/or hindering the claimants, their agents, servants, contractors, sub-contractors, group companies, licencees, invitees, and/or employees'* ("the consequence wording").

10. The Draft Judgment expressly deals with the Claimants' rights to the HS2 land (from [27]). The Court is satisfied that the Claimants have the powers asserted over the land in question and are either in lawful occupation or possession (or have an immediate right to possession) (at [46]).

11. Moreover, that Claimants are *prima facie* entitled to an injunction to restrain a threatened or apprehended trespass on the HS2 Land. That is the case even in respect of temporary possession land, where the Claimants have a better title to possession than even the current occupiers and those who wish to come on-site (see [78]).

12. The 'consequence' wording is therefore unnecessary. The Claimants are entitled to seek injunctive relief against the Defendants for trespass and/or nuisance. There is no need to demonstrate what the consequences of such activities were.

13. To the extent that it is relevant, the 'consequence wording' has been included to define the scope of 'persons unknown', D2 and D3. This is to curtail the wide category of 'persons unknown'. It prevents the inadvertent trespasser from falling within the scope of the Draft Order. Similar language has been used in respect of D4.[2]

14. D1 and D5-63 are not inadvertent trespassers. In order for there to be a potential breach of the Draft Order, they would need to:

    a. enter or remain upon the HS2 land;
    b. deliberately obstruct or otherwise interfere with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or
    c. interfere with any fence or gate on or at the perimeter of the HS2 Land.

15. We make two further submissions on this issue.

16. First, there is no requirement that the Claimants tolerate, for example, a named defendant trespassing on HS2 Land where there is 'no harm'. The Claimants are entitled to assert their possessory rights and the Court has made such a finding [78].

17. Second, the Draft Injunction does not curtail the lawful right to protest.[3] Similarly, no freeholder or leaseholder will be subject to committal proceedings in the event of breach.[4]

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[2] We note that the Court has also addressed this point at [154]:
"I am satisfied that the definitions of 'persons unknown' set in Appendix 1 are apt and appropriately narrow in scope in accordance with the *Canada Goose* principles. The definitions would not capture innocent or inadvertent trespass."

[3] The Claimants have given undertakings that the Draft Order is not intended to prohibit lawful protest which does not involve trespass upon the HS2 Land and does not block, slow down, obstruct, or otherwise interfere with the Claimants' access or egress from the HS2 land.

[4] the Claimants have given undertakings that no freeholder or leaseholder with a lawful interest in HS2 is to be subject to committal proceedings for breach of such an Order.

18. Accordingly, to the extent that the Court is concerned about safeguarding lawful activity, such provisions have been 'carved out' in the Draft Order.

Knowledge

19. First, the requirement for knowledge is not an issue which concerns D6. It has not been part of D6's case that he had not been served with the application or the Draft Order. D6 has participated in proceedings throughout. It cannot properly be argued that a provision on 'knowledge' is therefore necessary in §3 in order to safeguard D6.

20. Second, throughout these proceedings, the Court has properly grappled with what is necessary by way of alternative service, pursuant to CPR 6.15. It follows that it is incumbent upon the Claimants to demonstrate to the criminal standard that the Draft Order in question was served and that the Defendant performed at least one deliberate act, that was non-complaint with the Draft Order, in any subsequent contempt application (*Cuciurean*).

21. Third, the imposition of an additional 'knowledge' requirement is not necessary. It would amount to 'something extra'; an approach deprecated by the Court of Appeal in *Cuciurean*. Accordingly, the suggestion that such a requirement should be imposed in §3 is strongly refuted by the Claimants.

Demarcation

22. D6 suggests that clear demarcation is necessary in order for there to be a finding that there has been 'interference'.

23. The HS2 land covers a large area. The Court agrees and found that:

'[t]he HS2 land is an area of a sufficient size that it is not practicable to police the whole area with security personnel or to fence it or make it otherwise inaccessible'.

24. The Court also found that the Revised HS2 Land Plans are '*clear, detailed and precise*' [54] and they '*clearly show the land to which the injunction, if granted, will apply*'.

25. We respectfully agree with that analysis. For both D6's purposes and for the purposes of all other Defendants, we submit that demarcation is both impractical and unnecessary.

26. D6 has now revised the scope of his 'demarcation argument' to relate to areas in which works are underway. This revision has no better justification than his original argument because the HS2 land is clearly and precisely defined. There is no warrant to require a landowner to demarcate land in order to have quiet enjoyment of it, nor is there any need for a landowner to show that they are presently using the land.

PERMISSION TO APPEAL

27. D6 submits that:

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.

Possession

28. In her First Witness Statement, Julie Dilcock said [Bundle B154, §33] that the First Claimant has served the requisite notices under the HS2 Acts and is entitled to temporary possession of that part of the HS2 land coloured green pursuant to section 15 and schedule 16 of the Phase One Act and section 13 and schedule 15 of the Phase 2a Act. A spreadsheet of the notices was provided.

29. D6 has accepted in earlier stages of these proceedings that Sch 15/16 rights were sufficient – see §13 in the submissions of 5th April 2022 on behalf of D6 which are attached. This concession was correctly made.

30. Now, D6 submits that "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)." [§10 PTA application].

31. The green land is needed. That is why Parliament gave the rights under the HS2 Acts. Petitioners could, and did, petition Parliament to say that the land was not needed. Indeed, if a petitioner could show that land was not needed, that is a most effective means of challenging the hybrid bill. There is no requirement to need the land 'imminently', as is common sense.

32. D6 has no interest in any Green land and his point is therefore an arid one. D6 merely wishes to disrupt the scheme by any means available to him.

33. The point is wrong for the reasons submitted in written and oral argument and nothing has changed in the PTA application. Paragraphs 78 and 120 of the draft judgment are correct. There is no prospect at all of the Court of Appeal taking a different view of the HS2 Act.

A1P1

34. This is a point developed by post-hearing submissions. The ground on which PTA is sought is that a governmental organisation cannot be a victim under the Convention.

35. As was made clear in our A1P1 submissions dated 31st May 2022 in response (attached), it is no part of HS2's case that it is a victim. The submissions at §§7-19 are repeated here. The learned judge was evidently correct at [93-97], [163] and [198], and was supported by clear authority. With respect to D6, he has failed to engage with the real issues and the ground on which PTA is sought has no prospects.

Terms of the Order – slow walking – chilling effect

36. It was part of D6's case that slow walking should be permitted because it was a long-established form of protest (D6's skeleton at §118). At the same time, it was also submitted by D6 that 'slow-walking' was too vague, relying on *Ineos* (D6's skeleton at §120). D6 wants to have it both ways.

37. But, in any event, the draft Order contains clear safeguards, as the learned judge carefully considered and found at: [63], [158], [159]. The learned judge had to assess the effect of the particular order sought, including its provisions to ensure rights over public rights of way and use of the public highway are neither prevented nor interfered with. The effect of D6's submissions is to suggest the removal of safeguards such as '*Nothing in this Order shall prevent any person from exercising their rights over any public right of way over HS2 land'.* That is a provision which one might have thought an objector to the Order would welcome. To include it cannot arguably be an error of law. This ground is unrealistic. Mr Knaggs knows what 'slow-walking' is and he knows where it will have the effect of hampering the construction of the scheme.

Service

38. This point is essentially the same debate which the Court heard in respect of service of the Claim. That process was highly effective in drawing the proceedings to the attention of those who wished to participate. Sensibly, D6 did not pursue its application for permission to appeal the order of the court which ensured good and effective service of the Claim.

39. Further the answer to this ground of appeal lies in §11 of the draft Order:

> "Further, without prejudice to paragraph 8, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been, on the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court."

40. So, personal service is a requirement if it is reasonably practicable. The net result is that if HS2 become aware of, for example, a trespasser, the trespasser has to be served unless there are good reasons why that cannot be done. Quite why this approach would amount to an error of law has not been explained. There is no such error.

41. Permission to appeal should be refused.

Richard Kimblin KC **16th September 2022**
Sioned Davies

No.5 Chambers

Michael Fry
Jonathan Welch

Francis Taylor Building

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):

POSSESSION ORDER FOR CASH'S PIT LAND (AMENDED 08.04.22)

INTRODUCTION

1. This skeleton argument sets out objections to the claim for possession over the Cash's Pit Land sought by the Claimants in the claim dated 28.03.22. Given the short notice prior to the hearing of 05.04.22, the arguments are set out in outline only.

2. There are numerous persons, including children, resident in dwellings on the Cash's Pit land. Any application for a possession order must therefore comply with requirements under the Protection from Eviction Act 1977.

3. No valid notice to quit has been served in the present proceedings.

Defendants' occupation of the land

4. The Defendants occupy dwellings on the Cash's Pit land as their sole home. It is not disputed that they have been present on the land for over a year. They have been lawfully present on the land under a licence.

Claimants' right to possession

5. The Claimants right to possession of the Cash's Pit land is founded on Section 13 and Schedule 15 of the High Speed Rail (West midlands – Crewe) Act 2021 ('the Phase 2a Act'). This enables the Claimant to take temporary possession of specified land under a statutory procedure.

Chronology

6. The relevant chronology is:

March 2021	Defendants occupy land at Cash's Pit.
23.02.22	Claimants serve notice of intention under paragraph 4(1) of Schedule 15 of the Phase 2a Act.
25.03.22	Claimants bring possession proceedings (no further notice to quit served).
05.04.22	Date of Hearing.

Legal Framework

Protection from Eviction Act 1977

7. The Protection from Eviction Act 1977 ('PEA 1977') provides (emphasis added):

> *3 Prohibition of eviction without due process of law.*
>
> (1) Where any premises have been let as a dwelling under a tenancy which is [neither a statutorily protected tenancy nor an excluded tenancy and—
>
> (a) the tenancy (in this section referred to as the former tenancy) has come to an end, but
>
> (b) the occupier continues to reside in the premises or part of them,
>
> it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.

(2) In this section "the occupier", in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy.

…

(2B) Subsections (1) and (2) above apply in relation to any premises occupied as a dwelling under a licence, other than an excluded licence, as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly.

8. Section 3A set out numerous categories of excluded licences. These include (emphasis added):

(7) A tenancy or licence is excluded if—

(a) it confers on the tenant or licensee the right to occupy the premises for a holiday only; or

(b) it is granted otherwise than for money or money's worth.

9. The statutory procedural requirements are set out in Section 5:

5 Validity of notices to quit.

(1) Subject to subsection (1B) below] no notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless—

(a) it is in writing and contains such information as may be prescribed, and

(b) it is given not less than 4 weeks before the date on which it is to take effect.

(1A) Subject to subsection (1B) below, no notice by a licensor or a licensee to determine a periodic licence to occupy premises as a dwelling (whether the licence was granted before or after the passing of this Act) shall be valid unless—

(a) it is in writing and contains such information as may be prescribed, and

(b) it is given not less than 4 weeks before the date on which it is to take effect….

Common law

10. In relation to excluded licences, whilst they do not fall within s3 PEA 1977, common law principles in relation to a reasonable time the defendant to leave with his possessions do apply. In *Gibson v Douglas* [2016] EWCA Civ 1266, [2017] H.L.R. 11 the Court of Appeal stated (emphasis added):

> 20. ….it is clear law that, where the relevant period has not been specified by the licence itself, a licensee is entitled, following revocation of the licence, to whatever in all the circumstances is a reasonable time to remove himself and his possessions: see *Minister of Health v Bellotti* [1944] K.B. 298. With all respect to counsel who suggested otherwise, it is impossible to define the principle with any greater precision and undesirable that we attempt to do so.

> 21. I add these observations. At one end of the spectrum, the unwanted visitor who presents himself at the front door, is asked in but then told to go, must leave immediately, taking the quickest route back to the highway and not delaying; so his period of grace may be measured in minutes: see *Robson v Hallett* [1967] 2 Q.B. 939 . On the other hand, a period measured in years may in some cases be appropriate: see, for example, *Parker v Parker* [2003] EWHC 1846 (Ch), where the Earl of Macclesfield was held entitled to two years to leave the ancestral home, Shirburn Castle, which he had been occupying as a licensee for some 10 years. There was some discussion before us as to what the appropriate period might be in a case such as this. It depends on the circumstances. That said, I very much doubt that it would be a period measured in minutes, hours or even days. On the other hand, I can well imagine that it might typically be a period measured in weeks rather than months or years. Further than that I am not prepared to go.

Phase 2a Act

11. The relevant provisions of the Phase 2a Act are:

> *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.
>
> …
>
> *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….

12. Paragraph 1 of Schedule 15 creates a legal right to possession of land provided the statutory notice requirements of paragraph (4)(1) are met (*SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)).

Submissions

13. It is not disputed that Paragraph 1 of Schedule 15 creates a legal right to possession of land provided the statutory notice requirements of paragraph (4) are met. This much is confirmed by *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch).

14. However, the existence of a legal right to possession and its enforcement through eviction are distinct matters.

15. The Defendant maintains that he was present on the land as a licensee. Given the undisputed length of time of occupation (over 1 year) knowledge and acceptance of occupation by the land owner may reasonably be inferred.

16. However, it is accepted that in the absence of further evidence the defendant will not be able to establish that any licence to occupy the Cash's Pit land was granted for money's worth. Therefore, the Defendant accepts that he cannot establish a non-excluded licence for the purposes of Section 3 PEA 1977. In all the circumstances, the Defendant does not oppose the application for a possession order of the Cash's Pits land.

17. As a former licensee, the Defendant is entitled to a reasonable period to remove himself and his possessions from the land. Such period to be determined by the court.

Conclusion

18. The Defendant does not oppose the present application for a possession order for the Cash's Pitt Land subject to a reasonable period to remove himself and his possessions.

Owen Greenhall
Garden Court Chambers
05.04.22
(Amended 08.04.22)

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 IN REPLY ON A1P1

INTRODUCTION

1. The hearing of this Claim took place over 26th and 27th May. D6 indicated that he intended to make further written submissions on whether A1P1 was a right which the Claimants have, and if so, in what regard.

2. D6 has filed and served those submissions which argue:

    a. HS2 Ltd is a core public authority, alternatively a hybrid public authority and a governmental organisation, being wholly owned by the Secretary of State and publically funded – see *Aston Cantlow*;

    b. The burden lies on the Claimants to establish in law and in fact that they may rely on A1P1 rights;

    c. So far as previous cases say otherwise, they are wrongly decided or distinguishable;

    d. The exercise of CPO powers falls within '*functions of a public nature';*

    e. Thus, neither Claimant may rely on A1P1 rights in support of the application.

3. We address each of these five points in turn. Before doing so, it is worthwhile to draw attention to the following points:

    a. There is no claim by either Claimant to be 'victim' nor any claim under s7 Human Rights Act 1998;

    b. The A1P1 point only arises in the context of proportionality and balancing such rights under Arts 10 and 11 as the defendants contend for;

    c. D6's case has focused on particular parts of the draft injunction order, particularly the prohibition in 3(b) [**B/8/051**] on standing etc. on the carriageway to impede free passage of vehicles and slow walking in front of vehicles;

    d. The draft injunction order seeks prohibition of many other acts on HS2 Land, i.e. not at the gateways, but on land in HS2 Ltd's possession;

    e. The definitions of D(1), D(2), D(3), D(4) capture the different circumstances which pertain and which cause damage, delay and hinderance.

4. D6's submissions do not differentiate as between these elements of the harms which the defendants cause and will continue to cause. However, it is necessary to be precise because it is HS2 Ltd's case that Art 10 and 11 rights are not even arguably in play for D(1), D(2), and D(4). The A1P1 rights of the Claimants only become relevant in respect of protest on the public highway. So far as persons unknown are concerned, that falls within D(3).

SUBMISSIONS

[a] Public authority

5. The starting point is s6 of the Human Rights Act 1998, in particular:

    (3) In this section "public authority" includes –

    (a) a court or tribunal, and

    (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

6. The Claimant cites the very well-known domestic authorities on 'public authority'. As will be submitted below, it does not advance the understanding of the issues on this point to examine those cases. This is because it is obvious that the Secretary of State is a public authority, and it is also obvious that HS2 Ltd has functions of a public nature. Indeed, that fact is an important part of the Claimants' case for the injunction – the defendants are impeding and actively trying to stop a major piece of public infrastructure which the Claimants are charged with delivering at public expense.

7. What D6 does not grapple with, is how or why it is relevant that HS2 Ltd is a s6(3)(b) public authority (a hybrid public body in the language used in *Aston Cantlow*). D6 does not suggest that an act to protect its property rights is not an act of a private nature. Rather, D6's arguments proceed on the basis that a s6(3)(b) public authority cannot rely on a convention right as a 'victim'. That is not at issue in this case. The issue is whether a s6(3)(b) public body such as HS2 has A1P1 rights to be balanced against such rights as the defendants rely upon.

8. HS2 Ltd does not say that it is a 'victim' in convention terms. That is not HS2 Ltd's case. HS2 Ltd's case is in trespass and nuisance. It is the defendants who rely on their convention rights, particularly Arts 10 and 11[1]. Evidently, the Court will: (1) decide whether and if so to what extent those rights are in play, and if so; (2) whether there would be an interference, and if so; (3) whether such interference is justified.

[b] Burden

9. There is no question of burden here. The Court's task is as at paragraph 8 above, considering the basis of the draft injunction order which is sought and all of the evidence.

[1] There is a hint in D6's skeleton that convention rights trump domestic rights in property (para 2(ii) as to the 'elevated status of an ECHR right'). The point is not developed, so nothing further is said here save to deny that there is any such simple ranking.

[c] Case law

10. D6's submissions are silent on which cases are said to be wrongly decided or distinguishable. That hampers the Claimants in assisting the Court with a reply.

11. There are, however, examples of exactly the balancing of rights which the Claimants' contend for in other applications of this type, and over many years. So, in *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch), Arnold J, as he then was, accepted the submissions of Mr Fancourt QC, as he then was, that A1P1 rights went into the balance against Art 10/11 rights, at [22]:

> *"In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in Re S [2004] UKHL 47, [2005] 1AC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each."*

12. It is a simple point. If the Court is looking at human rights, it must look at all of the relevant rights, not some of them. That would be the opposite of a balancing test. In the ODA case, there was a s6(3)(b) public body which evidently had rights under A1P1, and they were considered in the context of the rights asserted by the defendants.

13. That is what should happen in this case, to the extent which is relevant to any particular part of the order which is sought.

14. There was nothing wrong with the judge's approach in that case. It is not distinguishable. There were protests against a large development project. Protestors wanted to stop it. They did so by obstructing access. There were significant costs and delays.

15. D6 submits (paragraph 16 of its skeleton argument) that a s6(3)(b) public body cannot rely on its own convention rights in the balance when assessing proportionality. This

submission is based on the tailpiece of paragraph 75 of *YL*. That bears some further examination:

a. The Court of Appeal was there expressly at odds with Lord Nicholls in the *Aston Cantlow* case;

b. The whole context of the discussion in paragraph 75 is reliance on convention rights as a 'victim', which is not at all the case here;

c. Nothing in *YL* addresses the balancing exercise as between the relevant rights which arise in a particular case.

16. In addressing conflicting human rights, the academic writing makes clear that rights which pull in different directions are to be taken into account[2]:

"*A similar task is the balancing exercise required in the reconciliation of conflicts between fundamental rights. Intrinsically this is no different from cases where an article allows for exceptions and the question is whether the exception outweighs the rule, for example where the right to a public hearing is negatived by the interest of morals, public order etc, as there provided. But balancing becomes particularly difficult where the main thrust of different articles is in different directions"*

17. Further, D6's submissions fail to address *DPP v Cuciurean* [**A/13/078 at [84]**], despite the Court having been taken to it in detail in opening. To emphasise:

"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."

18. In short, there is nothing in the leading cases to indicate that a proper balancing exercise in this case requires the Court to leave rights out of account. On the contrary, there is recent highly persuasive authority which sets out in one sentence the obvious point that rights which pull in different directions must be assessed together.

19. All of that having been said, even if the Court does consider Art 10/11 to be engaged on some aspect of the proposed injunction order, the evidence is such that the outcome will be the same whether A1P1 rights are put into the balance or not. The Court is asked to

[2] *Wade & Forsyth* Administrative Law (Oxford; 11th Edition) at [151]

make that alternative finding and conclusion, not least because other judges have reached that conclusion without A1P1 being taken into account[3].

[d] CPO powers

20. It is irrelevant that the Claimants exercise statutory powers to acquire some of the HS2 Land. In any event, much of the Pink Land has been acquired by private treaty. Further, there are many statutory provisions which enable non-public bodies to acquire land compulsorily (e.g. the regime under the Planning Act 2008 for development consent orders, i.e. to consent nationally significant infrastructure projects such as highways and power stations).

CONCLUSION

[e] The correct approach to A1P1 rights in this case

21. In this case, Arts 10 and 11 are not even arguably engaged in respect of the activity defined D(1), D(2), D(4). This because there is no freedom of forum: *DPP v Cuciurean* [**A/13/078 at [76-77]**].

22. That leaves the delay and disruption which is caused at the gates, on which the Court will: (1) decide whether and if so to what extent those rights are in play, and if so; (2) whether there would be an interference, and if so; (3) whether such interference is justified.

23. Further, and in the alternative, the A1P1 point does not matter. The result will be the same. The Court is asked to make that alternative finding.

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31st May 2022

[3] [2018] EWHC 1404 (Ch) – Barling J granting an interim injunction in respect of Harvil Road