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

(6) JAMES KNAGGS AND OTHERS

Defendants

SKELETON ARGUMENT FOR REVIEW HEARING

ON BEHALF OF D6 (JAMES KNAGGS)

Essential reading: Skeleton arguments, Witness statement of D6

INTRODUCTION

1. An injunction was previously made by Mr Justice Julian Knowles. It is an injunction with far- reaching effects, and binding on an indeterminate number of people. It was made in circumstances in which the court permitted a departure from the usual procedures by which people are informed of claims that may affect them and be given an opportunity to make representations.

2. The Injunction Order was made by Mr Justice Julian Knowles on 20.09.22. The injunction made was limited in relation to: its geographical ambit; the time for which it was to last; and the conduct which it prohibited.

3. Notwithstanding the wide-ranging nature of the relief sought and granted, the Claimants have, by their application dated 27.03.23, asked the court to go further. Not only do they seek an extension, of the duration of the injunction, they seek very considerable extensions of the scope and effect of the injunction, and the conduct that it would prohibit. The Claimants seek to support that by making very significant changes to their claim, and also apply to re-amend their pleadings. These are very significant and important changes.

4. D6 is one of the people joined to the proceedings by the Claimants. He makes no submissions on the Claimants' application to extend the duration of the existing injunction, which is a matter for the Court, notwithstanding the judge's original decision as to its length. D6 does not intend to make submissions at this hearing in opposition to some form of temporal extension to the existing injunction, notwithstanding that the temporal limitation on an injunction is a key requirement for its validity: see *Boyd v Ineos* [2019] EWCA Civ 515, [2019] 4 WLR 100, especially at paragraphs 34 (6), and 43. Furthermore, whilst D6 does not agree with the decision of Mr Justice Julian Knowles to grant the existing injunction, he respects it. Importantly, D6 has not, and does not intend to, breach the terms of the existing injunction.

5. What D6 does however oppose are the Claimants' applications to make very extensive changes to the prohibitions and scope of the existing injunction. Were these to be granted, they would make very significant changes to the ambit of the injunction and introduce very considerable uncertainty and difficulty. As will be submitted below, those latter points are, of themselves, reasons for the court not to make these changes, as no court can make an injunction that is too uncertain properly to be enforced. Furthermore, there are significant problems with the Claimants' contended basis for seeking these extensions.In particular D6 submits that the Claimants cannot justify including prohibitions founded on, and intended to restrain, the tort of Conspiracy to Injure by Unlawful Means.

Timing of D6 intervention

6. The timetable produced by the Claimants and approved by the court permits persons not already named in the order to tell the court by Friday 12th May of their intention to make representations. The court made different directions in relation to people such as D6 who had already been made defendants to the claim. They were expected to provide information to a more compressed timetable.

7. D6 accepts that, on a strict reading of the court's order, that he was to have provided notice of his opposition to the Claimants' proposed order at an earlier date. The court will note that:

    i) This was a timetable provided by the Claimants, and without the direct involvement or acquiescence of D6.

    ii) The application to vary and extend the underlying basis of the injunction was made relatively recently, and that what it entails is an issue of very considerable legal complexity. This is not a simple issue of extending the injunction for another year. It is an application that engages a whole range of new and different considerations. It is only recently that D6 has been able to obtain advice about those, and to obtain and resource legal assistance in formulating not just that advice, but the articulation of his opposition through the means of this skeleton argument and an appearance at the hearing on 16th May 2023.

    iii) The points being raised by D6 address the new matters contained in the Claimants' application. They are not matters about which he has already had the opportunity to address the court.

    iv) D6 has informed the Claimants of his opposition to the Claimants' application on more notice than would be required ordinarily under an application notice in proceedings.

    v) The Claimants seek remedies against "Persons Unknown", and, effectively, against the whole world. The arguments that D6 wishes to make are

arguments that anyone except the named defendants could have made at the hearing on 16th May if they had provided notice of their intention to do so and their names and addresses by 12th May. D6 seeks to achieve no more nor less than any of those litigants could have achieved, and there is no reason so far as the court is concerned for him to be in a *worse* position.

vi) Since the Claimants have chosen to seek such wide- ranging remedies against "persons unknown", the court, and the Claimants, are under greater duties to ensure a just outcome than in a conventional case where the court case- manages a case where it has the defendants all before the court. The arguments made on behalf of D6 are arguments that should assist the court in deciding whether or not to accede to what, effectively, would be an application made *ex parte*. It is well- established that those who seek *ex parte* injunctions are under considerable duties properly to apprise the court of the effect of that application on those whom it seeks to bind by that injunction. The submissions made below are, arguably, submissions that the Claimants are under a duty to bring to the attention to the court, but in any event, are submissions that it is hoped that the court will find of assistance.

vii) If it is necessary to apply for relief against sanctions, such application can be made and considered. D6 would hope that his position will be one which assists the court and should be considered in any event.

8. D6 raises concerns over the following matters:

i) The Claimant seeks injunctive relief on the basis of claims which do not establish an entitlement to any remedies, , and which disclose no reasonable cause of action, not least because the Claimants have totally failed to comply with the court's requirements for statements of case to be clear. The Claimants do not identify what the conspiracy is, who the conspirators are, or where and how the conspiracy is said to have been hatched;

ii) The Claimant wrongly seeks to restrain lawful protest on the highway and other land to which the public have access;

iii) The test for a precautionary (*quia timet*) injunction to restrain Unlawful Means Conspiracy is not met;

iv) The terms are overly broad and vague, so objectionable due to uncertainty;

v) The Draft Order amounts to a disproportionate interference with D6's Article 10 and 11 Rights.

SOME CONTEXT: INJUNCTIVE RELIEF AND PROTESTS

9. In *Canada Goose v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802, the Court of Appeal, in a joint judgment from the then Master of the Rolls, David Richards LJ and Coulson LJ considered some of the issues arising in protest injunctions brought against "persons unknown". As will be discussed below, subsequent cases have revised some of the decision reached in that case. However, nothing has been said to undermine paragraph 93 of the judgment, where the court said:

> "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 protesters. 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 protesters. 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* [2019] EWCA Civ 1490, [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."

10. The Claimants in this case are asking a judge of the King's Bench Division to extend injunctions based on claimed private law rights. That is the only basis

upon which the Claimants can ask the court to act. The Claimants either have a case, and can succeed in it, or they cannot. In Where the private law rights in issue are highly controversial, the court will need to consider how the Claimants' case is said to support the remedies sought.

11. Furthermore, there is no dispute that in this claim, protestors have rights under Article 10 and 11 ECHR These 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.

12. Articles 10 and 11 together supplement the common law and serve to protect the right to protest. As has been said at the highest levels, the rights contained in Article 10 and Article 11 are statutory rights. Furthermore, the court being a public authority for the purposes of section 6 of the Human Rights Act 1998 makes it unlawful for the court to act in a way which is incompatible with these rights. This must therefore, along with the other principles upon which discretionary remedies are either granted or with- held, have a bearing on whether the court maintains an injunction restricting protest.

13. Articles 10 and 11 together contain important protections of the right to protest. As might be thought is common sense, these protect not just the right to speak freely, but the right to demonstrate and associate with others. A protest involving one person standing with a placard, such as the man who used to walk along Oxford Street with a sign saying, in capitals, "LESS LUST FROM LESS PROTEIN. LESS FISH, BIRD, MEAT, CHEESE, EGG, BEANS, PEAS, NUTS AND SITTING" may be taken less seriously than a million people turning up to protest against the Iraq War. Numbers, locale and methods are all important.

14. It is also the essence of protest that many, including those in power, will regard it as unwelcome. As Laws LJ stated in *R(Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23:

> "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." (at [43])

15. In *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105, the House of Lords unanimously determined that the police had acted unlawfully when they had intercepted coaches conveying protestors from London to a demonstration at a military base at Fairford, then required the coaches to turn around from a motorway services and take all passengers back to London. These events were taking place at the time of tensions around the Iraq War and in connection with an airbase from which American planes were likely to fly. Lord Bingham gave the principal speech. His summary of the context is at paragraphs 3-7. The situation was quite extreme: see Lord Carswell (in his concurring speech) at paragraphs 103. He referred to the situation faced as "quite possibly extending to acts of serious sabotage" (at a military base) and where in that same paragraph he found a risk of "very serious consequences" (which it appeared might include the risk that US soldiers guarding the bases would deploy their weapons against protestors or others).

16. Nevertheless, the House of Lords concluded that the police actions were unlawful. Lord Bingham set out the common law powers relating to detention to prevent a breach of the peace (paragraph 29- 33), and the necessity test

applying before detention is permitted, and set out how the ECHR rights to freedom of expression and freedom of association fit into English law (paragraphs 34- 37). He concluded (paragraphs 39, 43, 45, 56) that the Chief Constable had acted unlawfully.

17. At paragraph 52, Lord Bingham stated that "article 10 and 11 rights are fundamental rights, to be protected as such. Any prior restraint on their exercise must be scrutinised with particular care." Or, as Lord Carswell said at paragraph 115, "prior restraint (pre- emptive action) needs the fullest justification". The police, and courts below, had gone wrong and the claimant protestor succeeded in her claim. The court will note that the restrictions had been unlawful even though Lord Bingham was prepared to accept (paragraph 55) that some on the coaches "might wish to cause damage and injury", or as Lord Carswell , the fact was that the location of any potential disorder was known and could and should be left to the control of police officers in attendance at the scene. It was, "wholly disproportionate" to restrict the claimant's rights under Article 10/11 merely because she was in the company of others who might breach the peace: see paragraph 55.

18. *Laporte* represents a decision, at the highest level, supportive of the principles that protest, even disruptive protest is lawful, and the courts cannot prevent it unless there is a clear necessity to do so, and even more importantly, that rights under Article 10 and Article 11 are statutory rights.

19. Subsequently, the Supreme Court 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];

20. 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].

21. 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];

22. There will be further submissions in relation to *Ziegler* on the topic of protest on the public highway, but for the moment, there are two points to be made. One ought to be obvious, namely that engagement of Article 10 and 11 means that any decision by the court to restrict protest must be sufficiently principled and predictable to satisfy the Strasbourg court. Secondly, the engagement of Article 10 in the subject- matter of injunctive relief means that section 12 Human Rights Act 1998 applies. This elevates the proper threshold for the grant of an injunction to being that the Claimants must satisfy the court that that they are likely to succeed at trial. D6 submits that these injunctions can only be granted if the test under section 12(3) HRA 1998 is satisfied.

THE TEST FOR INJUNCTIVE RELIEF

23. Section 12 of the Human rights Act 1998 states:

> 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.

24. In the present case, the Claimants must show that they are 'likely to establish' that injunctive relief should be granted following trial (see judgment of Julian Knowles J at [97] [CORE-A-45] and also *Boyd v Ineos* [2019] 4 WLR 100 (at paragraphs 17 (2), 33, 50) and *Birmingham City Council v Afsar* [2019] EWHC 1560 (QB) at [60]). The *Boyd v Ineos* case, being from the Court of Appeal, is, of course, binding.

25. D6 submits that the Claimants are not "likely" to succeed at trial.

THE CLAIMANTS' LACK OF A CASE

26. The Claimants rely on a claim in conspiracy to injure by unlawful means. The Re-Amended Particulars of Claim plead matters at the level of utmost generality . Reference is made to a witness statement for details of the claims relied on without providing any legal categorization of the matters set out therein.

27. The Re-Amended Particulars of Claim state:

> IX. Dobson 1 explains that targeting of the HS2 Scheme by activists has recently included:
>
> a) trespass on land which is not HS2 Land but over which HS2 is exercising powers granted under Schedule 4 of the HS2 Acts;
>
> b) Anti-social behavior including graffiti, swearing, making threats, egg throwing, and assault on HS2 Land;

c) Criminal damage in and around HS2 Land;

d) Disrupting works on land over which HS2 was exercising powers under the HS2 Acts; and

e) Interfering with fences and gates in and around the HS2 Land.

X. In particular, the action targeting the HS2 Scheme has:

a) Resulted from a combination or concerted action between two or more persons;

b) Involved unlawful means, including trespass, nuisance, breach of orders and statutory notices, and battery.

c) Involved individuals who:

i) Are aware that the activities that they are taking part in are unlawful;

ii) Intend to cause the Claimants' loss or harm;

iii) Have overtly acted in unison; and

iv) Have caused damage to the Claimants by reason of loss or delay.

28. The basis for the claim in unlawful means conspiracy therefore appears to be: "trespass, nuisance, breach of orders and statutory notices and battery" (Re-Amended POCs [X(b)]). Whilst not expressly stated, the are torts actionable only by third-parties (for convenience "third-party torts") and breach of orders and statutory notices. In any event, it is clear that the matters relied on go beyond breaches of the criminal law.

29. Quite frankly, this will not do. The Claimants are alleging unlawful conduct on the part of particular individuals, of deliberate conduct and said to be acting alongside others.

30. It is well established that allegations, say, of fraud, must be directly and fully pleaded. In *Marsh v Chief Constable of Lancashire* [2003] EWCA Civ 284, the Court of Appeal was considering an allegation to strike out a claim in misfeasance in public office. Chadwick LJ (at paragraph 57) said:

> "…..Allegations of that nature are amongst the most serious – short of conscious dishonesty – that can be made against police officers or, indeed, any public official. They should not be made by a responsible pleader unless he has grounds for believing that they can be made good. If they are not made, in circumstances where the allegation of misfeasance in public office cannot be made out without them, a court is entitled – indeed bound – to act on the basis that the pleader did not feel able to make them."

31. That is an important point of principle and practice in relation to what the court should expect from those bringing claims making serious allegations of

deliberate and unlawful conduct. The Re-Amended Particulars here totally fail to identify with any degree of precision what it is that is said to support the Claimants' claim in the tort of conspiracy. The court should draw the same conclusion that Chadwick LJ did in relation to the viability of the claim.

32. This submission is even more valid given the express requirements of the CPR in relation to pleading claims of conspiracy. There can be no conspiracy without an agreement. In this case, it appears that the Claimants intend to allege claim based on agreement by conduct. PD16.7.5 reads as follows:

> 7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done.

33. It will be seen that this is mandatory. The Claimants are therefore in the position of asking the court to approve amendments to their claim and their pleadings in circumstances where they have failed to comply with mandatory rules relating to the particular claim that they ask the court to entertain, and where the reason that they do not do so must be because a "responsible pleader" is unable to formulate any sort of case against any of the Defendants. This inability on their part is not something simply to be indulged, or overlooked. It is central to the court's assessment of: (i) whether permission to amend should be granted; and, (ii) as *Marsh* shows, the court's assessment of the viability of the claim.

34. Quite simply, there is no proper case formulated in conspiracy, and the failure to do that ought to be fatal to the Claimants' application. The "by whom" part of that is important. A claimant can only bring a claim against a party with legal personality. The courts do not allow Claimants to invent, or hypothesise, imaginary tortfeasors. The courts will strike out claims brought against persons without legal personality. An important example of that, and in a case seeking injunctive relief against protestors, was seen in in *EDO v Campaign to Smash EDO and others* [2005] EWHC 837. The claims brought against an organisation without legal personality were struck out: see paragraphs 43- 45 of Gross J's judgment.

35. It may be that this problem for the Claimants is a consequence of their decision to proceed against "Persons Unknown" without regard to the circumstances in which such a method of proceeding might properly be brought. Essentially, there are serious conceptual and practical problems in using "Persons Unknown" in protestor cases, particularly where the tortious conduct alleged or apprehended would be committed away from a defined area or piece of land. Some of these problems were discussed by Nicklin J in *Canada Goose v Persons Unknown* [2019] EWHC 2459 (QB) at paragraphs 149- 150. On appeal, the Court of Appeal ([2020] EWCA Civ 303, [2020] 1 WLR 2802) went on to state that final orders should not be made "in a protestor case" against "persons unknown": see 89- 93. The generality of that proposition cannot be seen, at least at present, as longer completely correct following following the decision in *London Borough of Barking v Persons Unknown* [2022] EWCA Civ 13, [2023] QB 295. That case has itself been appealed to the Supreme Court, with arguments heard and judgment awaited.

36. The Court of Appeal in *Barking* decided:

    i) there is *jurisdiction* to make final orders against "persons unknown": see 119- 121,

    ii) that the court can grant final injunctions that prevent persons who are unknown and unidentified from trespassing on local authority land (as formulated in the heading between paragraphs 70-71 and precisely set out at paragraph 101).

    iii) Sir Geoffrey Vos MR also cast some doubt, and indeed, over- ruled, paragraphs 89-92 of the *Canada Goose* case. Those paragraphs from *Canada Goose* form separate sub- headings above paragraphs 79, 83, 84 and 91 of the *Barking* decision.

37. The court will note that paragraph 93 of the *Canada Goose* case was NOT discussed, still less over- ruled, in this way. The court in *Barking* was concerned with whether people who set up a camp on a local authority camp can, depending on the evidence, be said to have been provided with proper

notification of the terms of an injunction. This case cannot help with the more complex problems of actual notice and how that can be given, in cases involving protest, where some of the acts restrained will be taking place far away from the particular venue.

38. That is particularly with the injunctions here, which are underpinned by the alleged Conspiracy (i.e. a state of mind and agreement) with completely unrestricted geographical ambit.

39. There are further points to be made, which further support the contention that the Claimants cannot show a proper case in conspiracy. For those reasons, there are now some important general points on the activities which the Claimants seek to bring within their apparent claim for Unlawful Means Conspiracy before returning to the specific torts relied on. These include the fact that the alleged unlawful acts relate to conduct on the public highway; the fact that the Claimants rely on torts that depend on their ownership of possession of land when they lack the status to bring claims; serious problems with the conceptual and practicality of their contended claims in conspiracy to injure; the problems with their evidential case in those torts in a case in which they have suffered no unlawful action referable to their contended cause of action.

(i) Public Highway Land

40. Insofar as the activity sought to be brought within the claim for Unlawful Means Conspiracy covers land which is a public highway, it should be noted that all the underlying torts relied on require the defendants' use of the highway to be unreasonable.

41. 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]).

42. 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. Instead, there 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]).

43. Clearly it cannot be asserted <u>any</u> form of obstructive protest on the highway will constitute a trespass without regard to the degree and impact of the obstruction.

44. Similarly protests which do not cause undue interference with the rights of others do not fall within the definition of either public or private nuisance.

45. Whilst the owner of a property may enjoy a common law right of access to the highway (now to a large extent qualified by statute), it is not the case that *every* interference with such access will constitute an actionable private nuisance. As Lord Adkin stated in in *Marshall v Blackpool Corp* [1935] A.C. 16:

> "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. …The rights of the public to pass along the highway are subject to this right of access: <u>just as the right of access is subject to the rights of the public and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway</u>." (at [22], emphasis added)

46. Insofar as the general obligations as to nuisance on the highway are referred to, in *Harper v G N Haden & Sons* [1933] Ch 298, Romer LJ said:

> "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. <u>They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others</u>." (at 320, emphasis added)

47. This reflects the general features of the tort of private nuisance, it was described by the House of Lords in *R v Rimmington* [2005] UKHL 63 as:

> "Thus the action for private nuisance was developed to protect the right of an occupier of land to enjoy it without substantial and unreasonable interference." (at [5], emphasis added)

48. It is therefore not the case that every interference with access to, or passage along, the highway, for whatever duration and extent, will be tortious. Similarly, not every such obstruction will be lawful. It is all a matter of fact and degree

49. The important point is that the underlying claims relied on by the Claimant to establish the unlawful means conspiracy rest on an assessment of disruptive protest on the highway as unreasonable. It is far from clear that protests which disrupt minor roads or pavements/footpaths passing near HS2 Land will lead to a viable civil claim. Similarly, where the extent of the interference with more major roads is not a total and extended halting of traffic the outcome of balancing the extent of disruption against the defendants rights under Article 10/11 ECHR cannot be determined in advance.

(ii) Non-public highway land

50. Insofar as the injunction covers land which is not part of the public highway, the Claimant appears to rely on claims in trespass and private nuisance, albeit that the Claimants seem to accept that they do not have sufficient rights of possession to bring a claim in their own name for trespass or private nuisance for all the conduct covered.

51. Given the complexities of land ownership in the large swathes of land covered by the existing injuinction and the yet further areas which the Claimants seek to bring within the Unlawful Means Conspiracy terms, it cannot confidentially be asserted that the landowner will not tolerate the presence of those protesting against the Claimant in each and every case where this might occur. It is therefore unclear that claims in trespass and private nuisance will be made out.

(iii) Breach of orders and statutory notices

52. It is not understood what breaches of "orders and statutory notices" are referred to by the Claimants in seeking to found a claim in Unlawful Means Conspiracy. If "breaches of orders" refers to injunctions, then such matters are

already covered by injunctive relief and there is no need to extend the present order. Indeed, it would be circular and objectionable to see alleged breaches of the injunction as being "unlawful means" to support a claim for further injunctive relief.

(iv) Unlawful Means Conspiracy and Third Party Torts

53. As a general point, the reliance on wide-ranging economic torts such as conspiracy to injure through unlawful means was discouraged by the Court of Appeal in *Boyd v Ineos* [2019] 4 WLR 100. The trial judge granted an injunction based on torts of trespass, private nuisance, public nuisance and conspiracy to injure by unlawful means (at [11]). The Court of appeal stated:

> "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.
>
> …
>
> 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 [those based on unlawful means conspiracy] 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." (emphasis added)

54. The Court of Appeal discharged those parts of the order based on public nuisance and unlawful means conspiracy leaving only those based on trespass and private nuisance. The clear concern raised was over the use of wide-ranging economic torts to restrain protest rather than the detailed application of torts such as trespass and the like.

55. In *Cuadrilla*, the Court of Appeal accepted that reference to intention *might* in some circumstances be permitted in an injunction and that it would theoretically be possible to incorporate prohibitions in an injunction corresponding to the tort of unlawful means conspiracy using reference to intention and effect (at [69]). However, the Court did not endorse the use of the tort of unlawful means conspiracy as a basis for founding injunctive relief in protest cases. In *Cuadrilla*, the Court of Appeal found the relevant prohibitions were made out on the facts from claims in private nuisance. The court described the prohibition corresponding to unlawful means conspiracy as "a different matter" (at [81]). The Court noted that in relation to the particular conduct that formed the basis of the committal hearing: "Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct." (at [81]).

56. In any event, the extension of the tort of Unlawful Means Conspiracy to third-party torts does not have a solid jurisprudential basis. Whilst in *Customs Comrs v Total Network SL*[2008] AC 1174 the House of Lords held that Unlawful Means Conspiracy could *in certain circumstances* be founded on criminal conduct, it did not go so far as to extend the reasoning to third-party torts. Indeed, Lord Sumption in the UKSC case of *JSC BTA Bank v Ablyazov and another (No 14)* [2018] UKSC 19 stated:

> "15 The reasoning in *Total Network* leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems."

57. It is noted that in *Shell Oil Products v Persons Unknown* [2022] EWHC 1215 (QB) Johnson J granted an injunction founded on third-party torts (trespass and nuisance). In granting the injunction he stated:

> "For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action

> is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act." (at [29])

58. Notwithstanding the limited threshold imposed by the judge relating to a serious issue to be tried (rather than that under s12(3) HRA 1998 as addressed above) there are a number of flaws with his reasoning. Johnson J effectively held that third-party torts could found a claim in Unlawful Means Conspiracy where this "did not undermine or undercut the rationale for those torts". It is submitted that this is not a proper basis to extend the ambit of Unlawful Means Conspiracy. It appears to rest on a misunderstanding of the requirement for 'instrumentality' in Unlawful Means Conspiracy.

59. In *OBG Ltd v Allan* [2008] 1 AC 1, Lord Nicholls stated the following (in the context of a claim for causing loss through unlawful means):

> "159. The difficulties here are more apparent than real. The answer lies in keeping firmly in mind that, in these three-party situations, the function of the tort is to provide a remedy where the claimant is harmed through the instrumentality of a third party. That would not be so in the patent example.
>
> 160. Similarly with the oft-quoted instance of a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits and ignore traffic lights. The unlawful interference tort would not apply in such a case. The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression."

60. Whilst "instrumentality" is a "function of the tort" and is therefore a <u>necessary</u> condition for tortious liability via an unlawful means conspiracy. It is not a <u>sufficient</u> condition on which it should be determined whether particular types of unlawful conduct fall within the scope of the tort.

61. In *Customs Comrs v Total Network SL* [2008] AC 1174 the House of Lords considered the elements of the tort of conspiracy to injure through unlawful means. The case concerned a carousel fraud allege to have been committed by the defendant. The Court of Appeal held that this criminal conduct was insufficient to found a claim in unlawful means conspiracy. Reversing the decision on this point, the House of Lords held that in certain circumstances a criminal offence could provide a basis for an unlawful means conspiracy claim.

However, there was also a requirement for 'instrumentality': the criminal conduct must be the means by which the claimant has suffered loss. As Lord Mance stated:

> "119. Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in *OBG Ltd v Allan [2008] 1 AC 1* , para 266) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And—as in relation to the tort of causing loss by unlawful means inflicted on a third party—there is a legitimate objection to making liability "depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant": per Lord Hoffmann in OBG Ltd v Allan , at para 59."

62. Lord Walker stated:

> "94. From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort …
>
> "95. In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allen [2008] AC 1* , para 159 called 'instrumentality') of intentionally inflicting harm."

63. It is therefore clear that "instrumentality" is considered as an *additional* element of the tort of unlawful means conspiracy and not a test as to whether unlawful acts of a particular character (tortious/criminal etc) can form the basis of the unlawful means tort.

64. The comments of Lord Walker were directly addressed by Lord Sumption in the UKSC case of *JSC BTA Bank v Ablyazov and another (No 14)* [2018] UKSC 19 where he said:

> "15 The reasoning in *Total Network* leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds. "

65. There is therefore very considerable doubt as to whether a claim in unlawful means conspiracy may be founded on a third-party tort. If Lord Sumption had considered that satisfaction of the test of instrumentality would be sufficient to extend unlawful means conspiracy to a third party tort he would have said so (as he did with criminal offences). He explicitly did not.

66. Although in *Racing Partnerships Ltd v Done Bros Ltd* [2020] EWCA Civ 1300 it appears to have been assumed that the sole requirement of whether an unlawful means conspiracy may be based on a third-party breach of contract/breach of confidence claim is the requirement to fulfil the test of instrumentality, the court did not address the antecedent question. In fact, in *Ablyazov* the issue of whether an unlawful means conspiracy can in principle be based on a breach of contract/breach of confidence claim was left open. The *Racing Partnerships* case does not assist the Claimants.

67. These points of substance are even more well-founded when the court sees that the Claimants in the present case are unable to formulate proper details of the specific basis of the tortious claims on which unlawful means conspiracy is said to arise, hence it being impossible to assess whether the test of instrumentality is met.

68. Finally, there has been no consideration of the concerns expressed in *Ineos* over founding injunctive relief in the context of protest on extensive and nebulous claims in unlawful means conspiracy. Either the Claimants have a proper claim or they do not, and the fact that they have declined to provide one means, alongside these obvious legal problems, that a claim in unlawful means conspiracy is an improper and inappropriate means to base injunctive relief in the present case.

TEST FOR PRECAUTIONARY INJUNCTION NOT MET

69. The test for a precautionary injunction to prevent Unlawful Means Conspiracy is not met in the present case.

70. 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]) says:

> "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)

71. 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).

72. In the evidence to support a claim in Unlawful Means Conspiracy, the Re-Amended Particulars of Claim refer to the witness statement of James Dobson. The statement runs to 178 paragraphs. No particular paragraphs or section is highlighted.

73. At paragraph 29 he states that there have been "37 activist related incidents targeting the HS2 Scheme" and details "of the more notable incidents" are included in a table.

74. The majority of incidents appear not to involve more than one person. There is no connection between the incidents set out, The incidents cover a geographically wide area, and a broad period of time. There is also no real basis for concluding that the motivation behind them is the same. Discrete complaints of things happening that the Claimants do not like do not amount to a case in conspiracy. Those, however, provide the basis of the Claimants' contentions. . For example:

    i) 13.11.22: "UID male trespassed upon the HS2 site at Old Oak Common"

    ii) 15.11.22: "a male was recorded on the site CCTV attaching a padlock and chain to the front gates"

iii) 20.11.22: “Several road signs… found graffitied”

iv) 05.12.22: “An agricultural contractor… rammed the site gates with their tractor”

75. At least two of the incidents are clearly unrelated to any protestor activity (the agricultural contractor incident on 05.12.22 and the Bicester Hunt trespass on 22.11.22). If the Claimants believe those to be unlawful, then they should have been taking action against, say, the members of the hunt. It is impermissible to dress those up as acts in pursuit of a conspiracy to which D6 is said to be a party.

76. Furthermore, conspiracy is a tort which requires proof of damage to be actionable. The level of damage caused to the Claimants in many of the incidents is minimal. For example, removing A4 posters stating “expect us” on 06.10.22 or removal of a baner from trees on 20.11.22. Those do not constitute physical damage, so are not in themselves actionable, proof of actual economic loss (and the conceptual problems with recoverability there are very significant).

77. In addition to the matters set out in the table at paragraph 29, Mr Dobson also refers to “secondary targeting of the Claimants supply chain” at paragraph 61 onwards. Much of his statement is taken up with irrelevant description of various protest groups, such as Palestine Action and the Stonehenge Heritage Action Group camp, which are unrelated to the HS2 project.

78. Reference is made at paragraphs [77] to [80] to a protest at HMP Full Sutton as part of the Kier Ends Here campaign. The action appears to have been targeted at the involvement of the construction firm Kier in the building of a new prison facility and in solidarity with imprisoned activists from a range of campaigns.

79. Further reference is made to Extinction Rebellion/XR at pragraphs [81] to [107] and a purported campaign directed at businesses associated with the HS2 scheme. Much of the statement focusses on a protest at the London offices of Eversheds (the solicitors for the Claimants in the present case).

80. It is notable that there is no evidence of any losses suffered by the Claimants in any of the actionns described under “secondary targeting of the Claimants’

supply chain". None of the protests against Keir or Eversheds caused the present Claimants any loss. There is also no clear evidence of an intention to directly cause the Claimants loss through any such secondary targeting. There is hence no claim in Unlawful Means Conspiracy arising from these actions.

81. Thus the Claimants here face the same hurdle as defeated the claimants in *Boyd v Ineos*. The absence of a proper formulation of their case, and the absence of evidence to support a conspiracy to injure means that they cannot make their case.

TERMS OF INJUNCTION

Legal Framework

82. General principles of justice and 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)).

83. The terms of an injunction muse not be unduly vague. At paragraph 82 of *Canada Goose v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802 the Court of Appeal set out the following guidance applicable for injunctive relief against "persons unknown" in protestor cases:

> "(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."

84. 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." (emphasis added)

85. 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 Boyd* 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])

86. 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 Order:

87. The proposed definition of persons unknown reads:

> PERSONS UNKNOWN BY UNLAWFUL MEANS OBSTRUCTING, IMPEDING, HINDERING, OR DELAYING WORKS OR ACTIVITES AUTHORISED BY THE HS2 ACTS, IN EXPRESS OR IMPLIED AGREEMENT OR COMBINATION WITH ANOTHER PERSON WITH THE INTENTION OF CAUSING DAMAGE TO THE CLAIMANTS

88. The Order prohibits:

> Injunction in force
>
> 3. With immediate effect, and until 2359 on 31 May 2024 unless varied, discharged or extended bu further order, the Defendants and each of them are forbidden from doing the following:
>
> …
>
> (d) by unlawful means obstructing, impeding, hindering, or delaying works of activities authorised by the HS2 Acts, in express or implied agreement or in combination with another person with the intention of causing damage to the Claimants.

89. Those definitions, and the Claimants' failure to construct the definitions in accordance with that follow clear caselaw show that either the Claimants wilfully refuse to do what the courts require, or that they are unable to present their claim in a form that allows the court properly to decide what it can fairly do. Whichever of those applies, the court cannot grant injunctive remedies. In relation to the definition of "persons unknown":

i) The tort of unlawful means conspiracy requires both an intention to cause harm and actual harm to arise. Therefore, in order that the order captures only those who have committed tortious acts there should be an effect clause in the definition of the conduct prohibited.

ii) The tort of unlawful means conspiracy requires instrumentality: the unlawful act must be the direct cause of loss to the claimant rather then merely the occasion of such loss. This should be specified in the definition of persons unknown.

90. To establish any proper basis of claim, the definition of "persons unknown" could only ever be possible were it to read:

> PERSONS UNKNOWN BY UNLAWFUL MEANS DIRECTLY OBSTRUCTING, IMPEDING, HINDERING, OR DELAYING WORKS OR ACTIVITES AUTHORISED BY THE HS2 ACTS, IN

EXPRESS OR IMPLIED AGREEMENT OR COMBINATION WITH ANOTHER PERSON WITH THE INTENTION AND EFFECT OF CAUSING DAMAGE TO THE CLAIMANTS

91. The terms relating to the prohihited conduct should be similarly amended.

92. However, these amendments do not address the more fundamental objections outlined below.

No definition of "unlawful means"

93. No definition is provided in the order of "unlawful means" and moreover, given the failure of the Claimants to specify what "unlawful means" are relied on for their claim, none can be provided.

94. The failure to define "unlawful means" offends against the prohibition on defining the conduct restrained by an injunction by reference to a legal term. This requirement is of paramount importance when drafting an injunction against persons unknown. It is wholly unrealistic to expect those without legal training to have any idea what is meant by "unlawful means" as it appears in the present order. Indeed the difficulty goes deeper than that. Whilst for many torts advice can be sought from a lawyer as to the broad parameters of the tort, the element of "unlawful means" for the modern tort of Unlawful Means Conspiracy is one of the most opaque concepts in civil law. Not even the Supreme Court in *Ablyazov* were prepared to commit to a clear definition of the term.

95. The present order is also fundamentally flawed in that it defines the prohibited conduct not merely by reference to a legal term but entirely on the basis of the legal tort on which the injunction is based. Rather than, for example using a tort such as trespass as the basis on which to obtain an injunction which prohibits a certain form of conduct that corresponds to the tort (e.g. entry into an exclusion zone) the present order simply uses the tort of unlawful means conspiracy itself to specify the prohibited conduct. Again the flaw runs deep. The Claimants are unable to replace the definition of the prohibited conduct with a description in non-legal language of the conduct which is sought to be restrained. This is no accident. The Claimants have not, and cannot, specify the conduct they seek to prevent by any more particularised means.

96. It is notable that the terms relating to Unlawful Means Conspiracy in the present order differ from those relating to terms founded on torts such as trespass and nuisance where the conduct restrained is not described simply be reference to the underlying tort (e.g. clause 3(a) which prohibits "entering or remaining on the HS2 land" is not defined by reference to the tort of trespass on which it is based). This difference highlights the flaws with the extension of the order to cover Unlawful Means Conspiracy.

Unlimited geographical scope

97. The existing HS2 injunction already covers a vast swathe of land from London to the North West. The addition of the unlawful means terms effectively extend the scope of the injunction without any geographical limit. The prohibition on impeding or delaying works or activities authorised by the HS2 acts applies to conduct anywhere in England or Wales (in fact anywhere in the world according a literal reading of the order).

98. The lack of any requirements that the Claimant actually suffers loss or any restriction on the "unlawful means" used further etends the scope of the order.

99. It is precisely this form of open ended injunction which was criticised by the Court of Appeal in *INEOS* and which should not be granted in a protestor case.

100. The above points are not simply points of drafting. They are good faith attempts by D6 to approach the ways in which the draft can be improved, yet coming up wanting. Ultimately, it is the Claimants who have the responsibility for presenting the court with an acceptable draft. If they cannot do so, then they cannot have an injunction.

PROPORTIONALITY AND EXERCISE OF COURT'S DISCRETION

101. 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.

102. 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.

103. Overall it is submitted that the terms of the order, and the related definitions of persons unknown are overly broad, too complex and unclear. The definition of persons unknown in the present injunction is so wide that is covers persons entirely unrelated to the previous protests against HS2 and seeks to restrain them from using nebulous and undefined "unlawful conduct". The definitions of persons unknown and the prohibited conduct are so convoluted, unwieldy and complex that . the Order is simply too difficult to be reliably interpreted by a lay-person. A lay-person will be unable to ascertain what he or she can and cannot do under the order and will therefore be chilled into not exercising his or her right of free speech at all.

CONCLUSION

104. 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]

105. In seeking the to extend the Order the Claimant overlooks the role of the police in managing public order situations and protests. There are already ample police powers (including new offences contained in recent public order legislation) to address the limited number of more serious types of activity (such as tunnelling) which the Claimant has raised concerns over. There are also police powers to regulate unreasonable obstructions on the highway (including arrest for the

offence of Obstruction of the Highway which now carries a potential prison sentence). The advantage of allowing such issues to be addressed by the police is that a factual assessment can be made on the ground as to the extent of disruption and the relevant competing rights and interests can be balanced, if necessary, on a minute-by-minute basis. Such an approach will inevitably produce a more tailored and proportionate balancing of rights than a court order which seeks to strike a balance in advance and in general terms across a wide range of factual circumstances. The limited instances of disruptive protest relied on by the Claimants therefore do not warrant the granting of an extensive and complicated order in the form sought.

106. The Court should refuse the Claimants' application to extend the scope of the existing order.

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10.05.23