Claim No. QB-2022-BHM-000044

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

BETWEEN:

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

Claimants

- and –

PERSONS UNKNOWN & OTHERS

Defendants

AUTHORITIES BUNDLE
for hearing on 15 May 2024

TAB	DOCUMENT	PAGE
1	Order of Mrs Justice Collins Rice dated 26 April 2024 (QB-2021-003576 - *National Highways Limited v Persons Unknown*)	AUTH-3 to AUTH-41
2	*Valero Energy Ltd & Ors v Persons Unknown & Ors* [2024] EWHC 134 (KB)	AUTH-42 to AUTH-79
3	*Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47	AUTH-80 to AUTH-156
4	*National Highways v Persons Unknown* [2023] EWCA Civ 182	AUTH-157 to AUTH-168
5	*TfL v Lee* [2023] EWHC 402	AUTH-169 to AUTH-183
6	*National Highways v Kirin* [2023] EWHC 3000 (KB)	AUTH-184 to AUTH-206
7	*Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch)	AUTH-207 to AUTH-271
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Sheffield
S1 2lX

Telephone: **0114 283 3312**
Email: **HS2Injunction@dlapiper.com**
Reference: **RXS/380900/441**

Solicitors for the Claimants

AUTH-2

QB-2021-003576

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Before: Mrs Justice Collins Rice
On: 26 April 2024

BETWEEN:

NATIONAL HIGHWAYS LIMITED

Claimant

- and -

(1) PERSONS UNKNOWN CAUSING THE BLOCKING OF, ENDANGERING, OR PREVENTING THE FREE FLOW OF TRAFFIC ON THE M25 MOTORWAY, A2 A20 AND A2070 TRUNK ROADS AND M2 AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23 AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING
(2) MX CATHERINE RENNIE - NASH AND 10 OTHERS

Defendants

ORDER

PENAL NOTICE

IF YOU THE WITHIN NAMED DEFENDANTS OR ANY OF YOU DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

IMPORTANT NOTICE TO THE DEFENDANTS

This Order prohibits you from doing the acts set out in this Order. You should read it very carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge this Order.

AUTH-3

A Defendant who is an individual who is ordered not to do something must not do it himself/herself/themselves or in any other way. He/she/they must not do it through others acting on his/her/their behalf or on his/her/their instructions or with his/her/their encouragement.

FURTHER TO the Order made by Mr Justice Cotter dated 5 May 2023 (**"Original Cotter Order"**) (as amended by Mr Justice Cotter by further Orders dated 24 July 2023 (**"July 2023 Order"**) and 3 October 2023 (**"October 2023 Order"**) (**"Consequential Orders"**) together **"Cotter Injunction"**)

AND UPON the Claimant's application by Application Notice dated 27 March 2024

AND UPON Mrs Justice Collins Rice reading the judgment of Mr Justice Cotter in National Highways Limited v Persons Unknown [2023] EWHC 1073 (KB), the Second Witness Statement and exhibit of Sean Martell dated 26 March 2024 and the Witness Statement and exhibit of Petra Billing dated 18 April 2024

AND UPON the Court noting the basis on which the Cotter Injunction was granted, and reviewing whether there remains a continued threat which justifies the continuation of the injunction

AND UPON the Court being satisfied that based on the evidence before the Court that there was a continued threat such that the Cotter Injunction should be continued

AND UPON the Claimant re-confirming that this Order is not intended to prohibit lawful protest which does not block or endanger, or prevent the free flow of traffic on the Roads defined in paragraph 1 of this Order

AND UPON the Police Representative Assistant Chief Constable Mark Williams (Assistant Chief Constable Owen Weatherill having retired) consenting to the Third-Party Disclosure provisions at paragraph 10 of this Order on behalf of all the Chief Constables for those forces listed in Schedule 2 to this Order, which consent has been evidenced to the Court

AND UPON HEARING Counsel for the Claimant (the Defendants not attending nor making any submissions in writing or otherwise) at a hearing on 26 April 2024.

IT IS ORDERED THAT:

Definitions

1. In this Order, the following defined terms shall apply:

    a. "**Named Defendants**" means D14, D50, D52, D53, D54, D76, D93, D100, D101, D104, D136, whose names appear in Schedule 1 annexed to this Order.

b. "**Defendants**" means all defendants.

c. "**the Roads**" shall mean all of the following:

i. The M25, meaning the London Orbital Motorway and shown in red on the plans at Appendix 1 annexed to this Order.

ii. The A2, A20, A2070, M2 and M20, meaning the roads shown in blue and green on the plans at Appendix 2 annexed to this Order.

iii. The A1(M) (Junction 1 to Junction 6), A1 (from A1M to Rowley Lane and from Fiveways Corner roundabout to Hilltop Gardens), M11 (Junction 4 to Junction 7), A12 (M25 Junction 28 to A12 Junction 12), A1023 (Brook Street) (from M25 Junction 28 roundabout to Brook Street Shell Petrol Station access), A13 (M25 Junction 30 to A1089), A13 (from junction with A1306 for Wennington to M25 Junction 30), A1089 (from junction with A13 to Port of Tilbury entrance), M26 (whole motorway from M25 to M20), A21 (M25 to B2042), A23 (M23 to Star Shaw), M23 (Junction 7 to Junction 10 (including M23 Gatwick Spur)), A23 (between North and South Terminal Roundabouts), A3 (A309 to B2039 Ripley Junction), M3 (Junction 1 to Junction 4), A316 (from M3 Junction 1 to Felthamhill Brook), A30 (M25 Junction 13 to Harrow Road, Stanwell, Feltham), A3113 (M25 Junction 14 to A3044), M4 (Junction 1 to Junction 7), M4 Spur (whole of spur from M4 Junction 4 to M4 Junction 4a), M40 (Junction 7 to A40 at Fray's River Bridge), M1 (Junction 1 to Junction 8), A405 (from M25 Junction 21A to M1 Junction 6), A1 (from Fiveways Corner roundabout to Hilltop Gardens), and A414 (M1 Junction 8 to A405), meaning the roads shown in red on the plan at Appendix 3 annexed to this Order.

iv. In the case of each of the Roads, the reference to the Roads shall include all carriageways, hard shoulders, central reservations, motorway (including the A1(M)) verges, slip roads, roundabouts (including those at junctions providing access to and from the Roads), gantries, traffic tunnels, traffic bridges including in the case of the M25 the Dartford Crossing and Queen Elizabeth II Bridge and other highway structures whether over, under or adjacent to the motorway/trunk road, together with all supporting infrastructure including all fences and barriers, road traffic signs, road traffic signals, road lighting,

communications installations, technology systems, laybys, police observation points/park up points, and emergency refuge areas.

d. "**Injunction Website**" means the page on the National Highways website which holds the information as to injunctions in force, which is presently at: https://nationalhighways.co.uk/about-us/high-court-injunctions-for-motorways-and-major-a-roads/.

Variations/ Amendments

2. The Claimant has permission to amend the Schedule of Defendants in the form set out at Schedule 1. Those amendments are as follows:

   a. Removal of all Named Defendants from the Cotter Injunction, namely: D14, D50, D52, D53, D54, D76, D93, D100, D101, D104, D136 such that there are now no Named Defendants to the Cotter Injunction

   b. The substitution of the following revised wording to the Schedule of Defendants being a revision of paragraph 2(c) of the Cotter Injunction: "*For the avoidance of doubt, any person who has previously been a named defendant in these proceedings, in the Cotter Injunction, or who has given undertakings to the Court in these proceedings, may nevertheless become Defendant 1 as a person unknown if they commit any of the prohibited acts.*"

Injunction in force

3. With immediate effect and until 23.59 hrs on 10 May 2025 the Defendants and each of them are forbidden from:

   a. Blocking or endangering, or preventing the free flow of traffic on the Roads for the purposes of protesting by any means including their presence on the Roads, or affixing themselves to the Roads or any object or person, abandoning any object, erecting any structure on the Roads or otherwise causing, assisting, facilitating or encouraging any of those matters.

   b. Causing damage to the surface of or to any apparatus on or around the Roads including by painting, damaging by fire, or affixing any structure thereto.

   c. Entering on foot those parts of the Roads which are not authorised for access on foot, other than in cases of emergency.

Service by Alternative Method on the First Defendant

4. The Court will provide sealed copies of this Order to the Claimant's solicitors for service (whose details are set out below).

5. Pursuant to CPR r. 6.15, 6.27 and r.81.4:

    a. The Claimant shall serve this Order upon D1 by:

        i. Posting a direct link to this Order on the National Highways Injunctions Website at: https://nationalhighways.co.uk/about-us/high-court-injunctions-for-motorways-and-major-a-roads/m25-high-court-injunction-proceedings/.

        ii. Sending a notification of the existence of this Order to the Press Association and in particular advertising the web address of the Injunction Website and a direct link to this Order.

        iii. Publishing social media posts on the National Highways Twitter and Facebook platforms advertising the existence of this Order and providing a link to the Injunction Website.

        iv. Emailing a copy of this Order to:

            1. juststopoil@protonmail.com
            2. juststopoilpress@protonmail.com
            3. insulatebritainlegal@protonmail.com
            4. Ring2021@protonmail.com
            5. actions@animalrebellion.org
            6. fundraising@animalrebellion.org
            7. integration@animalrebellion.org
            8. talks@animalrebellion.org
            9. global@animalrebellion.org
            10. localgroups@animalrebellion.org
            11. media@animalrebellion.org
            12. governance@animalrebellion.org
            13. pressoffice@animalrebellion.org
            14. finance@animalrebellion.org
            15. techsupport@animalrebellion.org

16. info@animalrising.org

6. Service in accordance with paragraph 5 above shall:

    a. Be verified by certificates of service to be filed with the Court;

    b. Be deemed effective as at the date of service specified by the certificates of service;

    c. Be good and sufficient service of this Order on D1 and each of them and the need for personal service is dispensed with.

Service by Alternative Method on Named Defendants removed from the Cotter Injunction by paragraph 2(a) of this Order

7. The Claimant shall serve this Order on each Named Defendant in accordance with CPR r. 6.20. If the Claimant is not able to effect service on a Named Defendant in accordance with CPR r. 6.20 because it does not know the current address of a Named Defendant, then pursuant to CPR r. 6.15 and 6.27, the Claimant is permitted instead to serve this Order on each Named Defendant by:

    a. Placing this Order on the Injunction Website; and

    b. Social media: only in circumstances where the Claimant has no address, or no email address for a Named Defendant, but is aware of that Named Defendant having a social media account which will permit the Claimant to contact that Named Defendant directly, the Claimant may serve this Order by sending a message to that Named Defendant providing either this Order or a link to the Injunction Website.

    c. Where a Named Defendant is known by the Claimant to be in prison this Order shall be served by sending it by first class and/or special delivery post to the Named Defendant at the prison in which the Claimant reasonably considers they are being held.

8. Service in accordance with paragraph 7 above shall:

    a. be verified by certificates of service to be filed with Court;

    b. be deemed effective as at the date specified by the certificates of service; and

    c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.

9. Further, without prejudice to paragraph 5, whilst this Order is in force, the Claimant shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom it becomes aware is, or has been, on the Roads for the purposes of protesting and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court.

Third-Party Disclosure

10. Pursuant to CPR 31.17, the Chief Constables for those forces listed in Schedule 2 to this Order shall procure that the officers within their forces disclose to the Claimant:

    a. all of the names and addresses of any person who has been arrested by one of their officers in the course of, or as a result of, protests on the Roads referred to in these proceedings; and

    b. all arrest notes, body camera footage and/or all other photographic material relating to possible breaches of this Order.

11. Without the permission of the Court, the Claimant shall not make use of any document disclosed by virtue of paragraph 10 of this Order, other than for one or more of the following uses:

    a. applying to name and join any person as a Named Defendant to these proceedings and to serve the said person with any document in these proceedings;

    b. investigating, formulating, pleading and prosecuting any claim within these proceedings arising out of any alleged breach of this Order;

    c. use for purposes of formulating, pleading and prosecuting any application for committal for contempt of court against any person for breach of any Order made within these proceedings.

12. The Chief Constables listed in Schedule 2 to this Order shall procure that the officers within their forces give the relevant person whose details are to be provided to the Claimant pursuant to paragraph 10 of this Order not less than 48 hours' notice that disclosure will be given under paragraph 10 of this Order and supply a copy of this Order or refer to an e-mail address/website or phone number provided by the Claimant to enable this Order to be provided/available for consideration.

13. Until further Order, the postal address and/or address for service of any person who is added as a Named Defendant to these proceedings shall be redacted in any copy of any document which is served other than by means of it being sent directly to that person or their legal representative.

14. The Claimant is to serve this order on the Police Representative (Assistant Chief Constable Mark Williams (Mark.Williams@npocc.police.uk), by email only by way of service upon the Chief Constables of all of the forces listed in Schedule 2 to this Order.

Further Directions

15. Unless the Court is notified that no hearing is required (as no continuation of the Order is sought), the Order will be reconsidered at a hearing on Friday 25 April 2025 at 10.30 hrs at the Royal Courts of Justice, London to determine whether there is a continued threat which justifies continuation of this Order beyond 23.59 hrs on 10 May 2025 ("**Review Hearing**"). No further application by the Claimant shall be required.

16. The Claimant has liberty to apply for this Order to be reconsidered on the papers in order to avoid unnecessary expense and use of Court time:

    a. The Claimant's application for reconsideration on the papers must be made by 4pm on 28 March 2025.

    b. The Claimant shall file any evidence and/or written submissions by 4pm on 28 March 2025. The Claimant shall place any document so filed on the Injunction Website, which shall constitute good service on the Defendants.

    c. Any other party interested in the review of this Order shall file with the Court and serve on the Claimant (at the address in paragraph 21 below) any evidence and/or written submissions by 4pm on 4 April 2025.

    d. The Claimant, if so advised, may file and serve upon the relevant party further evidence and/or written submissions in response by 4pm on 11 April 2025.

    e. The Court shall determine whether the to proceed on the papers and so vacate the Review Hearing by 4pm on 16 April 2025.

17. The Defendants or any other person affected by this Order may apply to the Court at any time to vary or discharge it but if they wish to do so they must inform the Claimant's solicitors by email to the addresses specified at paragraph 21 below 48 hours before making such application of the nature of such application and the basis for it.

18. Any person applying to vary or discharge this Order must provide their full name and address, and address for service to the Claimant and to the Court and must also apply to be joined as a Named Defendant to these proceedings at the same time.

19. The Claimant has liberty to apply to extend, vary or discharge this Order, or for further directions.

Costs

20. No order as to costs.

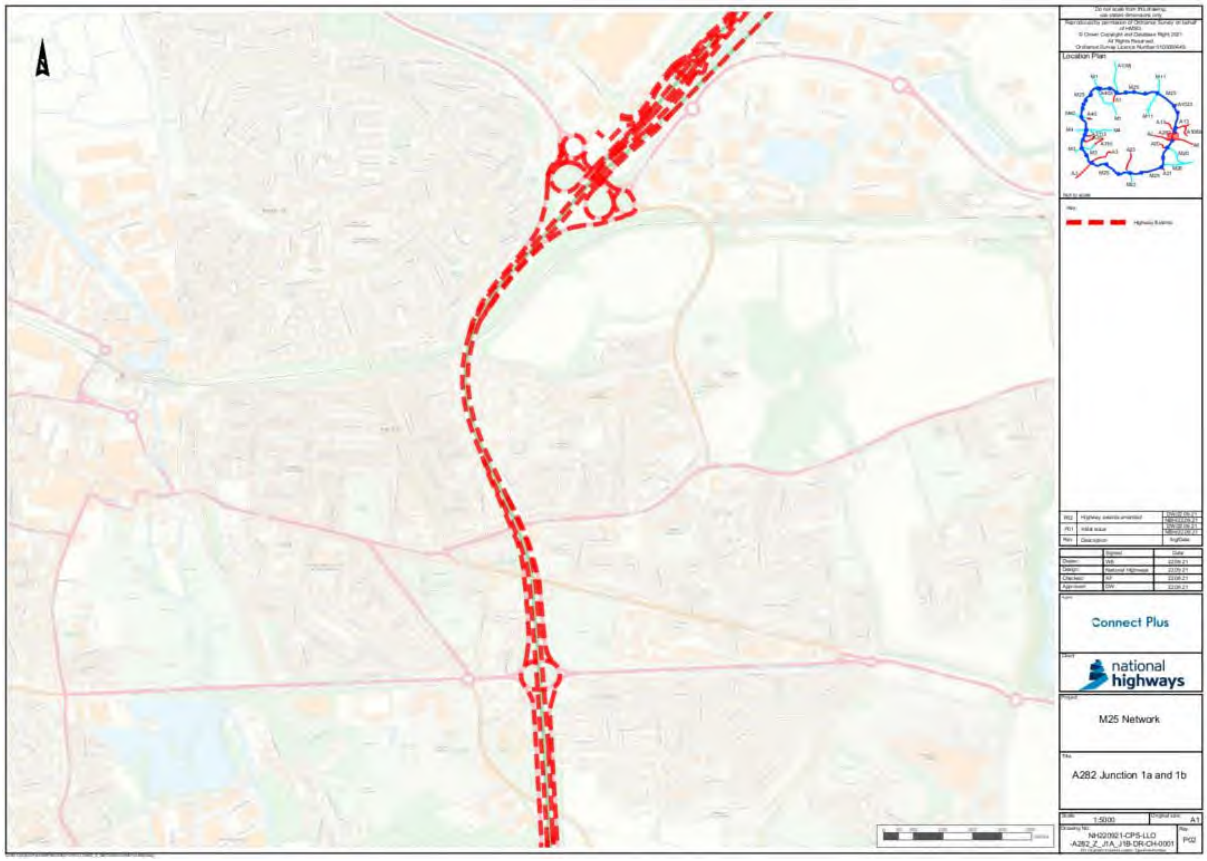
Communications with the Claimant

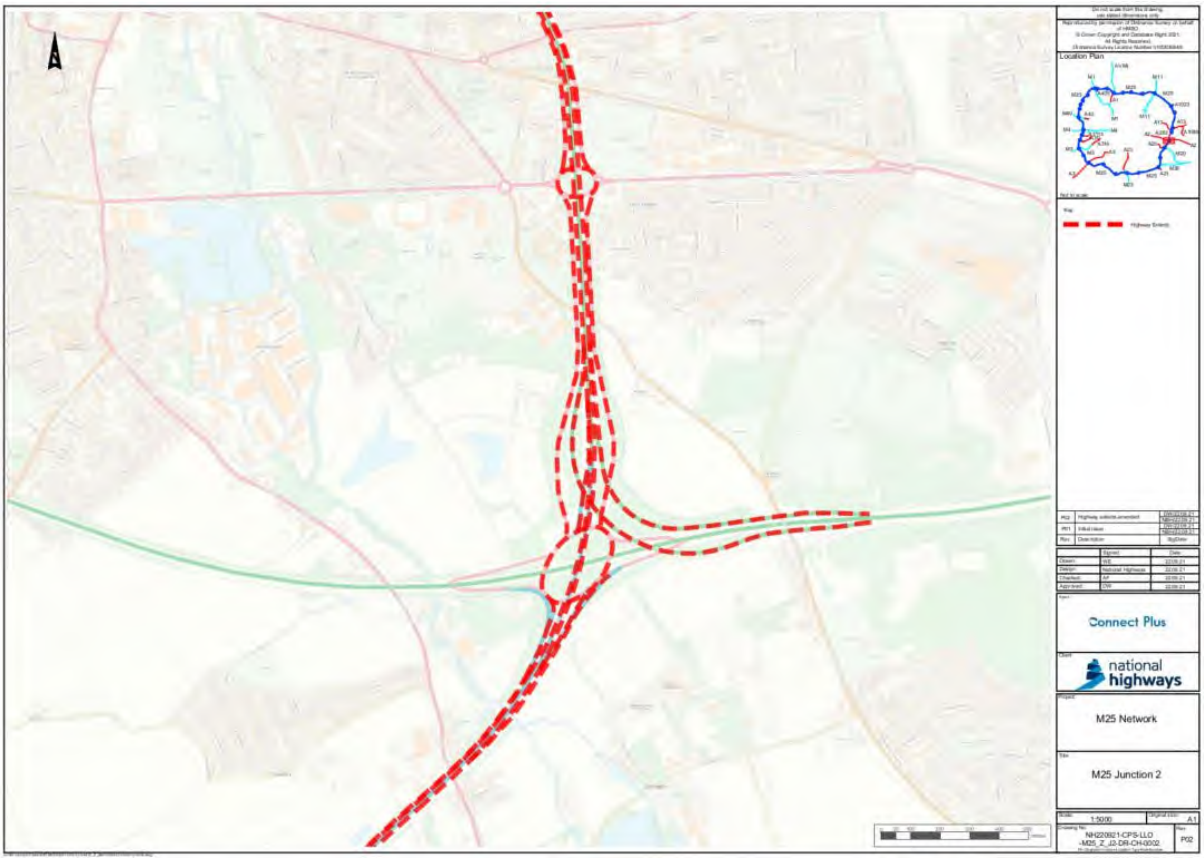
21. The Claimant's solicitors and their contact details are:

    DLA Piper UK LLP
    Attention: National Highways Injunction Team (Ref: PXB/RXS/439241/15)
    1 St. Paul's Place
    Sheffield
    S1 2JX
    E: NH-Injunctions@dlapiper.com
    T: 0207 796 6047 / 0114 283 3312

BY THE COURT
MADE ON 26 APRIL 2024

APPENDIX 1





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AUTH-13


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North Lodge
Willow Farm
Riverhead
Chipstead
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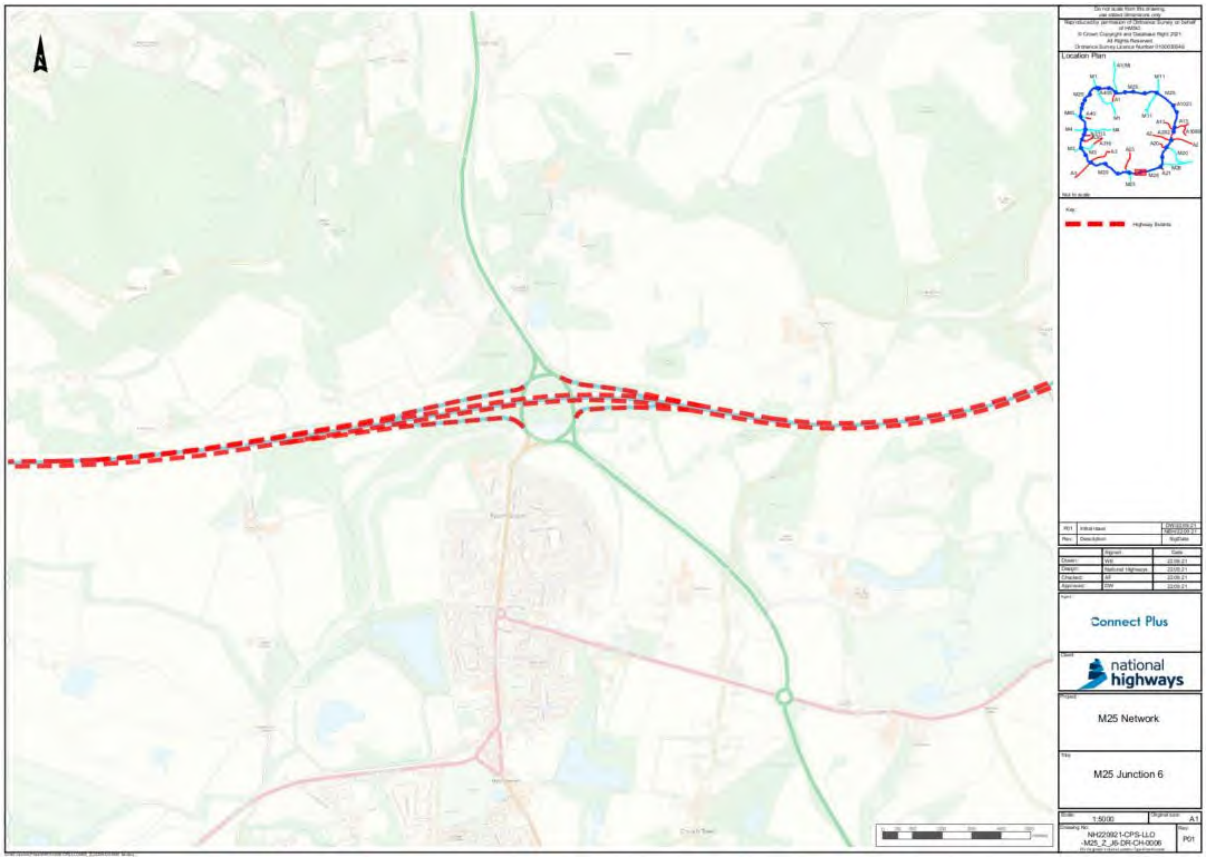
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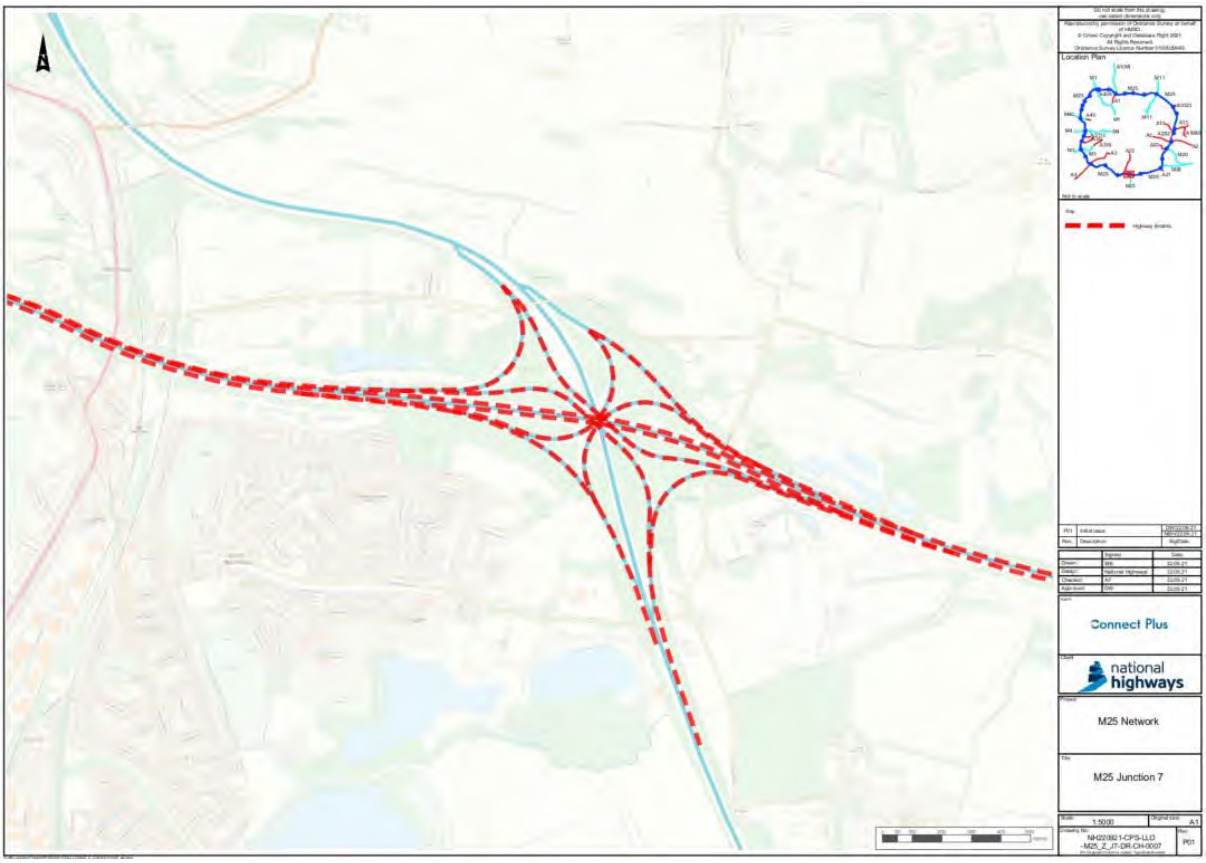
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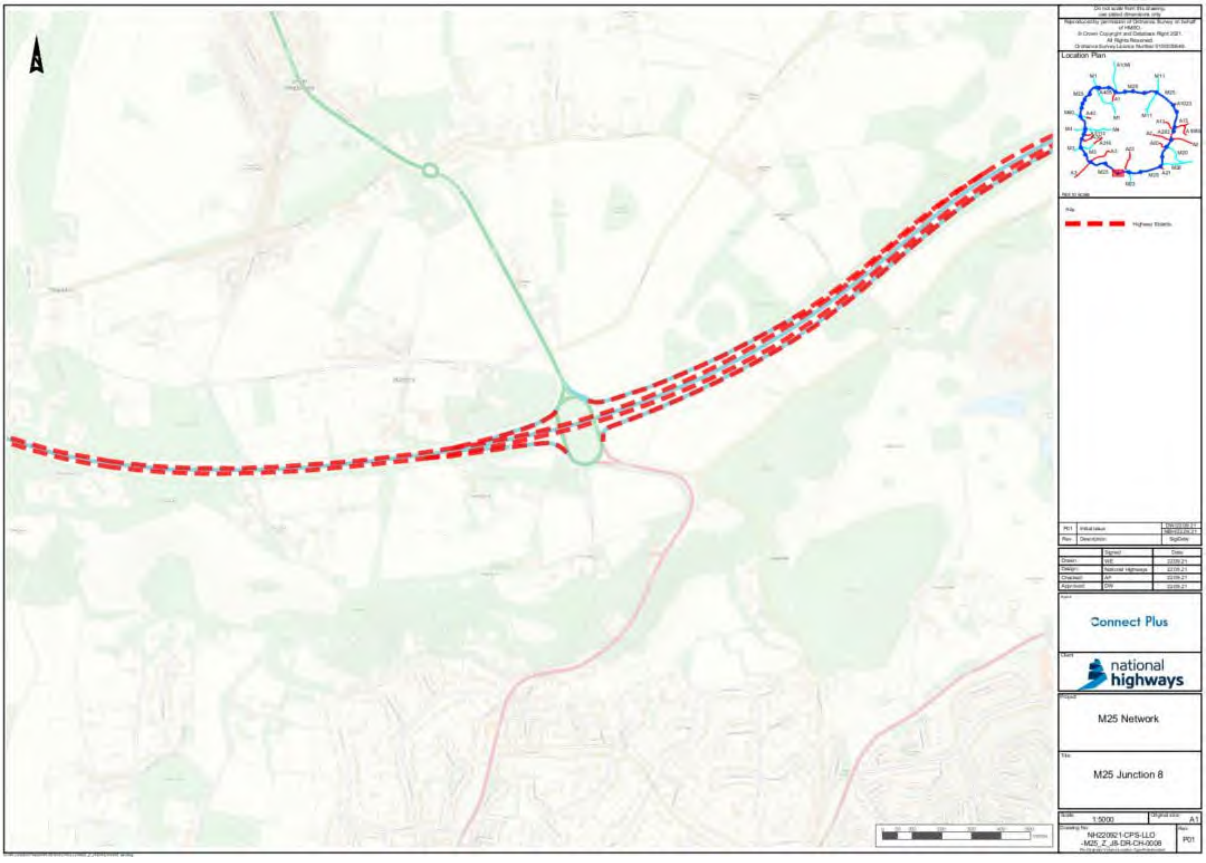
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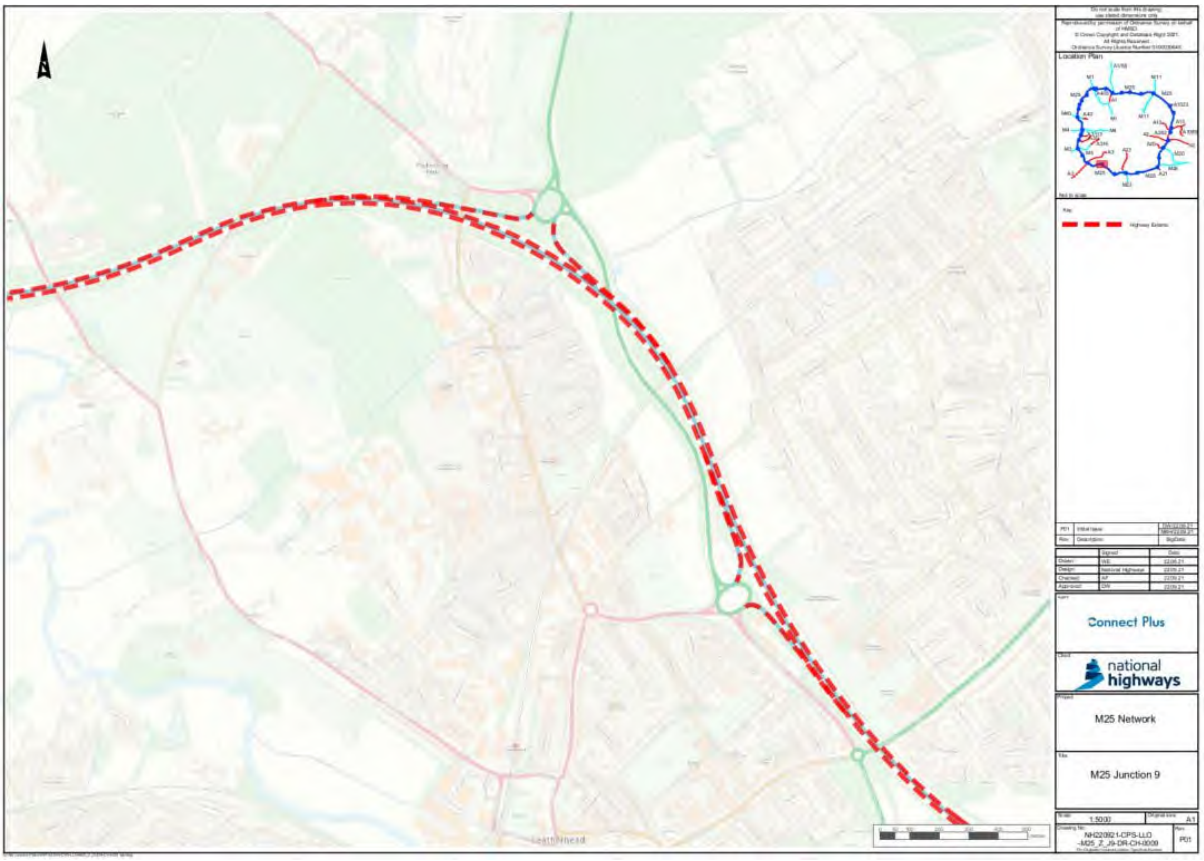
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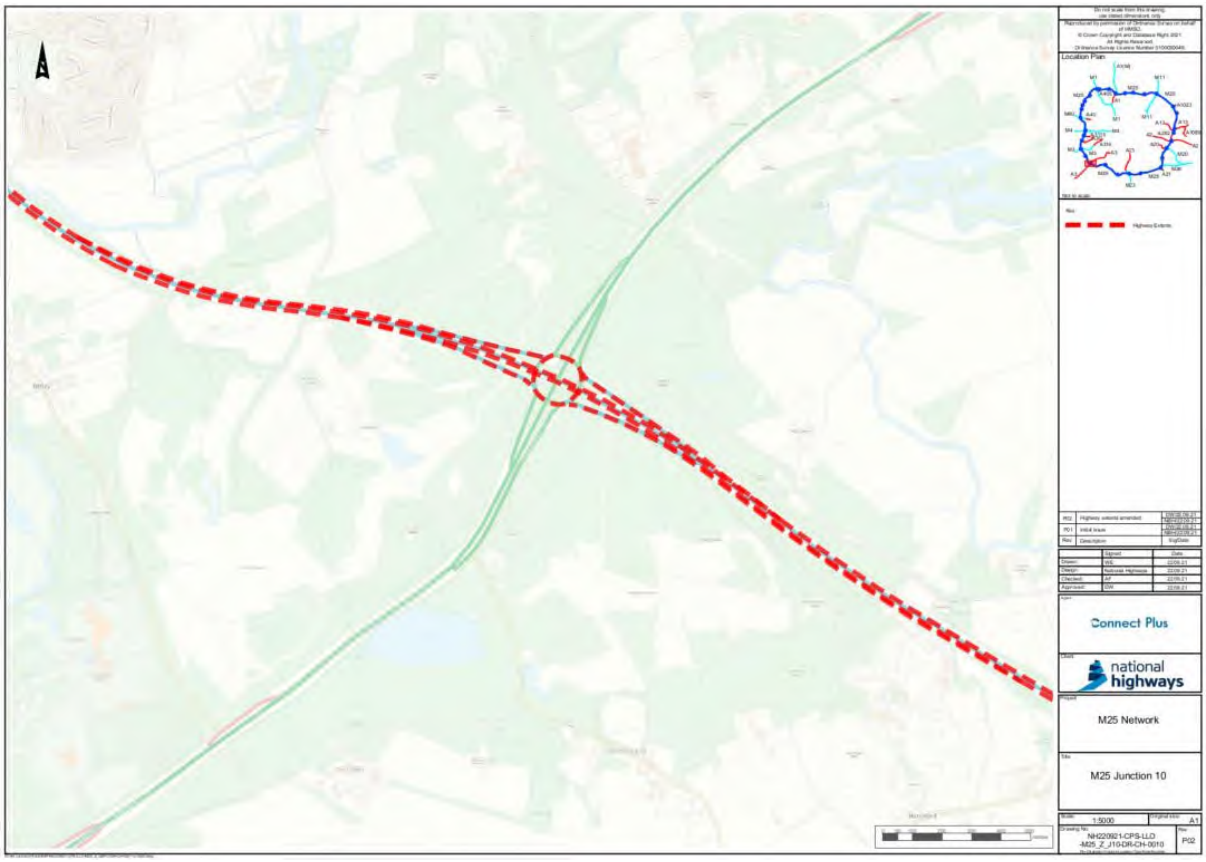
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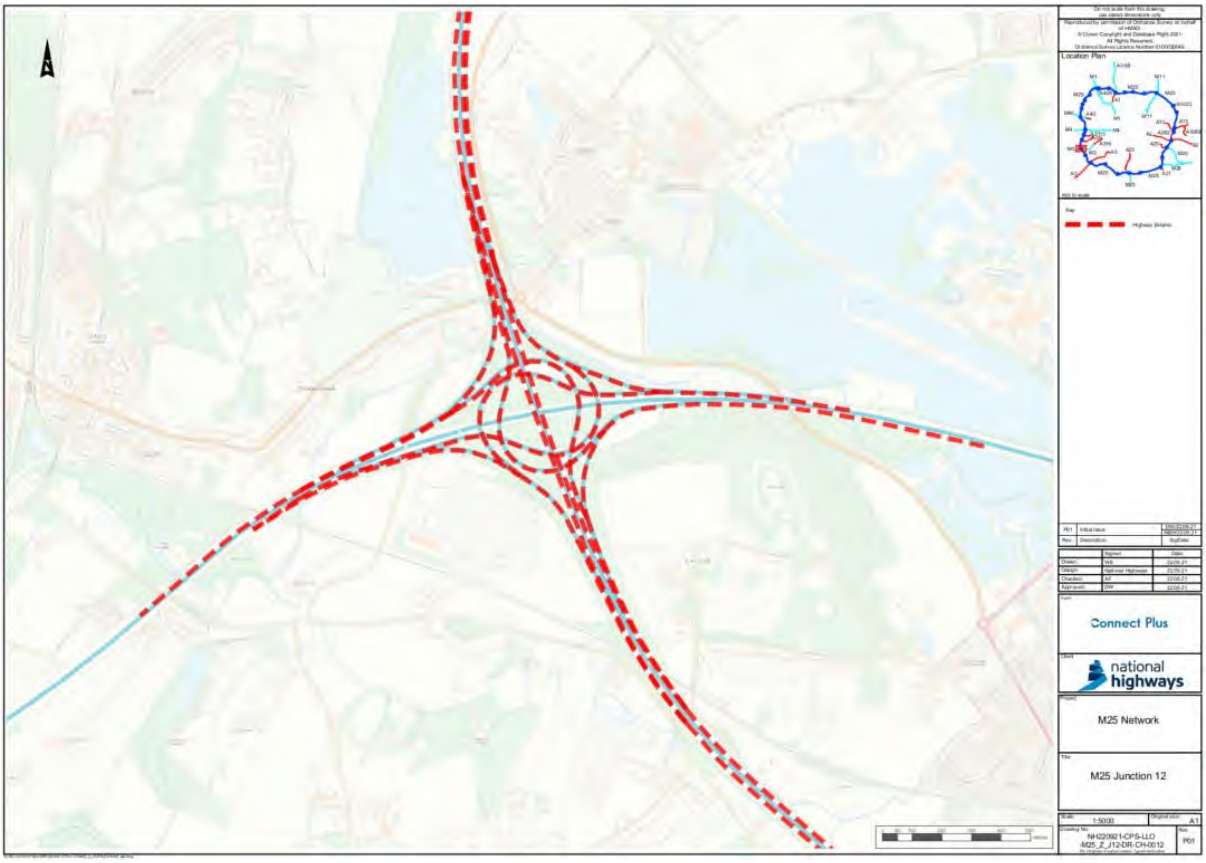
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AUTH-17


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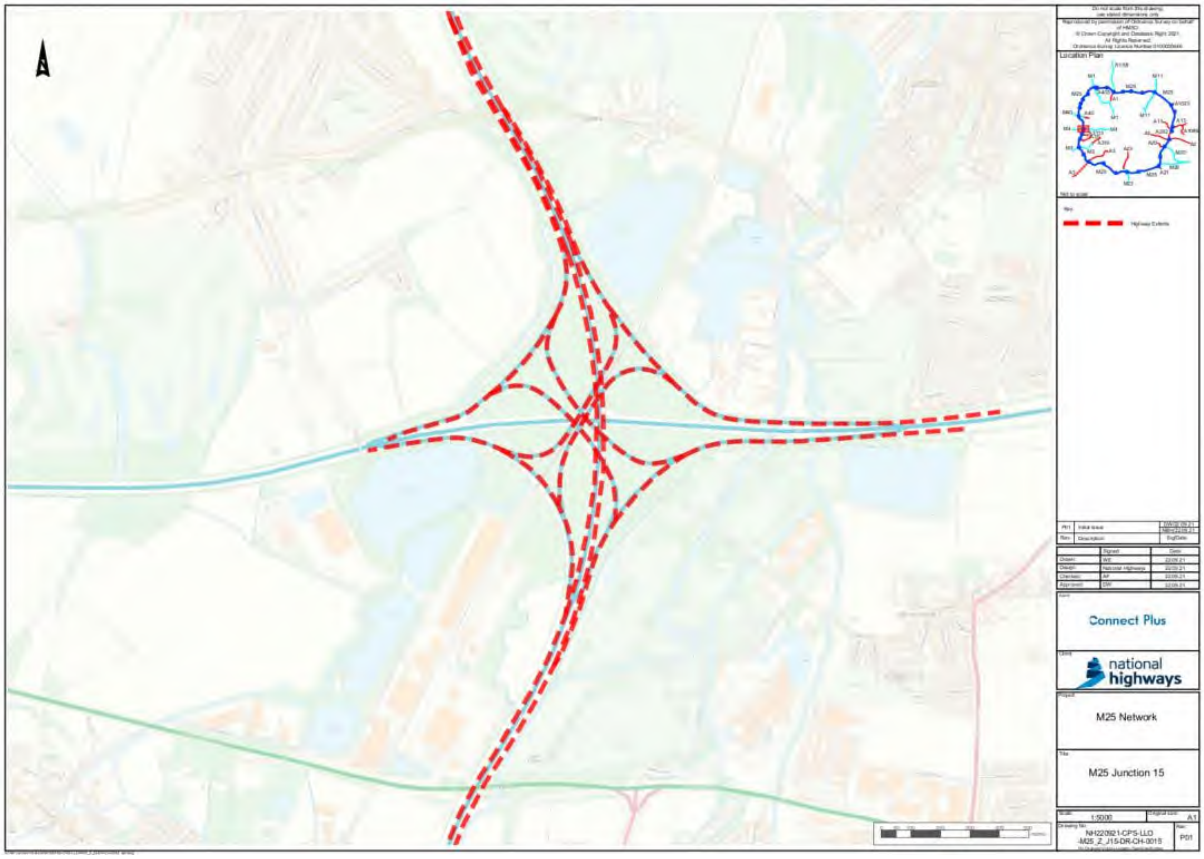
AUTH-18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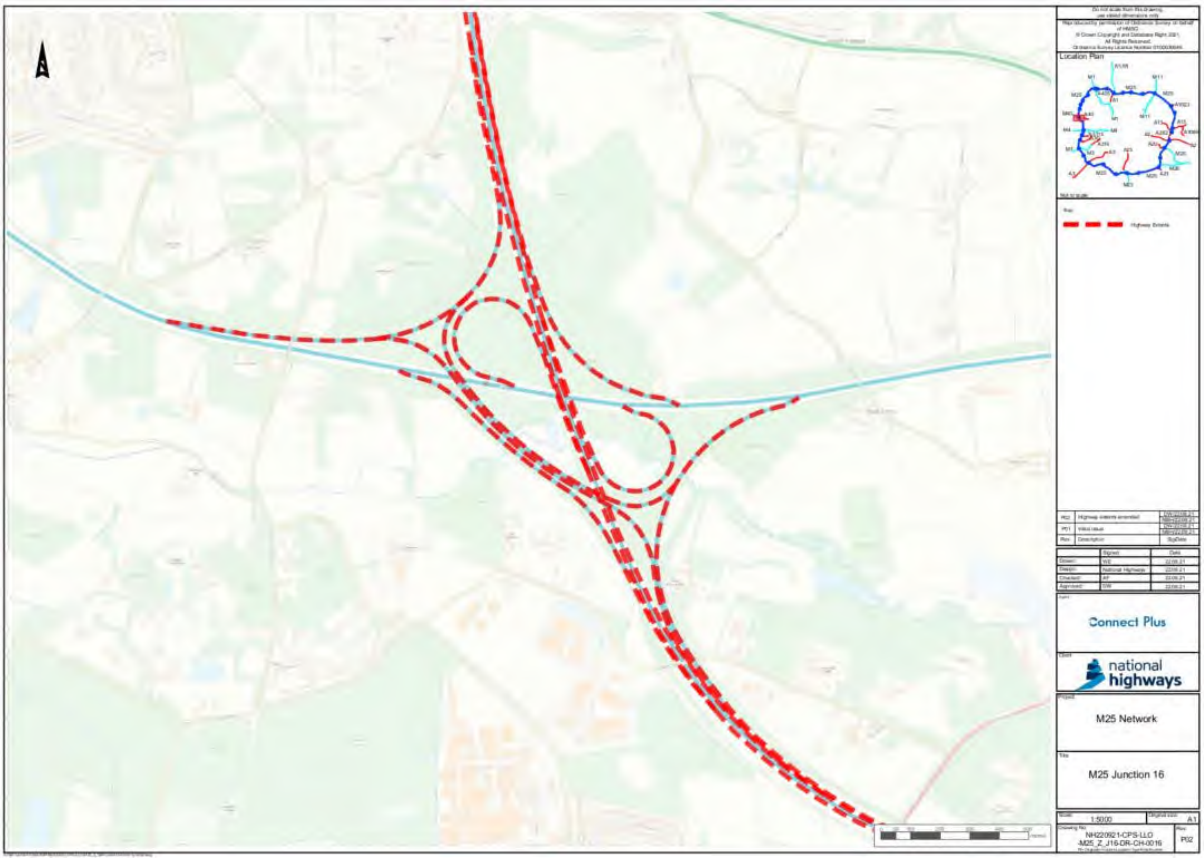
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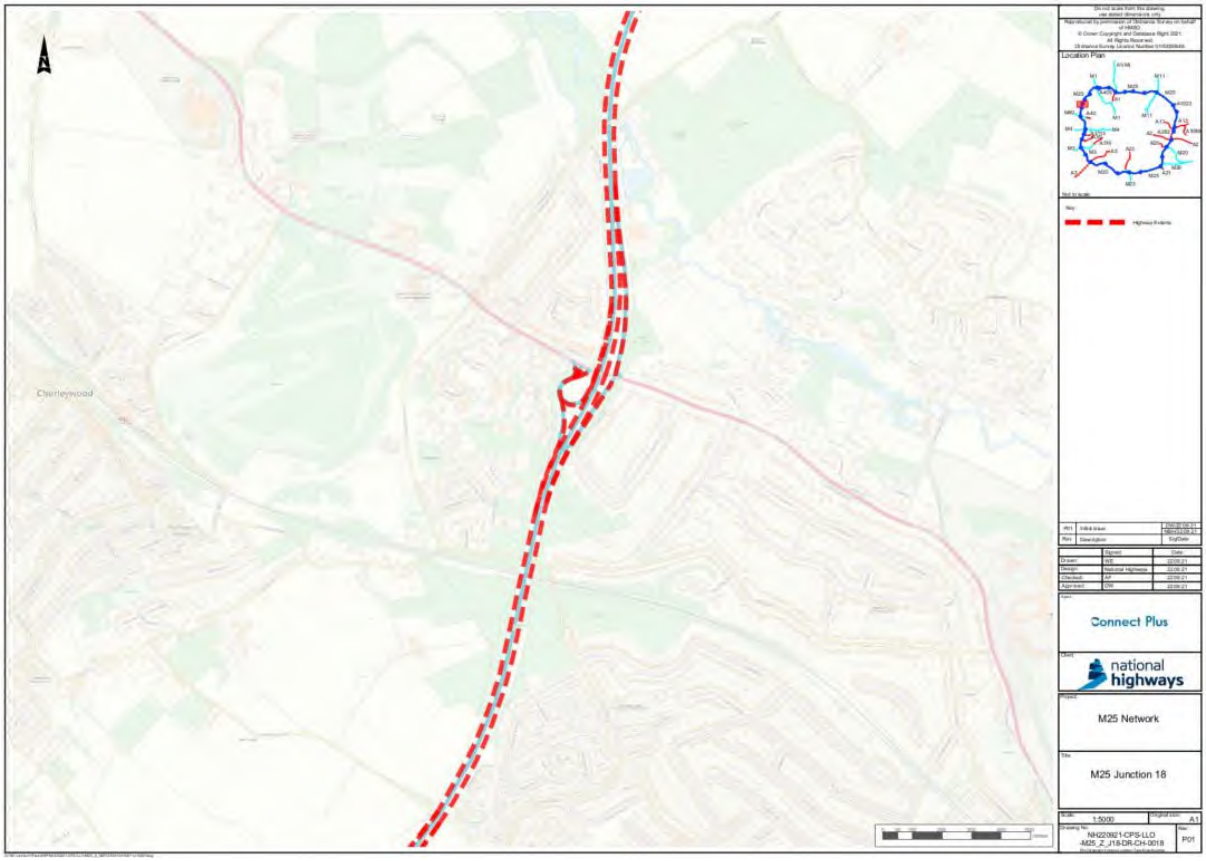
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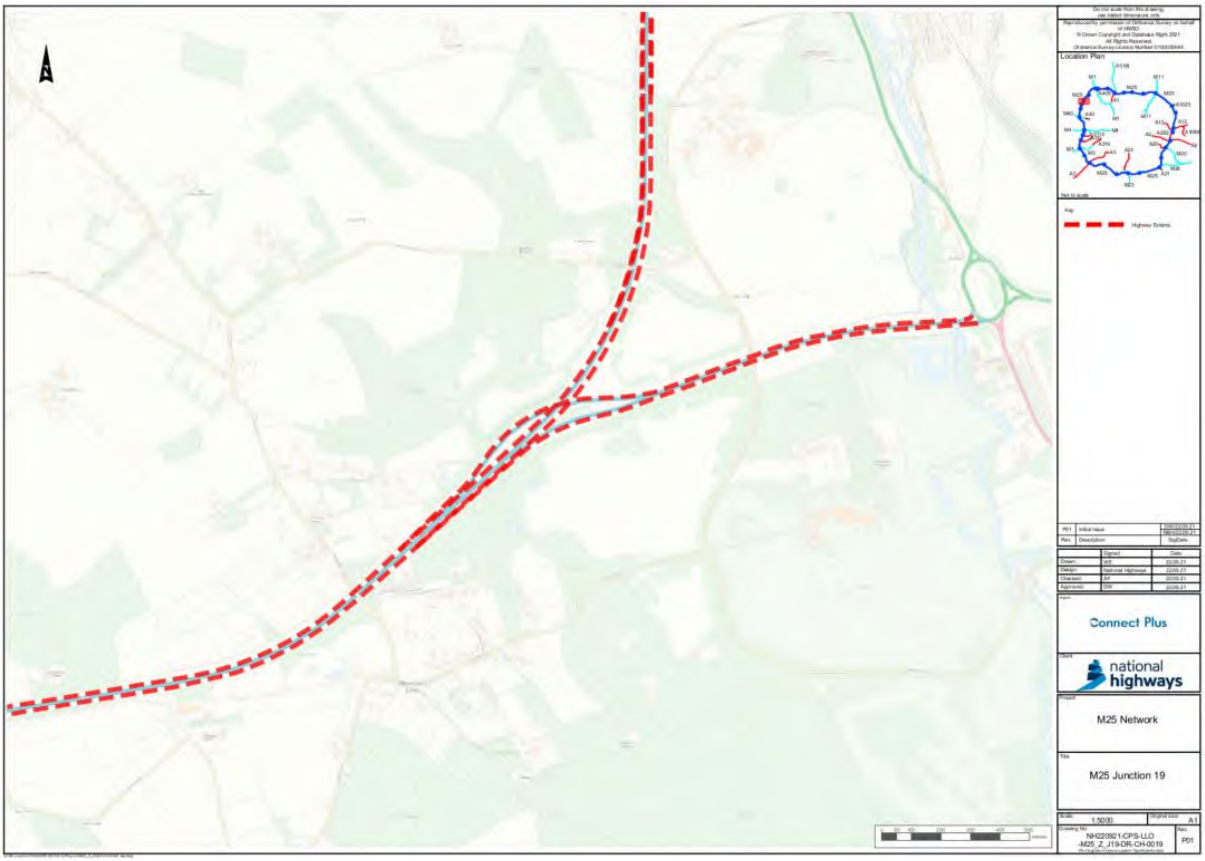
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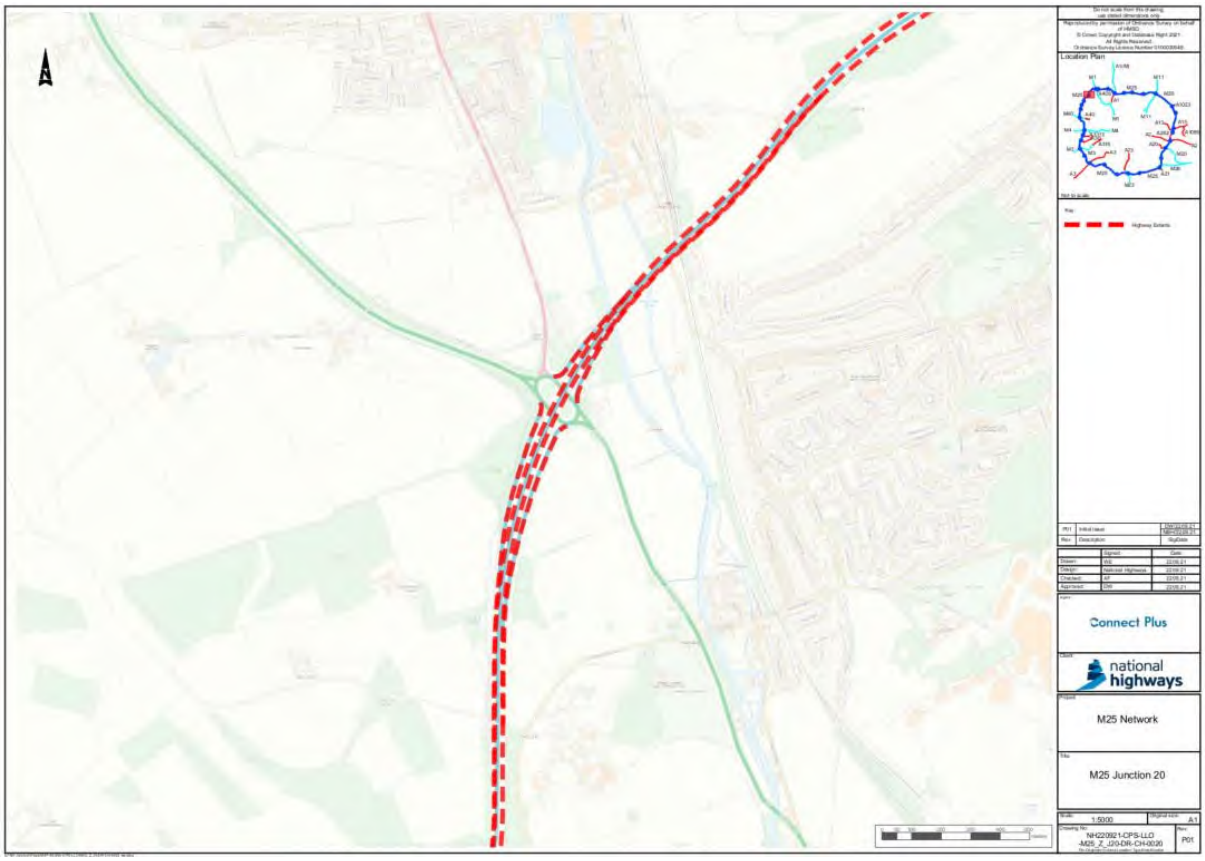
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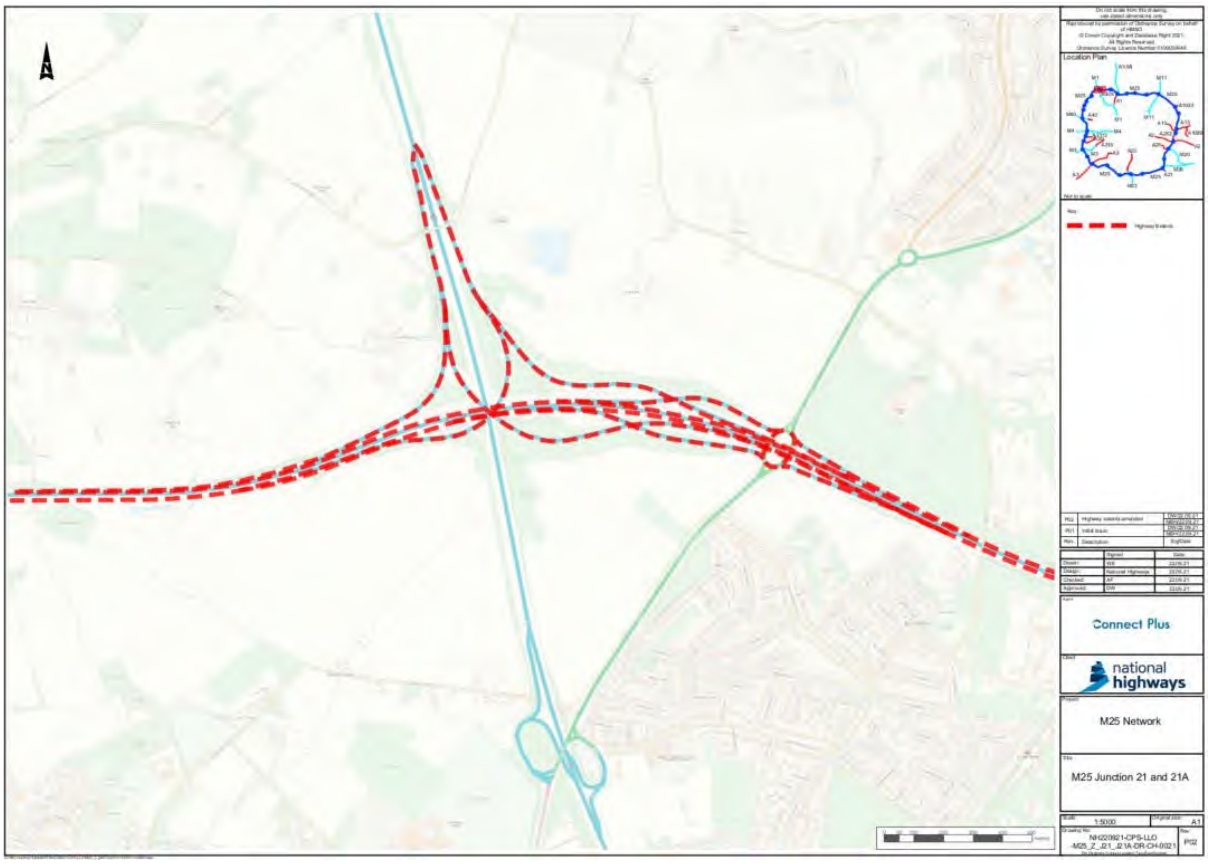
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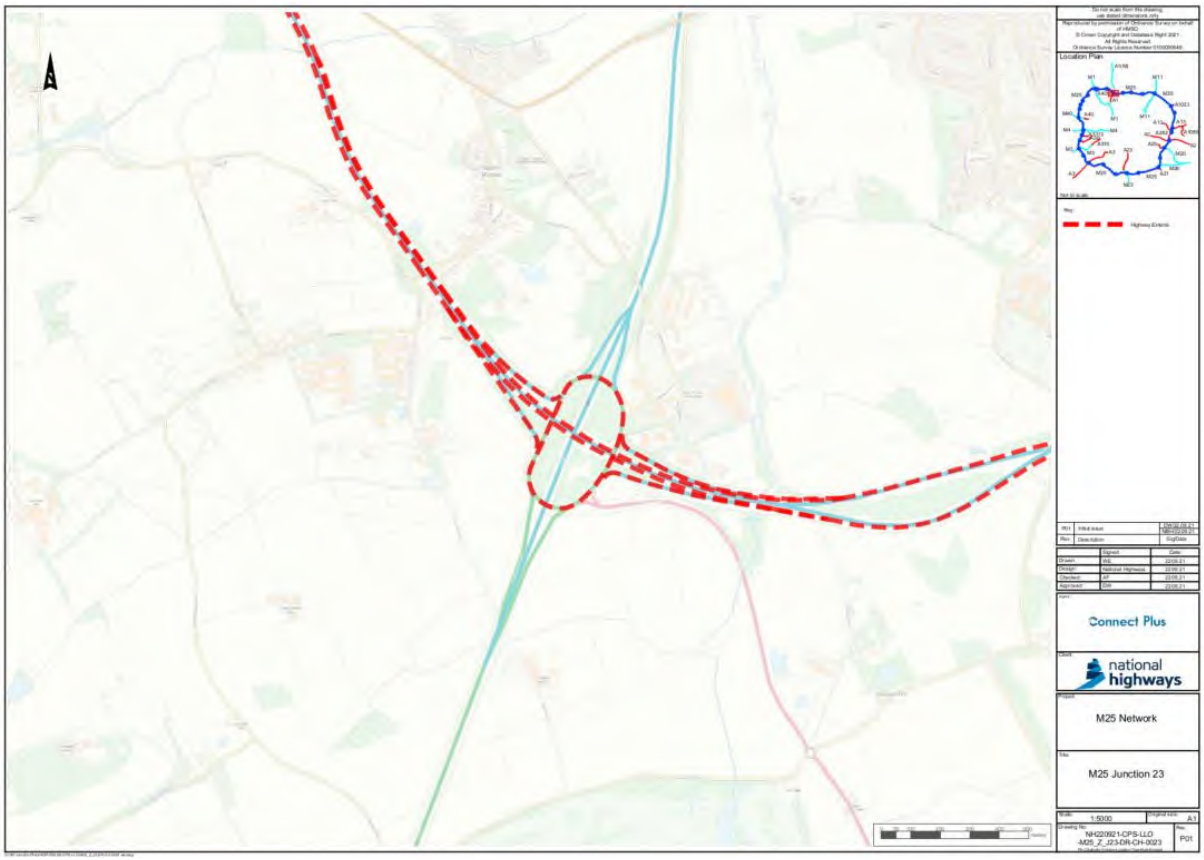
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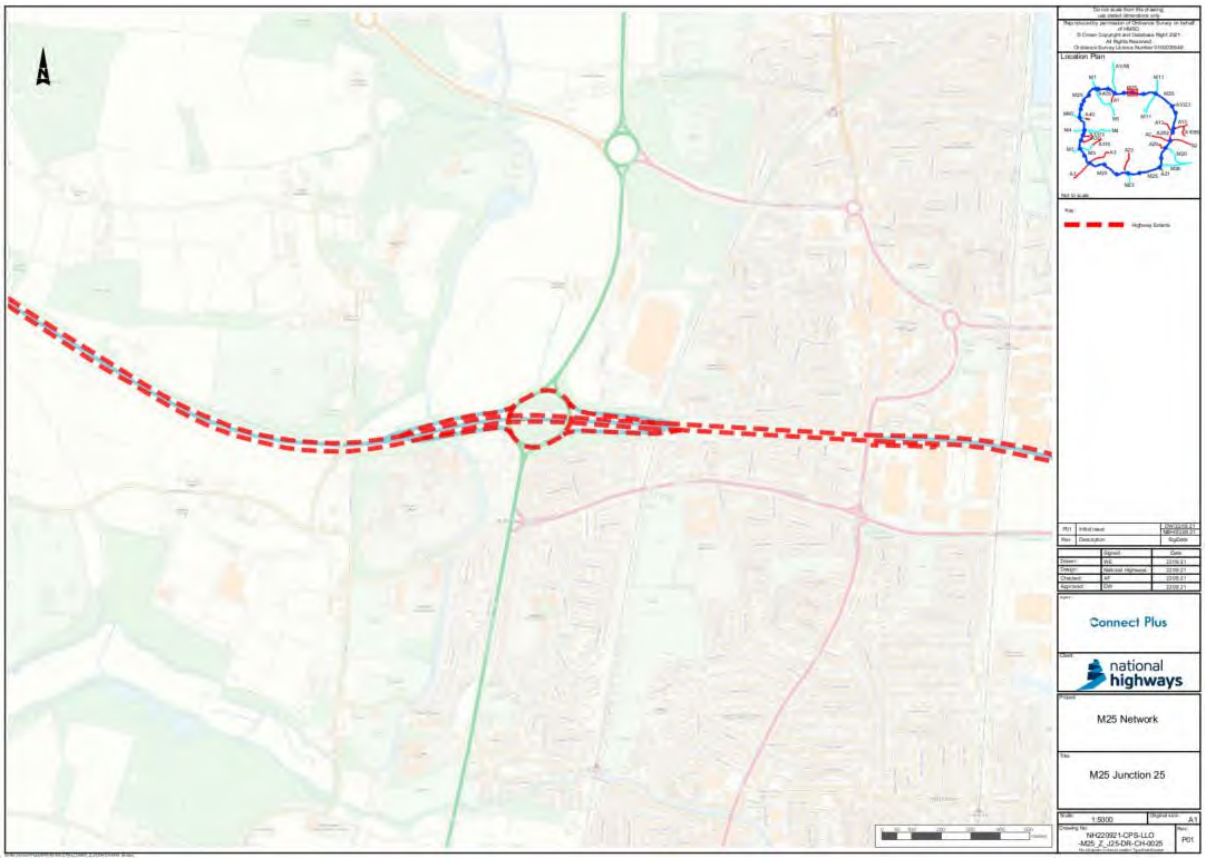
AUTH-23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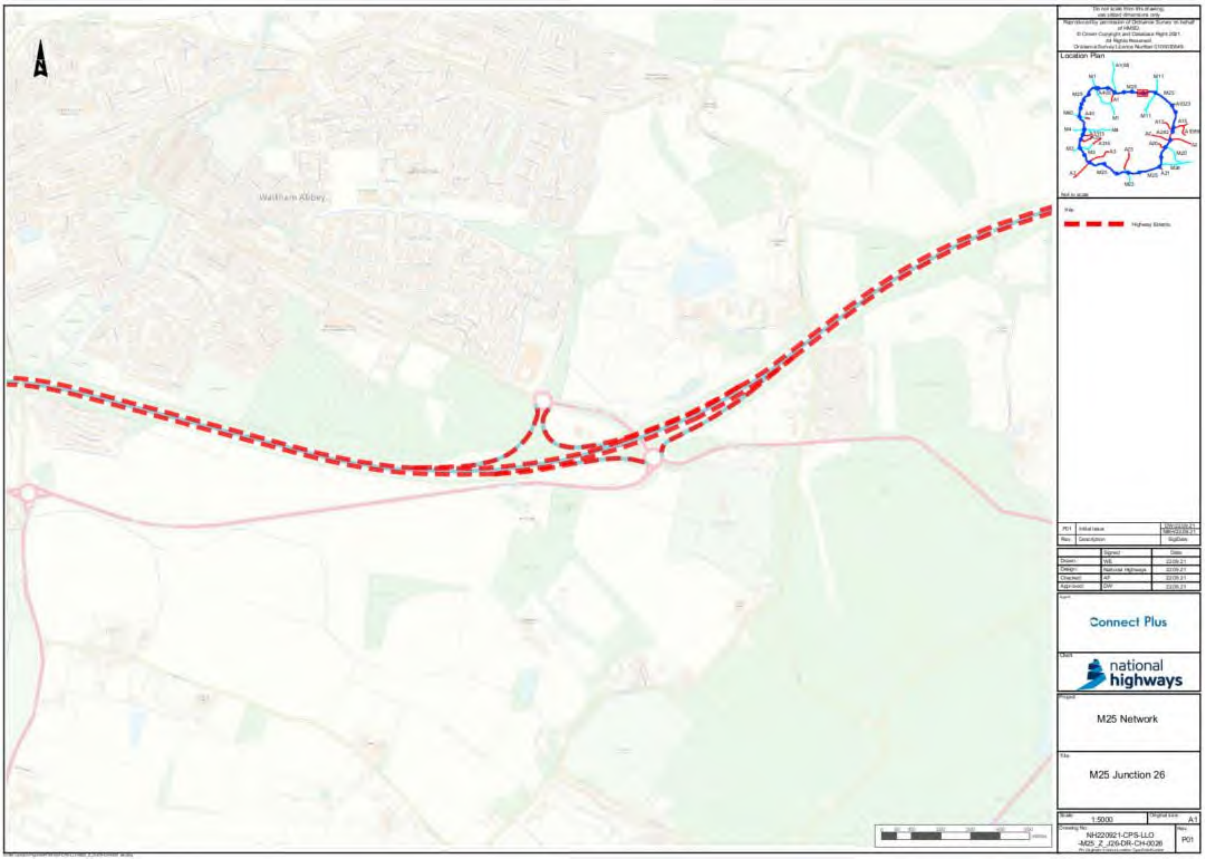
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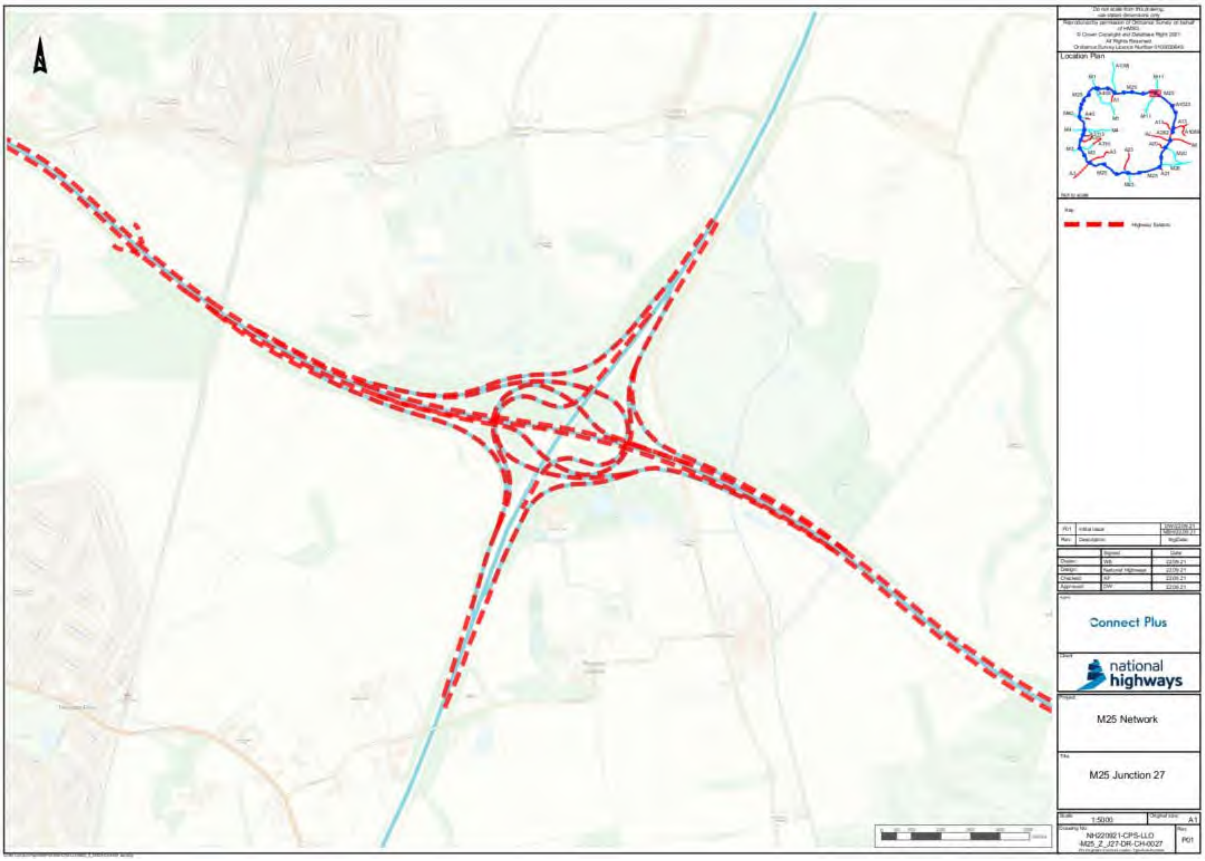
AUTH-24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national highways
M25 Network
M25 Junction 27


Location Plan
Connect Plus
national highways
M25 Network
M25 Junction 28

AUTH-25


Location Plan
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Connect Plus
national highways
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M25 Junction 29
1:5000
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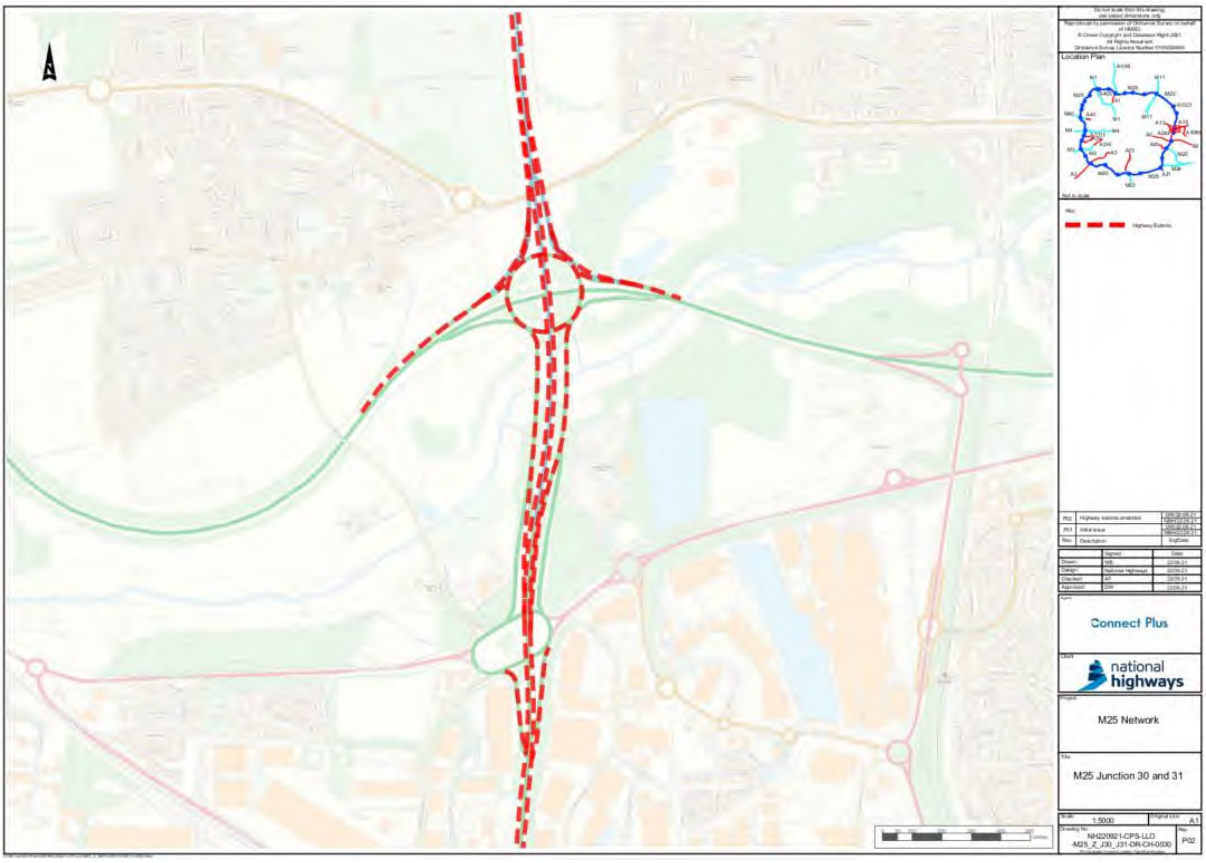
-M25_Z_J29-DR-CH-0029
P01


Location Plan
Highway Extents
Connect Plus
national highways
M25 Network
M25 Junction 30 and 31
1:5000
A1
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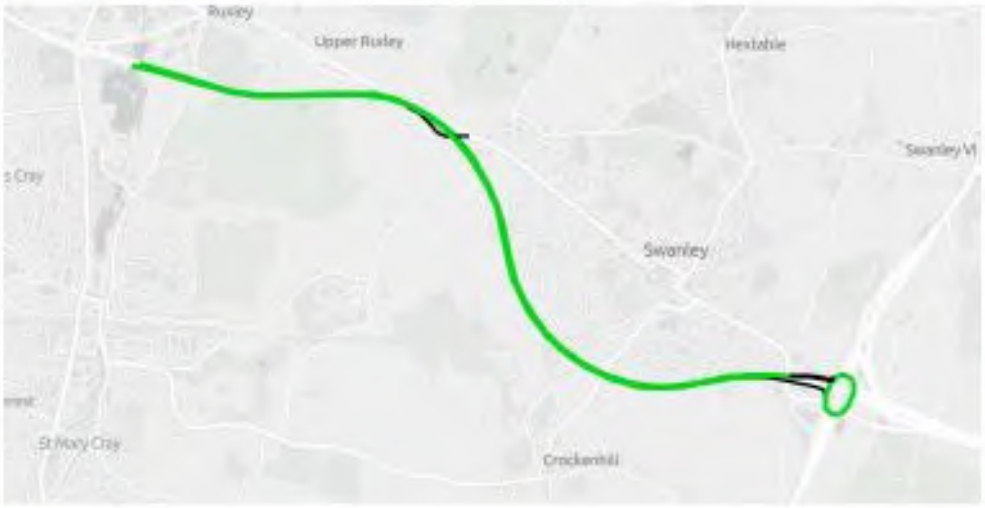
P02

AUTH-26

APPENDIX 2

A20 London - M25



M20

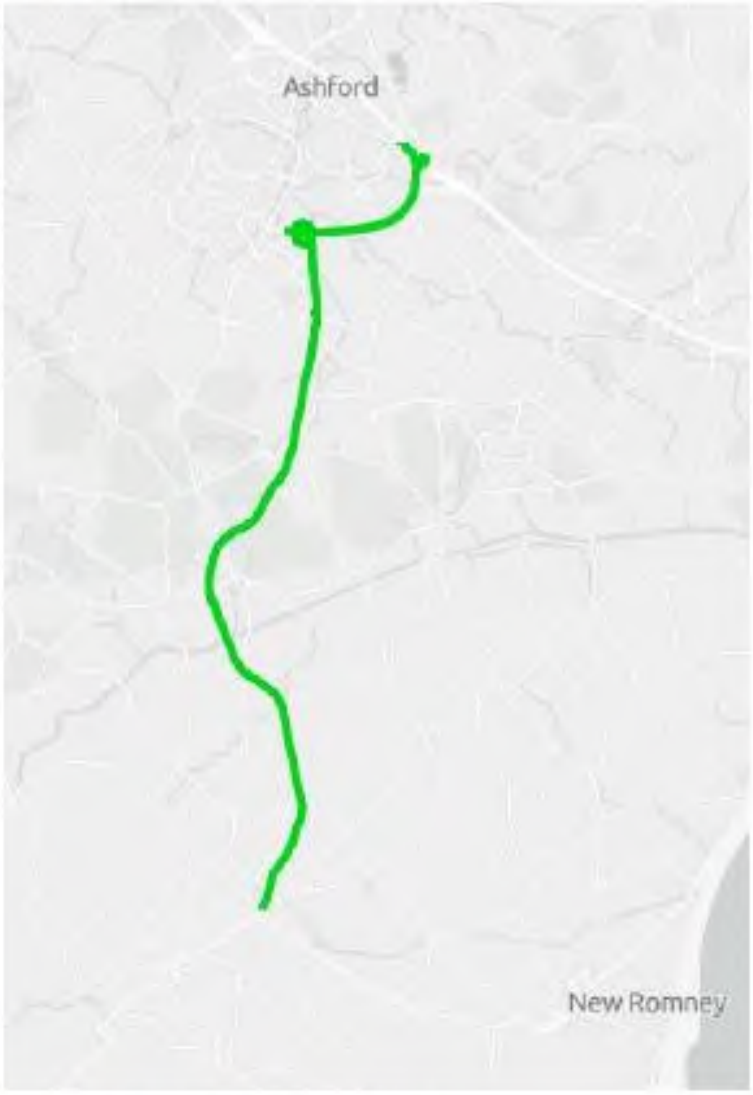
A20 Coast Section

A2 London – M2 Section

M2

A2 M2 - Dover Section

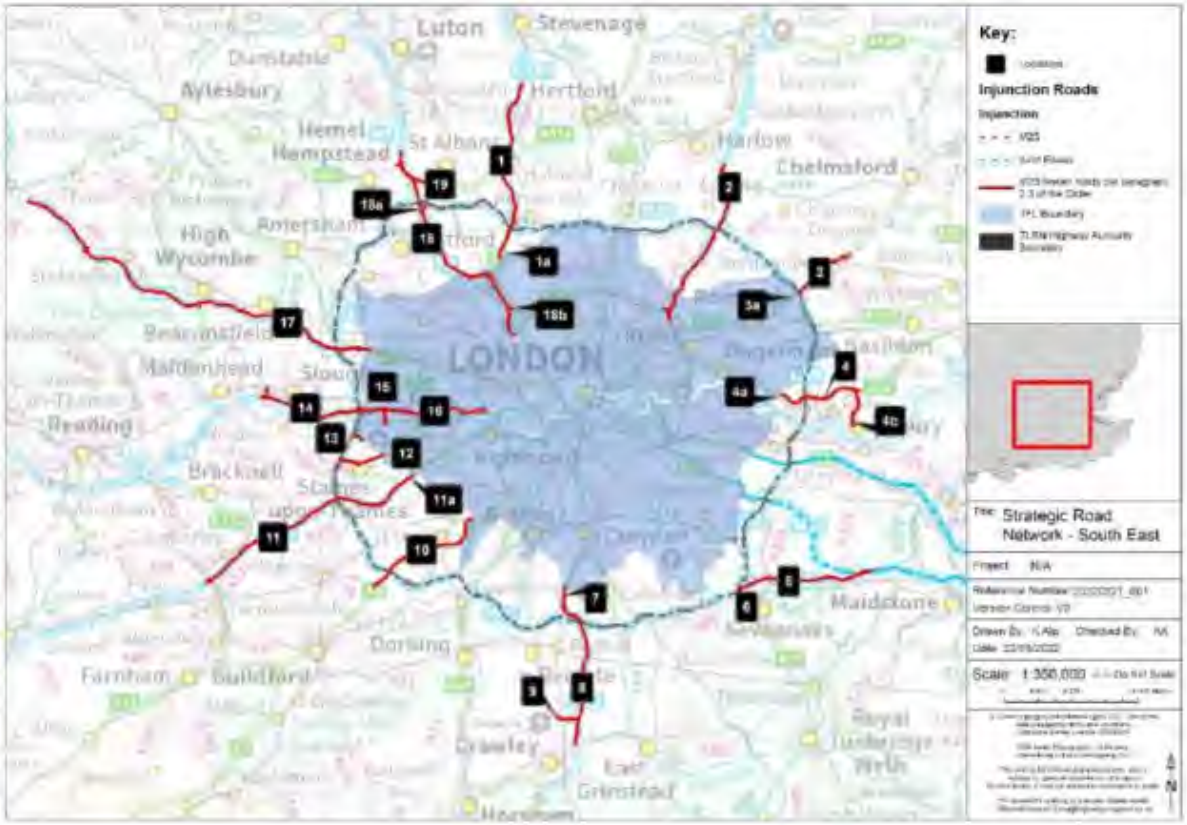
A2070



Kent & Surrounding areas SRN

APPENDIX 3

Strategic Road Network – South East



1. A1(M) from Junction 1 to Junction 6

1a. A1 from A1(M) to Rowley Lane

2. M11 from Junction 4 to Junction 7

3. A12 from M25 Junction 28 to A12 Junction 12

3a. A1023 (Brook Street) from M25 Junction 28 roundabout to Brook Street Shell Petrol Station access

4. A13 from M25 Junction 30 to junction with A1089

4a. A13 from junction with A1306 for Wennington to M25 Junction 30

4b. A1089 from junction with A13 to Port of Tilbury entrance

5. M26 (the whole motorway) from M25 to M20

6. A21 from the M25 to B2042

7. A23 from M23 to Star Shaw

8. M23 from Junction 7 to Junction 10 (including M23 Gatwick Spur)

9. A23 between North and South Terminal Roundabouts

10. A3 from A309 to B2039 Ripley Junction

11. M3 from Junction 1 to Junction 4

11a. A316 from M3 Junction 1 to Felthamhill Brook

12. A30 from M25 Junction 13 to Harrow Road, Stanwell, Feltham

13. A3113 from M25 Junction 14 to A3044

14. M4 from Junction 4B to Junction 7

15. M4 Spur (whole spur) from M4 Junction 4 to M4 Junction 4a

16. M4 from Junction 1 to Junction 4B

17. M40 from M40 Junction 7 to A40 (Fray's River Bridge)

18. M1 from Junction 1 to Junction 8

18a. A405 from M25 Junction 21A to M1 Junction 6

18b. A1 from Fiveways Corner roundabout to Hilltop Gardens

19. A414 from M1 Junction 8 to A405

SCHEDULE 1 – NAMED DEFENDANTS

For the avoidance of doubt, any person who has previously been a named defendant in these proceedings in the Cotter Injunction, or who has given undertakings to the Court in these proceedings, may nevertheless become Defendant 1 as a person unknown if they commit any of the prohibited acts.

	Name	**Details**
1.	PERSONS UNKNOWN CAUSING THE BLOCKING OF, OR ENDANGERING, OR OTHERWISE PREVENTING THE FREE FLOW OF TRAFFIC ON THE M25 MOTORWAY, A2, A20 AND A2070 TRUNK ROADS AND M2 AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23 AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING	
2.	Not used	
3.	Not used	
4.	Not used	
5.	Not used	
6.	Not used	
7.	Not used	
8.	Not used	
9.	Not used	
10.	Not used	
11.	Not used	
12.	Not used	
13.	Not used	
14.	Catherine RENNIE-NASH	

15.	Not used	
16.	Not used	
17.	Not used	
18.	Not used	
19.	Not used	
20.	Not used	
21.	Not used	
22.	Not used	
23.	Not used	
24.	Not used	
25.	Not used	
26.	Not used	
27.	Not used	
28.	Not used	
29.	Not used	
30.	Not used	
31.	Not used	
32.	Not used	

33.	Not used	
34.	Not used	
35.	Not used	
36.	Not used	
37.	Not used	
38.	Not used	
39.	Not used	
40.	Not used	
41.	Not used	
42.	Not used	
43.	Not used	
44.	Not used	
45.	Not used	
46.	Not used	
47.	Not used	
48.	Not used	
49.	Not used	
50.	Julia SCHOFIELD	

51.	Not used	
52.	Karen WILDIN	
53.	Liam NORTON	
54.	Louis MCKECHNIE	
55.	Not used	
56.	Not used	
57.	Not used	
58.	Not used	
59.	Not used	
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75.	Not used	
76.	Paul SHEEKY	
77.	Not used	
78.	Not used	
79.	Not used	
80.	Not used	
81.	Not used	
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83.	Not used	
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86.	Not used	

87.	Not used	
88.	Not used	
89.	Not used	
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91.	Not used	
92.	Not used	
93.	Stephen Charles GOWER	
94.	Not used	
95.	Not used	
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97.	Not used	
98.	Not used	
99.	Not used	
100.	Tessa-Marie BURNS	
101.	Theresa NORTON	
102.	Not used	
103.	Not used	
104.	Tracey MALLAGHAN	

105.	Not used	
106.	Not used	
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122.	Not used	

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128.	Not used	
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130.	Not used	
131.	Not used	
132.	Not used	
133.	Not used	
134.	Not used	
135.	Not used	
136.	Morgan TROWLAND	
137.	Not used	
138.	Not used	
139.	Not used	
140.	Not used	

SCHEDULE 2

CHIEF CONSTABLES OF THE FORCES OF:

City of London Police

Metropolitan Police Service

Avon and Somerset Constabulary

Bedfordshire Police

Cambridgeshire Constabulary

Cheshire Constabulary

Cleveland Police

Cumbria Constabulary

Derbyshire Constabulary

Devon & Cornwall Police

Dorset Police

Durham Constabulary

Essex Police

Gloucestershire Constabulary

Greater Manchester Police

Hampshire Constabulary

Hertfordshire Constabulary

Humberside Police

Kent Police

Lancashire Constabulary

Leicestershire Police

Lincolnshire Police

Merseyside Police

Norfolk Constabulary

North Yorkshire Police

Northamptonshire Police

Northumbria Police

Nottinghamshire Police

South Yorkshire Police

Staffordshire Police

Suffolk Constabulary

Surrey Police

Sussex Police

Thames Valley Police

Warwickshire Police

West Mercia Police

West Midlands Police

West Yorkshire Police

Wiltshire Police

Neutral Citation Number: [2024] EWHC 134 (KB)

Claim no: QB-2022-000904

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE ROYAL COURTS OF JUSTICE

Date: 26th January 2024

Before:
MR JUSTICE RITCHIE

- - - - - - - - - - - - - - - - - - -

BETWEEN

(1) VALERO ENERGY LTD
(2) VALERO LOGISTICS UK LTD
(3) VALERO PEMBROKESHIRE OIL TERMINAL LTD

Claimants

-and-

(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH ENVIRONMENTAL PROTESTS BY THE 'JUST STOP OIL' OR 'EXTINCTION REBELLION' OR 'INSULATE BRITAIN' OR 'YOUTH CLIMATE SWARM' (ALSO KNOWN AS YOUTH SWARM) MOVEMENTS ENTER OR REMAIN WITHOUT THE CONSENT OF THE FIRST CLAIMANT UPON ANY OF THE 8 SITES (defined below)

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH ENVIRONMENTAL PROTESTS BY THE 'JUST STOP OIL' OR 'EXTINCTION REBELLION' OR 'INSULATE BRITAIN' OR 'YOUTH CLIMATE SWARM' (ALSO KNOWN AS YOUTH SWARM) MOVEMENTS CAUSE BLOCKADES, OBSTRUCTIONS OF TRAFFIC AND INTERFERE WITH THE PASSAGE BY THE CLAIMANTS AND THEIR AGENTS, SERVANTS, EMPLOYEES, LICENSEES, INVITEES WITH OR WITHOUT VEHICLES AND EQUIPMENT TO, FROM, OVER AND ACROSS THE ROADS IN THE VICINITY OF THE 8 SITES (defined below)

AUTH-42

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

Katharine Holland KC and **Yaaser Vanderman**
(instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**. The Defendants did not appear.

Hearing date: 17th January 2024

- -

Approved Judgment

This judgment was handed down remotely at 14.00pm on Friday 26th January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

The Parties

1. The Claimants are three companies who are part of a large petrochemical group called the Valero Group and own or have a right to possession of the 8 Sites defined out below.

2. The "4 Organisations" relevant to this judgment are:
   2.1 Just Stop Oil.
   2.2 Extinction Rebellion.
   2.3 Insulate Britain.
   2.4 Youth Climate Swarm.

   I have been provided with a little information about the persons who set up and run some of these 4 Organisations. They appear to be crowdfunded partly by donations. A man called Richard Hallam appears to be a co-founder of 3 of them.

3. The Defendants are firstly, persons unknown (PUs) connected with 4 Organisations who trespass or stay on the 8 Sites defined below. Secondly, they are PUs who block access to the 8 Sites defined below or otherwise interfere with the access to the 8 Sites by the Claimants, their servants, agents, licensees or invitees. Thirdly, they are named persons who have been involved in suspected tortious behaviour or whom the Claimants fear will be involved in tortious behaviour at the 8 Sites and the relevant access roads.

The 8 Sites

4. The "8 Sites" are:
   4.1 the first Claimant's Pembroke oil refinery, Angle, Pembroke SA71 5SJ (shown outlined red on plan A in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.2 the first Claimant's Pembroke oil refinery jetties at Angle, Pembroke SA71 5SJ (as shown outlined red on plan B in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.3 the second Claimant's Manchester oil terminal at Churchill Way, Trafford Park, Manchester M17 1BS (shown outlined red on plan C in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.4 the second Claimant's Kingsbury oil terminal at plot B, Trinity Road, Kingsbury, Tamworth B78 2EJ (shown outlined red on plan D in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.5 the second Claimant's Plymouth oil terminal at Oakfield Terrace Road, Cattedown, Plymouth PL4 0RY (shown outlined red on plan E in Schedule 1 to the Order made by Bourne J on 28.7.2023);
   4.6 the second Claimant's Cardiff oil terminal at Roath Dock, Rover Way, Cardiff CF10 4US (shown outlined red on plan F in Schedule 1 to the Order made by Bourne J on 28.7.2023);

4.7 the second Claimant's Avonmouth oil terminal at Holesmouth Road, Royal Edward dock, Avonmouth BS11 9BT (shown outlined red on the plan G in Schedule 1 to the Order made by Bourne J on 28.7.2023);

4.8 the third Claimant's Pembrokeshire terminal at Main Road, Waterston, Milford Haven SA73 1DR (shown outlined red on plan H in Schedule 1 to the Order made by Bourne J on 28.7.2023).

Bundles

5. For the hearing I was provided with a core bundle and 5 lever arch files making up the supplementary bundle, a bundle of authorities, a skeleton argument, a draft order and a final witness statement from Ms Hurle. Nothing was provided by any Defendant.

Summary

6. The 4 Organisations and members of the public connected with them seek to disrupt the petrochemical industry in England and Wales in furtherance of their political objectives and demands. After various public threats and protests and on police intelligence the Claimants issued a Claim Form on the 18th of March 2022 alleging that they feared tortious trespass and nuisance by persons unknown connected with the 4 Organisations at their 8 Sites and their access roads and seeking an interim injunction prohibiting that tortious behaviour.

7. Various interim prohibitions were granted by Mr Justice Butcher on the 21st of March 2022 in an ex-parte interim injunction protecting the 8 Sites and access thereto. However, protests involving tortious action took place at the Claimant's and other companies' Kingsbury site between the 1st and the 15th of April 2022 leading to not less than 86 protesters being arrested. The Claimants applied to continue their injunction and it was renewed by various High Court judges and eventually replaced by a similar interim injunction made by Mr Justice Bourne on the 28th of July 2023.

8. On the 12th of December 2023 the Claimants applied for summary judgment and for a final injunction to last five years with annual reviews. This judgment deals with the final hearing of that application which took place before me.

9. Despite valid service of the application, evidence and notice of hearing, none of the named Defendants attended at the hearing which was in open Court and no UPs attended at the hearing, nor did any member of the public as far as I could see in Court. The Claimants' counsel informed me that no communication took place between any named Defendant and the Claimants' solicitors in relation to the hearing other than by way of negotiations for undertakings for 43 of the named Defendants who all promised not to commit the feared torts in future.

The Issues

10. The issues before me were as follows:

10.1 Are the elements of CPR Part 24 satisfied so that summary judgment can be entered?

10.2 Should a final injunction against unknown persons and named Defendants be granted on the evidence presented by the Claimants?

10.3 What should the terms of any such injunction be?

The ancillary applications

11. The Claimants also made various tidying up applications which I can deal with briefly here. They applied to amend the Claimants' names, to change the word "limited" to a shortened version thereof to match the registered names of the companies. They applied to delete two Defendants, whom they accepted were wrongly added to the proceedings (and after the hearing a third). They applied to make minor alterations to the descriptions of the 1st and 2nd Defendants who are unknown persons. The Claimants also applied for permission to apply for summary judgment. This application was made retrospectively to satisfy the requirements of CPR rule 24.4. None of these applications was opposed. I granted all of them and they are to be encompassed in a set of directions which will be issued in an Order.

Pleadings and chronology of the action

12. In the Claim Form the details of the claims were set out. The Claimants sought a *quia timet* (since he fears) injunction, fearing that persons would trespass into the 8 Sites and cause danger or damage therein and disrupt the processes carried out therein, or block access to the 8 Sites thereby committing a private nuisance on private roads or a public nuisance on public highways. The Claimants relied on the letter sent by Just Stop Oil dated 14th February 2022 to Her Majesty's Government threatening intervention unless various demands were met. Just Stop Oil asserted they planned to commence action from the 22nd of March 2022. Police intelligence briefings supported the risk of trespass and nuisance at the Claimants' 8 Sites. 3 unidentified groups of persons in connection with the 4 Organisations were categorised as Defendants in the claim as follows: (1) those trespassing onto the 8 Sites; (2) those blockading or obstructing access to the 8 Sites; (3) those carrying out a miscellany of other feared torts such as locking on, tunnelling or encouraging others to commit torts at the 8 Sites or on the access roads thereto. The Claim Form was amended by order of Bennathan J. in April 2022; Re amended by order of Cotter J. in September 2022 and re re amended in July 2023 by order of Bourne J.

13. In late March 2022 Mr Justice Butcher issued an interim ex parte injunction on a quia timet basis until trial, expressly stating it was not intended to prohibit lawful protest. He prohibited the Defendants from entering or staying on the 8 sites; impeding access to the 8 sites; damaging the Claimants' land; locking on or causing or encouraging others to breach the injunction. The Order provided for various alternative methods of service for the unknown persons by fixing hard copies of the injunction at the entrances and on access road at the 8 Sites, publishing digital copies online at a specific website and sending emails to the 4 Organisations.

14. Despite the interim injunction, between the 1st and the 7th of April 2022 protesters attended at the Claimants' Kingsbury site and 48 were arrested. Between the 9th and 15th of April 2022 further protesters attended at the Kingsbury site and 38 were arrested. No application to commit any person to prison for contempt was made. The protests were not just at the Claimants' parts of the Kingsbury site. They targeted other owners' sites there too.

15. On the return date, the original interim injunction was replaced by an Order dated 11th of April 2022 made by Bennathan J. which was in similar terms and provided for alternative service in a similar way and gave directions for varying or discharging the interim injunction on the application by any unknown person who was required provide their name and address if they wished to do so (none ever did). Geographical plans were attached to the original injunction and the replacement injunction setting out clearly which access roads were covered and delineating each of the 8 Sites. Undertakings were given by the Claimants and directions were given for various Chief Constables to disclose lists and names of persons arrested at the 8 Sites on dates up to the 1st of June 2022.

16. The Chief Constables duly obliged and on the 20th of September 2022 Mr Justice Cotter added named Defendants to the proceedings, extended the term of the interim injunction, provided retrospective permission for service and gave directions allowing variation or discharge of the injunction on application by any Defendant. Unknown persons who wished to apply were required to self-name and provide an address for service (none ever did). Then, on the 16th of December 2022 Mr Justice Cotter gave further retrospective permission for service of various documents. On the 20th of January 2023 Mr Justice Soole reviewed the interim injunction, gave permission for retrospective service of various documents and replaced the interim injunction with a similar further interim injunction. Alternative service was again permitted in a similar fashion by: (1) publication on a specified website, (2) e-mail to the 4 Organisations, (3) personal service on the named Defendants where that was possible because they had provided addresses. At that time no acknowledgement of service or defence from any Defendant was required.

17. In April 2023 the Claimants changed their solicitors and in June 2023 Master Cook gave prospective alternative service directions for future service of all Court documents by: (1) publication on the named website, (2) e-mail to the 4
Organisations, (3) fixing a notification to signs at the front entrances and the access roads of the 8 Sites. Normal service applied for the named Defendants who had provided addresses.

18. On the 28th of July 2023, before Bourne J., the Claimants agreed not to pursue contempt applications for breaches of the orders of Mr Justice Butcher and Mr Justice Bennathan for any activities before the date of the hearing. Present at that hearing

were counsel for Defendants 31 and 53. Directions were given permitting a redefinition of "Unknown Persons" and solving a substantial range of service and drafting defects in the previous procedure and documents since the Claim Form had been issued. A direction was given for Acknowledgements of Service and Defences to be served by early October 2023 and the claim was discontinued against Defendants 16, 19, 26, 29, 38, 46 and 47 on the basis that they no longer posed a threat. A direction was given for any other Defendant to give an undertaking by the 6th of October 2023 to the Claimants' solicitors. Service was to be in accordance with the provisions laid down by Master Cook in June 2023.

19. On the 30th November 2023 Master Eastman ordered that service of exhibits to witness statements and hearing bundles was to be by: (1) uploading them onto the specific website, (2) emailing a notification to the 4 Organisations, (3) placing a notice at the 8 Sites entrances and access roads, (4) postal service to of a covering letter named Defendants who had provided addresses informing them where the exhibits could be read.

20. The Claimants applied for summary judgment on the 12th of December 2023.

21. By the time of the hearing before me, 43 named Defendants had provided undertakings in accordance with the Order of Mr Justice Bourne. Defendants 14 and 44 were wrongly added and so 17 named Defendants remained who had refused to provide undertakings. None of these attended the hearing or communicated with the Court.

The lay witness evidence

22. I read evidence from the following witnesses provided in statements served and filed by the Claimants:
    - 22.1 Laurence Matthews, April 2022, June 2023.
    - 22.2 David Blackhouse, March and April 2022, January, June and November 2023.
    - 22.3 Emma Pinkerton, June and December 2023.
    - 22.4 Kate McCall, March and April 2022, January (x3) 2023.
    - 22.5 David McLoughlin, March 2022, November 2023.
    - 22.6 Adrian Rafferty, March 2022
    - 22.7 Richard Wilcox, April and August 2022, March 2023.
    - 22.8 Aimee Cook, January 2023.
    - 22.9 Anthea Adair, May, July and August 2023.
    - 22.10 Jessica Hurle, January 2024 (x2).
    - 22.11 Certificates of service: supplementary bundles pages 3234-3239.

Service evidence

23. The previous orders made by the Judges who have heard the interlocutory matters dealt with all previous service matters. In relation to the hearing before me I carefully checked the service evidence and was helpfully led through it by counsel. A concern

of substance arose over some defective evidence given by Miss Hurle which was hearsay but did not state the sources of the hearsay. This was resolved by the provision of a further witness statement at the Court's request clarifying the hearsay element of her assertion which I have read and accept.

24. On the evidence before me I find, on the balance of probabilities, that the application for summary judgment and ancillary applications and the supporting evidence and notice of hearing were properly served in accordance with the orders of Master Cook and Master Eastman and the CPR on all of the Defendants.

Substantive evidence

25. **David Blackhouse.** Mr. Blackhouse is employed by Valero International Security as European regional security manager. In his earlier statements he evidenced his fears that there were real and imminent threats to the Claimants' 8 Sites and in his later statements set out the direct action suffered at the Claimants' sites which fully matched his earlier fears.

26. In his first witness statement he set out evidence from the police and from the Just Stop Oil website evidencing their commitment to action and their plans to participate in protests. The website set out an action plan asking members of the public to sign up to the group's mailing list so that the group could send out information about their proposed activities and provide training. Intervention was planned from the 22nd of March 2022 if the Government did not back down to the group's demands. Newspaper reports from anonymous spokespersons for the group threatened activity that would lead to arrests involving blocking oil sites and paralysing the country. A Just Stop Oil spokesperson asserted they would go beyond the activities of Extinction Rebellion and Insulate Britain through civil resistance, taking inspiration from the old fuel protests 22 years before when lorries blockaded oil refineries and fuel depots. Mr. Blackhouse also summarised various podcasts made by alleged members of the group in which the group asserted it would train up members of the public to cause disruption together with Youth Climate Swarm and Extinction Rebellion to focus on the oil industry in April 2022 with the aim of causing disruption in the oil industry. Mr. Blackhouse also provided evidence of press releases and statements by Extinction Rebellion planning to block major UK oil refineries in April 2022 but refusing to name the actual sites which they would block. They asserted their protests would *"continue indefinitely*" until the Government backed down. Insulate Britain's press releases and podcasts included statements that persons aligned with the group intended to carry out "*extreme protests"* matching the protests 22 years before which allegedly brought the country to a "*standstill*". They stated they needed to cause an "*intolerable level of disruption".* Blocking oil refineries and different actions disrupting oil infrastructure was specifically stated as their objective.

27. In his second witness statement David Blackhouse summarised the protest events at Kingsbury terminal on the 1st of April 2022 (which were carried out in conjunction

with similar protests at Esso Purfleet, Navigator at Thurrock and Exolum in Grays). He was present at the Site and was an eye-witness. The protesters blocked the access roads which were public and then moved onto private access roads. More than 30 protesters blocked various tankers from entering the site. Some climbed on top of the tankers. Police in large numbers were used to tidy up the protest. On the next day, the 2nd of April 2022, protesters again blocked public and private access roads at various places at the Kingsbury site. Further arrests were made. Mr Blackhouse was present at the site.

28. In his third witness statement he summarised the nationwide disruption of the petrochemical industry which included protests at Esso West near Heathrow airport; Esso Hive in Southampton, BP Hamble in Southampton, Exolum in Essex, Navigator terminals in Essex, Esso Tyburn Road in Birmingham, Esso Purfleet in Essex, and the Kingsbury site in Warwickshire possessed by the Claimants and BP. In this witness statement Mr. Blackhouse asserted that during April 2022 protesters forcibly broke into the second Claimant's Kingsbury site and climbed onto pipe racks, gantries and static tankers in the loading bays. He also presented evidence that protesters dug and occupied tunnels under the Kingsbury site's private road and Piccadilly Way and Trinity Road. He asserted that 180 arrests were made around the Kingsbury site in April 2022. He asserted that he was confident that the protesters were aware of the existence of the injunction granted in March 2022 because of the signs put up at the Kingsbury site both at the entrances and at the access roads. He gave evidence that in late April and early May protesters stood in front of the signs advertising the injunction with their own signs stating: "*we are breaking the injunction*". He evidenced that on the Just Stop Oil website the organisation wrote that they would not be "intimidated by changes to the law" and would not be stopped by "private injunctions". Mr. Blackhouse evidenced that further protests took place in May, August and September at the Kingsbury site on a smaller scale involving the creation of tunnels and lock on positions to facilitate road closures. In July 2022 protesters under the banner of Extinction Rebellion staged a protest in Plymouth City centre marching to the entrance of the second Claimant's Plymouth oil terminal which was blocked for two hours. Tanker movements had to be rescheduled. Mr. Blackhouse summarised further Just Stop Oil press releases in October 2022 asserting their campaign would "continue until their demands were met by the Government". He set out various protests in central London and on the Dartford crossing bridge of the M25. Mr. Blackhouse also relied on a video released by one Roger Hallam, who he asserted was a co-founder of Just Stop Oil, through YouTube on the 4th of November 2022. He described this video as a call to arms making analogies with war and revolution and encouraging the *"systematic disruption of society*" in an effort to change Government policies affecting global warming. He highlighted the sentence by Mr Hallam:

> "if it's necessary to prevent some massive harm, some evil, some illegality, some immorality, it's justified, *you have a right of necessity to cause harm".*

The video concluded with the assertion "there is no question that disruption is effective, the only question is doing enough of it". In the same month Just Stop Oil was encouraging members of the public to sign up for arrestable direct action. In November 2022 Just Stop Oil tweeted that they would escalate their legal disruption. Mr. Blackhouse then summarised what appeared to be statements by Extinction Rebellion withdrawing from more direct action. However Just Stop Oil continued to publish in late 2022 that they would not be intimidated by private injunctions. Mr Blackhouse researched the mission statements of Insulate Britain which contained the assertion that their continued intention included a campaign of civil resistance, but they only had the next two to three years to sort it out and their next campaign had to be more ambitious. Whilst not disclosing the contents of the briefings received from the police it was clear that Mr. Blackhouse asserted, in summary, that the police warned that Just Stop Oil intended to have a high tempo civil resistance campaign which would continue to involve obstruction, tunnelling, lock one and at height protests at petrochemical facilities.

29. In his 4th witness statement Mr Blackhouse set out a summary of the direct actions suffered by the Claimants as follows ("The Refinery" means Pembroke Oil refinery):

> "***September 2019***
> 6.5 The Refinery was the target of protest activity in 2019, albeit this was on a smaller scale to that which took place in 2022 at the Kingsbury Terminal. The activity at the Refinery involved the blocking of access roads whereby the protestors used concrete "Lock Ons" i.e. the protestors locked arms, within the concrete blocks placed on the road, whilst sitting on the road to prevent removal. Although it was a non-violent protest it did impact upon employees at the Refinery who were prevented from attending and leaving work. Day to day operations and deliveries were negatively impacted as a result.
> 6.6…
> ***Friday 1st April 2022***
> Protestors obstructed the crossroads junction of Trinity Road, Piccadilly Way, and the entrance to the private access road by sitting in the road. They also climbed onto two stationary road tanker wagons on Piccadilly Way, about thirty metres from the same junction, preventing the vehicles from moving, causing a partial obstruction of the road in the direction of the terminal. They also climbed onto one road tanker wagon that had stopped on Trinity Road on the approach to the private access road to the terminal. Fuel supplies from the Valero terminal were seriously disrupted due to the continued obstruction of the highway and the entrance to the private access road throughout the day. Valero staff had to stop the movement of road tanker wagons to or from the site between the hours of 07:40 hrs and 20:30 hrs. My understanding is that

up to twenty two persons were arrested by the Police before Valero were able to receive road tanker traffic and resume normal supplies of fuel.

Sunday 3rd April 2022

6.6.1 Protestors obstructed the same entrance point to the private shared access road leading from Trinity Road. The obstructions started at around 02:00 hrs and continued until 17:27 hrs. There was reduced access for road tankers whilst Police completed the removal and arrest of the protestors.

Tuesday 5th April 2022

6.6.2 Disruption started at 04:49 hrs. Approximately twenty protestors blocked the same entrance point to the private shared access road from Trinity Road. They were reported to have used adhesive to glue themselves to the road surface or used equipment to lock themselves together. Police attended and I understand that eight persons were arrested. Road tanker movements at Valero were halted between 04:49 hrs and 10:50 hrs that day.

Thursday 7th April 2022

6.6.3 This was a day of major disruption. At around 00:30 hrs the Valero Terminal Operator initiated an Emergency Shut Down having identified intruders on CCTV within the perimeter of the site. Five video files have been downloaded from the CCTV system showing a group of about fifteen trespassers approaching the rear of the Kingsbury Terminal across the railway lines. The majority appear to climb over the palisade fencing into the Kingsbury Terminal whilst several others appear to have gained access by cutting mesh fencing on the border with WOSL. There is then footage of protestors in different areas of the site including footage at 00:43 hrs of one intruder walking across the loading bay holding up what appears to be a mobile phone in front of him, clearly contravening site safety rules. He then climbed onto a stationary road tanker on the loading bay. There is clear footage of several others sitting in an elevated position in the pipe rack adjacent to the loading bay. I am also aware that Valero staff reported that two persons climbed the staircase to sit on top of one of the gas oil storage tanks and four others were found having climbed the staircase to sit on the roof of a gasoline storage tank. Police attended and spent much of the day removing protestors from the site enabling it to reopen at 18:00 hrs. There is CCTV footage of one or more persons being removed from top of the stationary road tanker wagon on the loading bays.

6.6.4 The shutdown of more than seventeen hours caused major disruption to road tanker movements that day as customers were unable to access the site.

Saturday 9th April 2022

6.6.5 Protest activity occurred involving several persons around the entrance to the private access road. I believe that Police made three arrests and there was little or no disruption to road tanker movements.

Sunday 10th April 2022

6.6.6 A caravan was left parked on the side of the road on Piccadilly way, between the roundabout junction with the A51 and the entrance to the Shell fuel terminal. Police detained a small group of protestors with the caravan including one who remained within a tunnel that had been excavated under the road. It appeared to be an attempt to cause a closure of one of the two routes leading to the oil terminals.

6.6.7 By 16:00 hrs police responded to two road tankers that were stranded on Trinity Road, approximately 900 metres north of the entrance to the private access road. Protestors had climbed onto the tankers preventing them from being driven any further, causing an obstruction on the second access route into the oil terminals.

6.6.8 The Police managed to remove the protestors on top of the road tankers but 18:00 hrs and I understand that the individual within the tunnel on Piccadilly Way was removed shortly after.

6.6.9 I understand that the Police made twenty-two arrests on the approach roads to the fuel terminals throughout the day. The road tanker wagons still managed to enter and leave the Valero site during the day taking whichever route was open at the time. This inevitably meant that some vehicles could not take their preferred route but could at least collect fuel as required. I was subsequently informed that a structural survey was quickly completed on the road tunnel and deemed safe to backfill without the need for further road closure.

Friday 15th April 2022

6.6.10 This was another day of major disruption. At 04:25 hrs the Valero operator initiated an emergency shutdown. The events were captured on seventeen video files recording imagery from two CCTV cameras within the site between 04:20 hrs and 15:45 hrs that day.

6.6.11 At 04:25 a group of about ten protestors approached the emergency access gate which is located on the northern corner of the site, opening out onto Trinity Road, 600 metres north of the entrance to the shared private access road. They were all on foot and could be seen carrying ladders. Two ladders were used to climb up the outside of the emergency gate and then another two ladders were passed over to provide a means of climbing down inside the Valero site. Seven persons managed to climb over before a police vehicle pulled up alongside the gate. The seven then dispersed into the Kingsbury Terminal.

6.6.12 The video footage captures the group of four males and three females sitting for several hours on the pipe rack, with two of them (one male and one female) making their way up onto the roof of the loading

bay area nearby. The two on the roof sat closely together whilst the male undressed and sat naked for a considerable time sunbathing. The video footage concludes with footage of Police and the Fire and Rescue service working together to remove the two individuals.

6.6.13 The Valero terminal remained closed between 04:30 hrs and 16:00 hrs that day causing major disruption to fuel collections. The protestors breached the site's safety rules and the emergency services needed to use a 'Cherry Picker' (hydraulic platform) during their removal. There were also concerns that the roof panels would not withstand the weight of the two persons sitting on it.

6.6.14 I understand that Police made thirteen arrests in or around Valero and the other fuel terminals that day and had to request 'mutual aid' from neighbouring police forces.

Tuesday 26th April 2022

6.6.15 I was informed that approximately twelve protestors arrived outside the Kingsbury Terminal at about 07:30 hrs, increasing to about twenty by 09:30 hrs. Initially they engaged in a peaceful non obstructive protest but by 10:00 hrs had blocked the entrance to the private access road by sitting across it. Police then made a number of arrests and the obstructions were cleared by 10:40 hrs. On this occasion there was minimal disruption to the Valero site.

Wednesday 27th April 2022

6.6.16 At about 16:00 hrs a group of about ten protestors were arrested whilst attempting to block the entrance to the shared private access road.

Thursday 28th April 2022

6.6.17 At about 12:40 hrs a similar protest took place involving a group of about eight persons attempting to block the entrance to the shared private access road. The police arrested them and opened the access by 13:10 hrs.

Wednesday 4th May 2022

6.6.18 At about 13:30 hrs twelve protestors assembled at the entrance to the shared private access road without incident. I was informed that by 15:49 hrs Police had arrested ten individuals who had attempted to block the access.

Thursday 12th May 2022

6.6.19 At 13:30 hrs eight persons peacefully protested at the entrance to the private access road. By 14:20 hrs the numbers increased to eleven. The activity continued until 20:15 hrs by which time Police made several arrests of persons causing obstructions. I have retained images of the obstructions that were taken during the protest.

Monday 22nd August 2022

6.6.20 Contractors clearing undergrowth alerted Police to suspicious activity involving three persons who were on land between Trinity

Road and the railway tracks which lead to the rear of the Valero and WOSL terminals. The location is about 1.5 km from the entrance to the shared private access road to the Kingsbury Terminal. A police dog handler attended and arrested two of the persons with the third making off. Three tunnels were found close to a tent that the three were believed to be sleeping in. The tunnels started on the roadside embankment and two of them clearly went under the road. The entrances were carefully prepared and concealed in the undergrowth. Police agreed that they were 'lock in' positions for protestors intending to cause a road closure along one of the two approach roads to the oil terminals. The road was closed awaiting structural survey. I have retained a collection of the images taken by my staff at the scene. ***Tuesday 23rd August 2022***

6.6.21 During the morning protestors obstructed a tanker in Trinity Road, approximately 1km from the Valero Terminal. There was also an obstruction of the highway close to the Shell terminal entrance on Piccadilly Way. I understand that both incidents led to arrests and a temporary blockage for road tankers trying to access the Valero site. Later that afternoon another tunnel was discovered under the road on Trinity Way, between the roundabout of the A51 and the Shell terminal. It was reported that protestors had locked themselves into positions within the tunnel. Police were forced to close the road meaning that all road tanker traffic into the Kingsbury Terminal had to approach via Trinity road and the north. It then became clear that the tunnels found on Trinity Road the previous day had been scheduled for use at the same time to create a total closure of the two routes into the fuel terminals.

6.6.22 The closure of Piccadilly Way continued for another two days whilst protestors were removed and remediation work was completed to fill in the tunnels.

Wednesday 14th September 2022

6.6.23 There was serious disruption to the Valero Terminal after protestors blocked the entrance to the private access road. I believe that Police made fifty one arrests before the area was cleared to allow road tankers to access the terminal.

6.6.24 Tanker movements were halted for just over seven hours between mid-day and 19:00 hrs. On Saturday 16th July and Sunday 17th July 2022, the group known as Extinction Rebellion staged a protest in Plymouth city centre. The protest was planned and disclosed to the police in advance and included a march of about two hundred people from the city centre down to the entrance to the Valero Plymouth Terminal in Oakfield Terrace Rd. The access to the terminal was blocked for about two hours. Road tanker movements were rescheduled in advance minimising any disruption to fuel supplies."

I note that the events of 16th July 2022 are out of chronological order.

30. In his 5th witness statement the main threats identified by Mr Blackhouse were; (1) protesters directly entering the 8 Sites. He stated there had been serious incidents in the past in which protestors forcibly gained access by cutting through mesh border fencing or climbing over fencing and then carrying out dangerous activities such as climbing and sitting on top of storage tanks containing highly flammable fuel and vapour. He warned that the risk of fire for explosion at the 8 Sites is high due to the millions of litres of flammable liquid and gas stored at each. Mobile phones and lighters are heavily controlled or prohibited. (2) He warned that any activity which blocked or restricted access roads would be likely to create a situation where the Claimants were forced to take action to reduce the health and safety risks relating to emergency access which might include evacuating the sites or shutting some activity on the sites.

31. Mr. Blackhouse warned of the knock-on effects of the Claimants having to manage protester activity to mitigate potential health and safety risks which would impact on the general public. If activity on the 8 Sites is reduced or prevented due to protester activity this would reduce the level of fuel produced, stored and transported, which would ultimately result in shortages at filling station forecourts, potentially panic buying and the adverse effects thereof. He referred to the panic buying that occurred in September 2021. Mr Blackhouse described the various refineries and terminals and the businesses carried on there. He also described the access roads to the sites. He described the substantial number of staff accessing the sites and the substantial number of tanker movements per day accessing refineries. He also described the substantial number of ship movements to and from the jetties per annum. He warned of the dangers of blocking emergency services getting access to the 8 Sites. He stated that if access roads at the 8 Sites were blocked the Claimants would have no option but to cease operations and shut down the refineries to ensure compliance with health and safety risk assessments. He informed the Court that one of the most hazardous times at the refineries was when restarting the processes after a shut down. The temperatures and pressures in the refinery are high and during restarting there is a higher probability of a leak and resultant explosions. Accordingly, the Claimants seek to limit shutdown and restart activity as much as possible. Generally, these only happen every four or five years under strictly controlled conditions.

32. Mr. Blackhouse referred to an incident in 2019 when Extinction Rebellion targeted the Pembroke oil refinery and jetties by blocking the access roads. He warned that slow walking and blocking access roads remained a real risk and a health and safety concern. He also informed the Court that local police at this refinery took a substantial time to deal with protesters due to locking on and climbing in, resulting in significant delay. He further evidenced this by reference to the Kingsbury terminal protest in 2022.

33. Mr. Blackhouse asserted that all of the 8 Sites are classified as “Critical National Infrastructure”. The Claimants liaise closely with the National Protective Security Authority and the National Crime Agency and the Counter Terrorism Security Advisor Service of the police. Secret reports received from those agencies evidenced continuing

potential activity by the 4 Organisations. In addition, on the 8th of July 2023 Extinction Rebellion stickers were placed on a sign at the refinery.

34. Overall Mr. Blackhouse asserted that the deterrent effect of the injunctions granted has diminished the protest activity at the 8 Sites but warned that it was clear that at least some of the 4 Organisations maintained an ongoing campaign of protest activity throughout the UK. He asserted it was critical that the injunctive relief remained in place for the protection of the Claimants' employees, visitors to the sites, the public in surrounding areas and the protesters themselves.

35. **David McLoughlin.** Mr McLoughlin is a director employed by the Valero group responsible for pipeline and terminals. His responsibilities include directing operations and logistics across all of the 8 Sites.

36. He warned the Court that blocking access to the 8 Sites would have potentially very serious health and safety and environmental consequences and would cause significant business disruption. He described how under the *Control of Major Accidents Hazards Involving Dangerous Substances Regulations 2015* the 8 Sites are categorised according to the risks they present which relate directly to the quantity of dangerous substances held on each site. Heavy responsibilities are placed upon the Claimants to manage their activities in a way so as to minimise the risk to employees, visitors and the general public and to prevent major accidents. The Claimants are required to carry out health and safety executive guided risk assessments which involve ensuring emergency services can quickly access the 8 Sites and to ensure appropriate manning. He warned that there were known safety risks of causing fires and explosions from lighters, mobile phones, key fobs and acrylic clothing. The risks are higher around the storage tanks and loading gantries which seemed to be favoured by protestors. He warned that the Plymouth and Manchester sites were within easy reach of large populations which created a risk to the public. He warned that blocking access roads to the 8 Sites would give rise to a potential risk of breaching the 2015 Regulations which would be both dangerous and a criminal offence. Additionally blocking access would lead to a build-up of tankers containing fuel which themselves
posed a risk. He warned of the potential knock-on effects of an access road blockade on the supply chain for in excess of 700 filling stations and to the inward supply chain from tankers. He warned of the 1-2 day filling station tank capacity which needed constant and regular supply from the Claimants' sites. He also warned about the disruption to commercial contracts which would be caused by disruption to the 8 Sites. He set out details of the various sites and their access roads. He referred to the July 2022 protest at the Plymouth terminal site and pointed out the deterrent effect of the injunction, which was in place at that time, had been real and had reduced the risk.

37. **Emma Pinkerton.** Miss Pinkerton has provided 5 witness statements in these proceedings, the last one dated December 2023. She is a partner at CMS Cameron McKenna Nabarro Olswang LLP.

38. In her 3rd statement she set out details relating to the interlocutory course of the proceedings and service and necessary changes to various interim orders made.

39. In her last witness statement she gave evidence that the Claimants do not seek to prevent protesters from undertaking peaceful lawful protests. She asserted that the Defendants had no real prospect of successfully defending the claim and pointed out that no Acknowledgments of Service or Defences had been served. She set out the chronology of the action and service of proceedings. She dealt with various errors in the orders made. She summarised that 43 undertakings had been taken from Defendants. She pointed out that there were errors in the naming of some Defendants.
Miss Pinkerton summarised the continuing threat pointing out that the Just Stop Oil Twitter feed contained a statement dated 9th June 2023 setting out that the writer explained to Just Stop Oil connected readers that the injunctions banned people from taking action at refineries, distribution hubs and petrol stations and that the punishments for breaking injunctions ranged from unlimited fines to imprisonment. She asserted that the Claimants' interim injunctions in combination with those obtained by Warwickshire Borough Council had significantly reduced protest activity at the Kingsbury site.

40. Miss Pinkerton provided a helpful summary of incidents since June 2023. On the 26th of June 2023 Just Stop Oil protesters carried out four separate slow marches across London impacting access on King's College Hospital. On the 3rd of July 2023 protesters connected with Extinction Rebellion protested outside the offices of Wood Group in Aberdeen and Surrey letting off flares and spraying fake oil across the entrance in Surrey. On 10th July 2023 several marches took place across London. On the 20th of July 2023 supporters of Just Stop Oil threw orange paint over the headquarters of Exxon Mobile. On the 1st of August 2023 protesters connected with Just Stop Oil marched through Cambridge City centre. On the 13th of August 2023 protesters connected with Money Rebellion (which may be associated with Extinction Rebellion) set off flares at the AIG Women's Open in Tadworth. On the 18th of
August 2023 protesters associated with Just Stop Oil carried out a slow march in Wells, Somerset and the next day a similar march took place in Exeter City centre. On the 26th of August 2023 a similar march took place in Leeds. On the 2nd of September 2023 protesters associated with Extinction Rebellion protested outside the London headquarters of Perenco, an oil and gas company. On the 9th of September
2023 there was a slow march by protesters connected with Just Stop Oil in Portsmouth City centre. On the 18th of September 2023 protesters connected with Extinction Rebellion poured fake oil over the steps of the Labour Party headquarters and climbed the building letting off smoke grenades and one protester locked on to a handrail. On the 1st of October 2023 protesters connected with Extinction Rebellion protested in Durham. On the 10th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over the Radcliffe Camera library building in Oxford and the facade of the forum at Exeter University. On the 11th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over parts of Falmouth University. On the 17th of October 2023 various protesters were arrested in connection with the

Energy Intelligence forum in London. On the 19th of October 2023 protests took place in Canary Wharf targeting financial businesses allegedly supporting fossil fuels and insurance companies in the City of London. On the 30th of October 2023 60 protesters were arrested for slow marching outside Parliament. On the 10th of November 2023 protesters connected with Extinction Rebellion occupied the offices of the Daily Telegraph. On the 12th of November 2023 protesters connected with Just Stop Oil marched in Holloway Road in London. On the 13th of November 2023 protesters connected with Just Stop Oil marched from Hendon Way leading to a number of arrests. On the 14th of November 2023 protesters connected with Just Stop Oil marched from Kennington Park Rd. On the same day the Metropolitan Police warned that the costs of policing such daily marches was becoming unsustainable to the public purse. On the 15th of November 2023 protesters connected with Just Stop Oil marched down the Cromwell Road and 66 were arrested. On the 18th of November 2023 protestors connected with Just Stop Oil and Extinction Rebellion protested outside the headquarters of Shell in London and some arrests were made. On the 20th of November 2023 protesters connected with Just Stop Oil gathered in Trafalgar Square and started to march and some arrests were made. On the 30th of November 2023 protesters connected with Just Stop Oil gathered in Kensington in London and 16 were arrested.

41. Miss Pinkerton extracted some quotes from the Just Stop Oil press releases including assertions that their campaign would be "*indefinite*" until the Government agreed to stop new fossil fuel projects in the UK and mentioning their supporters storming the pitch at Twickenham during the Gallagher Premiership Rugby final. Further press releases in June and July 2023 encouraging civil resistance against oil, gas and coal were published. In an open letter to the police unions dated 13th September 2023 Just Stop Oil stated they would be back on the streets from October the 29th for a resumption after their 13 week campaign between April and July 2023 which they asserted had already cost the Metropolitan Police more than £7.7 million and required the equivalent of an extra 23,500 officer shifts.

42. Miss Pinkerton also examined the Extinction Rebellion press statements which included advice to members of the public to picket, organise locally, disobey and asserted that civil disobedience works. On the 30th of October 2023 a spokesperson for Just Stop Oil told the Guardian newspaper that the organisation supporters were willing to slow march to the point of arrest every day until the police took action to prosecute the real criminals who were facilitating new oil and gas extraction.

43. Miss Pinkerton summarised the various applications for injunctions made by Esso Oil, Stanlow Terminals Limited, Infranorth Limited, North Warwickshire Borough Council, Esso Petroleum, Exxon Mobile Chemical Limited, Thurrock Council, Essex Council, Shell International, Shell UK, UK Oil Pipelines, West London Pipeline and Storage, Exolum Pipeline Systems, Exolum Storage, Exolum Seal Sands and Navigator Terminals.

44. Miss Pinkerton asserted that the Claimants had given full and frank disclosure as required by the Supreme Court in *Wolverhampton v London Gypsies* (citation below). In summary she asserted that the Claimants remained very concerned that protest groups including the 4 Organisations would undertake disruptive, direct action by trespass or blocking access to the 8 Sites and that a final injunction was necessary to prevent future tortious behaviour.

Previous decision on the relevant facts

45. In *North Warwickshire v Baldwin and 158 others and PUs* [2023] EWHC 1719, Sweeting J gave judgment in relation to a claim brought by North Warwickshire council against 159 named defendants relating to the Kingsbury terminal which is operated by Shell, Oil Pipelines Limited, Warwickshire Oil Storage Limited and Valero Energy Ltd. Findings of fact were made in that judgment about the events in March and April 2022 which are relevant to my judgment. Sweeting J. found that protests began at Kingsbury during March 2022 and were characterised by protesters glueing themselves to roads accessing the terminal; breaking into the terminal compounds by cutting through gates and trespassing; climbing onto storage tanks containing unleaded petrol, diesel and fuel additives; using mobile phones within the terminal to take video films of their activities while standing on top of oil tankers and storage tanks and next to fuel transfer equipment; interfering with oil tankers by climbing onto them and fixing themselves to the roofs thereof; letting air out of the tyres of tankers; obstructing the highways accessing the terminal generally and climbing equipment and abseiling from a road bridge into the terminal. In relation to the 7th of April Sweeting J found that at 12:30 (past midnight) a group of protesters approached one of the main terminal entrances and attempted to glue themselves to the road. When the police were deployed a group of protesters approached the same enclosure from the fields to the rear and used a saw to break through an exterior gate and scaled fences to gain access. Once inside they locked themselves onto a number of different fixtures including the top of three large fuel storage tanks containing

petrol diesel and fuel additives and the tops of two fuel tankers and the floating roof of a large fuel storage tank. The floating roof floated on the surface of stored liquid hydrocarbons. Sweeting J found that the ignition of liquid fuel or vapour in such a storage tank was an obvious source of risk to life. On the 9th of April 2022 protesters placed a caravan at the side of the road called Piccadilly Way which is an access road to the terminal and protesters glued themselves to the sides and top of the caravan whilst others attempted to dig a tunnel under the road through a false floor in the caravan. That was a road used by heavily laden oil tankers to and from the terminal and the collapse of the road due to a tunnel caused by a tanker passing over it was identified by Sweeting J as including the risk of injury and road damage and the escape of fuel fluid into the soil of the environment.

Assessment of lay witnesses

46. I decide all facts in this hearing on the balance of probabilities. I have not seen any witness give live evidence. None were required for cross-examination by the Defendants. None were challenged. I take that into account.

47. Having carefully read the statements I accept the evidence put before me from the Claimants' witnesses. I have not found sloppiness, internal inconsistency or exaggeration in the way they were written or any reason to doubt the evidence provided.

The Law Summary Judgment

48. Under CPR part 24 it is the first task of this Court to determine whether the Defendants have a realistic prospect of success in defending the claim. Realistic is distinguished from a fanciful prospect of success, see *Swain v Hillman* [2001] 1 ALL ER 91. The threshold for what is a realistic prospect was examined in *ED and F Man Liquid Products v Patel* [2003] EWCA Civ. 472. It is higher than a merely arguable prospect of success. Whilst it is clear that on a summary judgement application the Court is not required to effect a mini trial, it does need to analyse the evidence put before it to determine whether it is worthless, contradictory, unimpressive or incredible and overall to determine whether it is credible and worthy of acceptance. The Court is also required to take into account, in a claim against PUs, not only the evidence put before it on the application but also the evidence which could reasonably be expected to be available at trial both on behalf of the Claimants and the Defendants, see *Royal Brompton Hospitals v Hammond (#5)* [2001] EWCA Civ. 550. Where reasonable grounds exist for believing that a fuller investigation of the facts of the case at trial would affect the outcome of the decision then summary judgement should be refused, see *Doncaster Pharmaceuticals v Bolton Pharmaceutical Co* [2007] F.S.R 3. I take into account that the burden of proof rests in the first place on the applicant and also the guidance given in *Sainsbury's Supermarkets v Condek Holdings* [2014] EWHC 2016, at paragraph 13, that if the applicant has produced credible evidence in support of the assertion that the applicant has a realistic prospect
of success on the claim, then the respondent is required to prove some real prospect of success in defending the claim or some other substantial reason for the claim going to trial. I also take into account the guidance given at paragraph 40 of the judgment of Sir Julian Flaux in the Court of Appeal in *National Highways Limited v Persons Unknown* [2023] EWCA Civ. 182, that the test to be applied when a final anticipatory injunction is sought through a summary judgment application is the same as in all other cases.

49. CPR part 24 r.24.5 states that if a respondent to a summary judgment application wishes to put in evidence he "must" file and serve written evidence 7 days before the hearing. Of course, this cannot apply to PUs who will have no knowledge of the hearing. It does apply to named and served Defendants.

50. But what approach should the Court take where named Defendant served nothing and PUs are also Defendants? In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J. ruled as follows on what to do in relation to evidence:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up . . ."

51. In my judgment, in a case such as this, where named Defendants have taken no part and where other Defendants are PUs, the safest course is to follow the guidance of the Supreme Court and treat the hearing as ex-parte and to consider the defences which the PUs could run.

Final Injunctions

52. The power of this Court to grant an injunction is set out in S.37 of *the Senior Courts Act 1981*. The relevant sections follow:

> "37 Powers of High Court with respect to injunctions ….
> (1) The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so.
> (2) Any such order may be made either unconditionally or on suchterms and conditions as the court thinks just."

53. An injunction is a discretionary remedy which can be enforced through contempt proceedings. There are two types, mandatory and prohibitory. I am only dealing with an application for the latter type and only on the basis of quia timet – which is the fear of the Claimants that an actionable wrong will be committed against them. Whilst the balance of convenience test was initially developed for interim injunctions it developed such that it is generally used in the granting of final relief. I shall refer below to how it is refined in PU cases.

54. In law a landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land: see Snell's Equity (34th ed) at

para 18-012. In relation to quia timet injunctions, like the one sought in this case, the Claimants must prove that there is a real and imminent risk of the Defendant causing the torts feared, not that the torts have already been committed, per Longmore LJ in *Ineos Upstream v Boyd* [2019] 4 WLR 100, para 34(1). I also take account of the judgment of Sir Julian Flaux in *National Highways v PUs* [2023] 1 WLR 2088, in which at paras. 37-40 the following ruling was provided:

> "37. Although the judge did correctly identify the test for the grant of an anticipatory injunction, in para 38 of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that before summary judgment for a final anticipatory injunction could be granted NHL had to demonstrate, in relation to each defendant, that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.
> 38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* [2019] 4 WLR 2 was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at para 31(1) the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions. 39. There is certainly no requirement for the grant of a final anticipatory
> injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at para 31(2) quoted at para 27 above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding, at para 35 of the judgment, that he could not grant summary judgment for a final anticipatory injunction against any named defendant unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.
> 40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom

we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial."

55. In relation to the substantive and procedural requirements for the granting of an injunction against persons unknown, guidance was given in *Canada Goose v Persons Unknown* [2021] WLR 2802, by the Court of Appeal. In a joint judgment Sir Terence Etherton and Lord Justices Richards and Coulson ruled as follows:

> "82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:
> (1) The "persons unknown" defendants in the claim form are, bydefinition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
> (2) The "persons unknown" must be defined in the originating processby reference to their conduct which is alleged to be unlawful.
> (3) Interim injunctive relief may only be granted if there is asufficiently real and imminent risk of a tort being committed to justify quia timet relief.
> (4) As in the case of the originating process itself, the defendantssubject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
> (5) The prohibited acts must correspond to the threatened tort. Theymay include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
> (6) The terms of the injunction must be sufficiently clear and preciseas 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 nontechnical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical andtemporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

56. I also take into account the guidance and the rulings made by the Supreme Court in *Wolverhampton City Council v London Gypsies* [2023] UKSC 47; [2024] 2 WLR 45 on final injunctions against PUs. This was a case involving a final injunction against unknown gypsies and travellers. The circumstances were different from protester cases because Local Authorities have duties in relation to travellers. In their joint judgment the Supreme Court ruled as follows:

"167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by theevidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Conventionrights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to

draw the application and any order made to the attention of all those likely to be affected by it (see paras 226—231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply withthe most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporallimitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. …"

…

"5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights

187. We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further, the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

Compelling justification for the remedy

188. Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i))."

…

"(viii) *A need for review*

(2) Evidence of threat of abusive trespass or planning breach 218. We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against persons unknown, including newcomers, in Gypsy and Traveller cases must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the threat must be real and imminent. We have no doubt that local authorities are well equipped to prepare this evidence, supported by copies of all relevant documents, just as they have shown themselves to be in making applications for injunctions in this area for very many years.

219. The full disclosure duty is of the greatest importance (see para167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

220. The evidence in support of the application must therefore err onthe side of caution; and the court, not the local authority, should be the judge of relevance.

(3) *Identification or other definition of the intended respondents to the application*

221. The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in *Cameron* [2019] 1 WLR 1471, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible

to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

222. It is always important that an injunction spells out clearly and in everyday terms the full extent of the acts it prohibits, and this is particularly so where it is sought against persons unknown, including newcomers. The terms of the injunction and therefore the prohibited acts must correspond as closely as possible to the actual or threatened unlawful conduct. Further, the order should extend no further than the minimum necessary to achieve the purpose for which it was granted; and the terms of the order must be sufficiently clear and precise to enable persons affected by it to know what they must not do. 223. Further, if and in so far as the authority seeks to enjoin any conduct which is lawful viewed on its own, this must also be made absolutely clear, and the authority must be prepared to satisfy the court that there is no other more proportionate way of protecting its rights or those of others.

224. It follows but we would nevertheless emphasise that theprohibited acts should not be described in terms of a legal cause of action, such as trespass or nuisance, unless this is unavoidable. They should be defined, so far as possible, in non-technical and readily comprehensible language which a person served with or given notice of the order is capable of understanding without recourse to professional legal advisers. (5) *Geographical and temporal limits*

225. The need for strict temporal and territorial limits is anotherimportant consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley* [2020] PTSR 1043, paras 99—109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view

ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

226. We recognise that it would be impossible for a local authority togive effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the basis on which we have proceeded. On the other hand, in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief.

227. Here the following further points may also be relevant. First,local authorities have now developed ways to give effective notice of the grant of such injunctions to those likely to be affected by them, and they do so by the use of notices attached to the land and in other ways as we describe in the next section of this judgment. These same methods, appropriately modified, could be used to give notice of the application itself. As we have also mentioned, local authorities have been urged for some time to establish lines of communication with Traveller and Gypsy communities and those representing them, and all these lines of communication, whether using email, social media, advertisements or some other form, could be used by authorities to give notice to these communities and other interested persons and bodies of any applications they are proposing to make.

228. Secondly, we see merit in requiring any local authority making anapplication of this kind to explain to the court what steps it has taken to give notice of the application to persons likely to be affected by it or to have a proper interest in it, and of all responses it has received.

229. These are all matters for the judges hearing these applications to consider in light of the particular circumstances of the cases before them, and in this way to allow an appropriate practice to develop.

(7) *Effective notice of the order*

230. We are not concerned in this part of our judgment with whetherrespondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

231. Any applicant for such an order must in our view make full andcomplete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) *Liberty to apply to discharge or vary*

232. As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) *Costs protection*

233. This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.

(10) *Cross-undertaking*

234. This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate.

Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-bycase basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) *Protest cases*

235. The emphasis in this discussion has been on newcomerinjunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

236. Counsel for the Secretary of State for Transport has submittedand we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from another in terms of the range and number of people who may be affected by the making or refusal of the injunction sought; the legal right to be protected; the illegality to be prevented; and the rights of the respondents to the application. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained."

57. I conclude from the rulings in *Wolverhampton* that the 7 rulings in *Canada Goose* remain good law and that other factors have been added. To summarise, in summary judgment applications for a final injunction against unknown persons ("PUs") or newcomers, who are protesters of some sort, the following 13 guidelines and rules must be met for the injunction to be granted. These have been imposed because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.

58. **(A) Substantive Requirements**

Cause of action

(1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.

Full and frank disclosure by the Claimant

(2) There must be full and frank disclosure by the Claimant (applicant) seeking the injunction against the PUs.

Sufficient evidence to prove the claim

(3) There must be sufficient and detailed evidence before the Court on the summary judgment application to justify the Court finding that the immediate fear is proven on the balance of probabilities and that no trial is needed to determine that issue. The way this is done is by two steps. Firstly stage (1), the claimant has to prove that the claim has a realistic prospect of success, then the burden shifts to the defendant. At stage (2) to prove that any defence has no realistic prospect of success. In PU cases where there is no defendant present, the matter is considered ex-parte by the Court. If there is no evidence served and no foreseeable realistic defence, the claimant is left with an open field for the evidence submitted by him and his realistic prospect found at stage (1) of the hearing may be upgraded to a balance of probabilities decision by the Judge. The Court does not carry out a mini trial but does carry out an analysis of the evidence to determine if it the claimant's evidence is credible and acceptable. The case law on this process is set out in more detail under the section headed "The Law" above.

No realistic defence

(4) The defendant must be found unable to raise a defence to the claim which has a realistic prospect of success, taking into account not only the evidence put before the Court (if any), but also, evidence that a putative PU defendant might reasonably be foreseen as able to put before the Court (for instance in relation to the PUs civil rights to freedom of speech, freedom to associate, freedom to protest and freedom to pass and repass on the highway). Whilst in *National Highways* the absence of any defence from the PUs was relevant to this determination, the Supreme Court's ruling in *Wolverhampton* enjoins this Court not to put much weight on the lack of any served defence or defence evidence in a PU case. The nature of the proceedings are "ex-parte" in PU cases and so the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them. In my judgment this is not a "Micawber" point, it is a just approach point.

Balance of convenience – compelling justification

(5) In interim injunction hearings, pursuant to *American Cyanamid v Ethicon* [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to *Wolverhampton,* this balance is angled against the applicant to a greater extent than is required usually, so that there must be a "compelling justification" for the injunction against PUs to protect the claimant's civil rights. In my judgment this also applies when there are PUs and named defendants.

(6) The Court must take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, if the PUs' rights under the European Convention on Human Rights (for instance under Articles 10(2) and 11(2)) are engaged and restricted by the proposed injunction. The injunction must be necessary and proportionate to the need to protect the Claimants' right.

Damages not an adequate remedy

(7) For the Court to grant a final injunction against PUs the claimant must show that damages would not be an adequate remedy.

(B) Procedural Requirements

Identifying PUs

(8) The PUs must be clearly and plainly identified by reference to: (a) the tortious conduct to be prohibited (and that conduct must mirror the torts claimed in the Claim Form), and (b) clearly defined geographical boundaries, if that is possible.

The terms of injunction

(9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like "tortious" for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.

The prohibitions must match the claim

(10) The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form.

Geographic boundaries

(11) The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible.

Temporal limits - duration

(12) The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the claimant's legal rights in the light of the evidence of past tortious activity and the future feared (quia timet) tortious activity.

Service

(13) Understanding that PUs by their nature are not identified, the proceedings, the evidence, the summary judgment application and the draft order must be served by alternative means which have been considered and sanctioned by the Court. The applicant must, under the Human Rights Act 1998 S.12(2), show that it has taken all practicable steps to notify the respondents.

The right to set aside or vary

(14) The PUs must be given the right to apply to set aside or vary the injunction on shortish notice.

Review

(15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.

59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters.

60. I have read and take into account the cases setting out the historical growth of PU injunctions including *Ineos Upstream v PUs* [2019] EWCA Civ. 515, per Longmore LJ at paras. 18-34. I do not consider that extracts from the judgment are necessary here.

Applying the law to the facts

61. When applying the law to the facts I take into account the interlocutory judgments of Bennathan J and Bourne J in this case. I apply the balance of probabilities. I treat the hearing as an ex-parte hearing at which the Claimants must prove their case and put forward the potential defences of the PUs and show why they have no realistic prospect of success.

<u>(A) Substantive Requirements</u>

Cause of action

62. The pleaded claim is fear of trespass, crime and public and private nuisance at the 8 Sites and on the access roads thereto. In the event, as was found by Sweeting J, Bennathan J. and Bourne J. all 3 feared torts were committed in April 2022 and thereafter mainly at the Kingsbury site but also in Plymouth later on. In my judgment the claim as pleaded is sufficient on a quia timet basis.

Full and frank disclosure

63. By their approach to the hearing I consider that the Claimant and their legal team have evidenced providing full and frank disclosure.

Sufficient evidence to prove the claim

64. In my judgment the evidence shows that the Claimants have a good cause of action and fully justified fears that they face a high risk and an imminent threat that the remaining

17 named Defendants (who would not give undertakings) and/or that UPs will commit the pleaded torts of trespass and nuisance at the 8 Sites in connection with the 4 Organisations. I consider the phrase "in connection with" is broad and does not require membership of the 4 Organisations (if such exists), or proof of donation. It requires merely joining in with a protest organised by, encouraged by or at which one or more of the 4 Organisations were present or represented. The history of the invasive and dangerous protests in April 2022, despite the existence of the interim injunction made by Butcher J, is compelling. Climbing onto fuel filled tankers on access roads is a hugely dangerous activity. Invading and trespassing upon petrochemical refineries and storage facilities and climbing on storage tanks and tankers is likewise very dangerous. Tunnelling under roads to obstruct and damage fuel tankers is also a dangerous tort of nuisance. I accept the evidence of further torts committed between May and September 2022. I have carefully considered the reduction in activity against the Claimants' Sites in 2023, however the threats from
the spokespersons who align themselves or speak for the 4 Organisations did not reduce. I find that the reduction or abolition of direct tortious activity against the Claimants' 8 Sites was probably a consequence of the interim injunctions which were restraining the PUs connected with the 4 Organisations and that it is probable that without the injunctions direct tortious activity would quickly have recommenced and in future would quickly recommence.

No realistic defence

65. The Defendants have not entered any appearance or defence. Utterly properly Miss Holland KC dealt with the potential defences which the Defendants could have raised in her skeleton. Those related to Articles 10 and 11 of the European Convention on Human Rights. In *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)] (emphasis added) Warby LJ said:

> "9. The following general principles are well-settled, and uncontroversial on this appeal.
> (1) Peaceful protest falls within the scope of the fundamental rightsof free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.
> (2) But the right to property is also a Convention right, protectedby Article 1 of the First Protocol ('A1P1'). In a democratic society, the protection of property rights is a legitimate aim, which

> may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has *the right to possession*, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest."

66. I consider that any defence assertion that the final injunction amounts to a breach of the Defendants' rights under Articles 10 and 11 of the *European Convention on Human Rights* would be bound to fail. Trespass on the Claimants' 8 sites and criminal damage thereon is not justified by those Articles and they are irrelevant to those pleaded causes. As for private nuisance the same reasoning applies. The Articles would only be relevant to the public nuisance on the highways. The Claimants accept that those rights would be engaged on public highways. However, the injunction is prescribed by law in that it is granted by the Court. It is granted with a legitimate aim, namely to protect the Claimant's civil rights to property and access thereto, to avoid criminal damage, to avoid serious health and safety dangers, to protect the right to life of the Claimants' staff and invitees should a serious accidents occur and to enable the emergency services by enabling to access the 8 Sites. There is also a wider interest in avoiding the disruption to emergency services, schools, transport and national services from disruption in fuel supplies. In my judgment there are no less restrictive means available to achieve the aim of protecting the Claimants' civil rights and property than the terms of the final injunction. The Defendants have demonstrated that they are committed to continuing to carry out their unlawful behaviour. In my judgment an injunction in the terms sought strikes a fair balance. In particular, the Defendants' actions in seeking to *compel* rather than *persuade* the Government to act in a certain way (by attacking the Claimants 8 Sites), are not at the core of their Article 10 and 11 rights, see *Attorney General's Reference (No 1 of 2022)* [2023] KB 37, at para 86. I take into account that direct action is not being carried out on the highway because the highway is in some way important or related to the protest. It is a means by which the Defendants can inflict significant disruption, see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), at para 40(4)(a) per Lavender J and *Ineos v Persons Unknown* [2017] EWHC 2945 (Ch), at para.114 per Morgan J. I take into account that the Defendants will still be able to protest and make their points in other lawful ways after the final injunction is granted, see *Shell v Persons Unknown* [2022] EWHC 1215, at para. 59 per Johnson J. I take into account that the impact on the rights of others of the Defendants' direct action, for instance at Kingsbury, is substantial for the reasons set out above. As well as being a public nuisance, the acts sought to be restrained are also offences contrary to s.137 of the *Highways Act 1980* (obstruction of the highway), s.1 of the *Public Order Act 2023* (locking-on) and s.7 of the *Public Order Act 2023* (interference with use or operation of key national infrastructure). In these

circumstances I do not consider that the Defendants have any realistic prospect of success on their potential defences.

Balance of convenience – compelling justification

67. In my judgment the balance of convenience and justice weigh in favour of granting the final injunction. The balance tips further in the Claimants' favour because I consider that there are compelling justifications for the injunction against the named Defendants and the PUs to protect the Claimants' 8 Sites d the nearby public from the threatened torts, all of which are at places which are part of the National Infrastructure. In addition, there are compelling reasons to protect the staff and visitors at the 8 Sites from the risk of death or personal injury and to protect the public at large who live near the 8 Sites. The risk of explosion may be small, but the potential harm caused by an explosion due to the tortious activities of a protester with a mobile phone or lighter, who has no training in safe handling in relation to fuel in tankers or storage tanks or fuel pipes, could be a human catastrophe.

68. I also take into account the dangers involved in shutting down any refinery site. I take into account that a temporary emergency shutdown had to be put in place at Kingsbury on 7th April 2022 and the dangers that such safety measures cause on restart.

69. I take into account that no spokesperson for any of the 4 Organisations has agreed to sign undertakings and that 17 Defendants have refused to sign undertakings. I take into account the dark and ominous threats made by Roger Hallam, the asserted cofounder of Just Stop Oil and the statements of those who assert that they speak for the Just Stop Oil and the other organisations, that some will continue action using methods towards a more excessive limit.

Damages not an adequate remedy

70. I consider that damages would not be an adequate remedy for the feared direct action incursions onto or blockages of access at the 8 Sites. None of the named Defendants are prepared to offer to pay costs or damages. 43 have sought to exchange undertakings for the prohibitions in the interim injunctions, but none offered damages or costs. Recovery from PUs is impossible and recovery from named Defendants is wholly uncertain in any event. No evidence has been put before this Court about the 4 Organisations' finances or structure or legal status or to identify which legal persons hold their bank accounts or what funding or equipment they provided to the protesters or what their legal structure is. Whilst no economic tort is pleaded the damage caused by disruption of supply and of refining works may run into substantial sums as does the cost to the police and emergency services resulting from torts or crimes at the 8 Sites and the access roads thereto. Finally, any health and safety risk, if triggered, could potentially cause fatalities or serious injuries for which damages would not be a full remedy. Persons injured or killed by tortious conduct are entitled to compensation, but they would always prefer to suffer no injury.

(B) Procedural Requirements

Identifying PUs

71. In my judgment, as drafted the injunction clearly and plainly identifies the PUs by reference to the tortious conduct to be prohibited and that conduct mirrors the feared torts claimed in the Claim Form. The PUs' conduct is also limited and defined by reference to clearly defined geographical boundaries on coloured plans.

The terms of the injunction

72. The prohibitions in the injunction are set out in clear words and the order avoids using legal technical terms. Further, in so far as the prohibitions affect public highways, they do not prohibit any conduct which is lawful viewed on its own save to the extent that such is necessary and proportionate. I am satisfied that there is no other more proportionate way of protecting the Claimants' rights or those of their staff, invitees and suppliers.

The prohibitions must match the claim

73. The prohibitions in the final injunction do mirror the torts feared in the Claim Form.

Geographic boundaries

74. The prohibitions in the final injunction are defined by clear geographic boundaries which in my judgment are reasonable.

Temporal limits - duration

75. I have carefully considered whether 5 years is an appropriate duration for this quasifinal injunction. The undertakings expire in August 2026 and I have thought carefully about whether the injunction should match that duration. However, in the light of the threats of some of the 4 Organisations on the longevity of their campaigns and the continued actions elsewhere in the UK, the express aim of causing financial waste to the police force and the Claimants and the total lack of engagement in dialogue with the Claimants throughout the proceedings, I do not consider it reasonable to put the Claimants to the further expense of re-issuing for a further injunction in 2 years 7 months' time. I have seen no evidence suggesting that those connected with the 4 organisations will abandon or tire of their desire for direct tortious action causing disruption, danger and economic damage with a view to forcing Government to cease or prevent oil exploration and extraction.

Service

76. I find that the summary judgment application, evidence in support and draft order were served by alternative means in accordance with the previous Orders made by the Court.

The right to set aside or vary

77. The final injunction gives the PUs the right to apply to set aside or vary the final injunction on short notice.

Review

78. Provision has been made in the quasi-final injunction for review annually in future. In the circumstances of this case I consider that to be a reasonable period.

Conclusions

79. I grant the quasi-final injunction sought by the Claimants for the reasons set out above.

END

Michaelmas Term
[2023] UKSC 47
On appeal from: [2022] EWCA Civ 13

JUDGMENT

Wolverhampton City Council and others (Respondents) *v* London Gypsies and Travellers and others (Appellants)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
29 November 2023

Heard on 8 and 9 February 2023

Appellants
Richard Drabble KC
Marc Willers KC
Tessa Buchanan
Owen Greenhall
(Instructed by Community Law Partnership (Birmingham))

1st Respondent
Mark Anderson KC
Michelle Caney
(Instructed by Wolverhampton City Council Legal Services)

2nd Respondent
Nigel Giffin KC
Simon Birks
(Instructed by Walsall Metropolitan Borough Council Legal Services)

3rd to 10th Respondents
Caroline Bolton
Natalie Pratt
(Instructed by Sharpe Pritchard LLP and London Borough of Barking and Dagenham Legal Services)

1st Intervener
Stephanie Harrison KC
Stephen Clark
Fatima Jichi
(Instructed by Hodge Jones & Allen LLP)

2nd Intervener
Jude Bunting KC
Marlena Valles
(Instructed by Liberty)

3rd and 4th Interveners
Richard Kimblin KC
Michael Fry
(Instructed by HS2 Ltd Legal Department and the Government Legal Department)

Appellants
(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

Respondents
(1) Wolverhampton City Council
(2) Walsall Metropolitan Borough Council
(3) London Borough of Barking and Dagenham
(4) Basingstoke and Deane Borough Council and Hampshire County Council
(5) London Borough of Redbridge
(6) London Borough of Havering
(7) Nuneaton & Bedworth Borough Council and Warwickshire County Council
(8) Rochdale Metropolitan Borough Council
(9) Test Valley Borough Council and Hampshire County Council
(10) Thurrock Council
(11) Persons unknown

Interveners
(1) Friends of the Earth
(2) Liberty
(3) High Speed Two (HS2) Ltd
(4) Secretary of State for Transport

LORD REED, LORD BRIGGS AND LORD KITCHIN (with whom Lord Hodge and Lord Lloyd-Jones agree):

1. Introduction

(1) The problem

1. This appeal concerns a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. Since the members of a group of Gypsies or Travellers who might in future camp in a particular place cannot generally be identified in advance, few if any of the defendants to the proceedings were identifiable at the time when the injunctions were sought and granted. Instead, the defendants were described in the claim forms as "persons unknown", and the injunctions similarly enjoined "persons unknown". In some cases, there was no further description of the defendants in the claim form, and the court's order contained no further information about the persons enjoined. In other cases, the defendants were described in the claim form by reference to the conduct which the claimants sought to have prohibited, and the injunctions were addressed to persons who behaved in the manner from which they were ordered to refrain.

2. In these circumstances, the appeal raises the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date: "newcomers", as they have been described in these proceedings.

3. Although the appeal arises in the context of unlawful encampments by Gypsies and Travellers, the issues raised have a wider significance. The availability of injunctions against newcomers has become an increasingly important issue in many contexts, including industrial picketing, environmental and other protests, breaches of confidence, breaches of intellectual property rights, and a wide variety of unlawful activities related to social media. The issue is liable to arise whenever there is a potential conflict between the maintenance of private or public rights and the future behaviour of individuals who cannot be identified in advance. Recent years have seen a marked increase in the incidence of applications for injunctions of this kind. The advent of the internet, enabling wrongdoers to violate private or public rights behind a veil of anonymity, has also made the availability of injunctions against unidentified persons an increasingly significant question. If injunctions are available only against identifiable individuals, then the anonymity of wrongdoers operating online risks conferring upon them an immunity from the operation of the law.

4. Reflecting the wide significance of the issues in the appeal, the court has heard submissions not only from the appellants, who are bodies representing the interests of Gypsies and Travellers, and the respondents, who are local authorities, but also from interveners with a particular interest in the law relating to protests: Friends of the Earth, Liberty, and (acting jointly) the Secretary of State for Transport and High Speed Two (HS2) Ltd.

5. The appeal arises from judgments given by Nicklin J and the Court of Appeal on what were in substance preliminary issues of law. The appeal is accordingly concerned with matters of legal principle, rather than with whether it was or was not appropriate for injunctions to be granted in particular circumstances. It is, however, necessary to give a brief account of the factual and procedural background.

(2) The factual and procedural background

6. Between 2015 and 2020, 38 different local authorities or groups of local authorities sought injunctions against unidentified and unknown persons, which in broad terms prohibited unauthorised encampments within their administrative areas or on specified areas of land within those areas. The claims were brought under the procedure laid down in Part 8 of the Civil Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR rule 8.1(2). The claimants relied upon a number of statutory provisions, including section 187B of the Town and Country Planning Act 1990, under which the court can grant an injunction to restrain an actual or apprehended breach of planning control, and in some cases also upon common law causes of action, including trespass to land.

7. The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth", "persons unknown entering or remaining without planning consent on those parcels of land coloured in schedule 2 of the draft order", and "persons unknown who enter and/or occupy any of the locations listed in this order for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphernalia".

8. In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR rule 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice

that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

9. As we have explained, the injunctions were addressed in some cases simply to "persons unknown", and in other cases to persons described by reference to the activities from which they were required to refrain: for example, "persons unknown occupying the sites listed in this order". The respondents were among the local authorities who obtained such injunctions.

10. From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen's Bench Division and the Judge in Charge of the Queen's Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups of local authorities) actively pursuing claims. The appellants were given permission to intervene. A hearing was then fixed at which four issues of principle were to be determined. Following the hearing, Nicklin J determined those issues: *Barking and Dagenham London Borough Council v Persons Unknown* [2021] EWHC 1201 (QB); [2022] JPL 43.

11. Putting the matter broadly at this stage, Nicklin J concluded, in the light particularly of the decision of the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 ("*Canada Goose*"), that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought. If the relevant local authority could identify anyone in the category of "persons unknown" at the time the final order was granted, then the final injunction bound each person who could be identified. If not, then the final injunction granted against "persons unknown" bound no-one. In the light of that conclusion, Nicklin J discharged the final injunctions either in full or in so far as they were addressed to any person falling within the definition of "persons unknown" who was not a party to the proceedings at the date when the final order was granted.

12. Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing LJJ agreed, the court held that "the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of

the order, from occupying and trespassing on land": *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295, para 7. The appellants appeal to this court against that decision.

13. The issues in the appeal have been summarised by the parties as follows:

> (1) Is it wrong in principle and/or not open to a court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 ("the 1981 Act") so as to grant an injunction which will bind "newcomers", that is to say, persons who were not parties to the claim when the injunction was granted, other than (i) on an interim basis or (ii) for the protection of Convention rights (ie rights which are protected under the Human Rights Act 1998)?
>
> (2) If it is wrong in principle and/or not open to a court to grant such an injunction, then –
>
> > (i) Does it follow that (other than for the protection of Convention rights) such an injunction may likewise not properly be granted on an interim basis, except where that is required for the purpose of restraining wrongful actions by persons who are identifiable (even if not yet identified) and who have already committed or threatened to commit a relevant wrongful act?
> >
> > (ii) Was Nicklin J right to hold that the protection of Convention rights could never justify the grant of a Traveller injunction, defined as an injunction prohibiting the unauthorised occupation or use of land?

2. The legal background

14. Before considering the development of "newcomer" injunctions – that is to say, injunctions designed to bind persons who are not identifiable as parties to the proceedings at the time when the injunction is granted – it may be helpful to identify some of the issues of principle which are raised by such injunctions. They can be summarised as follows:

> (1) Are newcomers parties to the proceedings at the time when the injunction is granted? If not, is it possible to obtain an injunction against a non-party? If they are not parties at that point, when (if ever) and how do they become parties?

(2) Does the claimant have a cause of action against newcomers at the time when the injunction is granted? If not, is it possible to obtain an injunction without having an existing cause of action against the person enjoined?

(3) Can a claim form properly describe the defendants as persons unknown, with or without a description referring to the conduct sought to be enjoined? Can an injunction properly be addressed to persons so described? If the description refers to the conduct which is prohibited, can the defendants properly be described, and can an injunction properly be issued, in terms which mean that persons do not become bound by the injunction until they infringe it?

(4) How, if at all, can such a claim form be served?

15. This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in the absence of a cause of action, (4) the commencement of proceedings against unidentified defendants, and (5) the service of proceedings on unidentified defendants.

(1) The jurisdiction to grant injunctions

16. As Lord Scott of Foscote commented in *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320, para 25, in a speech with which the other Law Lords agreed, jurisdiction is a word of some ambiguity. Lord Scott cited with approval Pickford LJ's remark in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 that "the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised". However, as Pickford LJ went on to observe, the word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide – in this context, the power to grant an injunction – and the principles and practice governing the exercise of that power.

17. The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed

(2014) ("Spry"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20-21 and *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658; [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24; [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

18. It is also relevant in the context of this appeal to note that, as a court of inherent jurisdiction, the High Court possesses the power, and bears the responsibility, to act so as to maintain the rule of law.

19. Like any judicial power, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court. Accordingly, as Lord Mustill observed in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360-361:

> "Although the words of section 37(1) [of the 1981 Act] and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints."

Nevertheless, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change. As Lord Scott observed in *Fourie v Le Roux* at para 30, practice has not stood still and is unrecognisable from the practice which existed before the 1873 Act.

20. The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the

Mareva or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] UKSC 28; [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21. It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

> "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be

> viewed and decided in the light of today's conditions and standards, not those of yester-year."

22. These dicta are borne out by the recent developments in the law of injunctions which we have briefly described. They illustrate the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice, such as freezing injunctions, *Anton Piller* orders, *Norwich Pharmacal* orders and *Bankers Trust* orders, and also, more significantly for present purposes, in respect of orders designed to protect substantive rights, such as internet blocking orders. That is not to undermine the importance of precedent, or to suggest that established categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require.

(2) Injunctions against non-parties

23. It is common ground in this appeal that newcomers are not parties to the proceedings at the time when the injunctions are granted, and the judgments below proceeded on that basis. However, it is worth taking a moment to consider the question.

24. Where the defendants are described in a claim form, or an injunction describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As will appear, service can be problematical where the identities of the intended defendants are unknown. Furthermore, as a general rule, for any injunction to be enforceable, the persons whom it enjoins, if unnamed, must be described with sufficient clarity to identify those included and those excluded.

25. Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is that the injunction is in substance addressed to the entire world, since anyone in the world may potentially fall within the description of the persons enjoined. But persons may be affected by the injunction in ways which potentially have different legal consequences. For example, an injunction designed to deter Travellers from camping at a particular location may be addressed to persons unknown camping there (notwithstanding that no-one is currently doing so) and may restrain them from camping there. If Travellers elsewhere learn about the injunction, they may consequently decide not to go to the site. Other Travellers,

unaware of the injunction, may arrive at the site, and then become aware of the claim form and the injunction by virtue of their being displayed in a prominent position. Some of them may then proceed to camp on the site in breach of the injunction. Others may obey the injunction and go elsewhere. At what point, if any, do Travellers in each of these categories become parties to the proceedings? At what point, if any, are they enjoined? At what point, if any, are they served (if the displaying of the documents is authorised as alternative service)? It will be necessary to return to these questions. However these questions are answered, although each of these groups of Travellers is affected by the injunction, none of them can be regarded as being party to the proceedings at the time when the injunction is granted, as they do not then answer to the description of the persons enjoined and nothing has happened to bring them within the jurisdiction of the court.

26. If, then, newcomers are not parties to the proceedings at the time when the injunctions are granted, it follows that newcomer injunctions depart from the court's usual practice. The ordinary rule is that "you cannot have an injunction except against a party to the suit": *Iveson v Harris* (1802) 7 Ves Jr 251, 257. That is not, however, an absolute rule: Lord Eldon LC was speaking at a time when the scope of injunctions was more closely circumscribed than it is today. In addition to the undoubted jurisdiction to grant interim injunctions prior to the service (or even the issue) of proceedings, a number of other exceptions have been created in response to the requirements of justice. Each of these should be briefly described, as it will be necessary at a later point to consider whether newcomer injunctions fall into any of these established categories, or display analogous features.

(i) Representative proceedings

27. The general rule of practice in England and Wales used to be that the defendants to proceedings must be named, and that even a description of them would not suffice: *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25; *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204. The only exception in the Rules of the Supreme Court ("RSC") concerned summary proceedings for the possession of land: RSC Order 113.

28. However, it has long been established that in appropriate circumstances relief can be sought against representative defendants, with other unnamed persons being described in the order in general terms. Although formerly recognised by RSC Order 15 rule 12, and currently the subject of rule 19.8 of the CPR, this form of procedure has existed for several centuries and was developed by the Court of Chancery. Its rationale was explained by Sir Thomas Plumer MR in *Meux v Maltby* (1818) 2 Swans 277, 281-282:

> "The general rule, which requires the plaintiff to bring before the court all the parties interested in the subject in question, admits of exceptions. The liberality of this court has long held, that there is of necessity an exception to the general rule, when a failure of justice would ensue from its enforcement."

Those who are represented need not be individually named or identified. Nor need they be served. They are not parties to the proceedings: CPR rule 19.8(4)(b). Nevertheless, an injunction can be granted against the whole class of defendants, named and unnamed, and the unnamed defendants are bound in equity by any order made: *Adair v The New River Co* (1805) 11 Ves 429, 445; CPR rule 19.8(4)(a).

29. A representative action may in some circumstances be a suitable means of restraining wrongdoing by individuals who cannot be identified. It can therefore, in such circumstances, provide an alternative remedy to an injunction against "persons unknown": see, for example, *M Michaels (Furriers) Ltd v Askew* (1983) 127 Sol Jo 597, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright infringement; and *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), concerned with environmental protesters.

30. However, there are a number of principles which restrict the circumstances in which relief can be obtained by means of a representative action. In the first place, the claimant has to be able to identify at least one individual against whom a claim can be brought as a representative of all others likely to interfere with his or her rights. Secondly, the named defendant and those represented must have the same interest. In practice, compliance with that requirement has proved to be difficult where those sought to be represented are not a homogeneous group: see, for example, *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, concerned with industrial action, and *United Kingdom Nirex Ltd v Barton*, The Times, 14 October 1986, concerned with protests. In addition, since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR rule 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

(ii) Wardship proceedings

31. Another situation where orders have been made against non-parties is where the court has been exercising its wardship jurisdiction. In *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422 the court protected the welfare of a ward of court (the daughter of an individual who had been convicted of manslaughter as a child) by

making an order prohibiting any publication of the present identity of the ward or her parents. The order bound everyone, whether a party to the proceedings or not: in other words, it was an order contra mundum. Similar orders have been made in subsequent cases: see, for example, *In re M and N (Minors) (Wardship: Publication of Information)* [1990] Fam 211 and *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254.

(iii) Injunctions to protect human rights

32. It has been clear since the case of *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*") that the court can grant an injunction contra mundum in order to enforce rights protected by the Human Rights Act 1998. The case concerned the protection of the new identities of individuals who had committed notorious crimes as children, and whose safety would be jeopardised if their new identities became publicly known. An injunction preventing the publication of information about the claimants had been granted at the time of their trial, when they remained children. The matter returned to the court after they attained the age of majority and applied for the ban on publication to be continued, on the basis that the information in question was confidential. The injunction was granted against named newspaper publishers and, expressly, against all the world. It was therefore an injunction granted, as against all potential targets other than the named newspaper publishers, on a without notice application.

33. Dame Elizabeth Butler-Sloss P held that the jurisdiction to grant an injunction in the circumstances of the case lay in equity, in order to restrain a breach of confidence. She recognised that by granting an injunction against all the world she would be departing from the general principle, referred to at para 26 above, that "you cannot have an injunction except against a party to the suit" (para 98). But she relied (at para 29) upon the passage in Spry (in an earlier edition) which we cited at para 17 above as the source of the necessary equitable jurisdiction, and she felt compelled to make the order against all the world because of the extreme danger that disclosure of confidential information would risk infringing the human rights of the claimants, particularly the right to life, which the court as a public authority was duty-bound to protect from the criminal acts of others: see paras 98-100. Furthermore, an order against only a few named newspaper publishers which left the rest of the media free to report the prohibited information would be positively unfair to them, having regard to their own Convention rights to freedom of speech.

(iv) Reporting restrictions

34. Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further

examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (eg as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

35. It is the practice of some courts to circulate copies of their draft judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 and [2021] UKSC 58; [2022] 1 WLR 367. Like reporting restrictions, such orders are not equitable injunctions, but they are relevant as further examples of orders directed against non-parties.

(vi) The effect of injunctions on non-parties

36. We have focused thus far on the question whether an injunction can be granted against a non-party. As we shall explain, it is also relevant to consider the effect which injunctions against parties can have upon non-parties.

37. If non-parties are not enjoined by the order, it follows that they are not bound to obey it. They can nevertheless be held in contempt of court if they knowingly act in the manner prohibited by the injunction, even if they have not aided or abetted any breach by the defendant. As it was put by Lord Oliver of Aylmerton in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223, there is contempt where a non-party "frustrates, thwarts, or *subverts the purpose* of the court's order and thereby interferes with the due administration of justice in the particular action" (emphasis in original).

38. One of the arguments advanced before the House of Lords in *Attorney General v Times Newspapers Ltd* was that to invoke the jurisdiction in contempt against a person who was neither a party nor an aider or abettor of a breach of the order by the defendant, but who had done what the defendant in the action was forbidden by the order to do was, in effect, to make the order operate in rem or contra mundum. That, it was argued, was a purpose which the court could not legitimately achieve, since its orders were only properly made inter partes.

39. The argument was rejected. Lord Oliver acknowledged at p 224 that "[e]quity, in general, acts in personam and there are respectable authorities for the proposition that injunctions, whether mandatory or prohibitory, operate inter partes and should be so expressed (see *Iveson v Harris: Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406)". Nevertheless, the appellants' argument confused two different things: the scope of an order inter partes, and the proper administration of justice (pp 224-225):

> "Once it is accepted, as it seems to me the authorities compel, that contempt (to use Lord Russell of Killowen's words [in *Attorney-General v Leveller Magazine Ltd* at p 468]) 'need not involve disobedience to an order binding upon the alleged contemnor' the potential effect of the order contra mundum is an inevitable consequence."

40. In answer to the objection that the non-party who learns of the order has not been heard by the court and has therefore not had the opportunity to put forward any arguments which he may have, Lord Oliver responded at p 224 that he was at liberty to apply to the court:

> "'The Sunday Times' in the instant case was perfectly at liberty, before publishing, either to inform the respondent and so give him the opportunity to object or to approach the court and to argue that it should be free to publish where the defendants were not, just as a person affected by notice of, for example, a *Mareva* injunction is able to, and frequently does, apply to the court for directions as to the disposition of assets in his hands which may or may not be subject to the terms of the order."

The non-party's right to apply to the court is now reflected in CPR rule 40.9, which provides:

> "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

A non-party can also apply to become a defendant in accordance with CPR rule 19.4.

41. There is accordingly a distinction in legal principle between being bound by an injunction as a party to the action and therefore being in contempt of court for

disobeying it and being in contempt of court as a non-party who, by knowingly acting contrary to the order, subverts the court's purpose and thereby interferes with the administration of justice. Nevertheless, cases such as *Attorney-General v Times Newspapers Ltd* and *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, and the daily impact of freezing injunctions on non-party financial institutions (following *Z Ltd v A-Z and AA-LL* [1982] QB 558), indicate that the differences in the legal analysis can be of limited practical significance. Indeed, since non-parties can be found in contempt of court for acting contrary to an injunction, it has been recognised that it can be appropriate to refer to non-parties in an injunction in order to indicate the breadth of its binding effect: see, for example, *Marengo v Daily Sketch and Sunday Graphic Ltd* at p 407; *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, 387-388.

42. Prior to the developments discussed below, it can therefore be seen that while the courts had generally affirmed the position that only parties to an action were bound by an injunction, a number of exceptions to that principle had been recognised. Some of the examples given also demonstrate that the court can, in appropriate circumstances, make orders which prohibit the world at large from behaving in a specified manner. It is also relevant in the present context to bear in mind that even where an injunction enjoins a named individual, the public at large are bound not knowingly to subvert it.

(3) Injunctions in the absence of a cause of action

43. An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), 256. There has been a gradual but growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea,* cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

44. One long-established exception is an injunction granted on the application of the Attorney General, acting either ex officio or through another person known as a relator, so as to ensure that the defendant obeys the law (*Attorney-General v Harris* [1961] 1 QB 74; *Attorney General v Chaudry* [1971] 1 WLR 1614).

45. The statutory provisions relied on by the local authorities in the present case similarly enable them to seek injunctions in the public interest. All the respondent local authorities rely on section 222 of the Local Government Act 1972, which confers on local authorities the power to bring proceedings to enforce obedience to public law, without the involvement of the Attorney General: *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. Where an injunction is granted in proceedings under section 222, a power of arrest may be attached under section 27 of the Police and Justice Act 2006, provided certain conditions are met. Most of the respondents also rely on section 187B of the Town and Country Planning Act 1990, which enables a local authority to apply for an injunction to restrain any actual or apprehended breach of planning control. Some of the respondents have also relied on section 1 of the Anti-Social Behaviour, Crime and Policing Act 2014, which enables the court to grant an injunction (on the application of, inter alia, a local authority: see section 2) for the purpose of preventing the respondent from engaging in anti-social behaviour. Again, a power of arrest can be attached: see section 4. One of the respondents also relies on section 130 of the Highways Act 1980, which enables a local authority to institute legal proceedings for the purpose of protecting the rights of the public to the use and enjoyment of highways.

46. Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606).

47. Another exception is the *Norwich Pharmacal* order, which is available where a third party gets mixed up in the wrongful acts of others, even innocently, and may be ordered to provide relevant information in its possession which the applicant needs in order to seek redress. The order is not based on the existence of any substantive cause of action against the defendant. Indeed, it is not a precondition of the exercise of the jurisdiction that the applicant should have brought, or be intending to bring, legal proceedings against the alleged wrongdoer. It is sufficient that the applicant intends to seek some form of lawful redress for which the information is needed: see *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 1 WLR 2033.

48. Another type of injunction which can be issued against a defendant in the absence of a cause of action is a *Bankers Trust* order. In the case from which the order derives its name, *Bankers Trust Co v Shapira* (para 20 above), an order was granted requiring an innocent third party to disclose documents and information which might assist the claimant in locating assets to which the claimant had a proprietary claim. The claimant asserted no cause of action against the defendant. Later cases have emphasised the width and flexibility of the equitable jurisdiction to make such orders: see, for example, *Murphy v Murphy* [1999] 1 WLR 282, 292.

49. Another example of an injunction granted in the absence of a cause of action against the defendant is the internet blocking order. This is a new type of injunction developed to address the problems arising from the infringement of intellectual property rights via the internet. In the leading case of *Cartier International AG v British Sky Broadcasting Ltd*, cited at paras 17 and 20 above, the Court of Appeal upheld the grant of injunctions ordering internet service providers ("ISPs") to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions, and a principled basis for doing so, in order to compel the ISPs to prevent their facilities from being used to commit or facilitate a wrong. On an appeal to this court on the question of costs, Lord Sumption (with whom the other Justices agreed) analysed the nature and basis of the orders made and concluded that they were justified on ordinary principles of equity. That was so although the claimants had no cause of action against the respondent ISPs, who were themselves innocent of any wrongdoing.

(4) The commencement and service of proceedings against unidentified defendants

50. Bringing proceedings against persons who cannot be identified raises issues relating to the commencement and service of proceedings. It is necessary at this stage to explain the general background.

51. The commencement of proceedings is an essentially formal step, normally involving the issue of a claim form in an appropriate court. The forms prescribed in the CPR include a space in which to designate the claimant and the defendant. As was observed in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471 ("*Cameron*"), para 12*,* that is a format equally consistent with their being designated by name or by description. As was explained earlier, the claims in the present case were brought under Part 8 of the CPR. CPR rule 8.2A(1) provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant". A number of practice directions set out such circumstances, including Practice Direction 49E, paras 21.1-21.10 of which concern applications under certain statutory provisions. They include section 187B of the Town and Country Planning Act 1990, which concerns proceedings for an injunction to restrain "any actual or apprehended breach of planning control". As explained in para 45 above, section 187B was relied on in most of the present cases. CPR rule 55.3(4) also permits a claim for possession of property to be brought against "persons unknown" where the names of the trespassers are unknown.

52. The only requirement for a name is contained in paragraph 4.1 of Practice Direction 7A, which states that a claim form should state the full name of each party. In *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 ("*Bloomsbury*"), it was said that the words "should state" in paragraph 4.1 were not mandatory but imported a discretion to depart from the practice in appropriate cases. However, the point is not of critical importance. As was stated in *Cameron,* para 12, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. It has no statutory force and cannot alter the general law.

53. As we have explained at paras 27-33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those examples – representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case - might however be said to be special in some way, and to depend on a principle which is not of broader application.

54. A wider scope for proceedings against unnamed defendants emerged in *Bloomsbury*, where it was held that there is no requirement that the defendant must be named. The overriding objective of the CPR is to enable the court to deal with cases justly and at proportionate cost. Since this objective is inconsistent with an undue reliance on form over substance, the joinder of a defendant by description was held to be permissible, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21). It will be necessary to return to that case, and also to consider more recent decisions concerned with proceedings brought against unnamed persons.

55. Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 WLR 1119). Service is significant for many reasons. One of the most important is that it is a general requirement of justice that proceedings should be brought to the notice of parties whose interests are affected before any order is made against them (other than in an emergency), so that they have an opportunity to be heard. Service of the claim form on the defendant is the means by which such notice is normally given. It is also normally by means of service of the order that an injunction is brought to the notice of the defendant, so that he or she is bound to comply with it. But it is generally sufficient that the defendant is aware of the injunction at the time of the alleged breach of it.

56. Conventional methods of service may be impractical where defendants cannot be identified. However, alternative methods of service can be permitted under CPR rule 6.15. In exceptional circumstances (for example, where the defendant has deliberately avoided identification and substituted service is impractical), the court has the power to dispense with service, under CPR rule 6.16.

3. The development of newcomer injunctions to restrain unauthorised occupation and use of land - the impact of Cameron and Canada Goose

57. The years from 2003 saw a rapid development of the practice of granting injunctions purporting to prohibit persons, described as persons unknown, who were not parties to the proceedings when the order was made, from engaging in specified activities including, of most direct relevance to this appeal, occupying and using land without the appropriate consent. This is just one of the areas in which the court has demonstrated a preparedness to grant an injunction, subject to appropriate safeguards, against persons who could not be identified, had not been served and were not party to the proceedings at the date of the order.

(1) Bloomsbury

58. One of the earliest injunctions of this kind was granted in the context of the protection of intellectual property rights in connection with the forthcoming publication of a novel. The *Bloomsbury* case, cited at para 52 above, is one of two decisions of Sir Andrew Morritt V-C in 2003 which bear on this appeal. There had been a theft of several pre-publication copies of a new Harry Potter novel, some of which had been offered to national newspapers ahead of the launch date. By the time of the hearing of a

much adjourned interim application most but not all of the thieves had been arrested, but the claimant publisher wished to have continued injunctions, until the date a month later when the book was due to be published, against unnamed further persons, described as the person or persons who had offered a copy of the book to the three named newspapers and the person or persons in physical possession of the book without the consent of the claimants.

59. The Vice-Chancellor acknowledged that it would under the old RSC and relevant authority in relation to them have been improper to seek to identify intended defendants in that way (see para 27 above). He noted (para 11) the anomalous consequence:

> "A claimant could obtain an injunction against all infringers by description so long as he could identify one of them by name [as a representative defendant: see paras 27-30 above], but, by contrast, if he could not name one of them then he could not get an injunction against any of them."

He regarded the problem as essentially procedural, and as having been cured by the introduction of the CPR. He concluded, at para 21:

> "The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.

(2) Hampshire Waste Services

60. Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to

identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61. Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or remained on any of the sites in question on or around the specified date. This is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

(3) Gammell

62. The *Bloomsbury* decision has been seen as opening up a wide jurisdiction. Indeed, Lord Sumption observed in *Cameron*, para 11, that it had regularly been invoked in the years which followed in a variety of different contexts, mainly concerning the abuse of the internet, and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the former context concerned defamation, theft of information by hacking, blackmail and theft of funds. But it is upon cases and newcomer injunctions in the second context that we must now focus, for they include cases involving protesters, such as *Hampshire Waste Services*, and also those involving Gypsies and Travellers, and therefore have a particular bearing on these appeals and the issues to which they give rise.

63. Some of these issues were considered by the Court of Appeal only a short time later in two appeals concerning Gypsy caravans brought onto land at a time when planning permission had not been granted for that use: *South Cambridgeshire District Council v Gammell*; *Bromley London Borough Council v Maughan* [2005] EWCA Civ 1429; [2006] 1 WLR 658 ("*Gammell*").

64. The material aspects of the two cases are substantially similar, and it will suffice for present purposes to focus on the South Cambridgeshire case. The Court of Appeal (Brooke and Clarke LJJ) had earlier granted an injunction under section 187B of the Town and Country Planning Act 1990 against persons described as "persons unknown … causing or permitting hardcore to be deposited … caravans, mobile homes or other forms of residential accommodation to be stationed … or existing caravans, mobile homes or other forms of residential accommodation … to be occupied" on land adjacent to a Gypsy encampment in rural Cambridgeshire: *South Cambs District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 PLR 88 ("*South Cambs*"). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

65. Several months later, Ms Gammell, without securing or applying for the necessary planning permission or making an application to set the injunction aside or vary its terms, proceeded to station her caravans on the land. She was therefore a newcomer within the meaning of that word as used in this appeal, since she was neither a defendant nor on notice of the application for the injunction nor on the site when the injunction was granted. She was served with the injunction and its effect was explained to her, but she continued to station the caravans on the land. On an application for committal by the local authority she was found at first instance to have been in contempt. Sentencing was adjourned to enable her to appeal against the judge's refusal to permit her to be added as a defendant to the proceedings, for the purpose of enabling her to argue that the injunction should not have the effect of placing her in contempt until a proportionality exercise had been undertaken to balance her particular human rights against the grant of an injunction against her, in accordance with *South Bucks District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558.

66. The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJJ agreed, stated that each of the appellants became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

67. We should also mention a decision of this court from about the same time concerning Travellers who had set up an unauthorised encampment in wooded areas managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780 ("*Meier*"). This was in one sense a conventional case: the Secretary of State issued proceedings alleging trespass by the occupying Travellers and sought an order for possession of the occupied sites. More unusual (and ultimately unsuccessful) was the application for an order for possession against the Travellers in respect of other land which was wholly detached from the land they were occupying. This was wrong in principle for it was simply not possible (even on a precautionary basis) to make an order requiring persons to give immediate possession of woodland of which they were *not* in occupation, and which was wholly detached from the woodland of which they *were* in occupation (as Lord Neuberger of Abbotsbury MR explained at para 75). But that did not mean the courts were powerless to frame a remedy. The court upheld an injunction granted by the Court of Appeal against the defendants, including "persons names unknown", restraining them from entering the woodland which they had not yet occupied. Since it was not argued that the injunction was defective, we do not attach great significance to Lord Neuberger's conclusion at para 84 that it had not been established that there was an error of principle which led to its grant. Nevertheless, it is notable that Lord Rodger expressed the view that the injunction had been rightly granted, and cited the decisions of the Vice-Chancellor in *Bloomsbury* and *Hampshire Waste Services,* and the grant of the injunction in the *South Cambs* case, without disapproval (at paras 2-3).

(5) Later cases concerning Traveller injunctions

68. Injunctions in the Traveller and Gypsy context were targeted first at actual trespass on land. Typically, the local authorities would name as actual or intended defendants the particular individuals they had been able to identify, and then would seek additional relief against "persons unknown", these being persons who were alleged to be unlawfully occupying the land but who could not at that stage be identified by name, although often they could be identified by some form of description. But before long, many local authorities began to take a bolder line and claims were brought simply against "persons unknown".

69. A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a

wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

70. One of the first of these injunctions was granted by Patterson J in *Harlow District Council v Stokes* [2015] EWHC 953 (QB). The claimants sought and were granted an interim injunction under section 222 of the Local Government Act 1972 and section 187B of the Town and Country Planning Act 1990 in existing proceedings against over thirty known defendants and, importantly, other "persons unknown" in respect of encampments on a mix of public and private land. The pattern had been for these persons to establish themselves in one encampment, for the local authority and the police to take action against them and move them on, and for the encampment then to disperse but later reappear in another part of the district, and so the process would start all over again, just as Lord Rodger had anticipated in *Meier*. Over the months preceding the application numerous attempts had been made using other powers (such as the Criminal Justice and Public Order Act 1994 ("CJPOA")) to move the families on, but all attempts had failed. None of the encampments had planning permission and none had been the subject of any application for planning permission.

71. It is to be noted, however, that appropriate steps had been taken to draw the proceedings to the attention of all those in occupation (see para 15). None had attended court. Further, the relevant authorities and councils accepted that they were required to make provision for Gypsy and Traveller accommodation and gave evidence of how they were working to provide additional and appropriate sites for the Gypsy and Traveller communities. They also gave evidence of the extensive damage and pollution caused by the unlawful encampments, and the local tensions they generated, and the judge summarised the effects of this in graphic detail (at paras 10 and 11).

72. Following the decision in *Harlow District Council v Stokes* and an assessment of the efficacy of the orders made, a large number of other local authorities applied for and were granted similar injunctions over the period from 2017-2019, with the result that by 2020 there were in excess of 35 such injunctions in existence. By way of example, in *Kingston upon Thames Royal London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB), the injunction did not identify any named defendants.

73. All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who might in future commit the acts which the injunction prohibited (eg *UK Oil and Gas Investments plc v Persons Unknown* [2018]

EWHC 2252 (Ch); [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an early return date.

74. It is important also to have in mind that these injunctions undoubtedly had a significant impact on the communities of Travellers and Gypsies to whom they were directed, for they had the effect of forcing many members of these communities out of the boroughs which had obtained and enforced them. They also imposed a greater strain on the resources of the boroughs and councils which had not yet obtained an order. This combination of features highlighted another important consideration, and it was one of which the judges faced with these applications have been acutely conscious: a nomadic lifestyle has for very many years been a part of the tradition and culture of many Traveller and Gypsy communities, and the importance of this lifestyle to the Gypsy and Traveller identity has been recognised by the European Court of Human Rights in a series of decisions including *Chapman v United Kingdom* (2001) 33 EHRR 18.

75. As the Master of the Rolls explained in the present case, at paras 105 and 106, any individual Traveller who is affected by a newcomer injunction can rely on a private and family life claim to pursue a nomadic lifestyle. This right must be respected, but the right to that respect must be balanced against the public interest. The court will also take into account any other relevant legal considerations such as the duties imposed by the Equality Act 2010.

76. These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* (para 65 above), para 13.

77. The conflict to which these issues gave rise was recognised at the highest level as early as 2000 and emphasised in a housing research summary, "Local Authority Powers for Managing Unauthorised Camping" (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

> "The basic conflict underlying the 'problem' of unauthorised camping is between [gypsies]/travellers who want to stay in an area for a period but have nowhere they can legally camp, and the settled community who, by and large, do not want [gypsies]/travellers camped in their midst. The local authority is stuck between the two parties, trying to balance the conflicting needs and often satisfying no one."

78. For many years there has also been a good deal of publicly available guidance on the issue of unauthorised encampments, much of which embodies obvious good sense and has been considered by the judges dealing with these applications. So, for example, materials considered in the authorities to which we will come have included a Department for the Environment Circular 18/94, *Gypsy Sites Policy and Unauthorised Camping* (November 1994), which stated that "it is a matter for local discretion whether it is appropriate to evict an unauthorised [gypsy] encampment". Matters to be taken into account were said to include whether there were authorised sites; and, if not, whether the unauthorised encampment was causing a nuisance and whether services could be provided to it. Authorities were also urged to try to identify possible emergency stopping places as close as possible to the transit routes so that Travellers could rest there for short periods; and were advised that where Gypsies were unlawfully encamped, it was for the local authority to take necessary steps to ensure that any such encampment did not constitute a threat to public health. Local authorities were also urged not to use their powers to evict Gypsies needlessly, and to use those powers in a humane and compassionate way. In 2004 the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping,* which recommended that local authorities and other public bodies distinguish between unauthorised encampment locations which were unacceptable, for instance because they involved traffic hazards or public health risks, and those which were acceptable, and stated that each encampment location must be considered on its merits. It also indicated that specified welfare inquiries should be undertaken in relation to the Travellers and their families before any decision was made as to whether to bring proceedings to evict them. Similar guidance was to be found in the Home Office *Guide to Effective Use of Enforcement Powers* (*Part 1; Unauthorised Encampments*), published in February 2006, in which it was emphasised that local authorities have an obligation to carry out welfare assessments on unauthorised campers to identify any issue that needs to be addressed before enforcement action is taken against them. It also urged authorities to consider whether enforcement was absolutely necessary.

79. The fact that Travellers and Gypsies have almost invariably chosen not to appear in these proceedings (and have not been represented) has left judges with the challenging task of carrying out a proportionality assessment which has inevitably involved weighing all of these considerations, including the relevance of the breadth of the injunctions sought and the fact that the injunctions were directed against "persons unknown", in deciding whether they should be granted and, if so, for how long; and

whether they should be made subject to particular conditions and safeguards and, if so, what those conditions and safeguards should be.

(6) Cameron

80. The decision of the Supreme Court in *Cameron* (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene. The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

81. The Court of Appeal allowed the claimant's appeal. In the Court of Appeal's view, it would be consistent with the CPR and the policy of the 1988 Act for proceedings to be brought and pursued against the unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151 of the 1988 Act for any judgment obtained against that driver.

82. A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who were identifiable but whose names were unknown. Squatters occupying a property were, for example, identifiable by their location though they could not be named. The second comprised defendants, such as most hit and run drivers, who were not only anonymous but could not be identified.

83. Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all of these modes of service

was the same, namely to enable the court to be satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to enable him to do so within an appropriate period of time. The purpose of service (and substituted service) was to inform the defendant of the contents of the claim and the nature of the claimant's case against him; to give him notice that the court, being a court of competent jurisdiction, would in due course proceed to decide the merits of that claim; and to give him an opportunity to be heard and to present his case before the court. It followed that it was not possible to issue or amend a claim form so as to sue an unnamed defendant if it was conceptually impossible to bring the claim to his attention.

84. In the *Cameron* case there was no basis for inferring that the offending driver was aware of the proceedings. Service on the insurer did not and would not without more constitute service on that offending driver (nor was the insurer directly liable); alternative service on the insurer could not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it had not been established that this was an appropriate case in which to dispense with service altogether for any other reason. It followed that the driver could not be sued under the description relied upon by the claimant.

85. This important decision was followed in a relatively short space of time by a series of five appeals to and decisions of the Court of Appeal concerning the way in which and the extent to which proceedings for injunctive relief against persons unknown, including newcomers, could be used to restrict trespass by constantly changing communities of Travellers, Gypsies and protesters. It is convenient to deal with them in broadly chronological order.

(7) Ineos

86. In *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, the claimants, a group of companies and individuals connected with the business of shale and gas exploration by fracking, sought interim injunctions to restrain what they contended were threatened and potentially unlawful acts of protest, including trespass, nuisance and harassment, before they occurred. The judge was satisfied on the evidence that there was a real and imminent threat of unlawful activity if he did not make an order pending trial and it was likely that a similar order would be made at trial. He therefore made the orders sought by the claimants, save in relation to harassment.

87. On appeal to the Court of Appeal it was argued, among other things, that the judge was wrong to grant injunctions against persons unknown and that he had failed properly to consider whether the claimants were likely to obtain the relief they sought at

trial and whether it was appropriate to grant an injunction against persons unknown, including newcomers, before they had had an opportunity to be heard.

88. These arguments were addressed head-on by Longmore LJ, with whom the other members of the court agreed. He rejected the submission that a claimant could never sue persons unknown unless they were identifiable at the time the claim form was issued. He also rejected, as too absolutist, the submission that an injunction could not be granted to restrain newcomers from engaging in the offending activity, that is to say persons who might only form the intention to engage in the activity at some later date. Lord Sumption's categorisation of persons who might properly be sued was not intended to exclude newcomers. To the contrary, Longmore LJ continued, Lord Sumption appeared rather to approve the decision in *Bloomsbury* and he had expressed no disapproval of the decision in *Hampshire Waste Services*.

89. Longmore LJ went on tentatively to frame the requirements of an injunction against unknown persons, including newcomers, in a characteristically helpful and practical way. He did so in these terms (at para 34): (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

90. The issue of unauthorised encampments by Gypsies and Travellers was considered by the Court of Appeal a short time later in *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12; [2020] PTSR 1043. This was an appeal against the refusal by the High Court to grant a five year de facto borough-wide prohibition of encampment and entry or occupation of accessible public spaces in Bromley except cemeteries and highways. The final injunction sought was directed at "persons unknown" but it was common ground that it was aimed squarely at the Gypsy and Traveller communities.

91. Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained

them, thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

92. The particular questions giving rise to the appeal were relatively narrow (namely whether the judge had fallen into error in finding the order sought was disproportionate, in setting too high a threshold for assessment of the harm caused by trespass and in concluding that the local authority had failed to discharge its public sector equality duty); but the Court of Appeal was also invited and proceeded to give guidance on the broader question of how local authorities ought properly to address the issues raised by applications for such injunctions in the future. The decision is also important because it was the first case involving an injunction in which the Gypsy and Traveller communities were represented before the High Court, and as a result of their success in securing the discharge of the injunction, it was the first case of this kind properly to be argued out at appellate level on the issues of procedural fairness and proportionality. It must also be borne in mind that the decision of the Supreme Court in *Cameron* was not cited to the Court of Appeal; nor did the Court of Appeal consider the appropriateness as a matter of principle of granting such injunctions. Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

93. As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as the elegant synthesis by Longmore LJ in *Ineos* (at para 34) of certain essential requirements for the grant of an injunction against persons unknown in a protester case (paras 29-30). He considered it appropriate to add in the present context (that of Travellers and Gypsies), first, that procedural fairness required that a court should be cautious when considering whether to grant an injunction against persons unknown, including Gypsies and Travellers, particularly on a final basis, in circumstances where they were not there to put their side of the case (paras 31-34); and secondly, that the judge had adopted the correct approach in requiring the claimant to show that there was a strong probability of irreparable harm (para 35).

94. The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of

alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

95. Coulson LJ went on (at paras 99-109) to give the wider guidance to which we have referred, and this is a matter to which we will return a little later in this judgment for it has a particular relevance to the principles to which newcomer injunctions in Gypsy and Traveller cases should be subject. Aspects of that guidance are controversial; but other aspects about which there can be no real dispute are that local authorities should engage in a process of dialogue and communication with travelling communities; should undertake, where appropriate, welfare and impact assessments; and should respect, appropriately, the culture, traditions and practices of the communities. Similarly, injunctions against unauthorised encampments should be limited in time, perhaps to a year, before review.

(9) Cuadrilla

96. The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

97. Only a few months later, in *Canada Goose* (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

98. Specifically, the claimants sought and obtained a without notice interim injunction against "persons unknown" who were described as "persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the claimants' store]". The injunction restrained them from, among other things, assaulting or threatening staff and customers, entering or damaging the store and engaging in particular acts of demonstration within particular zones in the vicinity of the store. The terms of the order did not require the claimants to serve the claim form on any "persons unknown" but permitted service of the interim injunction by handing or attempting to hand it to any person demonstrating at or in the vicinity of the store or by email to either of two stated email addresses, that of an activist group and that of People for the Ethical Treatment of Animals (PETA) Foundation ("PETA"), a charitable company dedicated to the protection of the rights of animals. PETA was subsequently added to the proceedings as second defendant at its own request.

99. The claimants served many copies of the interim injunction on persons in the vicinity of the store, including over 100 identifiable individuals, but did not attempt to join any of them as parties to the claim. As for the claim form, this was sent by email to the two addresses specified for service of the interim injunction, and to one other individual who had requested a copy.

100. In these circumstances, an application by the claimants for summary judgment and a final injunction was unsuccessful. The judge held that the claim form had not been served on any defendant to the proceedings; that it was not appropriate to permit service by alternative means (under CPR rule 6.15) or to dispense with service (under CPR rule 6.16); and that the interim injunction would be discharged. He also considered that the description of the persons unknown was too broad, as it was capable of including protesters who might never intend to visit the store, and that the injunction was capable of affecting persons who did not carry out any activities which were otherwise unlawful. In addition, he considered that the proposed final injunction was defective in that it

would capture future protesters who were not parties to the proceedings at the time when the injunction was granted. He refused to grant a final injunction.

101. The Court of Appeal dismissed the claimants' appeal. It held, first, that service of proceedings is important in the delivery of justice. The general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction – and that a person cannot be made subject to the jurisdiction without having such notice of the proceedings as will enable him to be heard. Here there was no satisfactory evidence that the steps taken by the claimants were such as could reasonably be expected to have drawn the proceedings to the attention of the respondent unknown persons; the claimants had never sought an order for alternative service under CPR rule 6.15 and there was never any proper basis for an order under CPR rule 6.16 dispensing with service.

102. Secondly, the Court of Appeal held that the court may grant an interim injunction before proceedings have been served (or even issued) against persons who wish to join an ongoing protest, and that it is also, in principle, open to the court in appropriate circumstances to limit even lawful activity where there is no other proportionate means of protecting the claimants' rights, as for example in *Hubbard v Pitt* [1976] QB 142 (protesting outside an estate agency), and *Burris v Azadani* [1995] 1 WLR 1372 (entering a modest exclusion zone around the claimant's home), and to this extent the requirements for a newcomer injunction explained in *Ineos* required qualification. But in this case, the description of the "persons unknown" was impermissibly wide; the prohibited acts were not confined to unlawful acts; and the interim injunction failed to provide for a method of alternative service which was likely to bring the order to the attention of the persons unknown. The court was therefore justified in discharging the interim injunction.

103. Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables*, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron* – that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91).

In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

104. This reasoning reveals the marked difference in approach and outcome from that of the Court of Appeal in the proceedings now before this court and highlights the importance of the issues to which it gives rise and to which we referred at the outset. Indeed, the correctness and potential breadth of the reasoning of the Court of Appeal in *Canada Goose*, and how that reasoning differs from the approach taken by the Court of Appeal in these proceedings, lie at the heart of these appeals.

(11) The present case

105. The circumstances of the present appeals were summarised at paras 6-12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose.* The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell,* which was binding on it.

106. The Court of Appeal's approach in the present case, as set out in the judgment of Sir Geoffrey Vos MR, with which the other members of the court agreed, was based primarily on the decision in *Gammell*. It proceeded, therefore, on the basis that the persons to whom an injunction is addressed can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

107. Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8

procedure. Furthermore, as the facts of the earlier cases demonstrated and *Bromley* explained, the court needed to keep injunctions against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

4. A new type of injunction?

108. It is convenient to begin the analysis by considering certain strands in the arguments which have been put forward in support of the grant of newcomer injunctions, initially outside the context of proceedings against Travellers. They may each be labelled with the names of the leading cases from which the arguments have been derived, and we will address them broadly chronologically.

109. The earliest in time is *Venables,* discussed at paras 32-33 above. The case is important as possibly the first contra mundum equitable injunction granted in recent times, and in our view correctly explains why the objections to the grant of newcomer injunctions against Travellers go to matters of established principle rather than jurisdiction in the strict sense: ie not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* at para 25 (cited at para 16 above). In that respect the *Venables* injunction went even further than the typical Traveller injunction, where the newcomers are at least confined to a class of those who might wish to camp on the relevant prohibited sites. Nevertheless, for the reasons we explained at paras 25 and 61 above, and which we develop further at paras 155-159 below, newcomer injunctions can be regarded as being analogous to other injunctions or orders which have a binding effect upon the public at large. Like wardship orders contra mundum (para 31 above), *Venables*-type injunctions (paras 32-33 above), reporting restrictions (para 34 above), and embargoes on the publication of draft judgments (para 35 above), they are not limited in their effects to particular individuals, but can potentially affect anyone in the world.

110. *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EWHC 1101 (QB); [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2016] EWHC 3295 (Ch); [2017] EMLR 11; *RXG v Ministry of Justice* [2019] EWHC 2026 (QB); [2020] QB 703; *In re Persons formerly known as Winch* [2021] EWHC 1328 (QB); [2021] EMLR 20 and [2021] EWHC 3284 (QB); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EWHC 1059 (QB); [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider

application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111. The next in time is the *Bloomsbury* case, the facts and reasoning in which were summarised in paras 58-59 above. The case was analysed by Lord Sumption in *Cameron* by reference to the distinction which he drew at para 13, as explained earlier, between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

112. Lord Sumption added at para 15 that where an interim injunction was granted and could be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it would sometimes be enough to bring the proceedings to the defendant's attention. He cited *Bloomsbury* as an example, stating:

> "the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction."

113. Lord Sumption categorised *Cameron* itself as a case in the second category, stating at para 16:

> "One does not, however, identify an unknown person simply by referring to something that he has done in the past. 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013', does not identify anyone. It does not enable

> one to know whether any particular person is the one referred to."

Nor was there any specific interim relief, such as an injunction, which could be enforced in a way that would bring the proceedings to the unknown person's attention. The impossibility of service in such a case was, Lord Sumption said, "due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is" (ibid). The alternative service approved by the Court of Appeal – service on the insurer – could not be expected to reach the driver, and would be tantamount to no service at all. Addressing what, if the case had proceeded differently, might have been the heart of the matter, Lord Sumption added that although it might be appropriate to dispense with service if the defendant had concealed his identity in order to evade service, no submission had been made that the court should treat the case as one of evasion of service, and there were no findings which would enable it to do so.

114. We do not question the decision in *Cameron.* Nor do we question its essential reasoning: that proceedings should be brought to the notice of a person against whom damages are sought (unless, exceptionally, service can be dispensed with), so that he or she has an opportunity to be heard; that service is the means by which that is effected; and that, in circumstances in which service of the amended claim on the substituted defendant would be impossible (even alternative service being tantamount to no service at all), the judge had accordingly been right to refuse permission to amend.

115. That said, with the benefit of the further scrutiny that the point has received on this appeal, we have, with respect, some difficulties with other aspects of Lord Sumption's analysis. In the first place, we agree that it is generally necessary that a defendant should have such notice of the proceedings as will enable him to be heard before any final relief is ordered. However, there are exceptions to that general rule, as in the case of injunctions granted contra mundum, where there is in reality no defendant in the sense which Lord Sumption had in mind. It is also necessary to bear in mind that it is possible for a person affected by an injunction to be heard after a final order has been made, as was explained at para 40 above. Furthermore, notification, by means of service, and the consequent ability to be heard, is an essentially practical matter. As this court explained in *Abela v Baadarani* [2013] UKSC 44; [2013] 1 WLR 2043, para 37, service has a number of purposes, but the most important is to ensure that the contents of the document served come to the attention of the defendant. Whether they have done so is a question of fact. If the focus is on whether service can in practice be effected, as we think it should be, then it is unnecessary to carry out the preliminary exercise of classifying cases as falling into either the first or the second of Lord Sumption's categories.

116. We also have reservations about the theory that it is necessary, in order for service to be effective, that the defendant should be identifiable. For example, Lord

Sumption cited with approval the case of *Brett Wilson llp v Persons Unknown* [2015] EWHC 2628 (QB); [2016] 4 WLR 69, as illustrating circumstances in which alternative service was legitimate because "it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form" (para 15). That was a case concerned with online defamation. The defendants were described as persons unknown, responsible for the operation of the website on which the defamatory statements were published. Alternative service was effected by sending the claim form to email addresses used by the website owners, who were providers of a proxy registration service (ie they were registered as the owners of the domain name and licensed its operation by third parties, so that those third parties could not be identified from the publicly accessible database of domain owners). Yet the identities of the defendants were just as unknown as that of the driver in *Cameron,* and remained so after service had been effected: it remained impossible to identify any individuals as the persons described in the claim form. The alternative service was acceptable not because the defendants could be identified, but because, as the judge stated (para 16), it was reasonable to infer that emails sent to the addresses in question had come to their attention.

117. We also have difficulty in fitting the unnamed defendants in *Bloomsbury* within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron.* The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

118. We also note that Lord Sumption's description of *Bloomsbury* and *Gammell* as cases concerned with interim injunctions was influential in the later case of *Canada Goose*. It is true that the order made in *Bloomsbury* was not, in form, a final order, but it was in substance equivalent to a final order: it bound those unknown persons for the entirety of the only relevant period, which was the period leading up to the publication of the book. As for *Gammell,* the reasoning did not depend on whether the injunctions were interim or final in nature. The order in Ms Gammell's case was interim ("until trial

or further order"), but the point is less clear in relation to the order made in the accompanying case of Ms Maughan, which stated that "this order shall remain in force until further order".

119. More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed *Gammell* solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

120. We also observe that *Cameron* was not concerned with equitable remedies or equitable principles. Nor was it concerned with newcomers. Understandably, given that the case was an action for damages, Lord Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (eg at paras 8 and 18-19). Proceedings in which injunctive relief is sought raise different considerations, partly because an injunction has to be brought to the notice of the defendant before it can be enforced against him or her. In some cases, furthermore, the real target of the injunctive relief is not the unidentified defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62. In other words, the identification of the unknown defendant can depend upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron.*

121. It also needs to be borne in mind that the unnamed defendants in *Bloomsbury* formed a tiny class of thieves who might be supposed to be likely to reveal their identity to a media outlet during the very short period when their stolen copy of the book was an item of special value. The main purpose of seeking to continue the injunction against them was not to act as a deterrent to the thieves or even to enable them to be apprehended or committed for contempt, but rather to discourage any media publisher from dealing with them and thereby incurring liability for contempt as an aider and abetter: see *Cameron*, para 10; *Bloomsbury*, para 20. As we have explained (paras 41 and 46 above), it is not unusual in modern practice for an injunction issued against defendants, including persons unknown, to be designed primarily to affect the conduct of non-parties.

122. In that regard, it is to be noted that Lord Sumption's reason for regarding the injunction in *Bloomsbury* as legitimate was not the reason given by the Vice-Chancellor. His justification lay not in the ability to serve persons who identified themselves by breach, but in the absence of any injustice in framing an injunction against a class of unnamed persons provided that the class was sufficiently precisely defined that it could be said of any particular person whether they fell inside or outside the class of persons restrained. That justification may be said to have substantial equitable foundations. It is the same test which defines the validity of a class of discretionary beneficiaries under a trust: see *In re Baden's Deed Trusts* [1971] AC 424, 456. The trust in favour of the class is valid if it can be said of any given postulant whether they are or are not a member of the class.

123. That justification addresses what the Vice-Chancellor may have perceived to be one of the main objections to the joinder of (or the grant of injunctions against) unnamed persons, namely that it is too vague a way of doing so: see para 7. But it does not seek directly to address the potential for injustice in restraining persons who are not just unnamed, but genuine newcomers: eg in the present context persons who have not at the time when the injunction was granted formed any desire or intention to camp at the prohibited site. The facts of the *Bloomsbury* case make that unsurprising. The unnamed defendants had already stolen copies of the book at the time when the injunction was granted, and it was a fair assumption at the time of the hearing before the Vice-Chancellor that they had formed the intention to make an illicit profit from its disclosure to the media before the launch date. Three had already tried to do so, been identified and arrested. The further injunction was just to catch the one or two (if any) who remained in the shadows and to prevent any publication facilitated by them in the meantime.

124. There is therefore a broad contextual difference between the injunction granted in *Bloomsbury* and the typical newcomer injunction against Travellers. The former was directed against a small group of existing criminals, who could not sensibly be classed as newcomers other than in a purely technical sense, where the risk of loss to the claimants lay within a tight timeframe before the launch date. The typical newcomer injunction against Travellers, on the other hand, is intended to restrain Travellers generally, for as long a period as the court can be persuaded to grant an injunction, and regardless of whether particular Travellers have yet become aware of the prohibited site as a potential camp site. The Vice-Chancellor's analysis does not seek to render joinder as a defendant unnecessary, whereas (as will be explained) the newcomer injunction does. But the case certainly does stand as a precedent for the grant of relief otherwise than on an emergency basis against defendants who, although joined, have yet to be served.

125. We turn next to the supposed *Gammell* solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of disobeying the relevant injunction. It has the merit of

being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

126. The circumstances and reasoning in *Gammell* were explained in paras 63-66 above. For present purposes it is the court's reasons for concluding that Ms Gammell became a defendant when she stationed her caravans on the site which matter. At para 32 Sir Anthony Clarke MR said this:

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case …. In the case of KG she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the injunction and who had then continued to disobey it. He was not concerned with the position of a newcomer, wishing to camp on a prohibited site who, after learning of the injunction, simply decided to obey it and move on to another site. Such a person would not, on his analysis, become a defendant at all, even though constrained by the injunction as to their conduct. Service of the proceedings (as opposed to the injunction) was not raised as an issue in that case as the necessary basis for in personam jurisdiction, other than merely for holding the ring. Neither *Cameron* nor *Fourie v Le Roux* had been decided. The real point, unsuccessfully argued, was that the injunction should not have the effect against any particular newcomer of placing them in contempt until a personalised proportionality exercise had been undertaken. The need for a personalised proportionality exercise is also pursued on this appeal as a reason why newcomer injunctions should never be granted against Travellers, and we address it later in this judgment.

127. The concept of a newcomer automatically becoming (or self-identifying as) a defendant by disobeying the injunction might therefore be described, in 2005, as a solution looking for a problem. But it became a supposed solution to the problem addressed in this appeal when prayed in aid, first briefly and perhaps tentatively by Lord Sumption in *Cameron* at para 15 and secondly by Sir Geoffrey Vos MR in great detail in the present case, at paras 28, 30-31, 37, 39, 82, 85, 91-92, 94, 96 and concluding at 99 of the judgment. It may fairly be described as lying at the heart of his reasoning for allowing the appeals, and departing from the reasoning of the Court of Appeal in *Canada Goose*.

128. This court is not of course bound to consider the matter, as was the Master of the Rolls, as a question of potentially binding precedent. We have the refreshing liberty of being able to look at the question anew, albeit constrained (although not bound) by the ratio of relevant earlier decisions of this court and of its predecessor. We conduct that analysis in the following paragraphs. While we have no reason to doubt the efficacy of the concept of self-identification as a defendant as a means of dealing with disobedience by a newcomer with an injunction, the propriety of which is not itself under challenge (as it was not in *Gammell),* we are not persuaded that self-identification as a defendant solves the basic problems inherent in granting injunctions against newcomers in the first place.

129. The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "[w]hen granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger cited this with approval (at para 17) in the *Meier* case (para 67 above). Similarly, Lady Hale stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "[w]e should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

130. A further problem with the *Gammell* solution is that where the defendants are defined by reference to the future act of infringement, a person who breaches the order will, by that very act, become bound by it. The Court of Appeal of Victoria remarked, in relation to similar reasoning in the New Zealand case of *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185, that an order of that kind "had the novel feature – which would have appealed to Lewis Carroll – that it became binding upon a person only because that person was already in breach of it": *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143, 161.

131. Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* 499 F Supp 791 (1980), New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1)

CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported), 18 February 2011.

132. As it seems to us, the difficulty which has been experienced in the English cases, and to which *Gammell* has hitherto been regarded as providing a solution, arises from treating newcomer injunctions as a particular type of conventional injunction inter partes, subject to the usual requirements as to service. The logic of that approach has led to the conclusion that persons affected by the injunction only become parties, and are only enjoined, in the event that they breach the injunction. An alternative approach would begin by accepting that newcomer injunctions are analogous to injunctions and other orders which operate contra mundum, as noted in para 109 above and explained further at paras 155-159 below. Although the persons enjoined by a newcomer injunction should be described as precisely as may be possible in the circumstances, they potentially embrace the whole of humanity. Viewed in that way, if newcomer injunctions operate in the same way as the orders and injunctions to which they are analogous, then anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they have been served with the proceedings. Anyone affected by the injunction can apply to have it varied or discharged, and can apply to be made a defendant, whether they have obeyed it or disobeyed it, as explained in para 40 above. Although not strictly necessary, those safeguards might also be reflected in provisions of the order: for example, in relation to liberty to apply. We shall return below to the question whether this alternative approach is permissible as a matter of legal principle.

133. As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose*. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose?*

134. Although we do not doubt the correctness of the decision in *Canada Goose,* we are not persuaded by the reasoning at paras 89-93, which we summarised at para 103 above. In addition to the criticisms made by the Court of Appeal which we have summarised at para 107 above, and with which we respectfully agree, we would make the following points.

135. First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables,* in which a final injunction could be granted contra mundum, but that protester actions did not fall within "that exceptional category". Accordingly, "[t]he usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* … p 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive category. Such an approach is mistaken in principle, as explained in para 21 above.

136. The court buttressed its adoption of the "usual principle" with the observation that it was "consistent with the fundamental principle in *Cameron* ... that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

137. The court also observed at para 92 that "[a]n interim injunction is temporary relief intended to hold the position until trial", and that "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43-49 above. As we have explained (eg at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

138. We are also unpersuaded by the court's observation that private law remedies are unsuitable "as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters" (para 93). If that were so, where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end. That would prioritise formalism over substance, contrary to a basic principle of equity (para 151 below). As we shall explain, there is no overriding reason why the courts cannot devise procedures which enable injunctions to be granted which prohibit unidentified persons from behaving unlawfully, and which enable such persons subsequently to become parties to the proceedings and to seek to have the injunctions varied or discharged.

139. The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron,* and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall

outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (ie in the old jargon ex parte) injunction, that is an injunction which, at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

140. More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129-132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (eg by seeing a copy of the order at the relevant site or by reading it on the internet), may be expected to comply with the injunction rather than act in breach of it. At the point of compliance that person will not be a defendant, if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at the interim stage.

141. In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more

likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

142. Recognition that injunctions against newcomers are in substance always a type of without notice injunction, whether in form interim or final, is in our view the starting point in a reliable assessment of the question whether they should be made at all and, if so, by reference to what principles and subject to what safeguards. Viewed in that way they then need to be set against the established categories of injunction to see whether they fall into an existing legitimate class, or, if not, whether they display features by reference to which they may be regarded as a legitimate extension of the court's practice.

143. The distinguishing features of an injunction against newcomers are in our view as follows:

(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in *Cameron*) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.

(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.

(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.

(iv) Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.

(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.

(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.

(vii) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.

(viii) Nor is the injunction designed (like a freezing injunction, search order, Norwich Pharmacal or Bankers Trust order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

144. Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in sub-paragraph (viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that closely related to

the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

145. Faced with the development by the lower courts of what really is in substance a new type of injunction, and with disagreement among them about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

This or a very similar formulation has provided the statutory basis for the grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, to inform the judge and the parties as to what is likely to be just or convenient.

146. Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see eg *Castanho v Brown & Root (UK) Ltd* (para 21 above).

147. The expression of the readiness of equity to change and adapt its principles for the grant of equitable relief which has best stood the test of time lies in the following well-known passage from Spry (para 17 above) at p 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

148. In *Broad Idea* (para 17 above) at paras 57-58 Lord Leggatt (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* and *Cartier International AG v British Sky Broadcasting Ltd*, that summary in Spry has come to be embedded in English law. The majority opinion in *Broad Idea* also explains why what some considered to be the apparent assumption in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39-40 that the relevant equitable principles became set in stone in 1873 was, and has over time been conclusively proved to be, wrong.

149. The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law. That is frequently because equity perceives that the strict pursuit of a common law right would be contrary to conscience. That underlies, for example, rectification, undue influence and equitable estoppel. But that conscience-based aspect of the principle has no persuasive application in the present context.

150. Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Part 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* (para 67 above)

as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Lady Hale at para 25 is resonant:

> "The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted."

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* (para 130 above) at pp 499-500, cited by Sir Andrew Morritt V-C in *Bloomsbury* at para 14.

151. The second relevant general equitable principle is that equity looks to the substance rather than the form. As Lord Romilly MR stated in *Parkin v Thorold* (1852) 16 Beav 59, 66-67:

> "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

That principle assists in the present context for two reasons. The first (discussed above) is that it illuminates the debate about the type of injunction with which the court is concerned, here enabling an escape from the twin silos of final and interim and recognising that injunctions against newcomers are all in substance without notice injunctions. The second is that it enables the court to assess the most suitable means of ensuring that a newcomer has a proper opportunity to be heard without being shackled to any particular procedural means of doing so, such as service of the proceedings.

152. The third general equitable principle is equity's essential flexibility, as explained at paras 19-22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Part 25 and which may be

modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Compania Naviera SA v International Bulk Carriers SA*. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

153. Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. This is best illustrated by the history of the supposed limiting principle (or even jurisdictional constraint) affecting all injunctions apparently laid down by Lord Diplock in *The Siskina* (para 43 above) that an injunction could only be granted in, or as ancillary to, proceedings for substantive relief in respect of a cause of action in the same jurisdiction. The lengthy process whereby that supposed fundamental principle has been broken down over time until its recent express rejection is described in detail in the *Broad Idea* case and needs no repetition. But it is to be noted the number of types of injunctive or quasi-injunctive relief which quietly by-passed this supposed condition, as explained at paras 44-49 above, including *Norwich Pharmacal* and *Bankers Trust* orders and culminating in internet blocking orders, in none of which was it asserted that the respondent had invaded, or even threatened to invade, some legal right of the applicant.

154. It should not be supposed that all relevant general equitable principles favour the granting of injunctions against newcomers. Of those that might not, much the most important is the well-known principle that equity acts in personam rather than either in rem or (which may be much the same thing in substance) contra mundum. A main plank in the appellants' submissions is that injunctions against newcomers are by their nature a form of prohibition aimed, potentially at least, at anyone tempted to trespass or camp (depending upon the drafting of the order) on the relevant land, so that they operate as a form of local law regulating how that land may be used by anyone other than its owner. Furthermore, such an injunction is said in substance to criminalise conduct by anyone in relation to that land which would otherwise only attract civil remedies, because of the essentially penal nature of the sanctions for contempt of court. Not only is it submitted that this offends against the in personam principle, but it also amounts in substance to the imposition of a regime which ought to be the preserve of legislation or at least of byelaws.

155. It will be necessary to take careful account of this objection at various stages of the analysis which follows. At this stage it is necessary to note the following. First, equity has not been blind, or reluctant, to recognise that its injunctions may in substance have a coercive effect which, however labelled, extends well beyond the persons named as defendants (or named as subject to the injunction) in the relevant order. Very occasionally, orders have already been made in something approaching a contra mundum form, as in the *Venables* case already mentioned. More frequently the court

has expressly recognised, after full argument, that an injunction against named persons may involve third parties in contempt for conduct in breach of it, where for example that conduct amounts to a contemptuous abuse of the court's process or frustrates the outcome which the court is seeking to achieve: see the *Bloomsbury* case and *Attorney General v Times Newspapers Ltd,* discussed at paras 37-41, 61-62 and 121-124 above. In all those examples the court was seeking to preserve confidentiality in, or the intellectual property rights in relation to, specified information, and framed its injunction in a way which would bind anyone into whose hands that information subsequently came.

156. A more widespread example is the way in which a *Mareva* injunction is relied upon by claimants as giving protection against asset dissipation by the defendant. This is not merely (or even mainly) because of its likely effect upon the conduct of the defendant, who may well be a rogue with no scruples about disobeying court orders, but rather its binding effect (once notified to them) upon the defendant's bankers and other reputable custodians of his assets: see *Z Ltd v A-Z and AA-LL* (para 41 above).

157. Courts quietly make orders affecting third parties almost daily, in the form of the embargo upon publication or other disclosure of draft judgments, pending hand-down in public: see para 35 above. It cannot we hope be doubted that if a draft judgment with an embargo in this form came into the hands of someone (such as a journalist) other than the parties or their legal advisors it would be a contempt for that person to publish or disclose it further. Such persons would plainly be newcomers, in the sense in which that term is here being used.

158. It may be said, correctly, that orders of this kind are usually made so as to protect the integrity of the court's process from abuse. Nonetheless they have the effect of attaching to a species of intangible property a legal regime giving rise to a liability, if infringed, which sounds in contempt, regardless of the identity of the infringer. In conceptual terms, and shorn of the purpose of preventing abuse, they work in rem or contra mundum in much the same way as an anti-trespass injunction directed at newcomers pinned to a post on the relevant land. The only difference is that the property protected by the former is intangible, whereas in the latter it is land. In relation to any such newcomer (such as the journalist) the embargo is made without notice.

159. It is fair comment that a major difference between those types of order and the anti-trespass order is that the latter is expressly made against newcomers as "persons unknown" whereas the former (apart from the exceptional *Venables* type) are not. But if the consequences of breach are the same, and equity looks to the substance rather than to the form, that distinction may be of limited weight.

160. Protection of the court's process from abuse, or preservation of the utility of its future orders, may fairly be said to be the bedrock of many of equity's forays into new forms of injunction. Thus freezing injunctions are designed to make more effective the enforcement of any ultimate money judgment: see *Broad Idea* at paras 11-21. This is what Lord Leggatt there called the enforcement principle. Search orders are designed to prevent dishonest defendants from destroying relevant documents in advance of the formal process of disclosure. *Norwich Pharmacal* orders are a form of advance third party disclosure designed to enable a claimant to identify and then sue the wrongdoer. Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere.

161. But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of "ordinary principles of equity": see *Cartier* (para 20 above) per Lord Sumption at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] RPC 7 at para 198.

162. The effect of an internet blocking order, or the cumulative effect of such orders against ISPs which share most of the relevant market, is therefore to hinder the wrongdoers from pursuing their infringing sales on the internet, without them ever being named or joined as defendants in the proceedings or otherwise given a procedural opportunity to advance any defence, other than by way of liberty to apply to vary or discharge the order: see again per Arnold J at para 262.

163. Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the

whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

164. Viewed in that way, internet blocking orders are in substance more of a precedent or jumping-off point for the development of newcomer injunctions than might at first sight appear. They demonstrate the imaginative way in which equity has provided an effective remedy for the protection and enforcement of civil rights, where conventional means of proceeding against the wrongdoers are impracticable or ineffective, where the objective of protecting the integrity or effectiveness of related court process is absent, and where the risk of injustice of a without notice order as against alleged wrongdoers is regarded as sufficiently met by the preservation of liberty to them to apply to have the order discharged.

165. We have considered but rejected summary possession orders against squatters as an informative precedent. This summary procedure (avoiding any interim order followed by final order after trial) was originally provided for by RSC Order 113, and is now to be found in CPR Part 55. It is commonly obtained against persons unknown, and has effect against newcomers in the sense that in executing the order the bailiff will remove not merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

166. Tempting though the superficial similarities may be as between possession orders against squatters and injunctions against newcomers, they afford no relevant precedent for the following reasons. First, they are the creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428-9 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier*, paras 33-36 per Lady Hale. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons from land, but disobedience to the bailiff does not sound in contempt. Thirdly, the possession order works once and for all by a form of execution which puts the owner of the land back in possession, but it has no ongoing effect in prohibiting entry by newcomers wishing to camp upon it after the order has been executed. Its shortcomings in the Traveller context are one of the reasons prayed in aid by local authorities seeking injunctions against newcomers as the only practicable solution to their difficulties.

167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in

the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226-231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries.

168. The issues in this appeal have been formulated in such a way that the appellants have the burden of showing that the balancing exercise involved in weighing those competing considerations can never come down in favour of granting such an injunction. We have not been persuaded that this is so. We will address the main objections canvassed by the appellants and, in the next section of this judgment, set out in a little more detail how we conceive that the necessary protection for newcomers' rights should generally be built into the process for the application for, grant and subsequent monitoring of this type of injunction.

169. We have already mentioned the objection that an injunction of this type looks more like a species of local law than an in personam remedy between civil litigants. It is said that the courts have neither the skills, the capacity for consultation nor the democratic credentials for making what is in substance legislation binding everyone. In other words, the courts are acting outside their proper constitutional role and are making what are, in effect, local laws. The more appropriate response, it is argued, is for local authorities to use their powers to make byelaws or to exercise their other statutory powers to intervene.

170. We do not accept that the granting of injunctions of this kind is constitutionally improper. In so far as the local authorities are seeking to prevent the commission of civil wrongs such as trespass, they are entitled to apply to the civil courts for any relief allowed by law. In particular, they are entitled to invoke the equitable jurisdiction of the court so as to obtain an injunction against potential trespassers. For the reasons we have explained, courts have jurisdiction to make such orders against persons who are not parties to the action, ie newcomers. In so far as the local authorities are seeking to prevent breaches of public law, including planning law and the law relating to highways, they are empowered to seek injunctions by statutory provisions such as those mentioned in para 45 above. They can accordingly invoke the equitable jurisdiction of the court, which extends, as we have explained, to the granting of newcomer injunctions. The possibility of an alternative non-judicial remedy does not deprive the courts of jurisdiction.

171. Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The

appellants did not engage with the detail of any of these points, their objection being more a matter of principle.

172. We have not been able to reach any conclusions about the issue of practicality, either generally or on the particular facts about the cases before the court. In our view the theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is not shown to be a reason why newcomer injunctions should never be granted against Travellers. Rather, the question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis. We say more about that in the next section of this judgment.

173. A second main objection in principle was lack of procedural fairness, for which Lord Sumption's observations in *Cameron* were prayed in aid. It may be said that recognition that injunctions against newcomers are in substance without notice injunctions makes this objection all the more stark, because the newcomer does not even know that an injunction is being sought against them when the order is made, so that their inability to attend to oppose is hard-wired into the process regardless of the particular facts.

174. This is an objection which applies to all forms of without notice injunction, and explains why they are generally only granted when there is truly no alternative means of achieving the relevant objective, and only for a short time, pending an early return day at which the merits can be argued out between the parties. The usual reason is extreme urgency, but even then it is customary to give informal notice of the hearing of the application to the persons against whom the relief is sought. Such an application used then to be called "ex parte on notice", a partly Latin phrase which captured the point that an application which had not been formally served on persons joined as defendants so as to enable them to attend and oppose it did not in an appropriate case mean that it had to be heard in their absence, or while they were ignorant that it was being made. In the modern world of the CPR, where "ex parte" has been replaced with "without notice", the phrase "ex parte on notice" admits no translation short of a simple oxymoron. But it demonstrates that giving informal notice of a without notice application is a well-recognised way of minimising the potential for procedural unfairness inherent in such applications. But sometimes even the most informal notice is self-defeating, as in the case of a freezing injunction, where notice may provoke the respondent into doing exactly that which the injunction is designed to prohibit, and a search order, where notice of any kind is feared to be likely to trigger the bonfire of documents (or disposal of laptops) the prevention of which is the very reason for the application.

175. In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without

notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

176. But advertisement in advance might well alert bodies with a mission to protect Travellers' interests, such as the appellants, and enable them to intervene to address the court on the local authority's application with focused submissions as to why no injunction should be granted in the particular case. There is an (imperfect) analogy here with representative proceedings (paras 27-30 above). There may also be a useful analogy with the long-settled rule in insolvency proceedings which requires that a creditors' winding up petition be advertised before it is heard, in order to give advance notice to stakeholders in the company (such as other creditors) and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

177. It might be thought that the obvious antidote to the procedural unfairness of a without notice injunction would be the inclusion of a liberal right of anyone affected to apply to vary or discharge the injunction, either in its entirety or as against them, with express provision that the applicant need show no change of circumstances, and is free to advance any reason why the injunction should either never have been granted or, as the case may be, should be discharged or varied. Such a right is generally included in orders made on without notice applications, but Mr Drabble KC submitted that it was unsatisfactory for a number of reasons.

178. The first was that, if the injunction was final rather than interim, it would be decisive of the legal merits, and be incapable of being challenged thereafter by raising a defence. We regard this submission as one of the unfortunate consequences of the splitting of the debate into interim and final injunctions. We consider it plain that a without notice injunction against newcomers would not have that effect, regardless of whether it was in interim or final form. An applicant to vary or discharge would be at liberty to advance any reasons which could have been advanced in opposition to the grant of the injunction when it was first made. If that were not implicit in the reservation of liberty to apply (which we think it is), it could easily be made explicit as a matter of practice.

179. Mr Drabble KC's next objection to the utility of liberty to apply was more practical. Many or most Travellers, he said, would be seeking to fulfil their cultural practice of leading a peripatetic life, camping at any particular site for too short a period to make it worth going to court to contest an injunction affecting that site. Furthermore, unless they first camped on the prohibited site there would be no point in applying, but if they did camp there it would place them in breach of the injunction while applying to vary it. If they camped elsewhere so as to comply with the injunction, their rights (if any) would have been interfered with, in circumstances where there would be no point in having an expensive and risky legal argument about whether they should have been allowed to camp there in the first place.

180. There is some force in this point, but we are not persuaded that the general disinclination of Travellers to apply to court really flows from the newcomer injunctions having been granted on a without notice application. If for example a local authority waited for a group of Travellers to camp unlawfully before serving them with an application for an injunction, the Travellers might move to another site rather than raise a defence to the prevention of continued camping on the original site. By the time the application came to be heard, the identified group would have moved on, leaving the local authority to clear up, and might well have been replaced by another group, equally unidentifiable in advance of their arrival.

181. There are of course exceptions to this pattern of temporary camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for trespass: see eg the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the site on notice, in the usual way, not least because there would be known targets capable of being served with the proceedings, and any interim application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

182. The next logical objection (although little was made of it on this appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason why public bodies doing their public duty are relieved of this burden (see *Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 11; [2013] 2 AC 28), and that reasoning has generally been applied in newcomer injunction cases against Travellers where the applicant is a local authority. We address this issue further in the next section of this judgment (at para 234) and it would be wrong for us to express more definite views on it, in the absence of any submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

183. The appellants' final main point was that it would always be impossible when considering the grant of an injunction against newcomers to conduct an individualised proportionality analysis, because each potential target Traveller would have their own particular circumstances relevant to a balancing of their article 8 rights against the applicant's claim for an injunction. If no injunction could ever be granted in the absence of an individualised proportionality analysis of the circumstances of every potential target, then it may well be that no newcomer injunction could ever be granted against Travellers. But we reject that premise. To the extent that a particular Traveller who became the subject of a newcomer injunction wished to raise particular circumstances applicable to them and relevant to the proportionality analysis, this would better be done under the liberty to apply if, contrary to the general disinclination or inability of Travellers to go to court, they had the determination to do so.

184. We have already briefly mentioned Mr Drabble KC's point about the inappropriateness of an injunction against one group of Travellers based only upon the disorderly conduct of an earlier group. This is in our view just an evidential point. A local authority that sought a borough-wide injunction based solely upon evidence of disorderly conduct by a single group of campers at a single site would probably fail the test in any event. It will no doubt be necessary to adduce evidence which justifies a real fear of widespread repetition. Beyond that, the point goes nowhere towards constituting a reason why such injunctions should never be granted.

185. The point was made by Stephanie Harrison KC for Friends of the Earth (intervening because of the implications of this appeal for protesters) that the potential for a newcomer injunction to cause procedural injustice was not regulated by any procedure rules or practice statements under the CPR. Save in relation to certain statutory applications referred to in para 51 above this is true at present, but it is not a good reason to inhibit equity's development of a new type of injunction. A review of the emergence of freezing injunctions and search orders shows how the necessary procedural checks and balances were first worked out over a period of development by judges in particular cases, then addressed by text-book writers and academics and then, at a late stage in the developmental process, reduced to rules and practice directions. This is as it should be. Rules and practice statements are appropriate once experience has taught judges and practitioners what are the risks of injustice that need to be taken care of by standard procedures, but their reduction to settled (and often hard to amend) standard form too early in the process of what is in essence judge-made law would be likely to inhibit rather than promote sound development. In the meantime, the courts have been actively reviewing what these procedural protections should be, as for example in the *Ineos* and *Bromley* cases (paras 86-95 above). We elaborate important aspects of the appropriate protections in the next section of this judgment.

186. Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate

exercise of the court's equitable discretion, where the general conditions set out in paragraph 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

5. The process of application for, grant and monitoring of newcomer injunctions and protection for newcomers' rights

187. We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further, the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land. We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

188. Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i)).

189. This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are) properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its

disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.

(i) An obligation or duty to provide sites for Gypsies and Travellers

190. The extent of any obligation on local authorities in England to provide sufficient sites for Gypsies and Travellers in the areas for which they are responsible has changed over time.

191. The starting point is section 23 of the Caravan Sites and Control of Development Act 1960 ("CSCDA 1960") which gave local authorities the power to close common land to Gypsies and Travellers. As Sedley J observed in *R v Lincolnshire County Council, Ex p Atkinson* (1996) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans might be brought, whether for temporary purposes or for use as permanent residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.

192. In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

193. Some 25 years later, the CJPOA repealed section 6 of the CSA 1968. But the *power* to provide sites for Travellers and Gypsies remained. This is important for it provides a way to give effect to the assessment by local authorities of the needs of these communities, and these are matters we address below.

194. The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its

area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

195. For many years there has been an obligation on local authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers when carrying out their periodic review of housing needs under section 8 of the Housing Act 1985.

196. This obligation was first imposed by section 225 of the Housing Act 2004. This measure was repealed by section 124 of the Housing and Planning Act 2016. Instead, the duty of local housing authorities in England to carry out a periodic review of housing needs under section 8 of the Housing Act 1985 has since 2016 included (at section 8(3)) a duty to consider the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed.

(iii) Planning policy

197. Since about 1994, and with the repeal of the statutory duty to provide sites, the general issue of Traveller site provision has come increasingly within the scope of planning policy, just as the government anticipated.

198. Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled "*Gypsy sites and planning*". This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local Planning Authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter*, at para 13.

199. The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") and the regulations made under it. Part 2 of the PCPA 2004 deals with local development and stipulates that the LPA is to prepare a development scheme and plan; that this must set out the authority's policies; that in preparing the local development plan, the authority must have regard to national policy; that each plan must be sent to the Secretary of State for independent

examination and that the purpose of this examination is, among other things, to assess its soundness and that will itself involve an assessment whether it is consistent with national policy.

200. Meantime, the advice in Circular 1/94 having failed to achieve its purpose, the government has from time to time issued new planning advice on the provision of sites for Gypsies and Travellers in England, and that advice may be taken to reflect national policy.

201. More specifically, in 2006 advice was issued in the form of the Office of the Deputy Prime Minister Circular 1/06 *Planning for Gypsy and Traveller caravan sites*. The 2006 guidance was replaced in March 2012 by *Planning policy for traveller sites* ("PPTS 2012"). In August 2015, a revised version of PPTS 2012 was issued ("PPTS 2015") and this is to be read with the National Planning Policy Framework. There has recently been a challenge to a decision refusing planning permission on the basis that one aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2022] EWCA Civ 1391; [2023] PTSR 312. But for present purposes it is sufficient to say (and it remains the case) that there is in these policy documents clear advice that LPAs should, when producing their local plans, identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets to address the needs of Gypsies and Travellers for permanent and transit sites. They should also identify a supply of specific, developable sites or broad locations for growth for years 6-10 and even, where possible, years 11-15. The advice is extensive and includes matters to which LPAs must have regard including, among other things, the presumption in favour of sustainable development; the possibility of cross-authority co-operation; the surrounding population's size and density; the protection of local amenities and the environment; the need for appropriate land supply allocations and to respect the interests of the settled communities; the need to ensure that Traveller sites are sustainable and promote peaceful and integrated co-existence with the local communities; and the need to promote access to appropriate health services and schools. The LPAs are also advised to consider the need to avoid placing undue pressure on local infrastructure and services, and to provide a settled base that reduces the need for long distance travelling and possible environmental damage caused by unauthorised encampments.

202. The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction.

(iv) Consultation and co-operation

203. This is another matter of considerable importance, and it is one with which all local authorities should willingly engage. We have no doubt that local authorities, other responsible bodies and representatives of the Gypsy and Traveller communities would benefit from a dialogue and co-operation to understand their respective needs; the concerns of the local authorities, local charities, business and community groups and members of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action.

(v) Public Spaces Protection Orders

204. The Anti-social Behaviour, Crime and Policing Act 2014 confers on local authorities the power to make Public Spaces Protection Orders ("PSPOs") to prohibit encampments on specific land. PSPOs are in some respects similar to byelaws and are directed at behaviour and activities carried on in a public place which, for example, have a detrimental effect on the quality of life of those in the area, are or are likely to be persistent or continuing, and are or are likely to be such as to make the activities unreasonable. Further, PSPOs are in general easier to make than byelaws because they do not require the involvement of central government or extensive consultation. Breach of a PSPO without reasonable excuse is a criminal offence and can be enforced by a fixed penalty notice or prosecution with a maximum fine of level three on the standard scale. But any PSPO must be reasonable and necessary to prevent the conduct and detrimental effects at which it is targeted. A PSPO takes precedence over any byelaw in so far as there is any overlap.

(vi) Criminal Justice and Public Order Act 1994

205. The CJPOA empowers local authorities to deal with unauthorised encampments that are causing damage or disruption or involve vehicles, and it creates a series of related offences. It is not necessary to set out full details of all of them. The following summary gives an idea of their range and scope.

206. Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have

caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

207. Following amendment in 2003, section 62A of the CJPOA confers on the police a power to direct trespassers with vehicles to leave land at the occupier's request, and that is so even if the trespassers have not caused damage or used threatening behaviour. Where trespassers have at least one vehicle between them and are there with the common purpose of residing there, the police, (if so requested by the occupier) have the power to direct a trespasser to leave and to remove any vehicle or property, subject to this proviso: if they have caravans that (after consultation with the relevant local authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

208. Focusing more directly on local authorities, section 77 of the CJPOA confers on the local authority a power to direct campers to leave open-air land where it appears to the authority that they are residing in a vehicle within its area, whether on a highway, on unoccupied land or on occupied land without the consent of the occupier. There is no need to establish that these activities have caused damage or disruption. The direction must be served on each person to whom it applies, and that may be achieved by directing it to all occupants of vehicles on the land; and failing other effective service, it may be affixed to the vehicles in a prominent place. Relevant documents should also be displayed on the land in question. It is an offence for persons who know that such an order has been made against them to fail to comply with it.

(vii) Byelaws

209. There is a measure of agreement by all parties before us that the power to make and enforce byelaws may also have a bearing on the issues before us in this appeal. Byelaws are a form of delegated legislation made by local authorities under an enabling power. They commonly require something to be done or refrained from in a particular area or location. Once implemented, byelaws have the force of law within the areas to which they apply.

210. There is a wide range of powers to make byelaws. By way of example, a general power to make byelaws for good rule and government and for the prevention and suppression of nuisances in their areas is conferred on district councils in England and London borough councils by section 235(1) of the Local Government Act 1972 ("the LGA 1972"). The general confirming authority in relation to byelaws made under this section is the Secretary of State.

211. We would also draw attention to section 15 of the Open Spaces Act 1906 which empowers local authorities in England to make byelaws for the regulation of open spaces, for the imposition of a penalty for breach and for the removal of a person infringing the byelaw by an officer of the local authority or a police constable. Notable too is section 164 of the Public Health Act 1875 (38 & 39 Vict c 55) which confers a power on the local authority to make byelaws for the regulation of public walks and pleasure grounds and for the removal of any person infringing any such byelaw, and under section 183, to impose penalties for breach.

212. Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899.

213. Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the Countryside Act 1949 (as amended by the Natural Environment and Rural Communities Act 2006); in relation to National Parks and areas of outstanding natural beauty under sections 90 and 91 of the 1949 Act (as amended); concerning the protection of country parks under section 41 of the Countryside Act 1968; and for the protection and preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000.

214. We recognise that byelaws are sometimes subjected to detailed and appropriate scrutiny by the courts in assessing whether they are reasonable, certain in their terms and consistent with the general law, and whether the local authority had the power to make them. It is an aspect of the third of these four elements that generally byelaws may only be made if provision for the same purpose is not made under any other enactment. Similarly, a byelaw may be invalidated if repugnant to some basic principle of the common law. Further, as we have seen, the usual method of enforcement of byelaws is a fine although powers to seize and retain property may also be included (see, for example, section 237ZA of the LGA 1972), as may powers to direct removal.

215. The opportunity to make and enforce appropriate elements of this battery of potential byelaws, depending on the nature of the land in issue and the form of the intrusion, may seem at first sight to provide an important and focused way of dealing with unauthorised encampments, and it is a rather striking feature of these proceedings that byelaws have received very little attention from local authorities. Indeed, Wolverhampton City Council has accepted, through counsel, that byelaws were not considered as a means of addressing unauthorised encampments in the areas for which it is responsible. It maintains they are unlikely to be sufficient and effective in the light of (a) the existence of legislation which may render the byelaws inappropriate; (b) the potential effect of criminalising behaviour; (c) the issue of identification of newcomers; and (d) the modest size of any penalty for breach which is unlikely to be an effective deterrent.

216. We readily appreciate that the nature of travelling communities and the respondents to newcomer injunctions may not lend themselves to control by or yield readily to enforcement of these various powers and measures, including byelaws, alone, but we are not persuaded that the use of byelaws or other enforcement action of the kinds we have described can be summarily dismissed. Plainly, we cannot decide in this appeal whether the reaction of Wolverhampton City Council to the use of all of these powers and measures including byelaws is sound or not. We have no doubt, however, that this is a matter that ought to be the subject of careful consideration on the next review of the injunctions in these cases or on the next application for an injunction against persons unknown, including newcomers.

(viii) A need for review

217. Various aspects of this discussion merit emphasis at this stage. Local authorities have a range of measures and powers available to them to deal with unlawful encampments. Some but not all involve the enactment and enforcement of byelaws. Many of the offences are punishable with fixed or limited penalties, and some are the subject of specified defences. It may be said that these form part of a comprehensive suite of measures and powers and associated penalties and safeguards which the legislature has considered appropriate to deal with the threat of unauthorised encampments by Gypsies and Travellers. We rather doubt that is so, particularly when dealing with communities of unidentified trespassers including newcomers. But these are undoubtedly matters that must be explored upon the review of these orders.

(2) Evidence of threat of abusive trespass or planning breach

218. We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against persons unknown, including newcomers, in Gypsy and Traveller cases must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the threat must be real and imminent. We have no doubt that local authorities are well equipped to prepare this evidence, supported by copies of all relevant documents, just as they have shown themselves to be in making applications for injunctions in this area for very many years.

219. The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court

whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

220. The evidence in support of the application must therefore err on the side of caution; and the court, not the local authority, should be the judge of relevance.

(3) Identification or other definition of the intended respondents to the application

221. The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in *Cameron*, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

222. It is always important that an injunction spells out clearly and in everyday terms the full extent of the acts it prohibits, and this is particularly so where it is sought against persons unknown, including newcomers. The terms of the injunction - and therefore the prohibited acts - must correspond as closely as possible to the actual or threatened unlawful conduct. Further, the order should extend no further than the minimum necessary to achieve the purpose for which it was granted; and the terms of the order must be sufficiently clear and precise to enable persons affected by it to know what they must not do.

223. Further, if and in so far as the authority seeks to enjoin any conduct which is lawful viewed on its own, this must also be made absolutely clear, and the authority must be prepared to satisfy the court that there is no other more proportionate way of protecting its rights or those of others.

224. It follows but we would nevertheless emphasise that the prohibited acts should not be described in terms of a legal cause of action, such as trespass or nuisance, unless this is unavoidable. They should be defined, so far as possible, in non-technical and readily comprehensible language which a person served with or given notice of the order is capable of understanding without recourse to professional legal advisers.

(5) Geographical and temporal limits

225. The need for strict temporal and territorial limits is another important consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley*, paras 99-109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

226. We recognise that it would be impossible for a local authority to give effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the basis on which we have proceeded. On the other hand, in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief.

227. Here the following further points may also be relevant. First, local authorities have now developed ways to give effective notice of the grant of such injunctions to those likely to be affected by them, and they do so by the use of notices attached to the land and in other ways as we describe in the next section of this judgment. These same methods, appropriately modified, could be used to give notice of the application itself. As we have also mentioned, local authorities have been urged for some time to establish lines of communication with Traveller and Gypsy communities and those representing them, and all these lines of communication, whether using email, social media, advertisements or some other form, could be used by authorities to give notice to these communities and other interested persons and bodies of any applications they are proposing to make.

228. Secondly, we see merit in requiring any local authority making an application of this kind to explain to the court what steps it has taken to give notice of the application to persons likely to be affected by it or to have a proper interest in it, and of all responses it has received.

229. These are all matters for the judges hearing these applications to consider in light of the particular circumstances of the cases before them, and in this way to allow an appropriate practice to develop.

(7) Effective notice of the order

230. We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

231. Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) Liberty to apply to discharge or vary

232. As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) Costs protection

233. This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.

(10) Cross-undertaking

234. This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate. Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-by-case basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) Protest cases

235. The emphasis in this discussion has been on newcomer injunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction

against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

236. Counsel for the Secretary of State for Transport has submitted and we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from another in terms of the range and number of people who may be affected by the making or refusal of the injunction sought; the legal right to be protected; the illegality to be prevented; and the rights of the respondents to the application. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained.

(12) Conclusion

237. There is nothing in this consideration which calls into question the development of newcomer injunctions as a matter of principle, and we are satisfied they have been and remain a valuable and proportionate remedy in appropriate cases. But we also have no doubt that the various matters to which we have referred must be given full consideration in the particular proceedings the subject of these appeals, if necessary at an appropriate and early review.

6. Outcome

238. For the reasons given above we would dismiss this appeal. Those reasons differ significantly from those given by the Court of Appeal, but we consider that the orders which they made were correct. There follows a short summary of our conclusions:

> (i) The court has jurisdiction (in the sense of power) to grant an injunction against 'newcomers', that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.
>
> (ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time

when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

(iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:

(a) that equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.

(b) That equity looks to the substance rather than to the form.

(c) That equity takes an essentially flexible approach to the formulation of a remedy.

(d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

These principles may be discerned in action in the remarkable development of the injunction as a remedy during the last 50 years.

(iv) In deciding whether to grant a newcomer injunction, the application of those principles in the context of trespass and breach of planning control by Travellers will be likely to require an applicant:

(a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.

(b) to build into the application and into the order sought procedural protection for the rights (including Convention rights) of the newcomers affected by the order, sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them. Those protections are likely to include advertisement of an intended application so as to alert potentially affected Travellers and bodies which may be able to represent their interests at the hearing of the application, full provision for liberty to persons affected to apply to vary or discharge the order without having to

show a change of circumstances, together with temporal and geographical limits on the scope of the order so as to ensure that it is proportional to the rights and interests sought to be protected.

(c) to comply in full with the disclosure duty which attaches to the making of a without notice application, including bringing to the attention of the court any matter which (after due research) the applicant considers that a newcomer might wish to raise by way of opposition to the making of the order.

(d) to show that it is just and convenient in all the circumstances that the order sought should be made.

(v) If those considerations are adhered to, there is no reason in principle why newcomer injunctions should not be granted.

Neutral Citation Number: [2023] EWCA Civ 182

Case No: CA-2022-001066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BENNATHAN J
[2022] EWHC 1105 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2023

Before :

DAME VICTORIA SHARP PRESIDENT OF THE KING'S BENCH DIVISION
SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE LEWISON

- -

Between :

NATIONAL HIGHWAYS LIMITED	**Appellant**
- and -	
(1)PERSONS UNKNOWN	**Respondent**
(2)ALEXANDER RODGER AND 132 OTHERS	

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Myriam Stacey KC, Admas Habteslasie and Michael Fry (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr David Crawford and Mr Matthew Tulley, two of the named Respondents, addressed the Court on behalf of the 109 named Respondents

Hearing dates : 16 February 2023

Approved Judgment

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Sir Julian Flaux C:

Introduction

1. This is the judgment of the Court. The appellant, National Highways Limited ("NHL") appeals, with the permission of Whipple LJ, against various paragraphs of the Orders of Bennathan J dated 9 and 12 May 2022. By those Orders, the judge dismissed in part the application of NHL for summary judgment ("the SJ Application") by which NHL sought a final anticipatory or *quia timet* injunction (i) against 133 named defendants who were Insulate Britain ("IB") protesters who had been arrested by the police at various demonstrations on motorways and other roads and (ii) against persons unknown. The judge granted a final injunction against 24 of the 133 named defendants, consisting of those who had been found to be in contempt of Court but otherwise refused to grant a final injunction, although he did grant an anticipatory injunction on an interim basis against the remaining 109 named defendants and against persons unknown on essentially the same terms as the final injunction.

Factual and procedural background

2. NHL is the highways authority for the Strategic Road Network ("SRN") pursuant to section 1A of the Highways Act 1980 and has the physical extent of the highway vested in it. NHL commenced three sets of proceedings in response to a series of protests organised by IB which began on 13 September 2021 in and around London and south-east England. The protests involved protesters blocking highways forming part of the SRN, normally by sitting down on the road surface or gluing themselves to the road surface. The protests created a serious risk of danger and caused serious disruption to the public using the SRN and more generally.

3. NHL made urgent applications for interim injunctions to restrain the conduct of the protesters:

   (1) In QB-2021-003576, Lavender J granted an interim injunction on 21 September 2021 in relation to the M25;

   (2) In QB-2021-3626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent;

   (3) In QB-2021-3737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.

   (4) On the return date of 12 October 2021, the three injunctions were continued until trial or further order and the claims were ordered to proceed together.

4. Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur a number of disclosure orders were made, providing for Chief Constables of the relevant police forces to disclose to NHL the identity of those arrested during the course of the protests, together with material relating

to possible breaches of the injunctions. On 1 October 2021, May J ordered that 113 people arrested for participation in the protests be added as named defendants. NHL continued to add further named defendants as protests continued. In October and November 2021 the claims were served on named defendants. No named defendants have been added since November 2021.

5. On 22 October 2021, NHL filed Consolidated Particulars of Claim in the three actions. The case was pleaded on the basis that the conduct of the protesters constituted (1) trespass; (2) private nuisance; and/or (3) public nuisance. The pleading described the protests that had already taken place and contended that they exceeded the rights of the public to use the highway and that the obstruction and disruption caused by the protests was a trespass on the SRN which endangered the life, health, property or comfort of the public and/or obstructed the public in the exercise of their rights. [18] and [19] of the pleading set out the basis for the anticipatory injunction sought: "there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the Roads" and referred to open expressions of intention by the defendants to continue to cause obstruction to the SRN, unless restrained. Although a claim for damages was made in the pleading, that has not been pursued by NHL.

6. On the same day as the pleading was filed, NHL made its first contempt application in relation to breaches of the M25 Injunction, given that notwithstanding the injunction, blocking and disruption of the M25 by IB protesters was continuing. This was determined on 17 November 2021. Two further contempt applications in relation to breaches of the M25 injunction were made on 19 November 2021 and 17 December 2021, determined on 15 December 2021 and 2 February 2022 respectively. 24 of the 133 defendants (to whom we will refer as "the contemnor defendants") were found to have been in contempt of court.

7. On 23 November 2021, defences were served on behalf of three of the named defendants. Mr Horton and Mr Sabitsky stated in identical terms that they had never trespassed on the SRN and had no intention of doing so. Proceedings against them were discontinued. Mr Tulley admitted being involved in protests on the M25 on three days in September 2021. He asserted that he was not involved in the IB protests covered by the injunctions but admitted being involved in IB protests not covered by the injunctions. He has remained a defendant. No other defences have been served and up to and including the hearing before the judge there was no engagement with the proceedings and no statements that the other defendants were not intending to continue the protests.

8. On 24 March 2022, NHL issued the SJ Application in the interests of finality. Although it would have been entitled to apply for default judgment against all the remaining named defendants other than Mr Tulley, it was explained in the witness statement in support of the SJ Application of Ms Laura Higson, an associate at DLA Piper UK LLP, NHL's solicitors, that this procedure was adopted to afford the defendants the opportunity to engage with the merits of the claim. The SJ Application was served on the named defendants, but as already indicated, they chose not to serve defences or otherwise engage with the merits of the claim.

9. Ms Higson's witness statement sets out details of the protests which had already occurred and the risk of future protests including quoting an IB press release of 7 February 2022 on its website which stated:

> *"We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.*
>
> *Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it.*
>
> *We haven't gone away. We're just getting started."*

Ms Myriam Stacey KC on behalf of NHL explained that it was because of this two to three year time frame that the draft order served with the SJ Application sought a final injunction until a date in April 2025.

10. Ms Higson also quoted another IB press release dated 15 February 2022 stating that it had joined Just Stop Oil. She referred to a presentation by Roger Hallam, a leading figure within both organisations, who said: *"Thousands of people will be going onto the streets and onto the motorways to the oil refineries and they will be sitting down."*

11. She referred to the disclosure orders and to the fact that each of the named defendants had been arrested on suspicion of conduct which constituted a trespass and/or nuisance on the roads subject to the interim injunctions. In 28 sub-paragraphs of [51] of the statement she set out details of all the arrests between 13 September and 2 November 2021. At [60] she summarised the evidence before the Court and at [61] said that on the basis of that evidence, there was a real and imminent risk of further unlawful acts of trespass and nuisance on the parts of the SRN covered by the interim injunctions and that risk was unlikely to abate in the near or medium future. The Court was accordingly invited to accede to the SJ Application.

12. The SJ Application was heard by the judge on 4 and 5 May 2022.

The judgment below

13. Having set out the background to the claims, the judge referred to the SJ Application at [4]. He evidently considered summary judgment a distinct process from the grant of a final injunction, since at [4] of the judgment he says that the application for a final injunction is being made "in addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at [24] to [36] then with the injunction at [37] to [49] of the judgment.

14. It is also evident both from what the judge said in the course of argument and in the summary judgment section of the judgment that he considered that summary judgment could not be granted unless NHL could establish tortious liability of the named defendants in respect of the protests which had taken place in the past. At [25] the judge said that an injunction was a remedy, not a cause of action, then at [26] that summary judgment under CPR Part 24 was available for a cause of action not a remedy. He then identified the causes of action pleaded by NHL as trespass, public nuisance and private nuisance.

15. Having summarised the law on those torts, he then found at [32] that, in relation to the 24 contemnor defendants, there was sufficient evidence to give summary judgment under Part 24 against them based on the judgments of the Divisional Court finding them in contempt. The factual summaries in those cases gave sufficient details for the judge to conclude that there was no realistic basis to believe there would be any issue if there were to be a trial.

16. However, at [33] the judge said that the position of the 109 other named defendants was different. He said the only evidence against them was in the 28 sub-paragraphs of [51] of Ms Higson's witness statement, the first two of which he then quoted. He said at [34] that at no point did she identify which defendant was arrested on what date or give details of the activities which led to the arrest. He noted that Ms Stacey KC relied upon the fact that apart from the three defences we have mentioned above, none of the defendants had served a defence to the claim.

17. At [35] he concluded, in relation to the question whether NHL had shown that there was no real prospect of a successful defence to the claims by the 109 named defendants, that NHL's evidence was "manifestly inadequate" for a number of reasons. The first was, so the judge said:

> "I would have to be satisfied in each case. As a matter of common sense, it is highly likely that many of the defendants *have* committed the 3 torts alleged but I am not able to take a broad brush approach that "*lumps together*" all 109 in a case where I am dealing with important and fundamental rights."

The judge then went on to cite examples of individual defendants who had been arrested, but in relation to whom it transpired that they had not committed any of the torts. He concluded at [36] that the consequence of his decision was that he had been persuaded to grant both a final injunction in respect of the 24 contemnor defendants and an interim injunction in respect of the 109 and the unknown defendants.

18. The judge then turned to the question of injunction. At [37] he cited the test for the grant of an interim injunction in *American Cyanamid*. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

> "…the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk

> and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy."

19. At [38] the judge adopted the summary of Marcus Smith J in *Vastint Leeds BV v Persons Unknown ("Vastint")* [2018] EWHC 2456 (Ch); [2019] 4 WLR 2 as to the effect of Court of Appeal decisions on anticipatory injunctions. He said there were two questions he had to address:

> "(1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?
>
> (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*."

20. Counsel who appeared before the judge for various environmental campaigners who were not IB protesters pointed out that the protests described by NHL were all in 2021 and had not been repeated at that stage in May 2022. The judge said at [39] that was a fair point but was outweighed by some of the public declarations made by IB. The judge said:

> "Once a movement vows "to cause more chaos across the country in the coming weeks" and threatens "a fusion of other large-scale blockade-style actions you have seen in the past", the Claimant must be entitled to seek the Court's protection without waiting for major roads to be blocked. In my view the scale of the protests being discussed, and those that have already occurred, are sufficient to meet the heightened test of harm so "grave and irreparable" that damages would be an inadequate remedy."

21. At [40] the judge concluded that the criteria in section 12 of the Human Rights Act 1998 were satisfied and did not prevent the grant of an injunction. At [41] the judge cited two Court of Appeal cases dealing with injunctions against persons unknown, *Ineos Upstream Ltd v Persons Unknown ("Ineos")* [2019] EWCA Civ 515; [2019] 4 WLR 100 and *Canada Goose Retail Ltd v Persons Unknown* [2020] EWCA Civ 202; [2020] 1 WLR 2802. He summarised the combined effect of those cases as being:

> "(1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
>
> (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
>
> (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that,

> there is no other proportionate means of protecting the claimant's rights [*Canada Goose*]."

22. The judge then referred to cases where the balance between the competing rights of protesters and others have been considered, starting with *DPP v Jones* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act came into force and has to be read with a degree of caution in the light of *DPP v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the District Judge dismissing the prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *DPP v Cuciurean* [2022] EWHC 736 (Admin) saying at [44]:

> "The limits to *Ziegler* were made clear in *DPP v Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as Article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under Article 1 of Protocol 1 ["*A1P1*"], by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway."

23. It is worth noting at this point that, under regulation 15 of The Motorways Traffic (England and Wales) Regulations 1982, pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey KC to that provision, it was not relied upon by NHL either before the judge or before this Court.

24. The judge cited *City of London Corporation v Samede* [2012] PTSR 1624 where Lord Neuberger MR said that political and economic views were at the top end of the scale in terms of views whose expression the European Convention on Human Rights is invoked to protect. At [48] he said, in drawing together the various legal threads:

> "…in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*DPP v Jones* and *DPP v Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the Claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protestors to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*NHL v Heyatawin*]."

25. At [49], in balancing the competing interests, he said:

> "The general character of the views held by IB protestors are properly described as "*political and economic*" and as such are at the "*top end of the scale*", as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protestors themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson's statement, above. Judging the future risks of protests against IB's past conduct I approved the terms of the draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads."

The ground of appeal

26. NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show on the balance of probabilities that all defendants had actually already committed the torts in question.

The submissions

27. Ms Stacey KC submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* at [34(1)]. This form of injunction was granted when the claimant's rights were threatened, but for whatever reason the claimant's cause of action was not complete: per Marcus Smith J in *Vastint* at [31(2)]:

> "*Quia timet* injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory."

28. The court's jurisdiction to grant *quia timet* or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint* at [27]. Ms Stacey

KC referred to the two stage test for considering whether to grant a *quia timet* injunction set out by Marcus Smith J in *Vastint* adopted by the judge in the present case and which we quoted at [19] above. In relation to the first stage, whether there is a strong possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey KC drew attention to the factors identified by Marcus Smith J at [31(4)], in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public such as missing a hospital appointment or a funeral or having an accident.

29. In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey KC submitted that, whilst the law had been in a state of flux, the decision of the Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown ("Barking")* [2022] EWCA Civ 13; [2022] 2 WLR 946 represents the law as it currently stands. In that case, this Court held that there was power under section 37 of the Senior Courts Act 1981 to grant a final injunction against persons who were unknown and unidentified, so-called "newcomers". This Court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose*.

30. The Supreme Court heard the appeal from the decision of the Court of Appeal in *Barking* on 8 and 9 February 2023 and judgment is reserved. In answer to the question from the Court as to what would happen if we follow the decision of the Court of Appeal in *Barking* and the Supreme Court concludes that the Court of Appeal decision was wrong, Ms Stacey KC pointed out that the terms of the order for an injunction (whether the final or interim form) provided for a review hearing before the High Court in April 2023 to determine whether the injunction should be discharged in whole or in part.

31. She asked this Court to note that the judge had dealt with the conditions to be satisfied in granting an injunction against persons unknown at [41] of his judgment and that there was no issue that the conditions were met. The judge had been referred to the decision of the Court of Appeal in *Barking* and no part of his judgment was founded on the notion that it was wrongly decided.

32. In relation to summary judgment under CPR Part 24, Ms Stacey KC submitted that there was no suggestion in CPR Part 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at 24.2.3 of Civil Procedure. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ Application.

33. Ms Stacey KC also relied upon the statement by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) also cited at 24.2.3:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
>
> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up..."

34. Ms Stacey KC relied upon CPR Part 24.5 which refers to the requirement that, if a respondent to a summary judgment application wishes to rely on written evidence, he should file and serve such evidence. She submitted that there was a process and an expectation that a respondent who wishes to oppose a summary judgment application should put in evidence. Other than the three defendants who served defences, the named defendants in the present case had not put in any evidence or defence, either formally or informally, and had not otherwise engaged with the Court process. The judge had erroneously dismissed this failure to serve defences and evidence as irrelevant to the SJ Application. Ms Stacey KC submitted that the fact that the named defendants had an opportunity to file a defence and did not do so was self-evidently a factor to be weighed in the assessment of the issue which the judge had to decide on the SJ Application, which was whether on the evidence, the defendants had no real prospect of successfully defending the claim for a final precautionary injunction. She submitted that there was no real prospect of any defence succeeding and no reasonable basis to expect that any further evidence would be forthcoming at trial.

35. At the hearing of the appeal, some 20 of the named defendants attended Court. Three of those were contemnor defendants against whom the judge granted a final injunction and in respect of whom there was no appeal before the Court. The other 17 were some of the 109 defendants. One of them, David Crawford, was deputed to address the Court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

36. The difficulty which the named defendants face is that none of their points was made before the judge, because they simply failed to engage in the proceedings. In relation to the test for the grant of an anticipatory injunction, the judge considered the evidence which was before him and concluded that there was a real and imminent risk of the torts of trespass and nuisance being committed so as to justify the grant of the injunction against the 109 named defendants, albeit on an interim basis. There was and is no cross-appeal by the defendants against

any part of the judgment dealing with the grant of an injunction. The matters which Mr Crawford and Mr Tulley put forward cannot be relied upon before this Court as a basis for challenging the judge's conclusion as to real and imminent risk and as to the appropriateness of granting an injunction.

Discussion

37. Although the judge did correctly identify the test for the grant of an anticipatory injunction in [38] of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that, before summary judgment for a final anticipatory injunction could be granted, NHL had to demonstrate in relation to each defendant that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.

38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at [31(1)] the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.

39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at [31(2)] quoted at [27] above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding at [35] of the judgment that he could not grant summary judgment for a final anticipatory injunction against any named defendant, unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.

40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR Part 24.2, namely whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial.

41. It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see [35(5)] of the judgment), the defendants' general attitude was of disinterest in Court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel*. If the judge had applied the right test under CPR 24.2 and had had proper regard to CPR 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that accordingly, NHL was entitled to a final injunction against those defendants.

42. Although *Barking* was cited to the judge and he refers to it at [36] of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged, it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

43. The only aspect of the final and interim injunctions granted by the judge and the final injunctions sought by NHL which caused us any concern is the reference in [10.1] and [11.1] of the Injunction Order dated 12 May 2022 to "tunnelling within 25m of the Roads". We are not aware of any such tunnelling having occurred or having been threatened by the IB protesters and Ms Stacey KC was not able to identify any such threats. In the circumstances, it seems to us that these words should be expunged from the injunctions granted by the judge and from the final injunction which we will grant. Subject to that one point, the appeal is allowed.

Neutral Citation Number: [2023] EWHC 402 (KB)

Case No: KB-2022-003542

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before :

MR JUSTICE CAVANAGH

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Between :

TRANSPORT FOR LONDON	**Claimant**
- and -	
LEE AND OTHERS	**Defendant**

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- -

Andrew Fraser-Urquhart KC (instructed by **TfL**) for the **Claimant**
Oliver Brady (named Defendant) attended. No attendance or representation for the other **Defendants**

Hearing date: 24 February 2023

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Approved Judgment

MR JUSTICE CAVANAGH :

1. On 31 October 2022, Freedman J granted an interim injunction that had been applied for by the claimant, TFL, against 168 named defendants and against persons unknown. The defendants are supporters of, and activists connected with, Just Stop Oil ("JSO"). The injunction prevents the blocking, for the purpose of protests, of the roads/locations currently specified in Annex 2 to that injunction and to the Claim Form in these proceedings. There are approximately 23 of these. These are referred to as "the JSO Roads". The JSO Roads are strategically important roads in London which form an important part of the TfL Strategic Road Network ("the GLA Roads"). GLA Roads are, very broadly speaking, the most important roads in Greater London, carrying a third of London's traffic despite comprising only 5% of its road network length.

2. A large proportion of those protests have involved protesters blocking roads by sitting down in the road and often gluing themselves to its surface and/or locking themselves to each other to make their removal more time consuming. In more recent times, groups of protesters have walked or marched in the roadway at a very slow pace, thereby impeding traffic.

3. The injunction granted by Freedman J continued an injunction which had been granted, without notice, by Yip J, on 18 October 2022. The period covered by Yip J's injunction expired on 23.59 on 27 October 2022. Freedman J heard argument from the claimant's counsel on that day and then continued the injunction for a short time until the return date of 31 October 2022. As I have said, he handed down his ruling on 31 October 2022. The order was sealed on 4 November 2022.

4. The injunction that was granted by Freedman J expires on 23.59 on 28 February 2023.

5. By an application notice dated 1 February 2023, the claimant seeks three further orders. These are that:

   i) There be an extension of the injunction order, until trial or further order or with a backstop of 23.59 on 24 February 2024. The claimant also seeks orders for alternative service and third party disclosure;

   ii) That there be an expedited trial, with a time estimate of 2 days; and

   iii) That there be an Order under CPR r31.22 to use in this Claim any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in Claim No. QB-2021-003841 and Claim No. QB-2021-004122. And to use in those other Claims any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in this Claim. These claims are similar proceedings brought by the claimant against supporters of Insulate Britain, an organisation with similar aims to JSO.

6. None of the Defendants has entered an appearance or attended the hearing before Freedman J. Only one of the Defendants has attended today, Mr Oliver Brady, though the named defendants were served notice of the hearing, using the means provided for in Freedman J's judgment. Specifically, on 14-15 February 2023, the claimant's solicitor sent via post to each named defendant a letter containing the details of this

hearing and stating that the claimant would provide upon request further evidence or other documents filed in these proceedings. That letter was accompanied by the N244 application notice for these applications and the draft Interim JSO Injunction Order including annexes. These documents were also all sent to JSO via email.

7. The claimant is represented before me, as it was before Freedman J, by Mr Andrew Fraser-Urquhart KC and Mr Charles Forrest. I am grateful to them for their assistance. As I have said, Mr Brady has attended the hearing today and I invited him to make submissions. It became clear that the main reason for his attendance, to his credit, is that he did not want the court to think that he was showing disrespect to the court by his non-attendance. He also explained that he had been arrested for actions which he says were outside the prohibited area. He says that he was told yesterday that the police will not take action against him in criminal proceedings. He is concerned that the civil proceedings will continue. He also gave me some explanation of the motivation behind the protests. As for those matters, I must stress that I am not dealing today with the question whether Mr Brady should be personally liable, or whether there should be a final remedy against him. That is a matter for another time and does not affect the question whether there should be a continuation of the injunction. As for the reasons for the protest, that is not a matter upon which the court should comment.

8. I have been provided with a witness statement of Mr Abbey Ameen, the defendant's solicitor, and with a number of other documents. I should add that one key document was not filed with the court. This was the written judgment of Freedman J, which is reported at [2022] EWHC 3102 (KB), in which he considered and dealt with most of the same issues that I am required to deal with, on much of the same evidence. I did not understand why this was not drawn to my attention specifically and filed with the court well in advance of this hearing. However, Mr Fraser-Urquhart KC provided an explanation, which was that the claimant's legal team was unaware that a written copy of the judgment had been published. Fortunately, I located the judgment of my own motion and read it at an early stage of my preparation for this hearing.

9. The factual allegations on the basis of which the injunction is sought, as they stood at 31 October 2022, are very fully set out by Freedman J in his judgment dated 31 October 2022. I will not repeat the summary of the facts which Freedman J has already given in that judgment beyond noting that Freedman J said this following:

    i) JSO is a group which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. It lends its name to a wider coalition - the JSO coalition - whose demands are (i) no new oil, (ii) tax big polluters and billionaires, (iii) energy for all, (iv) insulate our homes and (v) cheap public transport. J SO have stated that unless the government agrees to do what it requires, it will be forced to intervene and will take direct action, which it has now sought to do on a large number of occasions.

    ii) There is an intersection between the groups Insulate Britain, JSO and Extinction Rebellion. Since September 2021, the courts have granted a number of other injunctions, similar in form to the injunction granted by Freedman J in these proceedings, against members and supporters of those organisations. These were obtained at the behest of other bodies, including National Highways Limited and HS2 Ltd. Many of the same named defendants appear in a number

of the cases. In October and November 2021, the claimant was granted two urgent without notice interim injunctions against certain named defendants and persons unknown in connection with Insulate Britain protests which involved Insulate Britain protesters sitting down in and blocking GLA Roads. There is a large overlap between the defendants named in the TFL Insulate Britain injunctions and the defendants in this case;

iii) JSO protests have, until recently, largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. The intention is thereby to prevent traffic from proceeding along the highway or to disrupt traffic. The effect has been to cause traffic jams and significant tailing back of traffic.

iv) It is said on behalf of the claimant that JSO's actions have been deliberately to block the highway and cause disturbance, rather than that being an incidental result of their protesting. It is also claimed that the protests have been disruptive and are capable of giving rise to putting the lives of those protesting and people driving on the roads at risk, in particular on the movement of emergency service vehicles. There is also the risk that other motorists and users of the highway, antagonised by the methods of JSO, will engage in violence in the context of their ordinary lives being disrupted. It is submitted that the protests have also caused economic harm, serious nuisance and a great deal of cost to the police and other public bodies, including local authorities, National Highways and the CPS.

v) As of 26 October 2022, 1,900 arrests had been made of JSO protesters since 1 April 2022. 585 of those arrests were made between 1 and 26 October 2022.

vi) Protesters have breached interim injunctions on multiple occasions and there have been committal proceedings.

vii) On 4 May, 9 May and 12 May 2022, JSO declared both Birmingham Crown Court and the prison at which its protesters have been held to be sites of civil resistance. Various instances are referred to of protests both around the court and in prisons.

viii) There were protests daily by JSO between 1 October and 31 October 2022., During that period, there were, on a daily basis, large scale protests at key areas of largely the central London road system; and

ix) On many occasions, JSO have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London continued, even after interim injunctions were made and served.

10. All of the same points were made in the evidence before me, contained in Mr Ameen's seventh statement. Indeed, this was an updated version of the statement that was before Freedman J. Mr Ameen's statement also provided evidence, in an appendix, about the strategic importance of the JSO roads, explaining both the damage which has been caused and/or might further be caused by protesters blocking them and therefore also

their attraction to protesters who have sought or who might further seek to cause maximum disruption through their protests in pursuit of their demands.

11. I will now summarise events and developments since Freedman J handed down his judgment. The information upon which this summary is based comes from the seventh witness statement of the claimant's solicitor, Mr Abbey Ameen.

12. The claimant accepts that JSO activity involving blocking roads in London has slowed down somewhat since its peak in October 2022. The claimant believes that the injunction granted by Freedman J and other similar such interim injunctions have had the effect of pausing and/or reducing such protests. The claimant's evidence is also that a factor which temporarily pauses or reduces the intensity of such protests is the cold weather from around mid-December to around the end of March. Experience has shown that the absence of, or reduction in, protests during this period should not be interpreted as a sign that the protesters have stopped for good. Furthermore, the claimant says that the public statements made on behalf of JSO make clear that JSO has no intention of bringing its campaign of protests to an end. At paragraph 50 of his witness statement, Mr Ameen referred to 12 specific occasions, in which JSO (now also the JSO Coalition) and/or its individual protesters have said that they will not cease their deliberatively disruptive protests until their demands are met. For example, on 16 October 2022, in a response directed to the Home Secretary, JSO stated "We will not be intimidated by changes to the law, we will not be stopped by injunctions sought to silence nonviolent people. These are irrelevant when set against mass starvation, slaughter, the loss of our rights, freedoms and communities." On 1 November 2022, JSO stated that it would temporarily pause its disruptive protests to give the government time to reflect on JSO demands. But JSO said that if it did not receive a response by the end of 4 November indicating compliance with its demands then it would escalate its legal disruption against what it called a treasonous government. In late December 2022, JSO stated that it will continue its deliberately disruptive protests notwithstanding Extinction Rebellion saying on 31 December 2022 that it will be temporarily ceasing theirs.

13. There have, in fact, been a considerable number of JSO protests since Freedman J granted his injunction. There have been the following:

    i) On 7 November 2022, JSO started 4 days of protest on the M25. JSO protesters (including one named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries in at least 6 locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. JSO stated that it would continue to protest on the M25 and urged National Highways Limited to implement a 30mph speed limit on the whole M25.

    ii) On 8 November 2022, around 15 JSO protesters (including a named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

    iii) On 9 November 2022, around 10 JSO protesters, along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. The disruption resulted in two lorries colliding and a police officer, who had been

trying to set up a roadblock, being injured when he was thrown from his motorcycle.

iv) On 10 November 2022, JSO protesters (including a named defendant in the TfL JSO Claim), along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

v) On 11 November 2022, JSO said it was ceasing its protests on the M25 to give the government time to reflect on JSO's demands. In the 4 days of protest on the M25, 65 JSO protesters were arrested, 31 of whom were remanded in custody including 13 named defendants in the TfL JSO Claim. In combination with the 5 JSO protesters already in prison this meant on 11 November 2022 there were 36 JSO protesters in prison. Another 6 of the named defendants in the TFL JSO claim were also involved in the JSO M25 protests.

vi) On 14 November 2022, JSO protesters threw orange paint over the Silver Fin building which is the headquarters of Barclays Bank in Aberdeen. This was expressly in connection with a national day of action by Extinction Rebellion aimed at Barclays, with over 100 of the banks' offices and branches targeted with paint, posters, fake oil and crime scene tape.

vii) On 28 November 2022, JSO began a new tactic of slowly marching on roads in London in order to disrupt and delay traffic without necessarily bringing it to an absolute stop. 13 JSO protesters walked onto the road at Shepherds Bush Green and proceeded to march slowly in the road, causing traffic delays. Two were arrested for obstruction of the highway, albeit the Police have since stated on 6 December 2022 that this new tactic makes arrest and prosecution less likely because the protesters have been small in number and traffic is able to move around them.

viii) Also on 28 November 2022, similar JSO 'slow march' protest action was taken at Aldwych delaying motor traffic.

ix) On 30 November 2022, 10 JSO protesters walked onto Aldersgate Street in the City of London and proceeded to march slowly along London Wall, causing traffic delays. The march continued on major roads through the City, followed by at least 7 police vehicles and up to 20 police officers, but there were no arrests.

x) Also on 30 November 2022, similar JSO 'slow march' protest action was taken on Upper Street and Holloway Road near Highbury and Islington station, delaying motor traffic.

xi) On 3 December 2022, 4 JSO protesters occupied beds and sofas in Harrods Department Store.

xii) On 6 December 2022, around 15 JSO protesters walked onto the road at Bricklayers Arms roundabout in South London and proceeded to march slowly along the Old Kent Road, causing delays to motor traffic. The march continued

through South London, followed by at least 3 police vehicles and up to 10 police officers.

xiii) Also on 6 December 2022, similar JSO 'slow march' protest action took place at Bank junction in the City, delaying motor traffic.

xiv) On 8 December 2022, and including in response to the recent government decision to consent to a new coalmine at Whitehaven in Cumbria, around 15 JSO protesters walked onto Whitechapel Road, East London and proceeded to march slowly east and then west causing delays to traffic. The march continued on Commercial Road.

xv) On 12 December 2022, around 20 JSO protesters (including one of the named defendants in the TfL JSO Claim) walked onto the A24 near Clapham South and proceeded to march slowly Northwards, delaying traffic. They continued along Clapham High Street accompanied by around 7 police officers.

xvi) Also on 12 December 2022, similar JSO protest action was taken in Camden Town, delaying motor traffic.

xvii) On 14 December 2022, 17 JSO supporters (including one named defendant in the TfL JSO Claim) walked onto Green Lanes, Finsbury Park, and proceeded to march slowly northwards accompanied by around 7 police officers, delaying traffic. This protest reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 minutes.

xviii) Also on 14 December 2022, similar JSO protest action was taken in Camden Town.

xix) On 19 January 2023, JSO undertook a 'slow march' protest in Sheffield which delayed traffic an led the police to have to close a road.

xx) On 28 January 2023, JSO protesters (including one named defendant in the TfL JSO Claim) undertook a 'slow march' protest on a road(s) in Manchester causing traffic delays. JSO stated that further such protest action would take place across in the North in the coming months.

xxi) On 11 February 2023, JSO protesters undertook a 'slow march' protest in Islington starting outside Pentonville Prison, delaying motor traffic, and

xxii) On 18 February 2023, in total over 120 JSO protesters (including two named defendants in the TfL JSO Claim) undertook a 'slow march' protest in Liverpool, Norwich, and Brighton, delaying motor traffic and causing tailbacks through those city centres.

Expedited trial

14. It is convenient first to consider whether there should be an expedited trial, because that will affect the likely length of a further extension to the interim injunction.

15. The principles applicable to an application for expedition are set out in the claimant's skeleton argument. They were summarised by Lord Neuberger in **WL Gore and**

Associates GmbH v Geox SPA [2008] EWCA Civ 622. There are four factors to be considered:

i) Whether good reason for expedition has been shown;

ii) Whether expedition would be contrary to the good administration of justice. Good administration of justice involves both:

iii) Consideration of the interests of the various parties involved in the specific case and the efficient disposal of their various competing claims.

iv) Consideration of the interests of those parties not before the court; other litigants who would be prejudiced if the specific claim was given expedited treatment in preference to theirs. (**The Rangers Football Club PLC (In Administration) v Collyer Bristow LLP and others** [2012] EWHC 1427 (Ch));

v) Whether expedition would prejudice the other parties in the specific case; and

vi) Whether there were any special factors involved.

16. In my judgment, all of these factors point in favour of an expedited trial. It is in the public interest for a trial to take place, leading to determination as to whether a final injunction should be granted, as soon as possible, given the importance of this case to the claimant, to the general public and, indeed, to the defendants, who face the risk of committal for contempt if they breach the injunction. The defendants are not prejudiced, since they have not entered an appearance or, with one exception, taken part in the proceedings in any way.

17. The only countervailing factor is that which applies in any case in which expedition is ordered, namely that other cases will go further back in the queue, but I am satisfied that the importance of this case outweighs that factor. In any event, if a final disposition of this case takes place, it will, overall, free up court resources as there will no longer be any need for there to be regular applications to extend the interim injunction.

18. I am, therefore, prepared to order expedition, for a 2 day trial. It will be for the claimant to make arrangements to obtain a listing appointment. However, I have made enquiries myself with KB listing and I am told that a 2 day listing can be accommodated in May to July 2023. This means that, if I grant a further extension to the injunction, it is likely to last for between 2 and 4 months, approximately.

19. It is necessary for directions to be given for the trial. These can be more limited than normal, since the Defendants are not participating.

Should the interim injunction be extended?

20. There are a wide range of considerations that the court must take into account when deciding whether to extend the injunction. I will identify them in a moment. I have carefully considered and taken into account each one. However, there is no need to set out my reasoning on the issues in full detail in this judgment, because they have each been set out and considered in detail in the judgment of Mr Justice Freedman. I am in complete agreement with the reasoning and conclusions of Mr Justice Freedman in his judgment of 31 October 2022, to the clarity of which I pay tribute. This means that I

agree that, on the evidence before him on that date, Mr Justice Freedman was right to grant an extension to the injunction which was originally granted by Mrs Justice Yip, for the reasons that he gave. The relief sought by the claimant in the extension to the injunction is, apart from duration, materially identical to the relief obtained on the 31 October 2022. The real issue before me, therefore, is whether the evidence of events that have taken place since 31 October 2022 provides grounds for declining to extend the injunction on materially identical terms.

21. The answer is that there are no such grounds. The activities of JSO have continued, albeit with a change of tactics, and in my judgment the justification for interim injunctive relief to restrain unlawful activities on the JSO roads is as great as it has ever been.

22. It is true that the protests are less frequent than before the end of October 2022, but there has been no change to JSO's position that it will continue its protests indefinitely, and there have been a substantial number of protests on the roads in London since that time, including one in February 2023. The reduction in protest may be the result of a tactical decision, or it may be a result of the Winter weather, or it may be the result in part of some reduction in appetite because of the earlier injunctive relief, or a combination of all of these things, but in any event the evidence that protests will take place unless restrained by injunctive relief is as strong now as it was before Freedman J. The mere fact that some people have chosen to act in breach of the injunctions is not, of course, a reason for declining to grant a continuation (**South Buckingham DC v Porter** [2003] 2 AC 558; [2003] UKHL 26 at paragraph 32).

23. There has been additional evidence of harm, cost and disruption. Mr Ameen said the following in his witness statement:

> "As a result of a JSO protest on the M25 on 9 November 2022 two lorries collided and a police officer who had been trying to set up a roadblock was injured when he was thrown from his motorcycle. In early December 2022 a JSO protester stepped out on the road in front of a moving lorry which had to come to a sudden halt to avoid hitting him as he back-pedalled to avoid it . They have also caused a risk of violence between protesters and ordinary users of the highway, particularly in the removal of protesters from the highway and indeed force has been used to do this in both Insulate Britain and JSO protests. The force used between protesters and users of the highway seems to be particularly common in London, probably because other users of the highway are more willing to intervene on smaller London roads than strategic roads such as the M25.
>
> The protests have also caused considerable economic harm, serious nuisance, and a great cost to the police and to other public bodies such as NHL, TfL, local authorities, and the CPS. JSO protests have caused fuel shortages in petrol stations around the Midlands and south-east England and, as of 11 May 2022, had cost the police alone £5.9m in just a few months . On 5 February 2023 it was reported that, in just 9 weeks in the autumn of 2022, the JSO protests cost the Metropolitan Police alone £7.5m.

> The protests also cause significant but less measurable harm, such as members of the public missing or being significantly delayed for weddings, funerals, flights for holidays or work, important business meetings, important medical appointments etc. A man missed his father's funeral due to the JSO protests in November 2022 and, as I have said, a JSO protest on 14 December 2022 reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 mins."

24. Similarly, there have been no new developments that alter the position in relation to the other considerations that the Court must take into account from that which obtained before Freedman J. There are only two other changes of significance.

25. The first is that the tactics appear to have changed, in that protesters are generally taking part in slow marches, rather than sitting down to block the road, as before. Mr Fraser-Urquhart KC has made clear that his client does not intend that the order covers this type of activity, though he leaves open the possibility that an application might be made in the future. The fact that the tactics of JSO have changed for a while, however, does not mean that the risk of a return to the type of action which previously took place, and which was the subject of Freedman J's injunction, has evaporated. However, I have proposed that a form of words be added to the order, making it clear that "For the avoidance of doubt this wording [the wording in paragraph 5 of the injunction] does not apply to the practice of slow marching on the road.". I should add that this means that I do not need to consider whether the recent tactic of slow marching changes the outcome of the balancing exercise which the court must undertake to determine whether the extension of the injunction would infringe the defendants' rights under Articles 10 and 11 of the European Convention on Human Rights. I make clear that I make no observation, one way or another, on this issue.

26. The other change is the obvious one that the duration of the interim injunctive relief will be extended. However, this is only likely to be for 2-4 months, before the trial of the action, and this is not, in my view, a reason to refrain from granting injunctive relief.

27. For the sake of good order, I list the considerations that I have taken into account, though as I have said, I will not set out my reasoning in full detail, as, in relation to each consideration it is exactly the same as the reasoning that was set out by Mr Justice Freedman in his judgment.

28. The considerations are:

    i) Whether the named Defendants have been properly identified, on a proper evidential basis. I am satisfied that they have been, for the reasons given by Freedman J, and in light of the evidence that I have seen;

    ii) Applying the well-known test in **American Cyanamid v Ethicon** [1975] AC 396, whether there is a serious issue to be tried. For the reasons given by Freedman J, which echo the reasoning of Bennathan J in **National Highways Ltd v Persons Unknown and Ors** [2022] EWHC 1105 (QB), at paragraph 37, I am satisfied that there is. There is a serious issue to be tried as to whether the defendants are committing trespass, and private and public nuisance on the roads;

iii) Whether damages are an adequate remedy. They are plainly not. I agree with what was said in this regard in the claimants' skeleton argument, namely that damages would not prevent any further protests because the claimant cannot claim damages for others' loss, and that loss would in any case be impossible to quantify, and in any case the Defendants would not have enough money to pay it. The protests have had a very wide-ranging impact on London given the central role which GLA Roads have for the city. Given London's status as the national centre for commerce/business, politics/government, law, culture and creativity etc., they have also indirectly had an impact on the rest of the country. Impact assessments also cannot measure impacts which are of fundamental importance to those making their journey, e.g. attending hospital appointments, funerals, weddings, important business meetings etc. The claimant has offered a cross-undertaking as to damages, in the highly unlikely event that it might be necessary to rely upon it;

iv) Whether injunctive relief should be refused because this is in the form of a quia timet injunction, or because an injunction would infringe the rights of the defendants under Article 10 and Article 11 of the European Convention on Human Rights. I have taken into account that this is a quia timet injunction. For the reasons given by Freedman J, I do not think that this is a reason to refrain from granting relief. I have conducted the balancing exercise required by the impact of the injunctive relief upon the defendants' rights under Article 10 and Article 11 of the European Convention on Human Rights. In this regard, I have taken account of the guidance of the Supreme Court in **DPP v Ziegler** [2022] AC 408 and the observations made by Lord Neuberger in **Samede** [2012] PTSR 1624. In my judgment, the outcome of the balancing exercise in relation to the defendants' art 10 and 11 Rights remains the same as it was when Freedman J considered the matter, namely that it is not a good ground for declining to grant injunctive relief. Undertaking the same balancing exercise as was undertaken by Freedman J at paragraphs 41-61 of his judgment, I come to the same conclusion as he did. Balancing the relevant considerations, I have come to the view, as he did, that the injunction strikes a fair balance between the rights of individual protestors and the general interest of the community, including the rights of others.

v) Whether the balance of convenience is in favour of continuing the relief. I agree with Freedman J that there is a strong likelihood that the defendants will imminently act to infringe the claimant's rights and that they will cause serious disruption to the claimant and the public. The injunctions are limited to key roads and road junctions. On the evidence before me, the harm would be (and is intended to be) grave and irreparable as well as very widespread. The protesters either give no warning of their protests, or rarely give sufficient details about their nature/location for the claimant to react effectively. Protests also frequently change and move on the day itself, partly in response to policing and other crowd management;

vi) Finally, the effect of section 12 of the Human Rights Act 1998. I agree with what was said by Freedman J on this matter.

29. The order that is sought applies to persons unknown in addition to the named defendants. The claimant says that this is necessary because it is not considered that

the list of named defendants represents the entirety of those engaged in the JSO Protests, and so it remains necessary to identify the category of persons unknown as additional defendants. Freedman J considered whether it was appropriate to include persons unknown amongst the category of defendants at paragraphs 83-93 of his judgment, and addressed the test set out by the Court of Appeal in **Canada Goose v Persons Unknown** [2020] 1 WLR 2802; [2020] EWCA Civ 303. I agree entirely with Freedman J's reasoning and conclusion and so I agree that it is appropriate for the relief to extend to persons unknown. No good purpose would be served by me simply repeating in this judgment what Freedman J said in this part of his judgment, and so I will not do so.

30. For these reasons, I will extend the injunctive relief until trial or further order.

Alternative service

31. I am satisfied that the claimant has made out grounds for the continuation of alternative service under CPR r6.15 and r6.27 of all documents in this Claim, including the sealed interim injunction order as extended, thereby also dispensing with personal service for the purposes of CPR r81.4(2)(c)-(d). I will therefore permit alternative service in the terms of the draft TfL Interim JSO Injunction Order.

32. The reasons for alternative service are set out in paragraph 19 of Mr Ameen's witness statement. Similar orders have been made in other cases of a like nature. Alternative service is necessary for the relief to be effective. Moreover, as Mr Ameen points out, the Defendants already have a great deal of constructive knowledge that the TfL Interim JSO Injunction may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Limited, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc. shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests on JSO roads in London is unaware that injunctive relief has been granted by the courts. An order for alternative service has already been made in identical terms in this litigation, by Freedman J. For these reasons, I do not consider that it is necessary to adopt the step adopted by Bennathan J in the **NHL v Persons Unknown** case of directing that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the relevant organisation's website did not constitute service. However, Mr Fraser-Urquhart KC has said that in practice the claimant adopts and will continue the practice of not commencing committal proceedings against a person unknown unless that person has previously been arrested and has been served with the order.

Third party disclosure

33. The Claimant seeks, in the terms of the draft TfL Interim JSO Injunction Order, continuation of the provision for third party disclosure of information from the Metropolitan Police under CPR r31.17. That information is a) the names and addresses of those who have been arrested in the course of, or as a result of, any JSO protests on the JSO Roads; and b) evidence relating to any potential breach of the TfL Interim JSO Injunction.

34. The Metropolitan Police does not object to such an order, though it requires an order from the court before it will give such disclosure. An order to this effect was granted by Freedman J in the 31 October 2022 order. Similar orders have frequently been made in other cases such as this.

35. Once again, I agree with Freedman J's reasoning on this issue, at paragraphs 94-96 of his judgment, which I will not repeat. The conditions for the making of an order under CPR 31.17 have been met. The relevant circumstances have not changed since Freedman J made his ruling. For the reasons given in those paragraphs of his judgment, I grant this order.

The application for an Order under CPR r31.22

36. This was not a matter that was dealt with at the hearing before Freedman J, though the point was raised by Freedman J.

37. CPR r31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."

38. The law relating to this is helpfully summarised in the claimant's skeleton argument.

39. This rule applies to protect not just documents themselves but also their contents i.e. the information derived from them (**IG Index Plc v Cloete** [2013] EWHC 3789 (QB) at §31).

40. The Court's power under this rule is a general discretion to be exercised in the interests of justice and having regard to all the circumstances in the case. Good reason has to be shown (but this does not mean that the grant of permission is rare or exceptional if a proper purpose is shown) and the Court has to be satisfied there is no injustice to the party compelled to give disclosure (**Gilani v Saddiq** [2018] EWHC 3084 (Ch) at §21).

41. Documents read by a judge out of court before the hearing on which the judge based their decision and to which they made compendious reference in their judgment were documents referred to at a hearing held in public for the purposes of CPR r31.22(1)(a) (**SmithKline Beecham Biologicals SA v Connaught Laboratories Inc** [2000] FSR 1), as was a document mentioned briefly in oral evidence and exhibited to a witness statement which was before the judge (**NAB v Serco Ltd** [2014] EWHC 1225 (QB) at §27).

42. A Court may grant prospective or retrospective permission and in the case of the latter an important consideration would be whether permission would have been prospectively granted (**The ECU Group Plc v HSBC Bank plc** [2018] EWHC 3045 (Comm))

43. The trigger for the application in the present case is that the claimant has three ongoing Claims: this claim involving JSO, and the two TfL Insulate Britain Claims.

44. Under third-party disclosure Orders made in all of those Claims, the Police have disclosed to the Claimant the names and addresses of protesters who have been arrested for protests on certain roads. This disclosure has been in the form of names and other details (e.g. address, location and date of protest) contained in an excel spreadsheet, or that type of information sent in the body of an email which has then been copied and pasted into such a spreadsheet by the Claimant's lawyers. The disclosure also consists of Body Worn Video footage and arrest notes relating to potential breaches of the TfL Interim JSO Injunction and TfL Interim Insulate Britain Injunctions. I have seen these spreadsheets.

45. Against that background, the Claimant seeks an Order under CPR 31.22(1)(b) for documents, or at least information contained within them, disclosed in the Insulate Britain Claims to be able to be used in the JSO Claim, and vice versa.

46. Mr Fraser-Urquhart KC said that, arguably, such an Order is unnecessary as the material has been seen by the judge outside the hearing and referred to during the hearing. Nevertheless, the Claimant seeks permission from the Court to secure the basis for using such documents/information in all its Claims against these protesters. He said that the reason why permission should be granted is so that the Court can see all the protest activity undertaken by each named defendant, whether for JSO or Insulate Britain. This will help the court to determine whether a final injunction should be granted and against whom. It is also appropriate given the lack of distinction between the two groups: they are in coalition with each other including having joint aims, their protest methods such as sitting down in the road are the same, and there is a large overlap in who protests on each of their behalf.

47. 48. Mr Fraser-Urquhart KC further submitted that granting permission would not cause injustice to the Metropolitan Police who do not object to the proposed use of the disclosed material. It would not result in more of each named defendant's personal data being published and in any case each named defendant's address is redacted in any published document.

48. I agree that, in the interests of justice and having regard to all the circumstances in the case, this order should be made, for the reasons given by Mr Fraser-Urquhart KC.

Conclusion

49. For these relatively brief reasons, I order expedition of the trial of this action, grant the extension of the interim injunction until trial or further order, in the terms sought, and make the other orders sought by the claimant.

Neutral Citation Number: **[2023] EWHC 3000 (KB)**

Case No: KB-2022-004333

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2023

Before :

MR JUSTICE SOOLE

- -

Between :

NATIONAL HIGHWAYS LIMITED **Claimant**

- and -

CHARLOTTE KIRIN (D14)
DANIEL JOHNSON (D19)
GAIE DELAP (D28)
JOSEPH LINHART (D37)
LUKE ELSON (D42)
MAIR BAIN (D43)
PAUL BLEACH (D50)
PAUL SOUSEK (D51)
PAUL BELL (D52)
ROSEMARY JACKSON (D57)
THERESA HIGGINSON (D62)
THERESA NORTON (D63) **Defendants**

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- -

Michael Fry and Michael Feeney (instructed by **DLA Piper UK LLP**) for the Claimant
Owen Greenhall (instructed by **Hodge Jones & Allen**) for all Defendants (on the issue of knowledge); for Defendants 14, 28, 37, 42, 50, 51, 57, 62 (on sanction)
Nadesh Karu (instructed by **Hodge Jones & Allen**) for Defendants 19, 43, 52 (on sanction)
Theresa Norton in person (on sanction)

Hearing dates: 23-25, 27, 30 October 2023

- -

Approved Judgment

AUTH-184

Mr Justice Soole :

1. These are applications by the Claimant (NHL) to commit each of these 12 Defendants for contempt of court arising from their alleged breach of a precautionary injunction granted by Chamberlain J on 5 November 2022 (the Chamberlain Order) against Persons Unknown associated with the Just Stop Oil (JSO) protest group against trespassing on the structures (and in particular the gantries) of the M25.

2. On various occasions over 4 days commencing Monday 7 November 2022 protesters (including these Defendants) associated with JSO climbed and in some cases affixed themselves to the gantries with consequent massive disruption of the motorway. NHL is the highways authority and owner of the Strategic Road Network (SRN) which includes the M25 and its structures.

3. In apprehension of such protest activity, NHL applied to the High Court for an urgent interim precautionary injunction against Defendants described as 'Persons Unknown entering or remaining without the consent of the Claimant on, over, under or adjacent to a structure on the M25 motorway'.

4. By the Chamberlain Order NHL was granted an injunction until just before midnight on 10 December 2022 which restrained such Persons Unknown from (amongst other things) 'Entering or remaining upon or affixing themselves or any object to any Structure on the M25 motorway…'. 'Structures' were defined by the Order to include the gantries. Subsequent orders have continued that injunction. Before 5 November there had been previous injunction orders in respect of the M25 and many other motorways and roads in the SRN; and arising from activities of Insulate Britain, Extinction Rebellion and JSO. These included the Order of Bennathan J dated 9 May 2022 (the Bennathan Order) which was not confined to the 'structures' on the motorways; but required personal service and so was ineffective against 'newcomers'. That Order continued in force at the time of this protest action.

5. In the absence of any named defendants, the Chamberlain Order included permission for its service to be effected by methods alternative to personal service, namely by emailing a copy of the order to two JSO email addresses; providing a direct link to the Order on the National Highways Injunction website; advertising the existence of the Order on the National Highways Twitter feed with a link to that website; and notifying the Press Association of the existence of the Order. There is no dispute by any Defendant that NHL complied with that order for alternative service.

6. However 10 of the defendants contend that they had no knowledge of the injunction before they acted as they did; whether as a result of the permitted forms of alternative service or otherwise. This gives rise to an important question of law to which I will return.

7. Each of these Defendants was arrested by the police at the relevant scene; and was thereafter charged under s.78 Police, Crime, Sentencing and Courts Act 2022 with the statutory offence of public nuisance. In each case the trial of those alleged offences is listed for dates in 2024 and 2025.

8. NHL issued these contempt applications on 27 April 2023. By Order dated 31 July 2023 I refused the Defendants' application to stay these applications for contempt pending the conclusion of the criminal trials.

9. Until a late stage of the hearing the 12 defendants were all represented by solicitors Hodge Jones & Allen (HJA). Before the commencement of closing speeches the Defendant Theresa Norton withdrew her instructions from HJA and represented herself thereafter. For the purpose of the preliminary issue of law, all 12 defendants were represented by Counsel Mr Owen Greenhall. On the issue of sanction, Mr Nadesh Karu represented the Defendants Bain, Johnson and Bell; Mr Greenhall represented the other 8 defendants. Mr Michael Fry and Mr Michael Feeney appeared for NHL. I am grateful to all Counsel for the high quality of their submissions.

10. I return to the issue of knowledge on which the parties asked me to rule before any evidence was called. I considered that to be a sensible and appropriate course. At the close of argument I ruled against the Defendants. My reasons follow.

11. The issue raises two questions:

    (i) Knowledge: whether (as the Defendants contend) it is a necessary ingredient for a finding of breach of an injunction that the Defendant in question had actual knowledge of the existence of the Order and its material terms before acting as they did; or whether (as the Claimant contends) the absence of such prior knowledge is relevant only to the issue of sanction.

    (ii) Burden: in the latter event, whether (as the Defendants contend) the applicant bears the burden of proving knowledge to the criminal standard; or whether (as the Claimant contends) the Defendant in question has the burden of proving absence of knowledge to the civil standard.

12. Whilst other authorities have properly been cited and fall for consideration, the critical decisions are Cuciurean v. Secretary of State for Transport [2021] EWCA Civ 357 handed down on 16 March 2021; and London Borough of Barking and Dagenham v. Persons Unknown [2022] EWCA Civ 13 handed down on 13 January 2022. In Barking, an appeal was heard by the Supreme Court in February 2023 and judgment is pending.

13. Cuciurean was an appeal from a finding of contempt by a protester against the HS2 project. A helpful summary of the decision of the Court of Appeal is contained in the judgment of Nicklin J in MBR Acres Ltd v. McGivern [2022] EWHC 2072 (QB) at [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*.'*

14. Barking concerns the principle whereby a 'newcomer' may become a defendant party to an action against Persons Unknown (and bound by an injunction) as a result of their conduct after the grant of the injunction: following the decision in South Cambridgeshire District Council v. Gammell [2005] EWCA Civ 1429 (Gammell). As observed by Nicklin J in McGivern, various parts of the judgment of Sir Geoffrey Vos MR in Barking *'...suggested that the* Gammell *principle operated to make a*

newcomer a party to the proceedings only when s/he had knowingly *breached the injunction…'* [67]; then citing Barking at [30], [31], [37] and [38].

Knowledge

15. Mr Fry's submissions were founded on 5 propositions:

    (1) service is the critical action in respect of an injunction order;

    (2) if there is good service (personal or alternative) the starting point is that the defendant is taken to have the necessary knowledge of the injunction;

    (3) in this context knowledge, service and notice are sometimes used interchangeably by the courts in their decisions. However, where there has been specific reference to knowledge, that is usually where there has been service (personal or alternative) of the order;

    (4) there is no requirement in the CPR authorities to show both service and knowledge in civil proceedings in general and committal applications in particular. The committal jurisdiction is not a special case in that respect;

    (5) there is a single Court of Appeal authority directly on point: Cuciurean. That authority binds this court.

16. Mr Greenhall's central contentions are that the Court is not bound by the observations in Cuciurean; that 'notice' of an injunction means 'knowledge' thereof; and that this is demonstrated by a host of earlier authorities with which Barking is entirely consistent. Impressive as was Mr Greenhall's close analysis and presentation, I am unable to accept his arguments.

17. First, he submitted that the relevant statements of the law in Cucuirean do not form part of the ratio of that decision; in particular given the finding of the first instance judge (Marcus Smith J) that the evidence satisfied him to the criminal standard of proof that Mr Cuciurean had actual knowledge of the injunction and its material terms. I disagree. As the Court made clear, the grounds of appeal included the proposition that the applicant bore the burden of establishing that the alleged contemnor had actual knowledge of the injunction and its material terms: see at [7], [59] and [60]. The Court considered and rejected that contention. The binding authority of that conclusion is not diminished by the first instance finding of fact.

18. Next, he submits that the Court in Cuciurean had misunderstood the decision of the House of Lords in Attorney-General v. Times Newspapers [1992] 1 AC 191 at 217-218: the 'Spycatcher' case. The cited extract from the speech of Lord Oliver at 217-218 omitted a passage (217H-218B) which supported the requirement of knowledge. I disagree. That further passage (including *'…for there has to be shown not only knowledge of the order..'*) is a reference to the distinct ingredients for a finding of contempt by a third party 'stranger to the litigation': compare also the citation of principle for 'strict liability' contempt at p.205 C-F.

19. Next, that the statements in Cuciurean were at odds with earlier authorities which had not been cited to the Court of Appeal; and to which Nicklin J had subsequently referred to in MBR Acres Ltd. v. Maher [2022] EWHC 1123 (QB). These included Churchman v. Joint Shop Stewards Committee [1972] 1 WLR 1094; Hall & Co v Trigg [1897] 2 Ch 219; and R v. City of London Magistrates Court, ex parte Green [1997] 3 All ER 551; see also Varma v. Atkinson [2020] EWCA Civ 1602 where

Rose LJ (as she then was) referred to the many cases *'...which establish that once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order…'*: [54].

20. Mr Greenhall ultimately accepted that this Court is bound by the authorities (including Cuciurean) which identify the established ingredients of contempt liability for breach of a court order; namely that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof that the person (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see Cuadrilla Bowland v Persons Unknown [2020] EWCA Civ 9 at [25] and Cuciurean at [13]. However he submits that this leaves open the meaning of the word 'notice' in the first ingredient; and that notice in this context means actual knowledge. In the alternative he submits that the three ingredients are not exhaustive; noting that they are introduced in Cuadrilla by the words 'only if' not 'if and only if'; and thus allowing the additional ingredient of actual knowledge in accordance with the language of earlier authorities.

21. In my judgment these citations do not advance the Defendants' case for three interrelated reasons. First, because the authorities at times use language which does not distinguish the concepts of 'notice' and 'knowledge'. Secondly, because the established ingredients of contempt liability for breach of a court order uses the language of 'notice': see Cuciurean at [13], citing Cuadrilla at [25]; which in turn cited the summary by Proudman J in FW Farnsworth Ltd v Lacy [2013] EWHC 3487. Thirdly, because, as Cuciurean made clear, *'The authorities indicate that…in this context "notice" is equivalent to "service" and* vice versa*'*: and that *'there is no further requirement of mens rea, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt'* [58].

22. This clear distinction – in this context - between notice and knowledge is also seen in other recent decisions, e.g. in Varma where Rose LJ states *'Mr Varma's lack of knowledge is relevant to the sentence to be imposed but is not relevant to the finding of contempt.'*: [55].

23. In my judgment the decisions and statements in Cuciurean, Cuadrilla and Varma put beyond doubt the distinction between service/notice and knowledge. As Cuadrilla continued after recitation of the three ingredients: *'It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.'*: [25].

24. I add that the subsequent decision of the Court of Appeal in Business Mortgage Finance v. Hussain [2022] EWCA Civ 1264 contains nothing by way of disagreement with Cuciurean. Thus the Court noted the underlying requirement for due process before a person is committed to prison; which meant that there are certain procedural safeguards required for the benefit of the respondent; and that one of those safeguards is that the respondent should have proper notice of an injunction before he is at risk of being committed for breach: [78]. That same passage cites the historical survey of Nicklin J in Maher which in turn cites Cuciurean.

25. Mr Greenhall also referred to the judgment in NHL v. Lancaster where Cotter J included 'knew of the content of the order' as one of the necessary ingredients for a finding of contempt: [20]. However this was in a case where the defendant was taking no issue on breach; and the judge's decision was in respect of sanction alone. The

judgment notes that Ms Lancaster accepted that she was validly served with the order; had breached it; and was 'therefore in contempt of court': [2]. In my judgment this is simply another example of the word knowledge being used as a synonym for notice/service.

26. Turning to Barking, I do not accept that this decision is applicable to this issue. Unlike Cuciurean where the issue was squarely before the Court, Barking was not concerned with the ingredients of liability for contempt by breach of a court order. No doubt for that reason it was unnecessary for the parties to cite or for the Court to consider the decision in Cuciurean. For the same essential reason I must reject the submission that Barking is to be treated as an implied overturning of the decision or reasoning in Cuciurean. I add that Lewison LJ was a party to both decisions; and also to Varma.

27. Further, whilst I of course accept that a finding of contempt, even if no sanction is necessary, is a serious matter (Sheffield City Council v. Brooke [2019] QB 48 per Males J at [48]), this does not overcome the binding effect of the decision in Cuciurean.

28. Cuciurean and previous decisions then provide potential safeguards for the alleged contemnor. First, by an application to set aside the order for alternative service on the basis that it should not have been made, i.e. *'on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable'* : Cuciurean at [60]. If that application were successful, the applicant would have to prove that the alleged contemnor had actual knowledge of the injunction and its material terms in order to establish liability: compare the examples cited in Maher at [74] and [116] and further discussed in Hussain at [79]. Secondly, at the stage of sanction: *'...as this Court indicated in* Cuadrilla*, no penalty would be imposed.*: [62].

29. In the present case, the Defendants have made no application to set aside the order for alternative service. Mr Greenhall submitted that the Court would nonetheless have jurisdiction to set aside the order of its own motion if it thought that necessary and appropriate. On the evidence before me (and in the absence of any submissions to such effect) I see no basis for the Court to conclude that the Chamberlain Order in respect of alternative service was the result of misinformation or a wrong assessment of what constituted reasonable steps to bring the injunction to the attention of the identified class of Persons Unknown.

30. From all of this it follows that in each case the Claimant has established liability, i.e. proof to the criminal standard of the three ingredients identified in the standard formulation. The relevant safeguard – if needed in any individual case – lies in the decision on penalty.

Burden

31. If actual knowledge is a necessary ingredient of liability, it is of course common ground that the burden of proof falls on the applicant; and to the criminal standard. This will be the position in cases where the applicant is unable to prove service, whether personal or by an alternative means sanctioned by the Court: e.g. by presence in court when the order was made or by evidence of notice by other means: see Hussain at [79] and the authorities cited by Nicklin J in Maher at [74] and [116]. In each of the present cases there is no dispute that alternative service has been effected in accordance with the Chamberlain Order.

32. Mr Greenhall submits that there is the same burden and standard of proof if knowledge is relevant only to penalty. Thus if the applicant cannot establish to the criminal standard that the alleged contemnor had actual knowledge, the Court must impose no penalty for the breach. Mr Fry contends that once the applicant has established liability, the burden falls on the contemnor to establish absence of knowledge of the injunction and/or its material terms; but on the civil standard of proof.

33. Mr Greenhall submits that Cuciurean provides no support for that contention. I understood him to accept that the burden falls on the alleged contemnor in circumstances where s/he makes an application to set aside the order for alternative service: and consider that acceptance to be correct: see Cuciurean at [54]-[62].

34. However he submits that this does not apply where the safeguard is in respect of penalty. In that case, the position is akin to a Newton hearing in a criminal case where the defendant accepts guilt of the offence charged but disputes some of the facts of the prosecution case. In such cases the burden of proof remains on the prosecution. Alternatively the contemnor in question bears an initial evidential burden. Once that is satisfied, the burden shifts to the applicant. In the present cases the 10 Defendants who have given evidence disputing their knowledge of the injunction have thereby satisfied any evidential burden.

35. In support he again cited the decision in Sheffield City Council where Males J considered the burden of proof where an alleged contemnor was defending committal proceedings on the basis of s.3 Criminal Law Act 1967 and the use of reasonable force in defence of another. The judge contrasted a criminal case where it was for the prosecution to negate the defence of self-defence or defence of others and a civil case where the burden was on the defendant to establish the defence. He continued: *'In principle I am inclined to think that if the criminal test applies substantively, so too should the criminal burden of proof. However, as the question of burden of proof is not decisive in this case, I need not decide this.'*:[51].

36. In agreement with Mr Fry, I conclude that the burden is on the defendant to establish, on the civil standard, that s/he did not have knowledge of the existence of the order and/or of its material terms.

37. That conclusion is clearly supported by the decision in Cuciurean. In that case the complaint was that the trial judge had wrongly reversed the burden of proof on the issue of knowledge [7]; and the Court rejected that criticism: [54]-[62]. The Court was explicit that the burden was on the defendant in respect of an application to set aside service. It was implicit that the same should apply to the other safeguard – mitigation of penalty. I can see no good reason why the two safeguards with the same essential objective of defeating injustice to the defendant should have differing burdens of proof.

38. I am also not persuaded that the position is analogous to a Newton hearing nor that the observations in Sheffield City Council on the burden of proof provide any support. To impose the burden of establishing knowledge onto the applicant would be tantamount to holding that, notwithstanding proof of service (personal or alternative), the applicant also has to establish actual acknowledge; and that would be contrary to the decision in Cuciurean.

The evidence on knowledge

39. The evidence on behalf of the Claimant is contained in a number of affidavits which by consent were ordered to stand as evidence in chief. These comprised affidavits from Ms Laura Higson of the Claimant's solicitors; Mr Sean Martell of NHL; and 11 police officers. The Defendants did not require any of these witnesses to attend for cross-examination.

40. I start with the evidence of the Defendants (all save Bain and Norton) who say that they acted as they did in ignorance of the injunction; and who each gave evidence to the Court.

41. Whilst each case has to be considered individually, their evidence had broad common themes. This evidence showed their underlying passionate and conscientious concern and motivation arising from the issues of climate change and use of fossil fuels; that at some point they had engaged with JSO; that through this association they had discussed these issues and their response at meetings, by Zoom in particular, with others similarly concerned; that at some point they had heard of the plans for protest on the M25 gantries and had decided to volunteer; that having done so they had received an online legal briefing (in one case 2 briefings) and a separate training session on the use of the necessary equipment; that in due course they had been given the address of the safe house to which they were to go a day or so before their protest action on the gantry in question; that they had been told not to bring their own mobile phones in particular in order to avoid tracking of their location; that at the house they had been given a 'media phone' for the purpose of recording and in effect broadcasting their presence when on the gantry; and had been given some instruction in its use for that purpose.

42. In respect of the legal briefing they had been told of the potential criminal consequences of their intended actions, namely the potential commission of criminal offences and in particular the statutory offence of public nuisance. In that briefing they had not been told about civil injunctions generally or about the existence or risk of the grant of injunctions restraining such conduct or of the potential consequences of breach of such an injunction. In short the briefing was confined to the potential consequences under the criminal law. Further none was told of the Chamberlain Order following its grant on 5 November.

43. In respect of certain of the gantries, the Claimant's evidence was that warning notices of the fact and terms of an injunction – albeit of the Bennathan Order rather than the Chamberlain Order - were displayed at the site. Those Defendants who had attended the gantries in question said that they had not seen any such notice.

44. In a number of cases, the evidence from the police officers was that they had read out the fact and relevant terms of the injunction to Defendant protesters on the gantry. Those Defendants disputed hearing alternatively listening to these; and denied the acquisition of any knowledge about the injunction at this late stage.

45. Each Defendant stated that they had no intention of breaking Court orders in the future and apologised for being in even purely technical breach of the Chamberlain Order; albeit one or two, e.g. Ms Higginson, observed (not unfairly, if their account was true) that they found it difficult to apologise for breach of an injunction of whose existence they had been unaware.

46. Given the common themes, it is unnecessary to recite that general evidence in every case. However by way of example I set out the evidence of Ms Gaie Delap (D28). She is a retired teacher and therapist aged 76; lives in Bristol; over the years has done voluntary work for Oxfam and other such organisations; currently with a refugee

organisation. She has a long history of environmental and peace campaigning primarily through the Quakers.

47. She has no criminal convictions, has never breached an injunction and has had no previous proceedings against her in respect of injunctions. She had no previous involvement with earlier M25 protests by Insulate Britain but had been involved with Extinction Rebellion. She had been involved with JSO for a year or so before this action: 'as a segue from Extinction Rebellion'. This involved meetings in particular through Zoom in an affinity group with people who had read the latest scientific reports and so forth. She had gone on marches and distributed leaflets. She became involved in this action a few weeks before. On a JSO Zoom discussion she heard a call for about 70 people to climb; but with no further details. She did not think she could do this at her age, but having thought about it decided to follow it up. She was then ascribed a mentor with a codename which she could not remember to whom she spoke at 2 or 3 Zoom meetings lasting about half an hour each. He ascertained her motives and physical status. Other activists were on these calls. The mentor explained the possible legal consequences of the actions but by reference only to criminal charges and their consequences. There was no mention of injunctions. She did not know about the Chamberlain Order or any other. Fairly shortly before the action she went to an in-person session of climbing training. This was very comprehensive.

48. Ms Delap took part in the action on 9 November 2022. For that purpose she went to the identified safe house on the afternoon/early evening of Monday 7 November. She made her way there from the house of family members in London where she had been staying; and in accordance with instructions left her mobile phone there before setting off. Its location was in a suburb of London; she knew it then but could not remember it now. She got there by overland train but could not remember which station. It might have been Basildon but she was picking a name out of a hat. She did not know who owned the house. She agreed that she would have been interested in how the protest had been going since they began on 7 November and that it was discussed. There was no "debrief" about the first 2 days, just general discussion.

49. At the safe house there was no access to social media. She did not think that there was a television or radio. She was not made aware at the house of anything about injunctions. On the night before the action, i.e. on 8 November, she was given the media phone and a short training. She was not as technically adept as she might wish. Its purpose was to record the event and to send it to the media team. She understood at the time but did not manage to achieve this when on the gantry.

50. On the Tuesday (8th), they got nice food and did grounding exercises to achieve a calm state of mind. There was a lot of sorting out of climbing equipment.

51. On the early morning of 9 November, she was driven to the allocated gantry, with a buddy to help. She got onto the gantry via a ladder. She did not see any warning notice. Two motorcycle police officers soon arrived. She could not hear what they were saying. Then one policeman came followed by another. One of them asked if she was on her own; she said yes; he expressed some surprise; she showed him that she was perfectly safe and no danger. She was arrested. Nothing was said to her about an injunction. She had no awareness of an injunction when on the gantry. She was subsequently charged with the offence of public nuisance and made subject to a doorstep curfew.

52. The police evidence shows that she had displayed a JSO banner; that at 9.02 she was arrested on suspicion of conspiracy to cause a public nuisance; and that she was co-operative in coming down. The evidence also states that a warning notice (in respect

of the Bennathan Order) had been affixed to this gantry at 7.40 a.m. i.e. before the Chamberlain Order had been made; but had at some point been ripped off; and exhibits a picture of the notice when affixed. Taken to this picture in cross-examination Ms Delap did not think it was the same gantry; but in any event confirmed that she had not seen any notice.

53. Mr Fry put to Ms Delap that it was 'not credible' that she had never heard injunctions being discussed; and in particular in the circumstances where her own action had not taken place until the third day, 9 November, by which time news of the events of the previous two days must have been received. She disagreed.

54. Distinctive features in the evidence of the other 9 Defendants can be traced through the written and oral submissions of Mr Fry in respect of those individuals. I take these in turn.

Rosemary Jackson

55. Age 25; she took part on 7 November. She stated that in the course of her legal briefing, someone did ask about the effect on a criminal sentence if they had previously breached an injunction. That was the only reference to injunctions and she had no knowledge of any injunction being in place. This was all in the context of people talking about their personal circumstances. It was not a discussion about injunctions. She had previously been found guilty of a breach of the peace in respect of a JSO action in Scotland. After the event, but before 7 November 2022, she had been aware of the protest of 17/18 October 2022 when two individuals had climbed the suspension cables of the Queen Elizabeth II Bridge and suspended themselves and a JSO banner high above the carriageway. She had not seen any JSO Instagram posts about injunctions.

56. She could not remember the location of the safe house or the name of the town. Luke Elson had been in that house; but she did not recognise any of the other Defendants as having been there. Taken to the exhibited gantry notice, she had not seen it at the time.

Luke Elson

57. A support worker, aged 30. His action was on 7 November, together with Ms Jackson. He had attended two legal briefings; and both concerning criminal matters only. In the past actions he had been aware of press releases by JSO but had not read them. He had assumed that there was a press release for this action but he had not seen it. He did not know that there was an injunction in force. He had not seen any warning notice on the gantry. In closing submissions reference was made to BBC, ITV and newspaper stories on 6 November 2022 which referred to the grant of the injunction but neither he nor any other witness was taken to these in cross-examination.

Charlotte Kirin

58. She was a social worker employed by Cambridgeshire County Council. Her action was on 8 November 2022. The police evidence is that it began at about 7 a.m. She had unfurled a JSO banner. PC Wilkinson climbed up at about 7.45 in order to speak with her. He conducted the 'five-step-appeal process' to try and encourage her to come down. As is agreed, that process relates to criminal proceedings alone. She refused to come down and was arrested and in due course brought down.

59. Her evidence was of travelling to London and staying at a Travelodge at King's Cross. The safe house was somewhere in Greater London, maybe to the east. She thought she travelled by train and bus but could not remember more. On Monday 7th there was no discussion, beyond speculation, as to how the protests had gone that day. She denied that one of the reasons for being at the safe house was to avoid being served with an injunction. She did not see a computer, radio or TV; and did not know if there was internet access. Taken to the image in the police evidence of an injunction warning notice attached to the gantry, she did not think it was the same gantry that she had climbed; but in any event she had not seen the notice.

Paul Bleach

60. A gardener and carer based in Portsmouth, aged 56. His action was on 8 November. He was taken to two different safe houses, moving to the second on the Monday morning. He understood that this move was because the person in charge had felt uncomfortable after a conversation with a neighbour. The Defendant Joseph Linhart had been in the first house. Having looked at a map the evening before he gave his evidence, he believed its location was within the area of Chigwell; and that he had taken a train to get there. The address was given to him on a piece of tissue which was then destroyed. The second house was a lot further south and someone did talk about Wembley. He gave rough descriptions of each property.

61. On the gantry, he was '100% not aware' of the injunction. There was communication from the police but he could not hear what was being said. His sole concern was for his safety; and not to make a mistake. He was taken to the s.9 statement of DC Bettis which stated that when on the gantry he had read him the notice of the injunction and that throughout he understood 'either verbally or with a nod'. DC Bettis' statement continues that 'a short time later' other officers arrived, climbed up to the gantry and facilitated his removal. Mr Bleach said that he obviously nodded but had no idea what he was nodding to. He did not hear what he said. His job was to resist as long as he could. He did not take it in. His priority was to be safe and to continue as long as he could.

Paul Bell

62. A PhD student at Exeter University, then aged 22, a Quaker. He had no previous convictions and had never before breached an injunction. His action was on 8 November. His evidence is that his first knowledge of the injunction was when it was read to him by a police officer on the gantry. He had first noticed police officers shouting something up to him; as he was moving along the gantry just above the hard shoulder. He did not know what they were saying. Then the removal team arrived and an officer climbed up to him; and prevented him from climbing further by grabbing his karabiner. He stayed where he was and glued himself to the gantry. At that point, and in an 'air of calm', he listened to what the police were saying. He recalled an officer both delivering the 'five-step-appeal' and speaking the words of the injunction. He had not heard the words of the injunction until after he had glued himself to the gantry. He thought the glue had potentially delayed his removal by 5-10 minutes. By contrast the evidence of PC Wells is that he read out the five-step-appeal process from below but received no response; then the injunction, again receiving no response. He later repeated these while the heights team was 'working to bring him down', again with no response. He asked one of the team to direct Bell's attention to him. He then told him that he was under arrest for causing a public nuisance; and at that point Bell glued himself to the gantry.

Daniel Johnson

63. A part-time carpenter aged 25; undertaking a Masters degree at UCL. No previous convictions nor previously breached an injunction. His action was on 9 November. His journey to his safe house started by train from Cambridge where he had been staying to Liverpool Street. Having now also looked at a map, his recollection was that he had taken a train to Sidcup and then to the address he had been given. Having found the address he had destroyed the piece of paper. He could not now recall the address. This was the biggest action he had ever taken part in. He had previously taken part in two road blocks and filmed his brother taking action at Madame Tussauds. When at the safe house he had heard one piece of information about people getting arrested; mostly gleaned from drivers getting back and reporting.

64. His first knowledge that there was an injunction was when on the gantry and PC Hennessey read it out. As that officer stated in his evidence, he had been wearing ear plugs. This was mostly to calm himself; but the officer's job was to persuade him to come down; so he was trying to be distracted. He agreed that this was at about 8.00 and that he was finally brought down at 10.56 when he was arrested.

Paul Sousek

65. A retired farmer, previously in market research, aged 72; living in Cornwall. He first heard of the action about 2 weeks beforehand and so missed out on some earlier meetings. He attended a climbing session but not a legal briefing. He had no knowledge of the existence of any injunction. However he stated that injunctions had been discussed at various points, but he had never been informed of an injunction that can be breached without being personally named. In cross-examination he continued that he knew of injunctions being used to stop activists since he joined Insulate Britain and Extinction Rebellion, e.g. on the HS2 protest against individual named defendants. He knew this from all types of websites and Facebook and that it was 'general knowledge in the circle of activists'. However he did not know that there could be injunctions against Persons Unknown and he was astonished to find this out when, about 4 weeks after his release from remand, he received the contempt papers from the Claimant's solicitors.

Joseph Linhart

66. Age 22, took part on 7 November 2022. He had no previous convictions nor previously breached an injunction. His journey to the safe house on 6 November had been from East Finchley where he had been staying with a friend to High Barnet. He had been told that someone would meet him there. Someone eventually arrived and drove him to the house. When on the gantry, he remembered being shouted at from afar by police but there was live traffic beneath. He did not listen to the whole of what the police were saying with a serious ear. He was aware that police officers were trying to talk to him. He was not listening because a fellow defendant had mentioned the '5-step-appeal process'. In his experience of prior action it was not something to listen to. His objective was to be on top of the gantry. He was removed from the gantry by the police and arrested. Throughout the whole period he did not know that he was in breach of an injunction. He first knew about an injunction when he received papers from the Claimant's solicitors. In cross-examination he was taken to the affidavit of PC Kelly Walker and its exhibited s.9 statement of PC Willis which records a period when traffic was passing beneath Linhart on the motorway but then a period when the motorway had been closed and traffic had come to a halt. At this time it was 'rather quiet'. He could hear Linhart talking into his phone so was confident he too could be heard. He started by speaking to him and asking him if he could hear and he acknowledged he could. Having read out the High Court document he asked if Linhart had heard him and "he acknowledged that he could hear then but stated that

he did not hear anything prior to that but confirmed he could hear me now". He had been speaking loudly and there was nothing in terms of surrounding noise to prevent Linhart hearing him. In cross-examination on this material, he said that he did not think he was listening to the police officer. He had no memory of a High Court injunction being read to him.

Theresa Higginson

67. Aged 25, she took part in the action on 9 November. She had only been involved with JSO so since October 2022 in London. She had some vague awareness that people had got involved with injunctions. She knew and was told nothing about any injunction in respect of this action; and did not believe that she could be in breach of an injunction if not named. She had been involved in a few campaigns but not discussed this in any detailed manner. It was something she had overheard.

68. She was at the safe house with Paul Bleach; and his evidence had jogged her memory of being taken to a park one evening for the training with the media phone. Likewise she now recalled the move to a second house because the neighbours were suspicious. At the gantry she started climbing but did not get far because within 2 minutes she heard a crash. Minutes later the police came and shouted at her to come down. She was arrested. Her total time on the gantry was a matter of minutes. She saw no warning notice.

Claimant's submissions on knowledge

69. Mr Fry submits that none of the Defendants has discharged the burden of proof in respect of knowledge of the injunction. It amounted to a bare denial of knowledge which was not sufficient.

70. In any event the evidence was not credible. It was not credible that a campaigning organisation like JSO had failed to tell the Defendants about injunctions; at the very least once the Chamberlain Order had been granted on 5 November 2022. The evidence showed that the JSO took tight control of its volunteers. By that date those in control were aware of the Order; and their press releases on 7, 8, 9 and 10 November included specific reference to injunctions: 'we will not be stopped by private injunctions sought to silence peaceful people'.

71. Further between September 2021 and May 2022 4 injunctions had been granted against protesters on the M25 against Persons Unknown associated with Insulate Britain and JSO: 21 September 2021 (Lavender J); 24 September 2021 (Cavanagh J); Bain and Norton being added as Defendants on 1 October 2021; 2 October 2021 (Holgate J) in respect of feeder roads to the M25 and Insulate Britain. Ms Bain had been served with the Lavender and Cavanagh Orders on 29 September 2021 and the Holgate Order on 6 October 2021. Ms Norton had been served with the first two Orders on 3 October and the Holgate order on 6 October 2021. Ms Norton had subsequently (2 February 2022) been found in breach of the Lavender Order and committed to prison for 28 days: NHL v Springorum & ors: [2022] EWHC 205 (QB); William Davis LJ and Johnson J.

72. On 9 May 2022 the 3 orders had been amalgamated into one order by Bennathan J (the Bennathan Order).

73. There had been 4 contempt applications in respect of the Lavender Order, between 22 October 2021 and 19 August 2022; the latter resulting in the order for committal of

Ms Lancaster for 42 days suspended for 2 years: NHL v Lancaster [2021] EWHC 3080 (QB): Cotter J, 7 October 2022.

74. On 2 November 2022 there had been a JSO video meeting for the gantry protest, the video and transcript of which had been before Chamberlain J on 5 November. Ms Lancaster has spoken at this; another speaker had referred to the duty of care and 'the fact that they don't want people to be taking part in actions unless they are aware of the legal consequences'. This document was not put to any of the Defendants in cross-examination.

75. As already noted, the JSO press releases on 7-10 November had stated that they would not be stopped by private injunctions.

76. Mr Sousek had been open and honest about the discussion of injunctions in the activist community. This went straight to the credibility of the other Defendants who were being evasive and not telling the truth.

77. Further support was provided by the high level of communication within JSO; which in turn reflected the high level of coordination needed to arrange the protests.

78. It was not credible that the legal briefing had been limited to the consequences under the criminal law; and thus no reference to civil injunctions. In the circumstances of a potential 2-year prison term and an unlimited fine for breaching an injunction it would be a significant failure and breach of trust for JSO not to have told volunteers of these potential consequences.

79. Nor had any Defendant expressed surprise anger or upset at the injunction which had been granted. The reason was because they had been previously warned of this possibility.

80. The general approach of the Defendants in their evidence was evasive. Notwithstanding the importance of the decision and the expression by many that it was the biggest action in which they had taken part, they struggled on basic details of where they went and what they saw or heard. In particular their difficulty in recalling the location and address of the safe house in question had not been credible.

81. Given that the purpose of the action was publicity for the cause, it was not credible that none of the Defendants had tried to find out how the action had gone via their media phones. Each knew that if they admitted that they had seen television in the house the injunction would have been mentioned.

82. Mr Fry then made a range of comments about the individual Defendants drawing on the points of evidence noted above; particularly pointing to the evidence of Sousek, Jackson and Higginson as demonstrating a wider knowledge of injunctions in the activist community.

83. In any event, Mr Fry submitted by reference to the police evidence of events on the gantry that those defendants who had been notified thereon of the fact and terms of the injunction had in each case been in breach by thereafter remaining on the gantry for the identified period of time.

84. In the course of argument I questioned Mr Fry as to whether his case really was, as advanced, simply that the defendants in each case had not satisfied the civil standard of proof. Whilst it had not been squarely put to any defendant that they had lied about their knowledge – questions having been largely expressed in terms of their evidence

not being credible – I enquired whether that was the reality of the Claimant's case. By contrast, it was not being suggested that e.g. they had perhaps forgotten about some aspect of their legal briefing or otherwise of their knowledge of the existence of the injunction. Mr Fry ultimately responded that his case was that the defendants had deliberately given false evidence on the point to the Court.

Defendants submissions

85. On behalf of his clients Mr Greenhall submitted that the crucial issue was of each Defendant's knowledge at the point of going onto the gantry. As viewed at that point, he submitted that the Claimant's case could only be considered on the basis that each Defendant in question had lied about actual knowledge of the existence of the injunction.

86. The knowledge of others 'higher up' in JSO could not be enough. The effect of the Claimant's case was that each of these Defendants 'must have known'. However the organisation wanted a large number of volunteers for this action. If JSO were to spell out the injunction risk they would not get the volunteers they wanted. Likewise JSO had reason not to disseminate the emails which it received from the Claimant on 5 November and onwards. Further the JSO press releases which included reference to injunctions began on 7 November, after the action had started. The Chamberlain Order had only been made on 5 November; and all the legal briefing had been before that date.

87. As to other sources of information, it was inherently unlikely that information on the Claimant's website would attract the attention of individual activists. The BBC and ITV website references were to local areas; and there was no evidence that any Defendant had been looking at the newspaper websites. It was unsurprising that there was no access to social media in the safe house. This was a well-planned operation with strict rules. The volunteers were told not to bring their mobile phones or to go on to social media and these Defendants stuck to those rules.

88. The 3 multi-defendant sets of proceedings had been in 2021 and early 2022, sometime before this action. The case of Ms Lancaster was determined in October 2022 but involved only one person (and Insulate Britain) and there was no evidence of any extensive publicity.

89. As to the warning notices on the gantry, these had been put up on 5 November prior to the Chamberlain Order. It was not clear that they had remained in situ. In the case of Ms Delap the Claimant accepted that it was not on the gantry when police attended. In any event it was quite understandable that the Defendants were focused on getting to the gantry in the morning dark. The notices provide no support for the case on knowledge.

90. As to knowledge of the safe houses, many of the Defendants came from a considerable distance; the address was typically on a piece of paper which was then destroyed; and they only visited the property once. In some cases they had triggered their memory by looking at maps. There was nothing suspicious or surprising in the limits of their recollection.

91. Standing back from all the evidence, each Defendant had given a very clear account on the issue of knowledge. They had not sought to shy away from their conduct. On the contrary they had given a lot of information about the planning and organisation of the protest, including their knowledge of the consequences of the criminal law. This was all in the context of people who were facing criminal proceedings and giving

evidence which could be used against them. Their evidence should be accepted. Mr Greenhall then made submissions on particular points of evidence concerning particular Defendants.

92. On behalf of Paul Bell and Daniel Johnson Mr Karu made a range of submissions to similar effect both general and as to the specific evidence in their cases.

Conclusion on knowledge

93. I deal first with the question of knowledge before each of these 10 Defendants got to their respective gantry. In my judgment Mr Fry was right to acknowledge that the challenge to their denial of knowledge of the injunction can only be made on the basis that, in each case, they have come into the witness box and lied about what they knew. This is not a case where there is any potential halfway alternative case to the effect that their denial is the product of misunderstanding of what they were told or forgetfulness. Whilst in principle a case of deliberate dishonesty should always be squarely put to any witness before the court can be invited to reach that conclusion, I approach the case on the basis that this is what I have to decide.

94. Having observed and listened to each of these Defendants, my conclusion is that each of them has told the Court the honest truth on the issue of whether before going onto the gantry they had actual knowledge of the injunction. I do not accept that they have lied to the court. Accordingly they have each discharged the burden of proof which is placed on them.

95. In reaching that conclusion I have of course have taken full account of all the points made by Mr Fry on behalf of the Claimant which are said to undermine any such conclusion.

96. As to the failure of JSO to include reference to the possibility of injunctions, it is indeed surprising that a so-called legal briefing did not include reference to existing injunctions (in this respect the Bennathan Order; albeit this did not bind newcomers), the prospect of injunctions and the penal consequences in the event of breach; but in my judgment it is not incredible. Having heard these witnesses I am satisfied that the legal briefing was lacking in that respect. It is unnecessary to surmise as to JSO's reasons for its decision to focus only on the potential consequences in criminal law.

97. In this respect I also consider that the veracity of the Defendants' account is strengthened by the fact of their acknowledgment that the briefing had extended to the consequences of the criminal law, including the statutory offence of public nuisance for which their trials are pending in the Crown Court.

98. I am unequally unpersuaded that their accounts are rendered incredible by the history of injunction and contempt applications relating to the M25 in 2021 and 2022; the JSO video meeting of 2 November 2022; or the fact of the injunction granted by Chamberlain J on 5 November. As to the latter, I accept their evidence (where challenged) that they had no knowledge of that Order from JSO or television, radio, social media or from others staying at their respective safe houses. I also accept their evidence as to the absence of TV and radio or of their use of social media whilst in those houses.

99. I am also unpersuaded that the evidence of Mr Sousek, Ms Jackson or Ms Higginson about general knowledge of injunctions in any way weakens the individual accounts (including of those three) as to their absence of knowledge of this injunction and its material terms.

100. I find it unsurprising that these Defendants' recollection of the location of the safe houses was limited; given in particular the distance from which many had come; the overall secrecy of the operation; and the focus of their attention on the action which they were to undertake.

101. In this and other respects, I also reject any implicit suggestion that these Defendants were acting with what is sometimes called 'Nelsonian blindness' as to the existence of an injunction. That form of blindness amounts to actual knowledge; and I am satisfied that these Defendants did not have such knowledge.

Warning notices

102. I equally accept the evidence of each of the relevant Defendants Delap, Jackson, Elson, Kirin and Higginson that they did not see the notices about the Bennathan Order which it seems had been put on some of the gantries early in the morning of 5 November. For these purposes I assume without deciding that the photographs are of the correct gantries. As to Ms Delap, it appears in any event that the notice had been pulled down before she arrived.

On the gantry

103. I accept that the language of the charges in the Statement of Case is wide and clear enough to embrace the allegation that certain of the Defendants in any event 'remained upon' their gantry after being informed of the injunction by police officers who came to the scene.

104. I therefore turn to the evidence of such notice in respect of some of the Defendants.

Paul Bleach

105. Although I accept the honesty of his evidence on this point, the unchallenged police evidence is that the injunction notice was read to him by DC Bettis at 8.14 a.m. on the gantry and that he indicated that he heard and understood. I accept that he was distracted by concern about his safety but I am not persuaded that the officer's action did not bring the injunction to his notice. Other officers arrived 'after a short time'; he evidently co-operated and was brought down at 10.38.

Paul Bell

106. Mr Bell does not dispute that he heard the police officer (PC Wells) read the injunction to him from below; and accordingly had knowledge at that point. However there is a dispute as to whether this was before or after he glued himself to the gantry. I again accept the honesty of Mr Bell's present account. However when set against the detailed and unchallenged evidence of PC Wells, I conclude that through the drama of these events Mr Bell has misremembered the sequence of events. The first reading of the injunction finished at 7.04 and – following the arrival of the heights team - he reached the ground at 9.15.

Daniel Johnson

107. Mr Johnson accepted knowledge of the injunction from when it was read to him at 8.00, albeit he was wearing ear plugs to distract himself. He was brought down at 10.56.

Joseph Linhart

108. Whilst I again accept the honesty of Mr Linhart's present account of what he recalls about events on the gantry, it has to be set against the unchallenged evidence of PC Willis. I am not persuaded that Mr Linhart did not hear the injunction notice being read to him. Whether or not he was paying attention, from that time he had actual knowledge of the injunction and its terms. The reading was completed at 9.42 and he was brought down at 10.47.

Sanction

109. I deal first with those defendants who have satisfied me that they at no time before they were brought down from the gantry had knowledge of the existence of the Chamberlain Order. These are: Gaia Delap; Rosemary Jackson; Luke Elson; Charlotte Kirin; Paul Sousek; and Theresa Higginson.

110. Mr Fry submitted that in circumstances where the Defendant has discharged the burden of establishing the absence of knowledge of the injunction and its material terms, the observations of the Court of Appeal in Cuciurean and Cuadrilla do not mandate the non-imposition of any penalty. There remains a discretion in the court to impose a penalty. In this respect a distinction could properly be drawn between a case where a person trespassed inadvertently, e.g. on some remote rural land, in breach of an injunction; and a case such as this where the trespass was deliberate.

111. I disagree on all counts. In my judgment the effect of the decisions in Cuciurean and Cuadrilla leave no such discretion; nor can I see how it could be just to impose any penalty on a person who has established that at the time of the conduct in question s/he had no knowledge of any injunction restraining that conduct. Further the effect of the suggested distinction between deliberate and inadvertent trespass would be to introduce a new criminal offence for the former.

112. Accordingly in each of these cases no penalty will be imposed for the purely technical breach of the injunction.

113. I turn to the principles which apply in circumstances where the breach has occurred with knowledge of the existence of the injunction and its material terms.

114. These are uncontroversial and can be taken from the summary by the Divisional Court in NHL v Heyatawin & ors [2021] EWHC 3078 (QB) at [48]-[53].

115. Thus: there is no tariff for sanctions for contempt of court, because every case depends on its own facts. The sanction has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed.

116. The key general principles are that (a) the court has a broad discretion when considering the nature and length of any penalty for civil contempt. It may impose an immediate or suspended custodial sentence, an unlimited fine, or an order for sequestration of assets; (b) the discretion should be exercised with a view to achieving the purpose of the contempt jurisdiction, namely punishment for breach; ensuring future compliance with the court's orders; and rehabilitation of the contemnor; (c) the first step in the analysis is to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order; (d) the court shall consider all the circumstances including but not limited to: whether there has been prejudice as a result of the contempt and whether that prejudice is capable of remedy; the extent to which the contemnor has acted under pressure; whether the breach of the order was deliberate or unintentional; the degree of culpability; whether the contemnor was placed in breach by reason of the conduct

of others; whether he appreciated the seriousness of the breach; whether the contemnor has cooperated, for example by providing information; whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea; whether a sincere apology has been given; the contemnor's previous good character and antecedents; and any other personal mitigation; (e) imprisonment is the most serious sanction and can only be imposed where the custody threshold is passed. It is likely to be appropriate where there has been serious contumacious flouting of an order of the court; (f) the maximum sentence is 2 years imprisonment. A person committed to prison for contempt is entitled to unconditional release after serving one-half of the term for which he was committed; (g) any term of imprisonment should be as short as possible but commensurate with the gravity of the events and the need to achieve the objectives of the court's jurisdiction; (h) a sentence of imprisonment may be suspended on any terms which seem appropriate to the court.

117. Further the conscientious motives of the protesters are relevant and there may be cases where the contemnor is a law-abiding citizen apart from their protest activities. In such cases a lesser sanction may be appropriate because the sanction can be seen as part of a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's activities are contrary to the protester's own moral convictions. This is one reason why an order for imprisonment is sometimes suspended.

118. In some contempt cases there may be scope for the court to temper the sanction imposed because there is a realistic prospect that this will deter further lawbreaking or, to put it another way, encourage contemnors to engage in the dialogue described above with a view to mending their ways or purging their contempt. However it is always necessary to consider whether there is such a prospect on the facts of the case. In some cases there will be. In some cases, not. Moreover it is important to add that there is no principle which justifies treating the conscientious motives of the protester as a licence to flout court orders with impunity.

119. In reaching my decision I also take account of the sentences imposed in similar protester cases: including Heyatawin and NHL v. Buse & ors [2021] EWHC 3404(QB): Dingemans LJ and Johnson J.

120. Mr Greenhall and Mr Karu submit that in the event of the Court concluding that a particular case meets the custody threshold, determination of the length of sentence should take account of the time served on remand or curfew in respect of the criminal charge of statutory public nuisance which they face. This was the course taken by Cotter J in NHL v Lancaster where he stated "'There is a danger that if a view were taken that it was no longer in the public interest to continue with the prosecution that the period on remand would not be something for which the defendant was given credit (she would be given automatic credit within any criminal sentence). Accordingly, I shall give her credit within this sentence.": [51]. Ms Lancaster had spent 9 days on remand which was equivalent to a sentence of 18 days. The judge gave credit to that extent. In the present cases Counsel point to the very much more substantial periods of remand and subsequently qualifying curfew which most of these Defendants have served.

121. I am not persuaded that this is the right course to take. The criminal cases and these applications are distinct proceedings; the prospect of the criminal proceedings not being continued is purely speculative; and the counter possibility is that the periods on remand/curfew will be credited twice.

122. With these principles in mind I turn first to the two Defendants who admit knowledge of the injunction at all material times of their protest on the gantry: Mair Bain and Theresa Norton.

123. Mair Bain accepts that she had the requisite knowledge through personal service of the Bennathan Order (which included the Structures of the M25) and otherwise. She is the only one of the Defendants whose action was on 10 November 2022. The affidavit of PC Glensman shows that at about 6.45 a.m. she was seen climbing the relevant gantry and appeared to be climbing to the top. The officer scaled a concrete wall and then a fence in order to access the bottom of the structure. He climbed from the concrete base platform and onto a large metal electric box. From this point he grabbed Ms Bain and prevented her climbing further. Whilst awaiting assistance from the heights team he arrested her for public nuisance. He asked her if she had glue on her and she told him it was in her pocket and handed it over. The 'heights team' brought her down at about 7.12. When cautioned, she said that she 'wouldn't have to do this if the government wasn't breaking climate laws'.

124. By e-mail from HJA dated 2 October 2023 the Claimant's solicitors were advised that she was not contesting the allegation of contempt.

125. Ms Bain did not give evidence from the witness box but provided two witness statements dated 25 October 2023 and 27 October 2023 each verified with a statement of truth. She is 36 and works as a self-employed science communicator and volunteers with environmental and conservation groups along with homelessness charities and refugee groups. She accepts that she was a named defendant to the injunction initially granted by Lavender J and was subsequently served with the Bennathan Order. She was the subject of an Order of Cotter J made on 5 May 2023; but in consequence of a written undertaking dated 9 May 2023 given and accepted by the Court was removed from that injunction by the same judge's order of 24 July 2023.

126. That undertaking promises to the court that for a period of 2 years she will not engage in conduct including "Blocking or endangering or preventing the free flow of traffic on the roads identified in [the Bennathan Order] for the purposes of protesting by any means including their presence on the roads, or affixing themselves to the roads or any object or person, abandoning any object, erecting any structure on the roads or otherwise causing, assisting, facilitating or encouraging any of those matters".

127. There is no suggestion that Ms Bain has not complied with that undertaking to the Court.

128. Ms Bain also exhibits her email to Cotter J dated 28 April 2023 in which she explains that her main reasons for not engaging in future protest activity "in case there are any doubts" are that "After 12 arrests for climate protests in the last 3 years (Oct 2019 to Nov 2022) and experiencing first-hand the changes in criminal law regarding protests I'm at a point where if I engage in any more civil disobedience, I will be likely imprisoned (either remanded for breaking court bail or receiving a lengthy custodial sentence) and will lose my job, possibly my home and further damage my health and relationships".

129. Her first statement concludes with an apology for breaching the Chamberlain Order and states that in line with the May 2023 undertaking she promises not to do this in the future. She has no previous convictions nor breach of a civil order.

130. Following her arrest on 10 November 2022 she was remanded in custody for 40 days and was then on qualifying curfew for 178 days thereafter. As a result of her remand

she lost much of her work. She also provides evidence of other personal circumstances including her mental health.

131. Theresa Norton is now aged 65. Her action took place on 7 November. The affidavit of PC Batchelor states that she was first seen on the top of the relevant gantry at 7.48 a.m. She was arrested at 8.50 but refused to leave the gantry. With the assistance of the removal team she was brought back to the ground at about 9.49.

132. By e-mail dated 2 October 2023 her then solicitors HJA advised the Claimant's solicitors that she was not contesting the allegation of contempt. In skeleton remarks prepared by Mr Karu dated 26 October 2023 before his instructions were withdrawn, he noted the acceptance of the contempt and the entitlement to the full reduction in sanction. Throughout her life she had acted for the benefit of others. She had been a carer for her mother who had died in August 2023.

133. By Order dated 2 February 2022 in NHL v. Springorum & ors the Divisional Court committed Ms Norton to prison for 28 days for contempt of court. This was for the breach of the Lavender Order of 21 September 2021 in respect of protest on the M25 carried out by members of Insulate Britain. In her case she had not entered onto the live motorway. The judgment records at [56] that Ms Norton apologised to the people who were inconvenienced and disrupted by her actions but stated that she would do it again. She would continue to fight for climate and social justice and was willing to serve a prison sentence in solidarity with those sentenced before her. In mitigation she was the primary carer for her 92-year-old mother and had other volunteering commitments. The Court took a starting point of 9 weeks, reduced to 6 weeks for the admissions; but reduced the term to 28 days in light of her caring responsibilities.

134. Ms Norton did not give evidence but addressed me from her place in court. She began with a statement of the reasons for her actions, stating that the only reason she was ever on the M25 was the climate emergency. She had taken action before. She stated that she was not aware of the gantry injunction, i.e. the Chamberlain Order, but accepted responsibility for her actions as she always did.

135. In the light of that statement of unawareness of the gantry injunction, I interpose that in the combined circumstances of valid alternative service, the HJA email of 2 October 2023 and the absence of any evidence from the witness box in discharge of the reverse burden of proof, I proceed on the basis that Ms Norton must be treated as having had actual knowledge of the Chamberlain Order. The same applies to Ms Bain.

136. At the end of her submissions I asked Ms Norton what her intentions were for the future. She told me that she had no intention of breaking any injunctions in the future. I then asked Counsel for any observations on this response. Mr Fry very properly responded that he accepted that this was the dialogue to which the authorities refer. That is my own conclusion.

137. I start with the sanctions in the cases of Mair Bain and Theresa Norton.

Ms Bain

138. There can be no doubt that her culpability and the harm were high. Her acts were deliberate and in defiance of the court. The overall aim was of course to draw attention to the climate change and fossil fuel issues which is their motivation; but the means to that end were to cause disruption on the motorway which would result in publicity for that campaign.

139. As the evidence shows the protest caused massive disruption to the M25 and to members of the public. This is fully detailed in the affidavit evidence of Mr Martell. Notwithstanding the 'blue light' policy of JSO and protesters in respect of emergency vehicles there was evident risk that emergency vehicles and critical workers might be held up. There will have been inevitable economic loss and disruption to members of the public and the police who had to devote resources in anticipating and removing the protesters. In addition there is the risk of members of the public responding by taking the law into their own hands. The public interest firmly requires the upholding of orders of the court.

140. The mitigating features include her conscientious motivation; her apology for her conduct; her undertaking to the Court in May 2023 and compliance therewith; her reiterated statement that she will not breach Court injunctions in the future; and her various personal circumstances. She is also entitled to full credit for her admissions.

141. I do not consider that a fine is an appropriate sanction; and am satisfied that the custody threshold is passed. However I conclude that it is right to suspend the order for committal.

142. As to the length of the custodial term, I consider that the starting point is 2 months, expressed in days as 60 days. Ms Bain is entitled to one-third credit for her admission of breach, which reduces the period to 40 days.

143. In the light of the mitigating features and the true engagement with the Court which this has demonstrated, I consider that suspension of the order is appropriate. I conclude that the committal should be suspended for a period of 2 years on terms of compliance with the same terms as the Chamberlain Order.

144. I turn to Theresa Norton. This is a much more difficult case to assess because of the aggravating feature of the previous finding of contempt in respect of a similar order concerning the M25 and against the background of her previous statement to the Divisional Court that she intended to continue with her protest regardless; and thus to defy the Court.

145. The critical mitigating feature is her statement in Court that she has no intention of breaching any injunction in the future; to which I will return.

146. The custody threshold is plainly satisfied. The question for me is whether the appropriate custodial term should be served immediately or whether it should be suspended. After very considerable thought I have concluded that it should be suspended.

147. In my judgment the starting point for the custodial term in her case must be higher than that of Mair Bain because of the previous finding of contempt. I conclude that the starting point is 4 months, expressed as 120 days. Ms Norton is again entitled to full credit for her admissions which reduces that to 80 days.

148. In the absence of the statement which Ms Norton made in answer to my question I would not have suspended the order for committal. With all weight to be given to the motives of a conscientious protester, in the absence of any indication of dialogue or of learning from her previous court proceedings, the Court would have been driven to conclude that there was unrepentant defiance of Court orders. However having listened to Ms Norton, I take her at her word when she states that she has no intention of breaching court injunctions in the future. This is the dialogue to which the authorities refer and justifies the course of suspension.

149. The committal period of 80 days will be suspended for 2 years on the same terms as the Chamberlain Order.

The Defendants who acquired knowledge on the gantry

150. I turn to the defendants who by admission or my finding obtained knowledge of the injunction as a result of the oral notice given to them by the police when they were on the gantry. These are Paul Bleach; Paul Bell; Daniel Johnson; and Joseph Linhart.

151. In each case I keep in mind my finding that they had no prior knowledge of the injunction until notified thereof by the police officer in question. It was thereupon requisite that each should cease to remain on the gantry and the police officer and public were put to further trouble by the delays before they were brought down. However their culpability was distinctly less than for those Defendants who went on their gantry with knowledge of the order.

152. In each case I also take note of their admissions of liability in the respective e-mails from HJA on their behalf. In the case of Johnson and Bell these were unqualified. In the case of Bleach and Linhart they were subject to the issue of knowledge. Given the dispute on knowledge before entry onto the gantry and the legal argument that was properly and reasonably pursued on their behalf, I consider that they should equally receive full credit for their admissions.

153. This again has not been an easy decision. However I have concluded that in each case it is sufficient for the Court to have concluded and recorded that the Defendant in question acted in knowing breach of the Order by remaining on the gantry for a period of time after receiving notice of the injunction. In my judgment it is not necessary to impose a penalty on this occasion.

Conclusions on sanction

154. In the case of Theresa Norton there is a committal order for the term of 80 days suspended for 2 years on terms of compliance with the current successor to the Chamberlain Order.

155. In the case of Mair Bain there is a committal order for the term of 40 days suspended for 2 years on the same terms.

156. In respect of each of the other 10 Defendants, no penalty is imposed.

Neutral Citation [2020] EWHC 2614 (Ch)

Case No PT-2020-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST

The Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 13 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

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

Claimants/Applicants

- and -

ELLIOTT CUCIUREAN

Defendant/Respondent

- -

- -

Mr Michael Fry (instructed by **DLA Piper UK LLP**) for the Applicants
Mr Adam Wagner (instructed by **Robert Lizar Solicitors**) for the Respondent

Hearing dates: 30 and 31 July, 17 September and 13 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The Order

1. By an order dated 17 March 2020, sealed on 23 March 2020, Andrews J made various orders consequential upon her decision in these proceedings dated 20 March 2020, published under Neutral Citation Number [2020] EWHC 671 (Ch) (respectively, the **Order** and the **Judgment**[1]).

2. The Order, obtained on the application of the above-named Claimants/Applicants (together either the **Claimants** or **HS2**), was directed at four (groups of) defendants (**Defendants**). The second (group of) Defendants, the **Second Defendants**, were defined and identified in the Order as follows:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

3. I shall refer to the land described in this definition of the Second Defendants as the **Crackley Land** or the **Land** and the plan identifying this land as **Plan B**. A copy of Plan B, which formed part of the Order and was appended to it, is appended to this Judgment as **Annex 2**. Thus, the Second Defendants are persons defined by reference to their entering upon or remaining on the Land without the Claimants' consent. It appears to be perfectly possible – in these circumstances – to become one of the Second Defendants simply by entering upon the Land absent consent.

4. The other (groups of) Defendants identified in the Order are not relevant to this Judgment, and I consider them no further.

5. The Order contained a penal notice (the **Penal Notice**), headed as such in bold capital letters, in the following terms:

> "**Penal Notice**
>
> If you the within named Defendants or any of you disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.
>
> **Important Notice to the Defendants**
>
> This Order prohibits you from doing the acts set out in this Order. You should read it very carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge this Order."

6. The Order contains a number of recitals, and then, provides:

---

[1] The terms and abbreviations used in this Judgment are listed in **Annex 1** hereto, together with the paragraph number in the judgment in which each term/abbreviation is first used.

(1) By paragraph 1, that the steps taken by the Claimants "to serve the Claim, the Application and the evidence in support on the Defendants shall amount to good and proper service of the proceedings on the Defendants and each of them. The proceedings shall be deemed served on 4 March 2020."

(2) By paragraphs 8, 9 and 10, service of the Order on (amongst others) the Second Defendants is provided for. These paragraphs provide:

> "8. Pursuant to CPR 6.27 and 81.8, service of this Order on the…Second Defendants shall be dealt with as follows:
>
> 8.1 The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around…the Crackley Land.
>
> 8.2 The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.
>
> 8.3. The Claimants shall email a copy of the Order to the email address helpstophs2@gmail.com.
>
> 8.4 The Claimants shall further advertise the existence of this Order in a prominent location on the websites: (i) https://hs2warwicks.commonplace.is/; and https:/www.gov.uk/government/organisations/high-speed-two-limited, together with a link to download an electronic copy of this Order.
>
> 9. The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the…Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.
>
> 10. The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2][2] remain in place and legible, and, if not, shall replace them as soon as practicable."

(3) By paragraph 3, the Second Defendants (amongst others) were obliged forthwith to give the Claimants vacant possession of all the Crackley Land. By paragraph 7.2, the court declared that "[t]he Claimants are entitled to possession of the Crackley Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

(4) By paragraph 4, from 4pm on 24 March 2020 – and subject to a "carve-out" in paragraph 5 of the Order considered below – the Second Defendants and each of them were forbidden from entering or remaining upon the Crackley Land.

---

[2] The Order refers to paragraphs 7.1 and 7.2, which is an obvious error. The correct references are, as is evident from the face of the Order, clearly the paragraphs I have identified.

(5) Paragraph 5 – the "carve-out" – provided that:

"Nothing in paragraph 4 of this Order:

5.1 Shall prevent any person from exercising their rights over any open public right of way over the Land. These public rights of way shall, for the purposes of this Order, include the "unofficial footpath" between two points of the public footbath "PROW130" in the location indicated on Plan C annexted to the Particulars of Claim and reproduced as an annexe to this Order;

5.2 Shall affect any private rights of access over the Land held by any neighbouring landowner."

(6) The injunction in paragraph 4 of the Order is explicitly an interim injunction, as is made clear by paragraph 6 of the Order, which provides:

"The order at paragraph 4 above shall:

6.1 remain in effect until trial or further order or, if earlier, a long-stop date of 17 December 2020."

(2) This Application

7. This is the application, dated 9 June 2020, of the Claimants to commit the Respondent, Mr Cuciurean, for various breaches of the Order (the **Application**). The Application is supported by a statement of case (the **Statement of Case**) and by an affidavit sworn by a Mr Gary Bovan (**Bovan 1**). The Statement of Case provides as follows:

"18. It is the [Claimants'] case that [Mr Cuciurean] has on at least 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the Order, by wilfully breaching paragraph 4.2 of the Order by entering on to and remaining on the Crackley Land.

19. The [Claimants] set out in the Schedule to this Statement of Case each of the 17 alleged acts of contempt. Plan E and the Incident Location Photo also identify the location of each act.

20. As set out by the [Claimants] in the **Proceedings**,[3] the protestors (such as [Mr Cuciurean]) are strongly against the HS2 Scheme and, as feared, have not been deterred from seeking to return and trespass on the Crackley Land simply because the Second Defendants were evicted from the Crackley Land and relocated to Camp 2.[4]

21. The conduct of [Mr Cuciurean] is very serious and significant and has resulted in:

[3] These were the proceedings commenced by the Claimants before Andrews J, which resulted in the Order.

[4] **Camp 1** was the protestors' original location, within the Crackley Land. Pursuant to the Order, and as is further described below, the protestors were removed from Camp 1 and relocated to **Camp 2**, which lies on the Southern border of the Crackley Land.

21.1 substantial costs being incurred by the [Claimants] in seeking to ensure compliance with the Order. The costs alone of [High Court Enforcement Group Limited, **HCE**][5] are in the hundreds of thousands of pounds.

21.2 delays to the HS2 Scheme in the region of approximately 6 months;

21.3 serious risks to the health and safety of the [Claimants'] staff and contractors, members of the public and the protestors themselves;

21.4 risks of damage to plant and machinery used by the [Claimants'] contractors to carry out Phase One works; and

21.5 the [Claimants] now incurring further legal fees in seeking to enforce the Order via this application.

22. There is a real risk that if [Mr Cuciurean] is not sanctioned for the breach of the Order that he (and other protestors) will continue to act in contempt of the authority of the court and continue to breach the Order. In the event of continuing delays to works at the Crackley Land the HS2 Scheme will not be prevented, however, the necessary costs to the taxpayer will be substantial and is estimated to be in the hundreds of millions of pounds."

8. Paragraph 18 of the Statement of Case refers to "at least" 17 alleged breaches of the Order said to amount to contempt of court. I am obviously only interested in, and will only take account of, the 17 incidents described in the schedule to the Statement of Case (the **Schedule**). It will be necessary to consider these 17 incidents specifically in due course. For the present, all that needs to be noted is that I shall, in this judgment, refer to them as **Incidents 1 to 17**.

9. Clearly, the background to the Order and to this Application is the **HS2 Scheme**, by which I mean the works for the high speed rail project commonly referred to as HS2. Phase One of the construction of the HS2 Scheme has been sanctioned by – amongst other legislation – the High Speed Rail (London – West Midlands) Act 2017.

10. As is common knowledge, the HS2 Scheme is a highly controversial one, the sanctioning of which has provoked significant public protest, which has resulted in (amongst other things) the Proceedings and the Order. I should make absolutely clear that these are background facts only, of substantial irrelevance to the matters arising out of the Application. More particularly:

(1) I am not concerned with the lawfulness or desirability of the HS2 Scheme. I proceed on the basis that, in a democratic society such as ours, people are in general entitled to protest, and to voice their protest, in relation to matters that move them. Whilst there are limits to the right to protest, those limits are not before me for any kind of determination.

(2) The Claimants – in paragraph 3 of the Statement of Case – quoted from [133] of *Packham v. Secretary of State for Transport*:[6]

[5] As explained in paragraph 9 of the Statement of Case

[6] [2020] EWHC 829 (Admin).

> "…the clearance works were long ago authorised by Parliament and there is a strong public interest in ensuring that, in a democracy, activities sanctioned by Parliament are not stopped by individuals merely because they do not personally agree with them."
>
> This statement was made in connection with an attempt to judicially review and injunct certain clearance works done – or about to be done – in furtherance of the HS2 Scheme. The point is of no relevance to this Application. This Application is concerned only with *(i)* whether the Order has been breached and *(ii)* whether the circumstances of those breaches – if they occurred – are such as to trigger the contempt jurisdiction. These are extremely important questions to do with the consequences of an alleged breach of a court order. Their resolution does not depend on the merits or otherwise of the HS2 Scheme or the extent of a person's right of protest to that Scheme. The rule of law is, in this case, narrowly and importantly engaged in the sense that there is, before me, the question of whether an order of the court – the Order – has been breached.

(3) Mr Wagner, on behalf of Mr Cuciurean, contended that I should tread with particular care, and apply the rules of contempt with particular rigour, because Mr Cuciurean was exercising his fundamental right of free speech. I reject that submission, which was considered and rejected by Andrews J:[7]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"
>
> The fact is that Andrews J declared that the Claimants had the right to possess the Crackley Land[8] and she made an order buttressing that right to possess in the form of an interim injunction forbidding the Second Defendants and each of them from entering or remaining upon the Crackley Land. It is the breach of that order that is before me: <u>why</u> the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction (which is not a matter on which I have been addressed). Thus, whilst I shall of course apply the rigour and care that I would apply in any application to commit, I see no cause for adopting a different or more rigorous standard in the present case.

11. This is, therefore, an application made under CPR 81.4 concerning the enforcement, against Mr Cuciurean, of the Order. No-one – in particular not Mr Cuciurean – sought to dispute the validity of the Order. However, for reasons that I describe more specifically below, Mr Cuciurean contended that the Application must be dismissed.

(3) The hearing of the Application

12. The hearing of the Application was listed for two days, on 30 and 31 July 2020. I received helpful written submissions from both the Claimants and Mr Cuciurean before the hearing, and at the hearing heard – over two very full days – the oral evidence adduced by the parties. This evidence comprised:

---

[7] Judgment at [35].

[8] Paragraph 7.2 of the Order.

(1) *The evidence of Mr Bovan on behalf of the Claimants.* Mr Bovan is a High Court Enforcement Officer, who was present on the Crackley Land to execute the writ of possession made pursuant to the Order (the **Writ**).[9] Mr Bovan's evidence was contained in two affidavits, Bovan 1 (sworn 9 June 2020) and **Bovan 2** (sworn 23 July 2020). Mr Bovan gave evidence, for about 3 hours, on 30 July 2020, when he was largely cross-examined (his affidavits being admitted as evidence in-chief). In response to a request from me for a diagrammatic representation of his understanding of the perimeter to the Crackley Land, Mr Bovan produced a plan, which he spoke to briefly at the conclusion of the evidence on 31 July 2020. On his recall, Mr Bovan explained the diagram he had produced (by himself) and was briefly cross-examined on it. At my invitiation, he formalised his evidence in a third affidavit (**Bovan 3**), sworn 14 August 2020.

I found Mr Bovan to be a stolid witness, clearly telling what he considered to be the truth, and doing his best to assist the court.

(2) *The evidence of Mr William Sah on behalf of the Claimants.* Mr Sah is a project engineer retained by the Claimants in connection with the HS2 Scheme. Mr Sah's evidence was contained in an affidavit sworn on 24 July 2020 (**Sah 1**). Mr Sah gave evidence – briefly, for about 30 minutes – on 30 July 2020. Mr Sah's evidence was unsatisfactory. In their written closing submissions, the Claimants suggested that Mr Sah "appeared to be over-awed by the occasion, and failed to come up to proof".[10] I hope and believe that the atmosphere in court was not so difficult for witnesses as this, and certainly all of the other witnesses appeared to give their evidence unimpaired by their surroundings. It appeared to me that Mr Sah simply did not recognise the affidavit he had sworn, and parts of it appeared to have been written for him. Thus, Mr Sah did not recognise – and certainly was unable to give evidence in relation to[11] – a plan exhibited to his statement[12] and a video similarly exhibited.[13] I do not propose to speculate on why Mr Sah was adduced as a witness, but clearly I can place no weight on his evidence.

(3) *The evidence of Mr Cuciurean.* As to this:

(a) Mr Cuciurean gave two witness statements to the court. His first was dated 15 July 2020 (**Cuciurean 1**) and his second bears the date 15 July 2020 (**Cuciurean 2**), but is almost certainly made later than this date.[14]

---

[9] As I have described, the Order gave possession of the Crackley Land to the Claimants: see paragraph 3 of the Order and paragraph 6(3) above.

[10] Claimants' written closing submissions at paragraph 34.

[11] Indeed, Mr Sah came close to disowning the evidence, on the basis it was nothing to do with him.

[12] This was the plan at page 4 of the exhibit to Sah 1. The plan – referred to at paragraph 14 of Sah 1 – was provided to Mr Sah by a Mr Maurice Stokes.

[13] See paragraph 9 of Sah 1. The video was again provided by Mr Stokes.

[14] A number of the witness statements given on behalf of Mr Cuciurean were unsigned at the time of the hearing, but all of the witnesses adopted their evidence, and nothing turns on this. Signed statements were subsequently provided by Mr Cuciurean's representatives. However, it does mean that the dates of the statements before me were almost certainly wrong, assuming those dates to refer to the date the statement was made. Nothing turns on this, but I note the formal position for completeness.

(b) Mr Cuciurean gave evidence on his own behalf on 31 July 2020. He was to have given evidence on the previous day, 30 July 2020. It was clear during the course of the afternoon of 30 July 2020 that it would not be possible to complete Mr Cuciurean's evidence on 30 July 2020, if it was commenced after that of Mr Sah which, as I say, was given on on 30 July 2020. Mr Wagner, counsel for Mr Cuciurean suggested that, rather than be in "purdah" overnight, it would be better for Mr Cuciurean to give evidence fresh at the beginning of the next day. That sensible suggestion was adopted by the court.

(c) Mr Cuciurean gave evidence for about three hours, most of this being cross-examination. Mr Cuciurean was a charming, funny but ultimately evasive witness. He was – and is – obviously very much committed to his opposition to the HS2 Scheme, and was willing to place himself (and others) in positions of some danger if that furthered his ends in resisting the HS2 Scheme. One example of this arises in relation to Incident 14. Incident 14 involved Mr Cuciurean climbing the extending arm or boom of a piece of machinery used in connection with the HS2 Scheme, locking himself on to the boom (using a thumb lock) approximately 20 metres above the ground, without (so far as I could see) any form of protective harness. Mr Cuciurean was removed from this position by four specialist climbing officers, using two cherry pickers. Mr Cuciurean was either unable or unwilling to disengage or release the thumb lock, which had to be cut off, resulting in injury to Mr Cuciurean.

(d) For the present, it does not matter whether this conduct amounted to a breach of the Order or constituted some other offence. The latter is a matter falling altogether outside the province of this judgment; the former is a matter that I shall come to. I refer to the incident simply as a rather graphic illustration of Mr Cuciurean's commitment. I consider that Mr Cuciurean would go to very considerable lengths in order to give his objections to the HS2 Scheme as much force as they possibly could have. If such steps involved inconveniencing those carrying forward the Scheme or slowed progress down, then I consider that Mr Cucuirean would regard this as a positive and not a negative.

(e) I consider that Mr Cuciurean regarded the Application in exactly the same light. Mr Cuciurean saw the expense and trouble incurred by the Claimants in seeking to make good their Application as a positive and not a negative, and it is my judgement (having watched Mr Cucuirean carefully in the witness box) that in furtherance of this objective he was prepared to be evasive, but not to outright lie to the court.

(f) In short, Mr Cucuirean was a committed opponent of the HS2 Scheme, and I must treat his evidence with considerable caution. However, I do not reject that evidence as that of a liar.

(g) Three of the Incidents (Incidents 14, 16 and 17) have exposed Mr Cuciurean to the potential for separate criminal proceedings.[15] Mr Cucuirean invoked his right against self-incrimination in relation to these incidents and declined to answer certain questions in relation to them.[16] I am satisfied that Mr Cuciurean properly invoked his privilege against self-incrimination, and draw no adverse inference from his failure to answer.

(4) *Other evidence in support of Mr Cuciurean.* The other witnesses who gave evidence on behalf of Mr Cuciurean were all fellow protestors[17] against the HS2 Scheme. The original intention was for all of these witnesses to give evidence in person – as Mr Bovan, Mr Sah and Mr Cuciurean had done[18] - but (late in the day) three witnesses sought permission to give evidence remotely by Skype. More specifically:

(a) Mr Alexander Corcos was interposed as a witness before Mr Cuciurean gave evidence, on 30 July 2020. Mr Corcos is an academic living close to the HS2 Scheme development at the Crackley Land. His exercise regime brought him close to the HS2 Scheme work, but he was not a resident of either of the two camps at which protesters to the HS2 Scheme resided, nor did he regard himself as a part of these protests. However, he was independently concerned about the HS2 Scheme, and filmed and recorded activities on and around the Crackley Land. He made one statement in these proceedings (**Corcos 1**) and gave evidence briefly (for about 30 minutes) on 30 July 2020. He was a clear and careful witness, and I found the video footage exhibited to Corcos 1 particularly helpful in understanding the physical dynamics of the Crackley Land.

The remaining witnesses were called after Mr Cuciurean gave evidence, on 31 July 2020.

(b) Ms Brenda Hillier is, in her own words, opposed to the HS2 Scheme, and gave evidence chiefly in relation to the footpaths ordinarily running across the Crackley Land. Her evidence was contained in one witness statement

---

[15] Early in the course of the Application, it was suggested by Mr Cucuirean's solicitors that the substantive determination of the Application should await the outcome of the criminal proceedings. That point was not pursued and the Application was heard, without objection, in the manner I have described.

[16] The existence of related criminal proceedings was always known. The specific question of self-incrimination arose during the course of Mr Cuciurean's evidence. I permitted Mr Wagner, Mr Cuciurean's counsel, and his solicitor, to speak to Mr Cuciurean during the course of his evidence, to determine the extent to which Mr Cuciurean wished to invoke the privilege. The invocation of the privilege was assessed on a question-by-question basis, with Mr Fry, counsel for the Claimants, asking his questions, and Mr Cuciurean invoking his right not to answer individually.

[17] To a greater or lesser extent. All were opposed to the HS2 Scheme: some would not accept the label "protester", and in some cases (but not in others) that would be a fair point to take in the sense that some were not "professional" protestors. I use the term simply to refer generically to people present around the Crackley Land, interested in and opposed to the HS2 Scheme.

[18] This was a hearing during the COVID-19 pandemic, and a socially distanced court room was used, with other interested persons (other members of the legal teams, the press, members of the public) participating by Skype for Business. I should record my great debt to both the court staff and to the parties' legal teams for their considerable assistance in making the trial work as well as it did.

(**Hillier 1**), and Ms Hillier was only briefly cross-examined on it (for less than 5 minutes). I therefore had little time to assess Ms Hillier as a witness, as her evidence was substantially unchallenged by the Claimants. I accept her as an honest witness, doing her best to assist the court.

(c) Mr Hicks has resided at both camps, and is part of the local protests to the HS2 Scheme. The evidence in his first statement (**Hicks 1**) chiefly concerned an incident taking place on 21 April 2020 (Incident 16). Mr Hicks – both in the video footage and before me in court – presented as a massively calm and naturally authoritative figure. He gave evidence for about 10 minutes, and was forthright and clear in his evidence. After the evidential hearings on 30 and 31 July, Mr Hicks submitted a further statement (**Hicks 2**), which was essentially in response to Bovan 3.

(d) Ms Elizabeth Cairns runs her own business, and in her spare time supports the protests against the HS2 Scheme. She did not reside at either camp, but attended both camps from time-to-time. She gave one witness statement (**Cairns 1**) and gave evidence briefly (for about 20 minutes) on 31 July 2020. Although clearly and firmly opposed to the HS2 Scheme, she sought to give her evidence as clearly and fairly as she could, and was obviously an honest and straightforward witness.

(e) Ms Hayley Pitwell sought to give evidence by video–link (Skype for Business). The connection was appalling, and there was no way in which Ms Pitwell's evidence could sensibly be heard. Fortunately, Ms Pitwell's statement (**Pitwell 1**) sought to adduce video footage, and she made no other substantive points. On this basis, I admitted her statement into evidence, but Mr Fry did not have the opportunity of cross-examining her. I do not consider – given the nature of Ms Pitwell's evidence – that the Claimants were in any way prejudiced by this.

(f) Ms Rebecca Beaumont is a photographer, living close to the Crackley Land in Leamington Spa (less than 10 miles from the site). She attended the site, according to her statement, on three occasions. Ms Beaumont was a not particularly satisfactory witness, in that she attempted to portray herself as rather less engaged in the protests against the HS2 Scheme than she in fact was. Although I accept her interest in photography, I do not accept that that was why she was present around the Crackley Land. I do not know why she sought to play down her role as a protestor (for that is what I consider her to have been), but if it was in order to portray herself as a more objective witness, then she did not come across in this way. For the reasons I give later on in this judgment, I consider that I must treat the evidence of <u>all</u> the witnesses with some care: but Ms Beaumont's evidence I consider to have been tendentious and I have approached it with particular caution. Ms Beaumont gave one witness statement (**Beaumont 1**) and was cross-examined upon it for about 20 minutes. I take account of the fact that Ms Beaumont gave evidence by video-link (Skype for Business) and not in court. However, I consider that the quality of her evidence was sufficient for me to reliably make the assessment of her evidence that I have done.

(g) Mr Simon Pook is a solicitor in Robert Lizar Solicitors, the firm retained by Mr Cuciurean. He made a single statement (**Pook 1**) and gave evidence via video-link (Skype for Business). He presented as an entirely clear and straightforward witness, and the concerns that I express in this paragraph have nothing to do with the tenor of his evidence. Mr Pook's evidence post-dated the Incidents, and described a site visit made by him on 1 July 2020. His statement principally concerned the signage around the Crackley Land on that date. My concerns about Mr Pook's evidence are twofold:

(i) First, I am not sure that his was factual evidence at all. Essentially, Mr Pook was seeking to evidence the signage at the Crackley Land at the time the Incidents took place by an *ex post facto* examination. This, as it seems to me, was either expert evidence or irrelevant factual evidence, relating to a point in time that I am not concerned with.

(ii) Secondly, Mr Pook is obviously *parti pris*, being part of the firm whose duty it is to represent Mr Cuciurean.

In these circumstances, I do not consider that I can place much weight on Mr Pook's evidence. But I would wish to stress that this is in no way a criticism of the manner in which Mr Pook gave his evidence (which was for about 20 minutes).

13. With two exceptions – Mr Cuciurean himself and Ms Beaumont – where, for the reasons I have given, I treat their evidence with caution, I have found that all of the witnesses (with the further exception of Ms Pitwell, whose evidence was effectively admitted without examination, for reasons beyond her control) sought to give their evidence honestly and with the intention of doing their best to assist the court. However, I am conscious that the work on the HS2 Scheme and the protests to that Scheme have polarised views and that this inevitably affects how one group regards the other. There is an entirely unsurprising degree of mistrust and wariness, occasionally manifesting itself in violence. Each side is inclined unconsciously to read the worst and not the best into the conduct of the other, and I consider that this will have affected all of the evidence before me, even though I acknowledge (and have so found) that most of the witnesses were trying to help the court as best they could. Nevertheless, this an aspect of the oral evidence that I bear well in mind.

14. In many cases, a judge would draw on contemporaneous documentary evidence to cross-check – and often prefer over – the after-the-event oral evidence that is heard in court. In this case, there is an unsurprising absence of such documentary evidence:

(1) Although I have before me – generally exhibited to the witness statements that I have described – a large number of photographs and diagrams, these are inevitably not capable of presenting a complete contemporary picture of what was going on at the Crackley Land. Diagrams are essentially subjective representations of the views of the person making the diagram. Although it might be said that the camera does not lie (an aphorism I treat with a degree of scepticism in any event), the fact is that the photographs in this case are inevitably a snapshot of what occurred at a specific instant, and from a single

distance and angle. They will lack – inevitably, and without any criticism of the photographer – context.

(2) I was shown, and have admitted into evidence, a great deal of video-footage. Like photographs, such footage lacks context, and must be treated with caution. Inevitably, the camera operator films what he or she wants to record, which will (depending on the skill of the operator) be that person's take of the events being films. Although I have admitted into evidence – with the agreement of all parties – all of the video-evidence, I place more weight on the excerpts that were shown to the witnesses, about which they were asked. Even so, I treat this evidence with care.

15. Two days (30 and 31 July 2020) were set aside for the hearing of the Application. In the event, those days were only sufficient to hear the evidence in the case, and I adjourned the Application to the next two days convenient to the parties and to the court, 17 and 18 September 2020. I should place on the record that this is no criticism of the parties' hearing timetable. The fact is that technical issues arising out of the hearing forum (a socially distanced, "hybrid", hearing involving the attempted streaming of significant portions of video footage) meant that a great deal of time was lost, despite the very considerable efforts of both the legal teams before me and the court staff.

16. At the end of the hearing on 31 July 2020, the limited need for further evidence (Bovan 3 and Hicks 2, which I have described) was discussed, and a timetable for written closing submissions arranged, so that I could read and consider these well-before the resumed hearing on 17 September 2020. On 17 September 2020, I heard (sitting remotely in Birmingham[19]) oral closing submissions, and reserved my judgment. The hearing day scheduled for 18 September 2020 was vacated.

17. A further hearing – 16 October 2020 – was arranged for the hand-down of this Judgment, and any consequential matters.

B. THE RELEVANT LEGAL PRINCIPLES IN GENERAL TERMS

(1) Introduction

18. The breach of an order of the court is an act of contempt of court for which a defendant can be committed.[20] Unsurprisingly, given that the liberty of the subject is potentially at stake, the rules regarding committal are stringent and designed to protect the defendant.

19. This Section seeks to set out the applicable rules in general terms, before considering – in later Sections – whether the Application for committal can succeed in this case. I should stress that these legal principles have been articulated and developed in the context of "traditional" orders, where there is a named – an identified – defendant. This

[19] This was due to the "enhanced" COVID-19 restrictions in force in Birmingham at that time. These did not render an in-person hearing impossible, but did cause me to raise with counsel the (un)desirability of multiple persons physically assembling in Birmingham. The consensus was that oral closings could be as effectively conducted remotely.

[20] CPR 81.4.

case, of course, involves an order against "persons unknown" and Mr Cuciurean contended that the rules applied differently in the context of such orders. This Section does no more than articulate the general rules: the points taken by Mr Cuciurean are considered in later Sections.

(2) The standard of proof

20. The standard of proof on a committal application is the criminal standard of proof, that is to say, beyond reasonable doubt.[21] Rather than, mantra like, to repeat this requirement throughout this judgment, I should stress that this is the standard that I have applied throughout. When I say, in this judgment, that I am satisfied of something or find that something is the case, that means that I am satisfied to or have made a finding at and to the requisite standard.

(3) Requirements regarding the application for committal itself

21. As I have noted, the Application is for committal for breach of a judgment, order or undertaking to do or abstain from doing an act.[22] Such an application is made under CPR 23 and CPR 81.10.

22. The following requirements must be met in relation to such an application:[23]

(1) The application must "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts".[24] The importance of stating precisely and specifically the grounds of contempt was emphasised in *Ocado Group plc v. McKeeve*.[25]

(2) The application notice must contain a prominent notice stating the possible consequences of the court making a committal order.[26]

(3) The written evidence in support of the application must be by way of affidavit.[27]

(4) Unless dispensed with, the committal application must be personally served.[28]

23. I consider whether these requirements are met in Section C below.

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[21] CPR PD 81.9.

[22] The relevant rules are in Section II of CPR 81.

[23] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [26].

[24] CPR 81.10(3)(a).

[25] [2020] EWHC 1463 (Ch) at [18] to [36].

[26] CPR PD 81.13.2(4).

[27] CPR 81.10(3)(b).

[28] CPR. 81.10(4).

(4) Procedural pre-conditions regarding the order said to have been breached

24. Not every breach of a judgment, order or undertaking is capable of founding an application under CPR 81.10. There are three requirements that must be satisfied for a breached order to found the basis for an application under CPR 81.10:[29]

(1) Subject to limited exceptions, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form.[30]

(2) The order said to have been breached must have been served personally on the defendant, unless the requirement is dispensed with.[31]

(3) The relevant order must have been served before the end of the time fixed for the doing of the relevant acts.[32] According to its wording, this provision applies only to a mandatory order requiring the doing of an act. The point is that the target of the order must be able – within the time-frame envisaged by the order – to do the act ordered, in order for commital for breach of the order to be sought. There is no similar rule as regard prohibitory orders. That is because – as the wording of the relevant provision makes clear[33] – service is sufficient to put the defendant on notice not to do a certain act, and there is no time needed for compliance. Given that this was a prohibitory and not a mandatory order, it follows that I will only need to note this requirement.

25. I consider these requirements in Section D below.

(5) Substantive requirements

26. Assuming these (important) procedural requirements in relation to the order are met, there are two (what I shall call) substantive requirements:[34]

(1) The order must be clear and unambiguous.[35]

(2) The order must have been breached, and that breach must have been deliberate. It will be necessary to consider, in the context of this case, precisely what "deliberate" means.

27. I consider these requirements in Section E below.

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[29] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [28].

[30] CPR 81.9(1).

[31] CPR 81.5 and CPR 81.6.

[32] CPR 81.5(1).

[33] I.e. CPR 81.5(1).

[34] See, generally, *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30].

[35] *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30(1)] lists a number of other requirements, which have already been identified. I do not repeat them.

C. PROCEDURAL REQUIREMENTS IN RELATION TO THE APPLICATION

28. I set out the procedural requirements that had to be met in relation to the Application in paragraph 22 above.

29. Turning, then, to the requirements set out in paragraph 22 above:

(1) As to the first requirement described in paragraph 22(1) above:

(a) The Application was made by formal application notice, supported by the Statement of Case. The Statement of Case sets out, with great specificity, the alleged grounds of contempt, in particular in the Schedule which lists the 17 Incidents, each of which is said to constitute a breach of the Order and a contempt of court.

(b) Paragraph 50.2.2 of Mr Cuciurean's written closing submissions asserts that the Claimants are now pleading (or, perhaps more clearly, contending for) a different case to that set out in their Application. Specifically, the Schedule to the Statement of Case sought to identify the location of the various Incidents by reference to certain plans and photographs of the Crackley Land. However, in cross-examination, Mr Bovan accepted that the locations there set out were approximate or rough. Mr Cuciurean contends that this renders the Schedule "inaccurate". It is contended that the Claimants should have applied to amend the Statement of Case and/or the Schedule and – absent such amendment – the Application must fail.

(c) I reject this contention. It is, of course, the case that a respondent to an application for committal is entitled to know, with proper particularity stated in the application for committal, just what the case against him or her is.[36] That is precisely what the Claimants have done. Rather than simply assert that the nature of Mr Cuciurean's alleged contempt is the breach of paragraph 4.2 of the Order, the Claimants have (helpfully and properly) sought to enable Mr Cuciurean to respond in his own defence, by identifying each Incident relied upon with precision.

(d) In due course, I will consider whether the grounds of contempt have, or have not, been made out. But the suggestion that the Application is defective on this ground is hopeless.

I find that the requirement described in paragraph 22(1) above is satisfied.

(2) The Statement of Case, which is part of the application notice, contains a clear and appropriately prominent notice setting out the consequences of the Application. I find that the requirement described in paragraph 22(2) above is satisfied.

[36] *Ocado Group plc v. McKeeve*, [2020] EWHC 1463 (Ch) at [18] to [36].

(3) The Application is supported by Bovan 1, which an affidavit sworn by Mr Bovan, as I have described, and which was attached to the application notice. I find that the requirement described in paragraph 22(3) above is satisfied.

(4) The Application (meaning the application notice, Statement of Case, Bovan 1 and exhibits) have been served on Mr Cucuirean in the manner described in the affidavit of Mr Robert Shaw, a solicitor in the firm instructed by the Claimants, DLA Piper UK LLP (**Shaw 1**). The content of Shaw 1 was not challenged by Mr Cuciurean. It is evident from Shaw 1 that the Claimants were put to considerable trouble in seeking to serve Mr Cuciurean personally. By this, I do not mean to suggest that Mr Cuciurean was consciously seeking to evade service. However, the fact that Mr Cuciurean was, at this time, continuing his activities as a protester to the HS2 Scheme, and the unfortunate hostility that exists as between those who protest the HS2 Scheme and those who are engaged in it (even if only as process servers) meant that although the Application was ready for service on 19 June 2020,[37] it was only served personally on Mr Cuciurean on 24 June 2020, when Mr Cuciurean attended the hotel at which the process server (Mr Long, an enforcement officer with HCE) was staying.[38] I therefore find that Mr Cuciurean was personally served on 24 June 2020, and that the requirement described in paragraph 22(4) above is satisfied. I should be clear that I consider that Mr Cuciurean had notice of the Application well before this date: I cannot be sure whether he actually received the Application prior to 24 June 2020, but clearly something caused Mr Cuciurean to attend at Mr Long's hotel. Had it been necessary – and it is not – I would have been prepared to dispense with personal service of the Application.

D. PROCEDURAL PRE-CONDITIONS REGARDING THE ORDER SAID TO HAVE BEEN BREACHED

(1) The pre-conditions

30. I set out the procedural pre-conditions that must be met before an application for committal can substantively be entertained in paragraph 24 above.

(2) The first pre-condition

31. So far as the first requirement is concerned (described in paragraph 24(1) above), it was accepted by all, and is clear from the face of the Order, that the Order – at least in the abstract – contains the appropriate penal notice. Had the Order been served personally, this requirement would unequivocally have been satisfied.

32. In his submissions to me, Mr Wagner for Mr Cuciurean contended that the importance of a penal notice was clear given that it is expressly dealt with in a specific rule of the CPR, CPR 81.9(1). I accept this. Mr Wagner's point was that – given the way in which the Order was served (a point I have yet to consider) – CPR 81.9(1) was not satisfied. I propose to consider this point when I consider the question of service on "persons unknown", and it seems to me these points (service and the need for a penal notice) are

[37] See paragraphs 8 and 9 of Shaw 1.

[38] See paragraph 18 and in particular paragraphs 18.8 to 18.10 of Shaw 1.

inextricably linked. Subject, therefore, to this major reservation, which I deal with later, I find that the first pre-condition has been satisfied.

(3) The second pre-condition

(a) The issue stated

33. So far as the second requirement is concerned (described in paragraph 24(2) above), it was common ground, and indeed obvious from the narrative in this judgment, that the Order was not personally served on Mr Cuciurean at the time it was made.

34. If this is a deficiency in the Application, it is not one that I consider can be cured after the event. That is because the contempt jurisdiction must operate prospectively. In other words, the acts said to have been in breach of the Order must, at the very least,[39] have been done after service of the Order. The Incidents all took place between 4 April 2020 and 26 April 2020 and it is common ground that there was no personal service of the Order on Mr Cuciurean during this period – although, as Mr Cuciurean stressed, there could have been.

35. In short, unless the requirement for personal service has been dispensed with, and service properly undertaken in accordance with some form of alternative service, this deficiency is fatal to the Application, which would have to be dismissed on this basis alone. Unless I am satisfied that there has been proper service in advance of the Incidents, I am not going to permit any deficiency to be cured retrospectively. The law clearly sets its face against retrospective rules: and that is all the more important in the contempt jurisdiction, where the liberty of the subject is at stake.

36. Claims against persons unknown have in recent years come before the courts with increasing frequency. The civil legal process, and private law rights, are used in order to control ongoing public demonstrations by a continually fluctuating body of protestors. In *Canada Goose UK Retail Ltd v. Persons Unknown*, the Court of Appeal sounded a cautionary note in relation to such processes:[40]

> "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 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 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…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."

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[39] Mr Cuciurean contended that even this was not enough. That is a point I consider later on in this judgment.

[40] [2020] EWCA Civ 303 at [93].

37. *Canada Goose* concerned an injunction in relation to persons demonstrating near a store at 244 Regent Street in London. The present case concerns trespass to land with a defined perimeter in the countryside[41] to which the Claimants have the right of possession, which the court has declared in their favour.[42] They are doing work on that land pursuant to statutory authority, to which (amongst others) Mr Cuciurean objects. As Andrews J made clear in the Judgment, interests of public protest and demonstration are attenuated in this case:[43]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

As I noted earlier, no-one is seeking to enjoin the right of protest or free expression, save where that protest or free expression involves trespass onto the Crackley Land.

38. The Claimants are, therefore, simply asserting, against an unknown body of persons, their right to free enjoyment of their property. True it is that civil proceedings against a fluctuating body of persons are a "blunt instrument", but it is a blunt instrument that must be made to work so that the rights of all interested persons, including the civil rights of property-holders, are properly respected and upheld.[44]

39. The present issue – one of service – concerns the rights not of the Claimants, but of persons like Mr Cuciurean, who have not, in any conventional sense, been made party to these proceedings. Making an order against such persons is, in itself, a serious matter; bringing committal proceedings for breach of such an order even more so. Mr Wagner, on behalf of Mr Cucuirean, stressed the importance of procedural safegards. He was right to do so.

(b) Procedural guidelines

40. The law has recently and helpfully been clarified in a trilogy of cases, *Cameron*, *Cuadrilla* and *Ineos*.[45] These culminated in *Canada Goose*, to which I have already

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[41] I shall come to the definition of the Crackley Land, its perimiter, and how that perimeter was demarcated, in due course. Nothing in this paragraph should be taken as a suggestion that I am assuming that the perimeter was clear.

[42] I.e. by way of the Order.

[43] Judgment at [35].

[44] In this regard, it is worth noting that the Claimants did try to engage non-civil remedies. The description of Incident 1 in the schedule to the Statement of Case states:

"[Mr Cuciurean] appeared intoxicated and refused to leave the Crackley Land. [Mr Cuciurean] was therefore arrested by Enforcement Agents, employed by [HCE], for preventing a High Court Enforcement Officer from carrying out his lawful duty. [Mr Cuciurean] became violent by resisting his arrest and was subsequently restrained using reasonable force and secured on the ground.

Warwickshire Police were contacted. However, due to the lack of available space in custody and available policy units, they refused to attend to take [Mr Cuciurean] into custody. [Mr Cuciurean] was therefore de-arrested at approximately 21:00 by the Enforcement Officer and excorted off the Crackley Land."

[45] The trilogy, fully considered in *Canada Goose*, are: *Cameron v. Hussain*, [2019] UKSC 6; *Cuadrilla Bowland Ltd v. Persons Unknown*, [2020] EWCA Civ 9; *Ineos Upsteam Ltd v. Persons Unknown*, [2019] EWCA Civ 515.

referred. In *Canada Goose*, the Court of Appeal identified three classes of "persons unknown" against whom proceedings might be commenced and against whom injunctions might be sought. Those classes are as follow:

(1) *Category 1.* Anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying property.[46]

(2) *Category 2.* Defendants who are not only anonymous, but who cannot even be identified. A good example of a Category 2 Defendant is a "hit and run" driver.[47]

(3) *Category 3.* People who will or who are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought.[48]

41. The present case concerns **Category 3 Defendants**. The Court of Appeal noted at [63] in relation to this category:

"It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire Distict Council v. Gammell*…[49] in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land."

42. At [64], the Court of Appeal also noted:

"Lord Sumption also referred (at [11]) to *Ineos*, in which the validlty of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance)."

43. It is fair to say that Morgan J, who decided *Ineos* at first instance, expressed a degree of concern about proceedings and orders having this effect.[50] Nevertheless, the Court of Appeal in *South Cambridgeshire Distict Council v. Gammell* was clear:[51]

"…In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of WM she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of KG she became both a person to whom the injunction was addressed and the defendant when she

[46] *Canada Goose* at [60].

[47] *Canada Goose* at [60].

[48] *Canada Goose* at [63].

[49] [2005] EWCA Civ 1429.

[50] [2017] EWHC 2945 9 (Ch) at [119].

[51] [2005] EWCA Civ 1429 at [32]. Emphasis added.

caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

44. In short, the identity of a defendant in this, third category, is defined by reference to a person's future act, provided that act is defined with sufficient clarity in the proceedings. Thus, in this case, as I have described, the Second Defendants, were:

"Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

A person would become a Second Defendant by entering on the Crackley Land without the Claimants' consent.

45. Clearly, this is why Category 3 Defendants have caused a degree of unease. It would be concerning if a person could become party to proceedings, subject to an order and in breach of that order (all at the same time) simply by doing something enjoined by that very order. No doubt for this reason, the Court of Appeal emphasised that, whilst the doing of such an enjoined act might be a necessary condition to becoming a Category 3 Defendant, this was by no means a sufficient condition. Service of the proceedings is a fundamental, and generally anterior, critical requirement;[52] as is service of the order itself in order to commit.[53] The question of service of the order is the matter here specifically in issue. As regards the service of the proceedings, the Court of Appeal said this in *Canada Goose*:[54]

"…it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued, but he described that as an emergency jurisdiction which is both provisional and strictly conditional."

46. In light of this, the Court of Appeal articulated "the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one":[55]

"(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

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[52] *Canada Goose* at [61].

[53] Hence the requirement of service of the order, now being considered.

[54] *Canada Goose* at [61].

[55] *Canada Goose* at [82]. The guidance is more general than this, but here we are concerned with a Category 3 Defendant.

(2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass, harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction."

(c) The Canada Goose guidelines and service in this case

47. Andrews J has, of course, made the Order, which includes the making of an interim injunction against persons unknown. That Order was made after careful submissions by counsel and a reserved judgment – the Judgment – by Andrews J. The Order includes, as I have described, specific provision for:

(1) Service of the originating proceedings and the application for – amongst other things – the interim injunction: see paragraph 6(1) above.

(2) Service of the Order itself, containing the interim injunction: see paragraph 6(2) above.

48. In each case, the specific service provisions – which were expressly contemplating service on the Second Defendants, a class of persons unknown – did <u>not</u> require personal service, but rather service in accordance with the terms of the Order. However, the Order does not, <u>in terms</u>, state that personal service is to be dispensed with.

49. The Judgment, however, makes clear that the issues regarding service on "persons unknown" were carefully considered by the Judge, with the assistance of counsel.[56] The

[56] The Judgment at [2] states that "Mr Wagner [of counsel, and counsel to Mr Cuciurean in this case]…assisted the Court by drawing attention to points that he considered might have been made by the "persons unknown" trespassing on the...Crackley Land..., who are named as the…Second Defendants and who were not represented at the hearing".

question of the service of the proceedings on the Second Defendants was considered by the Judge at [15] and [16] of the Judgment:

> "15. There is a bespoke procedure for serving trespassers who are "persons unknown" with a claim for possession of the land under CPR 55.6. That procedure was followed by the Claimants' solicitors and the process servers, Mr Finch and Mr Seymour, but additional steps were also taken to bring these proceedings to the attention of anyone likely to have an interest in defending them.I am satisfied that the further steps that were taken, described in the evidence of Ms Jenkins, were both reasonable and sufficient, as evidenced by the fact that Mr Bishp and Mr Rukin [these were the Third and Fourth Defendants, obviously not persons unknown and specifically identified in the proceedings by name] were able to respond to the claim and instruct counsel to represent them.
>
> 16. The Claimants have made an application, to the extent that elements of the claim go beyond a claim for possession, for an order that the steps taken to bring the claim form to the attention of the defendants (including the "persons unknown" defendants) were good alternative service methods pursuant to CPR 6.15 and 6.27. I am satisfied that they were. Quite apart from the fact that these service methods sufficed to bring the proceedings to the attention of the two named defendants, Ms Jenkins' second witness statement confirms that a number of interested parties have sought and obtained copies of the proceedings since the notice was published on the websites to which she refers."

50. Equally, the question of interim injunctive relief against protestors whose identities are unknown was specifically considered, and the Judge expressly referred to the *Canada Goose* guidelines, the Court of Appeal's decision in *Canada Goose* having been handed down on 5 March 2020, a couple of weeks before the Judgment and the Order. The Judge bore these (and other) authorities in mind when making the Order. The Judgment says this (under the heading "The claim for an interim injunction"):

> "30. This proved to be the most controversial aspect of the claim, and at one point I was minded to refuse such relief on the basis that the declaration would suffice to protect the Claimants' interests. However, Mr Roscoe [counsel for the Claimants] made the valid point that an injunction may have a deterrent effect, at least so far as otherwise law-abiding protesters are concerned, and that the difficulties of enforcement which he acknowledged when pressing for declaratory relief have not prevented such relief from being granted by the courts in the past.
>
> 31. To the extent that injunctive relief was pursued against Mr Bishop and Mr Rukin personally, there was no evidence that either of these gentlemen was likely to trespass on the land in future if they were required by the Court to give possession back to the Claimants. Mr Wagner [counsel for Mr Bishop] assured me that this was so in the case of his client, and that if I granted an order for possession the only purpose for which Mr Bishop would return would be to assist in the dismantling of the camps and the removal of any structures erected by the protesters. Mr Powlesland [counsel for Mr Rukin], in echoing those assurances, pointed out that Mr Rukin had gone to the trouble of seeking out land that he believed did not belong to the Secretary of State on which to set up the protest site at Crackley, which was a clear indication that he would not deliberately set out to trespass on land to which the Claimants had rights of possession.
>
> 32. I made it very clear to Mr Bishop and Mr Rukin, who were present in court, that if they were found trespassing on the land in future, contrary to those assurances, it would not bode well for them in any contempt proceedings. I did not require any express undertakings to be given in lieu of an injunction because in order to obtain relief of

either sort the Claimants must first establish a real and imminent risk of further torts being committed by the relevant defendant. The Claimants have failed to do so. That being the case, there is no need for either Mr Bishop or Mr Rukin to continue to be named defendants to these proceedings.

33. So far as the claim for injunctive relief against "persons unknown" (including new protesters) is concerned, there is no dispute that, apart from Mr Bishop and Mr Rukin, the previous and current occupiers of the…Crackley Land have not been identified by the Claimants. Both Mr Wagner and Mr Powlesland raised the question whether sufficient steps had been taken by the Claimants to attempt to identify those other persons. There was no evidence, for example, that any of the "persons unknown" referred to in the evidence of Mr Corvin who were encountered by contractors, were asked the simple question "who are you?". That is fair comment, although it may be unrealistic to expect that a protester would answer that question. The group of protesters at the Crackley site comprised a handful of people, and the posts on social media could have been used in an effort to trace them, but it seems that apart from Mr Bishop and Mr Rukin no such effort was made. Indeed, no-one appears to have taken the fairly obvious step of asking Mr Bishop and Mr Rukin to identify them.

34. In light of this, I accept that perhaps the Claimants could have done more to identify the protesters who were in occupation of the protest camps on the two sites; but bearing in mind the evidence of Mr Bishop, in particular, it seems unlikely that any of the existing protesters associated with the camps will engage in any future trespasses. The problem lies with those who did not abide by the Code of Conduct.

35. If an injunction is granted in the short-term, the Claimants know that they will have to do better in terms of identifying those responsible if they are to convert it into a final order In a case such as this, the test for interim relief is a higher one than the standard *American Cyanamid* test for an injunction, because it must be shown that the Claimants are likely to obtain final relief. I consider that they are. In this regard, the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly. If persons are found trespassing in the future, and those people are identified or are sufficiently capable of being identified by the time of the hearing, then the conditions for final relief will be established.

36. The next thing that the Claimants must establish is that there is a sufficiently real and imminent risk of a tort being committed (in this case, a future trespass or trespasses) to justify *quia timet* relief. Mr Wagner submitted that much of the evidence of past behaviour relied on by the Claimants was contested. So far as the uncontested evidence was concerned – the nails and glass on the roadway, for example – these were isolated incidents for which the protesters at the camp were not responsible. Unlike *Cuadrilla*, this was not a case where committed and experienced protesters were using direct action to disrupt the works every day, by standing in front of truck and so forth. This was a case where peaceful protest camps had attracted one or two unfortunate incidents from outsiders, and going forward, such matters may well resolve. If they did not, it would be open to the Claimants to come back with better evidence.

37. Mr Powesland likewise submitted that so far as the Crackley Land was concerned, the incidents logged on Plan D and referred to in Mr Corvin's evidence were all in the immediate vicinity of the camp. Soe where well in the past, and had not been repeated, whilst others were apparently committed on the public highway. Once the camp has gone, he submitted, there was unlikely to be any risk of repetition.

38. However, as Mr Roscoe pointed out, such control of the land as there was by the responsible element of the protesters will cease with the dismantling of the camps. The problem potentially lies with those of a more militant persuasion who are prepared to do the type of things that Mr Bishop and those associated with him would not do, and have vehemently denied doing in the past, such as the breaking down of fencing or cutting the ties and padlocks on it; the digging up of closed badger setts; and the placing of nails and glass on the access roads. People who are prepared to engage in that sort of behaviour are less likely than the current protesters to make themselves known and less likely to desist in the face of orders for possession and declarations of landowners' rights.

39. I am satisfied that there is enough evidence to demonstrate a real risk of further trespasses on the land in future by persons who are opposed to the HS2 project and that such persons are unlikely to confine their activities in the way in which the peaceful protesters allied to Mr Bishop and Mr Rukin have done in the past.

40. I was initially inclined to take the view that it might be possible to formulate any interim injunction in a more focussed way that would specifically address the type of objectionable (and tortious) behaviour which is a particular cause of concern – breaking down fencing, for example. However, leaving aside the difficulty of proving individual responsibility for such acts, there is a wide variety of conduct that could disrupt the project – someone wandering into an area where soil has been excavated from the woodland for the purpose of replanting, for example. The concept of interference with the work of contrators is far more nebulous than trespass and there is a need to define with clarity precisely what someone is and is not entitled to do. Trespass is a binary and simple tort which is easily defined as entering on another person's land without permission, and therefore it is simple enough to formulate an injunction preventing future trespasses in terms that are clear and unambiguous.

41. Both Mr Wagner and Mr Powlesland raised consideration of whether HS2 had come to equity with clean hands. Reference was made to the evidence that their contractors had felled woodland that was outside the construction boundaries, and to Mr Rukin's evidence of incidents on other sites on the HS2 corridor where, for example, the habitats of nesting birds had been disturbed. Mr Roscoe's response was that the concerns that the Defendants have may well be legitimate concerns shared by the general public, but they have no private rights to protect the trees or the wildlife. There are bodies that do have such rights and they are the appropriate bodies to be policing the matter. There are ecologists who are actively involved in supervising the works, and it would be unrealistic to suggest that a largescale project of this type would not cause some ecological damage. Nevertheless, steps are being taken to mitigate that damage.

42. Like it or not, Mr Roscoe submitted, secure access is needed to the whole of the site in order for the works to be carried out safely. You cannot have people roaming around freely on the site in order to carry out monitoring. As Mr Holland QC observed in the previous HS2 case at [136], "there is not warrant for the court contemplating the commission of torts even if this could be described as "peaceful and non-violent civil disobedience" or "direct action". I respectfully agree.

43. At the end of the day, there is no material distinction to be drawn between the situation in that case and in this, so far as justification exists for granting an interim injunction. That said, I am not prepared to grant the injunction for a period of 2 yesrs as Mr Roscoe initially sought. 9 months should suffice to cover the two key periods of the year within the ecological cycle referred to by Mr Corvin, namely April-May and September-October, and given the Claimants sufficient time to identify the "persons

> unknown" against whom they would seek final injunctive relief. These proceedings should not be allowed to remain unresolved for longer than is necessary.
>
> 44. The Claimants can always seek an extension of time, but at the present time of economic uncertainty, there are many factors which could have an impact on the future of this project. That is yet another reason why I am not prepared to grant an injunction for more than 9 months. Mr Roscoe offered to include in the order a provision requiring the Claimants to inform the Court if something that materially affects the future of the HS2 project arises during the period of the injunction and I consider it would be sensible to do so."

51. It was not contended by Mr Cuciurean that the Order was irregular. Nor did Mr Cuciurean seek to avail himself of his undoubted right under paragraph 15 of the Order to apply to the court at any time (on notice to the Claimants) to vary or discharge it.

52. In these circumstances, it is very difficult to see how the Order has not, of itself, dispensed with the requirement for personal service:

(1) It is quite clear from *Canada Goose* that it is perfectly possible for a person or persons unknown – including Category 3 Defendants, which Mr Cuciurean is – to be joined to proceedings by alternative service and for an interim injunction to be made against such person or persons.

(2) In such a case, the persons unknown must be defined in the originating process by reference to their alleged unlawful conduct. In this case, the Second Defendants are materially defined as those "entering…without the consent of the Claimants [the Crackley Land]". Assuming – for present purposes – that Mr Cuciurean did enter the Crackley Land without the consent of the Claimants, he became a Second Defendant at that instant provided he was properly served with the proceedings.

(3) In this case, the Order expressly provided that the steps taken by the Claimants to serve the claim, the application and the evidence in support should amount to good service, the proceedings being deemed served on 4 March 2020.[57]

(4) Assuming entry by Mr Cuciurean onto the Crackley Land any time after 4 March 2020 (I will, of course, be coming to the Incidents), there is no doubt in my mind that by the operation of the Order, Mr Cuciurean became a Second Defendant at the time when entry was effected.

(5) Paragraph 1 of the Order only made provision for the service of the proceedings and the application pursuant to which the Order was ultimately made. Whether an order should be made, and whether it should contain an interim injunction was – as has been seen from the passages quoted in paragraph 50 above – the subject of careful consideration by the Judge. The Judge determined that it was appropriate to order an interim injunction. She obviously had well in mind the *Canada Goose* guidelines:

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[57] See paragraph 1 of the Order, quoted in paragraph 6(1) above.

(a) The injunction in the Order was expressly limited in time, with a long stop date of 17 December 2020.[58]

(b) The injunction was expressly limited in geographical scope, as set out in Plan B appended to the Order.[59]

(c) Service of the Order was expressly provided for. Paragraph 8 of the Order deals with service on the Second Defendants,[60] and provides that "service of this Order on the…Second Defendants shall be dealt with"[61] in the various ways set out in paragraph 8. Paragraph 8 is mandatory, in that service had to be effected in this way. That provision must have been made pursuant to CPR 81.8(2)(b), and it seems to me that an automatic consequence of making an order for alternative service under this provision is that personal service be dispensed with. CPR 81.8(2) provides:

> "In the case of any judgment or order the court may –
>
> (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place".

The court, in paragraph 8 of the Order, was obviously exercising the jurisdiction under CPR 81.8(2)(b). That is clear from the reference to CPR 6.27 and CPR 81.8.[62] The whole point of providing service "by an alternative method"[63] is that the primary method of service is dispensed with, but only to be replaced by a different (and, inferentially, in the circumstances more appropriate) form of service. There is no way that paragraph 8 of the Order can be read as making provision for service by an additional method.

(6) I have yet to consider whether these requirements in the Order were met. Mr Cuciurean's contentions focussed on the point that personal service was a requirement of the Order notwithstanding what I have found to be the effect of CPR 81.8(2)(b) and the relevant provisions of the Order. As to this:

(a) The foregoing analysis was adopted by His Honour Judge Pelling and the Court of Appeal in *Cuadrilla Bowland v. Ellis*[64] and was relied upon by

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[58] See paragraph 6 of the Order, quoted in paragraph 6(6) above.

[59] See paragraphs 2, 3 and 6(4) above, which refer to the relevant parts of the Order.

[60] Quoted in paragraph 6(2) above.

[61] Emphasis supplied.

[62] These are both provisions dealing with service by an alternative method.

[63] Emphasis added.

[64] [2019] E30MA313 at [13] and [14]; [2020] EWCA Civ 9 at [28].

the Claimants in support of their contention that personal service was not a requirement in this case.[65]

(b) Mr Cuciurean's written submissions did not address CPR81.8(2)(b). Rather, reference was made to service not being compliant with CPR81.8(1), which provides:

> "In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –
>
> (a) by being present when the judgment or order was given or made; or
>
> (b) by being notified of its terms by telephone, email or otherwise".

This provision deals with dispensation of service, not the present case of alternative service. It is clearly irrelevant in the present circumstances. The Order, as I have stated, makes provision for alternative service, it does not dispense with service altogether or at all. It might, fairly, be said that the method of alternative service replaces personal service.

53. It follows that Mr Cuciurean's points that he needed to be personally served and that, because he had not been, the Application must fail, are misconceived, and I reject them. Personal service was not required: alternative service was specified in the Order pursuant to CPR81.8(2)(b).

54. Of course, it does not follow from this that the Application must succeed. Mr Wagner, on behalf of Mr Cucuirean, made a number of points related to – but, in the final analysis, different from – the question of service that I have just considered. It will be necessary to consider these points specifically, and I do so in Section D(3)*(e)* below. Before I turn to these points, however, I must satisfy myself that the service requirements stipulated in the Order were complied with.

(d) The service requirements contained in the Order

(i) Compliance

55. It is, of course, necessary that the service requirements in the Order be strictly complied with. I find that they were:

(1) Paragraph 9 of the Order provides that the taking of the steps set out in paragraph 8 would be good and sufficient service of the Order on the Second Defendants. Service would be deemed when the last of those steps had been taken, and needed to be verified by a certificate of service.[66]

(2) The steps taken in order to comply with the service provisions of the Order are set out in a witness statement of a process server, Mr Ian Beim, dated 27 March 2020

[65] See paragraphs 24 and 25 of the Claimants' written opening submissions.

[66] See paragraph 6(2) above.

(**Beim 1**). Mr Beim was not called for cross-examination as the content of his statement was not challenged.

(3) In accordance with the Order, certificates of service were provided. They were before me, and I am satisfied that they show service of the Order in accordance with its terms.

56. I find that the service requirements contained in the Order were complied with. I find that, in accordance with the terms of the Order, service of the Order was effective on 25 March 2020.

(ii) The provisions regarding notice of the Order

57. Notice of the Order was thus provided for in three ways:

(1) On-line by publication on a website: see paragraph 8.4 of the Order.[67]

(2) By email to an email address: see paragraph 8.3 of the Order.[68]

(3) By notice: see paragraphs 8.1 and 8.2 of the Order.[69] It is necessary to explore the nature of these notices in greater detail:

(a) The Order specified two types of notice:

(i) What I shall term an **Injunction Notice**, affixing sealed copies of the Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around the Crackley Land.[70]

(ii) What I shall term an **Injunction Warning Notice**, a notice no smaller than A3 size, advertising the existence of the Order, and providing the Claimants' solicitors' contact details in case of requests for a copy of the Order or further information in relation to it.

(b) From the photographic evidence exhibited to Bovan 1, it is clear that Injunction Notices and Injunction Warning Notices were actually placed in the same locations (and that, I infer, was the intention of the Order: the Injunction Warning Notice was intended to advertise the Injunction Notice). Even if this was not the intention of the Order, this was an entirely proper and sensible course: the Injunction Notice is a copy of the Order (on A4 paper) and lacks a degree of visual prominence when affixed in the open air. That lack of visual prominence is made up for by the Injunction Warning Notice, which (whilst twice the size of the Injunction Notice) contains less detail, and a much more stark warning (white lettering on a red background) stating "HIGH COURT INJUNCTION IN

[67] These provisions are all set out in paragraph 6(2) above.

[68] These provisions are all set out in paragraph 6(2) above.

[69] These provisions are all set out in paragraph 6(2) above.

[70] Paragraph 8.1 of the Order.

FORCE" together with the necessary details and a map of the relevant land affected.

(c) I shall come to describe the Crackley Land – and the parts of the Crackley Land most important for the purposes of the Application – in due course. Conservatively, there were seven Injunction Notices and Injunction Warning Notices in the most important parts of the Crackley Land, and more if one considers the Crackley Land as a whole.

(d) In addition to the Injunction Notice and the Injunction Warning Notice, there was a third form of notice, which I shall call a **No Trespass Notice**. The No Trespass Notice – which was not provided for in the Order – stated:

"Trespassers keep out

Private property

This land is in possession of HS2

This is a personal protective equipment zone

Risk of injury from construction activities

Trespassers may be subject to civil/criminal proceedings

24/7 Freephone Community Helpline 08081 434 434"

These notices were large (about twice the size of the A3 Injunction Warning Notices) and again were visually distinctive – white text on a red background.

(e) As I have said, the No Trespass Notices were not ordered, and I was not provided with a map of their locations. However, it was common ground that these notices appeared not only at the perimeter of the Crackley Land, but also inside the perimeter. A person penetrating the Crackley Land, and proceeding within it, would be likely to see multiple No Trespass Notices.

(e) Further points taken by Mr Cucuirean

(i) Introduction

58. As I have noted, Mr Cuciurean's first point, as regards the requirement of service, was that personal service was required: and so, the Order was not properly served. I have rejected that contention, for the reasons already given.

59. However, the Order is no ordinary order and, as I noted in paragraph 54 above, Mr Cuciurean took a number of points related to the question of service but distinct from it. In short, Mr Cuciurean contended that even if (as I have found) there was proper service, the Application must still fail for these (independent) reasons. These points were as follows:

(1) There was a requirement of knowledge of the Order, including knowledge of its terms, operating independently of the requirement of service, that had to be satisfied before the Application could succeed. It was Mr Wagner's contention, on behalf of Mr Cuciurean, that what was required was some knowledge of the Order – going beyond the service requirements contained in the Order – of which I had to be satisfied before acceding to the Application (assuming satisfaction of all other requirements).

(2) There was a requirement that the penal notice in the Order be specifically – and separately – drawn to Mr Cuciurean's attention, and that this had not been done, sufficiently or otherwise.

(3) There was a continuing requirement that the service requirements specified in the Order be complied with. Mr Wagner made the point that the Order, albeit interim, had a duration of months (it had a long-stop date of 17 December 2020[71]) and that the notices put up pursuant to the Order might be subject of physical deterioration or damage (whether accidental or deliberate).

60. I consider these points in turn below.

(ii) An additional requirement of knowledge

61. In the law of contempt, it is very difficult to point to any clear law suggesting that there is a requirement of "knowledge" of the order independent of the requirement that the order be served, and neither Mr Wagner (for Mr Cuciurean) nor Mr Fry (for the Claimants) were able to do so. Of course, the vast majority of the case-law in this area relates to orders where there is a named defendant who is personally served. In such cases, it is very difficult to see how there is space for the existence of a knowledge requirement going beyond personal service. The whole point about personal service is to bring the order to the attention or notice of the person being served. If that person – despite personal service – chooses to pay no heed to the order, by (for instance) immediately binning it, then that sort of unwillingness to engage clearly cannot permit such a person to avoid the consequences of breaching the order (including committal).

62. CPR 81, as I have described, makes provision for service by alternative means. The whole point of this jurisdiction is to enable proper service to be effected by a different means, a means other than personal service. Any judge exercising this jurisdiction – particularly when the order in question is going to bear a penal notice – will be concerned to ensure that whatever method of alternative service is adopted is sufficient to bring to the notice of the persons concerned both *(i)* the existence of the order and *(ii)* either the terms of the order or else the means of knowing the terms of the order.

63. In these circumstances, I approach the question of the need for an additional knowledge requirement – over and above service – in the following way:

(1) The Order in this case is, as I have repeatedly noted, made against persons unknown. Almost inevitably in such cases – and inevitably in the case of Category 3 Defendants – that will involve some dispensation from the obligation

[71] See paragraph 6 of the Order.

of personal service and some form of alternative or substituted service in place of personal service.

(2) Because of the need to have effective service before the order in question is breached, it is inevitable that the question of alternative service be considered when the order is made and not when the breach of the order is brought before the court.

(3) A judge, when considering alternative service must, in the case of persons unknown, bear in mind and apply the guidance of the Court of Appeal in *Canada Goose*. In particular, it is necessary to note the fundamental importance of service, both of the originating proceedings and of the order itself.

(4) Obviously, what ought to be ordered by way of service depends on all the circumstances of the case. It is the judge making the order who is the person best qualified to determine:

(a) Whether service by alternative means is appropriate; and

(b) If so, how such service should be accomplished.

Where such an order is breached, and an application for committal made, the judge hearing that application ought to be slow to second guess the judge who made the order itself, particularly where the judge who made the order has paid due regard to the *Canada Goose* guidance.

(5) In this case, as I have described, Andrews J considered both the service of the originating process and the service of the Order with great care, in light of the *Canada Goose* guidance. The question of alternative service was expressly considered. It seems to me – if I may respectfully say so – that the question of service was gone into extremely thoroughly by the Judge, and that this is precisely the sort of case where the judge making the order ought not to be second-guessed. Matters would be very different if the service provisions either failed to consider the *Canada Goose* guidance or – in light of the circumstances as they stood at the time of the order – failed properly to apply that guidance. Neither of these points pertains here.

(6) This means that I must be slow to re-visit the question of service. But I do not consider that the question of service can be altogether disregarded on an application for committal, no matter how carefully the matter has been considered by the judge making the order. There is no inconsistency between attaching proper weight to the order of the judge making it, and taking account of matters subsequent to the making of the order. The circumstances in which service is in fact effected will always be relevant. Generally speaking, personal service of an order will be sufficient to bring both the existence of the order and the ability to consider its terms to the attention of the person served. But there may be exceptions. Even in the case of personal service, it is possible that (unknown to the applicant for committal) the person served suffers from some lack of capacity, rendering him or her incapable of considering the terms of the order or even the fact that it is an order of the court at all. In such a case – whilst the burden of proving this hypothetical lack of capacity would rest on those representing that

person – it is inconceivable that a court would consider the contempt procedure applicable. What was, on the face of it, good service, would be set aside.[72]

(7) I consider that precisely the same approach must apply in this case. Given that, in the case of Category 3 Defendants, the service provisions in the order will have to deal with the question of notice to an unknown and fluctuating body of potential defendants, there may very well be cases where *(i)* the rules on service may have been complied with, but *(ii)* the person infringing the order knows nothing about even the existence of the order, when infringing it, or that he or she is doing anything wrong. In such a case, provided the person alleged to be in contempt can show that the service provisions have operated unjustly against him or her, the service against that person may be set aside.

(8) I stress that where it can be shown that the service provisions that apply in the case of a given order can be shown to have operated unjustly, this is a matter that goes not merely to sanction (although such matters might also be relevant to sanction). Where the person subject to the order can show that the service provisions have operated unjustly against him or her, then service ought to be set aside and the threat of committal removed altogether. It is not, to my mind, sufficient to say, in such a case, that there is a contempt, but that the punishment ought to be minimal or none.[73]

(9) Mr Wagner contended that such an approach effectively reversed the burden of proof, and required Mr Cuciurean to show he had not been served with the Order. I disagree. The whole point of alternative service is that appropriate alternative means of service are imposed on the claimant, who is obliged to comply with them and to prove (to the requisite standard) that service on the defendant has been effected in this way. This, the Claimants have done, as I have found. There is nothing to prevent Mr Cuciurean from contending that the circumstances in this case are such that service should be set aside because the service provisions operate unjustly against him, even though the *Canada Goose* guidance has been carefully and appropriately considered by Andrews J. But – at this point – the burden is on him.

(10) Mr Wagner did not put Mr Cuciurean's case in this way. He contended that it was for the Claimants to show that some criterion beyond service had been satisfied (although he was unclear as to precisely what that criterion might be), rather than it being for Mr Cuciurean to show that ordinarily proper requirements for service had, in this case, operated unjustly. I reject this argument because it replaces the

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[72] I stress that I was taken to no authority for this point, but it seems to me inevitable when considering how courts generally deal with service. Thus, for instance, where proceedings are served out of the jurisdiction, and that service is found to be (for whatever reason) wrongly based, service is set aside.

[73] In *Cuadrilla Bowland v. Ellis*, [2019] E30MA313 at [14], His Honour Judge Pelling, QC said:

"…If the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed, then it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…"

I agree. However, one much not overlook the anterior question that it always possible – albeit only in the appropriate case – to set aside service altogether.

very clear rules on service with an altogether incoherent additional criterion for the service of an order.

(11) Although, for the reasons that I have given, I have rejected Mr Wagner's argument, it is nevertheless appropriate to consider whether the circumstances of this case warrant the setting aside of service. I have no doubt that they do not:

(a) Mr Wagner submitted that there were a number of other steps that the Claimants could have taken so as to bring the Order to Mr Cuciurean's notice or attention. For instance, when Mr Cuciurean was in the Claimants' custody or in the presence of agents or employees of the Claimants, it would have been easy to hand Mr Cuciurean a copy of the order and (say) video-tape the event as evidence. That may very well be the case, but it is not the point. This is to suggest an embellishment to the service provisions, not to suggest that service in accordance with the order operated unjustly against Mr Cuciurean.

(b) Mr Wagner submitted that, whilst he could not say that Mr Cuciurean was unaware of the Order (he knew there was an order in existence, but (according to his evidence, thought it related only to the Cubbington Land), he (Mr Cuciurean) was unaware of its terms, and that this was enough to render it unjust to proceed with the committal. I am afraid that I do not accept this contention. It will be necessary – when considering the various Incidents said to amount to a breach of the Order – to make findings as to Mr Cuciurean's knowledge, and I do not intend to anticipate those findings, which at least in part turn on a description of the Incidents themselves. It is sufficient for me to note now that, for the reasons I give later on in this judgment, I am satisfied:

(i) That Mr Cuciurean knew of the existence of the Order.

(ii) That Mr Cuciurean not only knew of the existence of the Order, but of its material terms. The material terms of the Order, to be clear, were not to enter upon the Crackley Land.

Mr Cuciurean came closer to admitting the first point than the second. Certainly, he accepted that there was an order made, but his evidence appeared to be that that order related to land that was not the Crackley Land.

64. For these reasons, I reject the contention that something more than compliance with the service provisions of the Order was required.

(iii) The penal notice

65. CPR 81.9(1) provides that an order to do or not to do an act may only be enforced by the committal process under CPR 81.4 where "there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets".

66. It is accepted by all that the Order contains an appropriate penal notice.

67. All that CPR 81.9 requires is that the order be served in accordance with this Section. It was not accepted by Mr Cuciurean that the Order had been served in accordance with the applicable Section (Section II) of CPR 81. However, I am satisfied that it was, for the reasons that I have given. In these circumstances, it is clear that CPR 81.9 has been complied with. There is nothing in this point, which I reject.

(iv) A continuing requirement that the service provisions in the Order be complied with

68. Clearly, the notice given to interested persons by service via email and by posting on a webside will not degrade over time. The same cannot be said of the physical notices – the Injunction Notices and the Injunction Warning Notices that I have described. I quite accept that, over the duration of operation of the Order – a period of months – these Notices might be subject to physical deterioration or damage (whether accidental or deliberate).

69. This contingency was anticipated by Andrews J in paragraph 10 of the Order:

> "The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2] remain in place and legible and, if not, shall replace them as soon as reasonably practicable."

70. It is noteworthy that the Order says nothing about the consequences of non-compliance with this provision. It would be possible for an order expressly to provide that, if the notices it stipulates are not replaced as and when necessary during the operation of the order, then service ceases to be effective after the date of that failure to comply.

71. That may be an appropriate order in an appropriate case, but it is <u>not</u> the order made by Andrews J. Clearly, compliance by the Claimants with paragraph 10 of the Order was an important matter. I have no reason to doubt that this part of the Order <u>was</u> complied with by the Claimants, but (as Mr Wagner contended) I do not consider that I can be satisfied <u>to the appropriate standard</u> that the Order was in fact so complied with. For instance, there was not before me any evidence as to the regular inspection of the Injunction Notices and Injunction Warning Notices, nor any evidence of their replacement where Notice were no longer fit for purpose. In these circumstances, it is difficult to be satisfied beyond all reasonable doubt that paragraph 10 of the Order was complied with.

72. If I were required to be satisfied beyond all reasonable doubt that paragraph 10 had been complied with, I would find that it had not been. But I do not consider that to be a necessary or relevant finding for me to make in relation to the Application. The Order does not provide for the automatic setting aside of service where there has been a failure to establish beyond all reasonable doubt that paragraph 10 of the Order has not been complied with. The question, as before, is whether, given that service on Mr Cuciurean was regular and in accordance with the terms of the Order, it would be unjust not to set service aside in all the circumstances. For the following reasons, I consider that service should <u>not</u> be set aside on this basis:

(1) As I have noted, the Order was deemed served on 25 March 2020,[74] pursuant to paragraph 9 of the Order.

(2) The Incidents, as I have noted, all occurred in the period commencing 4 April 2020 and ending 26 April 2020. Thus, assuming an obligation to check the Notices every 28 days, the 28 day period ended on 22 April 2020. Most of the Incidents – although by no means all – fall within the period within which the Claimants were entitled to proceed on the basis that the Notices did not require inspection.

(3) This was Mr Fry's primary point as to why paragraph 10 was an irrelevance, in this case. Although I consider that the point is good as far as it goes, I consider that it misses the reality of the case and the essence of the question that I must ask. The true position is that, the Order having (properly) defined what constitutes service, and the provisions in the Order having been followed, service should not be set aside unless Mr Cucuirean can show – the burden being on him – that the service provisions have operated unjustly against him.

(4) That is not the case here. Clearly, the service provisions were complied with, and (absent a co-ordinated attack on the Injunction Notices and Injunction Warning Notices) they could be expected to survive in readable and usable form throughout the Incidents.

(5) Although the Claimants could not produce evidence of regular inspections and replacements of the Injunction Notices and Injunction Warning Notices, the Claimants did carry out a random spot check of the signage at the Crackley Land on 14 June 2020,[75] and a plan of the Injunction Notices and Injunction Warning Notices present at the site was produced as an exhibit to Bovan 2. This shows a substantial number of notices at the relevant area, perhaps fewer than originally placed, but not materially so. In his evidence, basing himself on this inspection, Mr Bovan stated:[76]

> "I can also confirm that copies of the Order [i.e. Injunction Notices] and A3 Injunction Warning Notice remain in place around the Crackley Land or have been replaced."

Whilst Mr Bovan clearly could not say whether the Notices in question were original or replacement (a point Mr Wagner placed some stress on), the fact is that they were there on 14 June 2020 and had been out there on or before 25 March 2020. I have noted the evidence of Mr Pook – albeit with the reservations identified in paragraph 12(4)(g) above. Mr Pook suggested that when he inspected the site on 1 July 2020, there was a lack of signage. Mr Pook's statement is not especially clear about whether the signs Mr Bovan had identified on 14 June 2020 were no longer present on 1 July 2020. Whatever the position on 1 July 2020, I accept the evidence of Mr Bovan as to the position on 14 June 2020.

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[74] See paragraph 56 above.

[75] Bovan 2 at paragraph 29.

[76] Bovan 2 at paragraph 29.

(6) In all the circumstances, given the presence of the Notices on 25 March 2020 and the presence of the Notices on 14 June 2020, it is difficult to accept – and I do not accept – that there were not Notices on site when the Incidents took place.

73. Thus, I do not consider that Mr Cucuirean has in any way demonstrated that service should be set aside because of an inability to demonstrate – beyond all reasonable doubt – that paragraph 10 of the Order was complied with. For the reasons I have given, I do not consider that it is necessary, in order for the Application to succeed, for strict compliance with paragraph 10 to be shown.

(4) The third pre-condition

74. The third pre-condition does not arise in this case.[77]

E. SUBSTANTIVE REQUIREMENTS

(1) Introduction

75. I turn to the requirements set out in paragraph 26 above. These are that the Order must be clear and unambiguous and that the Order must *(i)* have been breached and *(ii)* that that breach must have been deliberate. I consider these requirements in turn below.

(2) Clear and unambiguous

76. I consider the entirety of the Order to be extremely clear and unambiguous, and will focus on the operative provisions that are most pertinent to this Application. These are, in the first instance, paragraph 4.2 of the Order, which states that the Second Defendants and each of them are forbidden from entering or remaining upon the Crackley Land. The Crackley Land – as I have described – is the land edged red on Plan B, which was annexed to the Order.

77. It is difficult to imagine a more straightforward or clearer provision.

(1) The act enjoined is easy to understand. It is not to enter (or remain upon) certain land.

(2) The land in question is clearly identified as that outlined in red on a plan that is attached to the Order – a copy of which is attached to this judgment as Annex 2.

78. The consequences of breaching the Order are set out in the penal notice that I have already referred to.

79. There is a "carve-out" to paragraph 4 of the Order contained in paragraph 5.1.[78] This provides that nothing in paragraph 4 shall prevent any person from exercising their rights over any open public right of way over the Land. This provision, I find, to be clear and unambiguous on its face. However, it will be necessary to re-visit this provision once the position regarding the footpaths over the Crackley Land has been

[77] For the reason given in paragraph 24(3) above.

[78] Described in paragraph 6(5) above.

explained, for Mr Wagner made a number of submissions in relation to footpaths on behalf of Mr Cuciurean.

80. I am satisfied that the Order is clear and unambiguous.

(3) Breach of the Order

(a) Approach

81. I approach the question of breach of the Order in the following way:

(1) Since all of the Incidents alleged to constitute contempt of court on the part of Mr Cuciurean involve a breach of paragraph 4.2 of the Order (i.e. not to enter upon the Crackley Land), the Incidents can only be understood when once the Crackley Land, certain footpaths on it, and the manner in which its perimeter was protected is understood. These matters are considered in Section E(3)*(b)* below.

(2) Thereafter, in Section E(3)*(c)* below, I describe the various Incidents that underlie the Application, and seek to locate them by reference to my description of the Crackley Land.

(3) I then deal with the various points made by Mr Cuciurean to suggest either that the Order had not, in fact, been breached or that I could not be satisfied, to the appropriate standard, that the Order had been breached. These various points are described and considered in Section E(3)*(d)* below.

My conclusion on the question of breach is stated in Section E(3)*(e)* below.

82. Finally, in Section E(4), I consider the question of deliberation.

(b) The Crackley Land

(i) The Crackley Land generally

83. The Crackley Land, as has been noted, is described by reference to the plan known as Plan B and annexed as such to the Order. It comprises Annex 2 to this Judgment. As can be seen from Annex 2, the Crackley Land is essentially a strip of land running (beginning at its Western tip) South-East. At approximately its halfway point, the strip is bisected by a road (known as Crackley Lane). It can be seen that the red-edging that demarcates the boundary of the Crackley Land runs parallel on either side of Crackley Lane as it bisects the Crackley Land. The Crackley Land is thus not a unitary tract of land, but in fact comprises two tracts of land, both edged red, divided by Crackley Lane.

84. I shall refer to the Crackley Land lying to the West of Crackley Lane as **Crackley Land (West)**. I shall refer to the Crackley Land lying to the Easy of Crackley Lane as **Crackley Land (East)**. It is the latter tract of land – Crackley Land (East) – that we are here concerned with.

(ii) Crackley Land (East)

85. The Incidents are alleged to have involved non-consensual entry upon the land by Mr Cuciurean on the Eastern side of Crackley Lane, that is Crackley Land (East). Although the colours on Plan B signify nothing for the purposes of the Order, they are helpful in identifying specific portions of Crackley Land (East), which I shall use to describe Crackley Land (East) more specifically:

(1) Immediately to the East (or right) of Crackley Lane is a rough square, coloured pink and green on Plan B (the **Square**).

(2) Immediately to the East (or right) of the Square is a portion of land, coloured pale blue on Plan B, in the shape of an isosceles triangle (the **Triangle**).

(3) The **Remaining Portion** comprises the remaining Crackley Land (East), that is all parts of Crackley Land (East) apart from the Square and the Triangle.

(iii) The physical nature of the perimeter of Crackley Land (East)

86. It is necessary to describe the manner in which the perimeter or boundary of Crackley Land (East) was demarcated. In large part, the basis for my findings in this regard is the evidence of Mr Bovan and Mr Hicks, both of whom provided helpful evidence enabling me to understand the nature of the perimeter, as well as the video evidence that was adduced before me. In order to understand the physical perimeter, it is necessary to refer to **Annex 3** to this Judgment, which constitutes a marked-up version of Plan B at Annex 2. The marking up, to be clear, has been done by me, based upon the evidence I have heard. More specifically:

(1) Annex 3 shows a line (running from Point 1 to Point 2) which bisects the Remaining Portion of Crackley Land (East). I stress that this line is roughly drawn, and makes no claims to particular accuracy. It is not necessary in order to understand the physical geography for the line to be precisely drawn.

(2) The line between Point 1 and Point 2 represents a line of **Heras fence panels**. Heras fence panels are forms of temporary, heavy duty, wire-mesh fencing in the form of panels, capable of being linked together. They are, thus, capable of being moved. Generally speaking, they are footed by large concrete blocks, out of which the feet of the Heras fence panel can be lifted.

(3) As part of the development of the HS2 Scheme on the Crackley Land, the contractors employed or retained by the Claimants often fenced off portions within the Crackley Land, using Heras fence panels. This fencing was, I stress, intended to be internal to the Crackley Land and did not seek to demarcate any boundary of or perimeter to the Crackley Land. Rather, the purpose of such internal fencing was to isolate from third parties those specific areas where work was being done or to protect equipment from such third parties. Of course, one might say that since these enclosures were all within the Crackley Land, such enclosures were unnecessary: the only persons present on the Crackley Land would be those present with the consent of the Claimants. That would, however, be wrong. As the Judgment of Andrews J makes clear, in addition to Mr Bishop and Mr Rukin (the individually named defendants to the Proceedings), there were

trespassers on the Crackley Land against whom such internal barriers might be needed:

> "11. The Claimants accepted, as do I, that Mr Bishop's activities as a concerned local resident have been genuine and sincere, and that at all times he has acted responsibly and peacefully. He is seen as a very important moderating influence, who has forged a good relationship with the HS2 representatives.
>
> 12. Mr Rukin has a wider agenda, in that he is the Campaign Manager of "Stop HS2" which, as its name suggests, is opposed to the project in principle. However, so far as the occupation of the Cubbington Land[79] and Crackley Land is concerned, Mr Rukin supports Mr Bishop's evidence that this is aimed at protecting the ancient woodland and observing and recording HS2 Ltd and their contractors' operations with a view to reporting any illegal activities to the relevant authorities. He denies that he or anyone associated with him or the camps has been responsible for litter or any anti-social behaviour on the land.
>
> 13. Unfortunately, the evidence of Ms Jenkins and Mr Corvon-Czarnodolski…on behalf of the Claimants indicates that not all trespassers on the Cubbington Land and Crackley Land are so well-behaved. People have carried out damage to the Heras fencing which is used to demarcate the land, in some areas pulling it down and abusing workmen who have taken in panels to repair it; nails and glass have been placed on roads used by construction traffic, and some people have actively blocked access to the sites or erected structures on them which have impeded the work."

In these circumstances, it is easy to understand why such internal fencing, intended to protect on-going works or equipment, might be necessary. I shall refer to such fencing as ***Ad Hoc* Fencing**, as it was moved according to the work going on. Its defining positive characteristic is that it was intended to protect on-going works; its defining negative characteristic is that *Ad Hoc* Fencing was <u>not</u> intended to demarcate the boundary or perimeter of the Crackley Land.

(4) The Heras fence panels running from Point 1 to Point 2 are to be differentiated from other types of *Ad Hoc* Fencing. This particular fence-line (which I shall refer to as the **Internal Boundary**) is significant because the land to the East (or right) of the Internal Boundary – designated by the letter B in Annex 3 (**Area B**) – was unfenced and comprised essentially open space. The perimeter of Area B was marked by No Trespass Notices,[80] but there was no fencing of any sort. The Internal Boundary thus:

(a) Merely constituted an internal perimeter or boundary <u>within</u> Crackley Land (East). It was not intended to demarcate the edge of the Crackley Land.

(b) However, the Internal Boundary was significant because it constituted a part of the <u>physical</u> boundary of the Crackley Land. A person approaching

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[79] This was the other tract of land with which the Judgment was concerned. I have, generally, omitted reference to the Cubbington Land in this judgment, as it is not directly relevant to the Incidents.

[80] There were some Injunction Notices and some Injunction Warning Notices also.

> the Internal Boundary through Area B would be on Crackley Land and – absent the consent of the Claimants – would be a trespasser on the land. However – apart from the Notices – there would be no physical demarcation of the boundary until the Internal Boundary was reached.

87. Thus, Area B is a portion of Crackley Land East, largely without perimeter fencing. The only physical perimeter (apart from Notices) was the Internal Boundary running along its Western flank, and dividing Area B from the other part of Crackley Land (East), **Area A**.

88. The Internal Boundary was moved at least once during the period of the Incidents, on 21 April 2020, when the Internal Boundary was moved Eastwards by a couple of meters, so as to enlarge Area A of the Crackley Land (East) and correspondingly reduce Area B of the Crackley Land (East).

89. Area A, in contrast to Area B, was fenced. It is important to describe the nature of this fencing. I shall do so by describing the perimeter of Area A in a clockwise fashion, starting at **Point 1,** which identifies the starting point of the Internal Boundary, and is marked as such on Annex 3. Taking this as the starting point, the perimeter of Area A was as follows:

(1) *Point 1 to* ***Point 2***. This is the Internal Boundary, which comprised, as I have stated, Heras fence panels.

(2) *Point 2 to* ***Point 3***. (I have not marked anything other than Points 1 and 2 on the map at Annex 3. To do so would lend a spurious specificity to what is intended to be a more broadbrush description of the physical geography.) This was intended to comprise part of Crackley Land (East)'s external boundary, and consisted of Heras fence panels. Point 3 was located around the Eastern tip of the Triangle.

(3) *Point 3 to* ***Point 4***. This was a continuation of Crackley Land (East)'s external boundary, and consisted of boarding or hoardings about 3 metres high (the **Hoarding Fence**). The Hoarding Fence ran substantially along the bottom edge of the Triangle, ending roughly at the Western tip of the Triangle, where the Triangle abuts the Square. The Hoarding Fence was intended to offer some sort of visual and sound protection to the residents of the farms located to the South of the Triangle. It was on this land South of the Triangle – not part of the Crackley Land – that the protestors to the HS2 Scheme had their camp (i.e., Camp 2).

(4) *Point 4 to* ***Point 5****, Point 5 to* ***Point 6****, Point 6 to* ***Point 7***. These three boundaries represent three sides of the Square, the middle boundary (Points 5 to Point 6) being the boundary running along Crackley Lane. These boundaries comprised Heras fence panels.

(5) *Point 7 to* ***Point 8***. This is part of the Northern boundary of Crackley Land (East), essentially opposite to and running parallel with the Hoarding Fence between Point 3 and Point 4. The perimeter was marked by a post and wire fence (the **Post and Wire Fence**).

(6) *Point 8 to Point 1*. The final stretch of the Northern boundary, terminating with the beginning of the Internal Boundary at Point 1 again comprised Heras fence panels.

90. I should stress that it is unnecessary to be more precise about the geographic location of Points 1 to 8. They are intended to enable better description of the Incidents to which I will come. It is also worth stressing that the demarcation between different fence lines – clear in my description – will have been less clear to the person walking around the Crackley Land. Thus, for example, the Internal Boundary (Point 1 to Point 2) comprised Heras fence panels, as did the external boundaries on either side, namely Point 2 to Point 3 and Point 8 to Point 1. I am not suggesting that it would have been possible to differentiate between these parts of the perimeter of Area A: the perimeter would simply have been a series of Heras fence panels. I do not consider that such inability to differentiate is in any way material to the matters considered in this judgment.

(iv) Footpaths

91. The public right of way known as **PROW165X** runs in part across the Crackley Land. It bisects the Crackley Land (East) running from South to North. Insofar as it crosses Crackley Land (East) it begins (at its Southern-most point) at a point between Point 1 and Point 2. It then runs roughly along the Eastern edge of the Triangle and across a part of the Square to its end (at least so far as material for present purposes) at Cryfield Grange Road on the Northern edge of Crackley Land (East), roughly at Point 7.

92. The Claimants sought to close PROW165X. The reason for this was that protestors were using PROW165X to access the Crackley Land. This is described by Mr Bovan in Bovan 2:

> "18 As described at paragraph 19 of my first affidavit, on 26 March 2020 steps were taken by myself and HCE to enforce the Writ and evict the protestors in Camp 1 on the Crackley Land. While we successfully removed 18 persons on the ground, this was not without difficulties and 5 protestors managed to scale trees at height on the Crackley Land and remained there until 3 April 2020.
>
> 19 4 of these 5 protestors at height had managed to enter onto the Crackley Land (without permission) during the process of eviction by walking on to the PROW and climbing over or under existing wooden fences. If it had not been for the PROW being open there would only have been 1 protestor in the trees at height.
>
> 20 Other protestors were also standing on the PROW during the course of the eviction, some of whom were: *(i)* shouting and being verbally abusive to my team and [me]; *(ii)* at times spitting on my team and [me]; *(iii)* failing and/or refusing to maintain a social distance of at least 2 metres in accordance with COVID-19 Government guidelines; and *(iv)* supplying the protestors at height in the trees with food and water.

I accept this statement of events.

93. It was common ground that:

(1) The Claimants had the statutory power to close PROW165X pursuant to powers conferred under the High Speed Rail (London – West Midlands) Act 2017.

(2) The Claimants' power was exerciseable only on consultation with the relevant local authority, which in this case was Warwickshire County Council (and only that authority). The purpose of the consultation was to ensure public safety and, so far as reasonably practicable, to reduce public inconvenience.

(3) The Claimants did so consult. However, that consultation stated, as I find, that a diversion would be in place before PROW165X was closed. In its consultation, the Claimants identified, on a plan, the route of a temporary diversion, which I shall term a temporary public right of way or **TPROW**.[81]

(4) The planned route of the TPROW was disclosed to Warwickshire County Council, which itself noted that "HS2 have confirmed that at no point will [PROW165X] be closed without the diversion being in place". The TPROW proposed is shown on the plan at **Annex 4** to this judgment. As to this:

(a) For the purposes of orientation, at the bottom left-hand corner of Annex 4, Birches Wood Farm can be seen. Above Birches Wood Farm, one can see the Hoarding Fence that runs between Point 3 and Point 4 marked as a fine red line. The Heras fence panels comprising Point 2 to Point 3 are to the right of the Hoarding Fence, marked as a green line. Other Heras fence panels – which were intended to enclose the TPROW, and to which I shall come – are also marked as a green line.

(b) The route of PROW165X is clearly marked. The part to be closed is marked by a thick red line. The TPROW constitutes a diversion from the closed part of PROW165X. Essentially, the diverted part of PROW165X – which roughly runs along the hypoteneuse of a triangle – is replaced by the TPROW, which runs along the other two sides of that triangle. The first side of that triangle runs parallel to the Hoarding Fence (at about 2-3 metres distance – the **Strip**), and then cuts across the Crackley Land away from the Hoarding Fence so as to rejoin the undiverted part of PROW165X, which then runs on to Cryfield Grange Road.

(c) Apart from the entrance point on the Southern boundary of the Crackley Land, which I shall return to, the TPROW was closed off from the rest of the Crackley Land by Heras fence panels running along either side of the TPROW. Although these enclosures to the TPROW are not fully disclosed in the diagram, I am satisfied that this was the case.[82] Thus, there were Heras fence panels running along either side of the TPROW intended:

(i) To prevent persons on the TPROW from leaving it;

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[81] I should be clear that whether this was a public right of way is a matter of controversy that I will have to consider. Mr Bovan used the term TPROW, which I adopt without prejudice to my consideration of this question.

[82] This was clear from the evidence of Mr Bovan in Bovan 2 (in particular, paragraph 13 of Bovan 2) and the video evidence that I saw. I put my understanding to counsel in the course of oral closing submissions, and neither party dissented from this explanation.

(ii) To ensure that the TPROW was only accessed from the Southern starting point of PROW165X described in paragraph 91 above. Thus, the Heras fence panels were intended to prevent persons joining the TRPOW midway rather than at the Southern starting point of PROW165X.

Clearly, these measures were intended to ensure that the TPROW was only used to pass and repass along its length, and to prevent entrance or exit from that length save at its start and end points. I shall refer to the Heras fence panels running along both sides of the TPROW as the **TPROW Fencing**.

94. PROW165X was closed on 26 March 2020.[83] Although the intention was that the TPROW would be made available to the public, it never was. Mr Bovan explained the position in Bovan 2:

> "21 I thus took the decision that the only way to complete a safe eviction (for both the protestors, HCE staff, [HS2's] contractors and site security) and secure the Crackley Land under the powers afforded to me as the authorised High Court Enforcement Officer under the Writ to close [PROW165X]. This was done by placing metal heras fencing across the top and bottom sections of the PROW to prevent further access.
>
> 22 Following the eviction on 26 March 2020, it was then the intention of the [Claimants] to open the TPROW. However, while we considered opening the TPROW on a couple of occasions, I never considered it feasible to do so due to the recurrent (almost daily) incursions on to the Crackley Land (and the TPROW) by protestors.
>
> 23 The TPROW was therefore never opened. It remained closed between the dates (4 April 2020 to 26 April 2020) on which the [Claimants] assert that [Mr Cuciurean] breached the Order.
>
> 24 The protestors were regularly informed by myself, enforcement officers from HCE and [the Claimants'] contractors that the TPROW was closed and had not been opened."

PROW165X was re-opened on 23 June 2020 (well after the Incidents were over).[84] The TPROW never opened.[85]

95. It was, therefore, the Claimants' position that Mr Cuciurean had no right – during the period in which the Incidents took place – to be on either PROW165X or the TPROW. This was disputed by Mr Cuciurean, and it will be necessary to consider the arguments advanced by both sides on this point.

(v) Gaps in the perimeter

96. It would be wrong to give the impression that the physical boundary surrounding Area A of the Crackley Land (East) was impregnable. Mr Hicks gave evidence that there was – at least for substantial parts of the period during which the Incidents occurred – a gap

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[83] Bovan 2 at paragraph 21.

[84] Bovan 2 at paragraph 17.

[85] Bovan 2 at paragraph 23.

in the Heras fence panels between Point 2 and Point 3 – that is the external perimeter between the Internal Boundary fencing and the Hoarding Fence.

97. Mr Hicks' evidence was supported by that of Mr Cuciurean, who made clear in the course of his cross-examination that he entered what the Claimants contend was the Crackley Land not by climbing over the Hoarding Fence (or, at least, not always) but by going around it, which was easier.

98. I should make clear that I accept this evidence. Specifically, I accept that there were times when Mr Cuciurean may have – instead of climbing over the Hoarding Fence – gone around it. Where that may have been the case, I indicate as much in my description of the Incidents below. Equally, where I am satisfied that Mr Cuciurean did climb the Hoarding Fence, I say so.

99. I conclude that there was from time-to-time a gap in the Heras fence panels between Point 2 and Point 3, very roughly at around the point where PROW165X and the TPROW were intended to start at the Southern border of the Crackley Land. I find that the gap was created by unknown third parties. I do not consider that it would have existed without the intervention of such third parties. It was Mr Bovan's evidence, which I accept, that the Claimants closed the Southern end of PROW165X/the TPROW and that the Claimants would not have permitted a gap in the Heras fence panels of the perimeter of Area A. That, of course, does not mean that such a gap did not exist. I find that:

(1) From time-to-time, such a gap did exist; and

(2) It was a gap created by the actions of unknown persons not comprising the Claimants or agents under their control.

(c) The Incidents

100. The Incidents are described in detail in the Schedule. Although the Schedule lists 17 different Incidents, a number of these occurred in very close temporal succession. Thus, for example, Incidents 1, 2, 3, 4 and 5 occurred between 8:30pm and 12:25am on 4 and 5 April 2020. It is necessary to bear in mind this closeness in time, simply because it is (in my view) a little unrealistic (if technically accurate) to say that in the night of 4/5 April 2020 there were five Incidents. In reality, there was a single, but sustained, attempt to penetrate what the Claimants contend was the Crackley Land.

101. The table below sets out a chronology of the relevant Incidents, and seeks to place each of them in context and to describe their salient details as I have found them on the evidence, according to the requisite standard. There was, in fact, remarkable little difference between the parties in terms of the description of events as set out in the Schedule: where such differences have arisen, I have resolved them in my narrative. In general terms, I seek to describe the Incidents by reference to my foregoing description of the Crackley Land. I should make clear that these findings of fact are expressly without prejudice to Mr Cuciurean's contention that the borders of the Crackley Land – as manifested by the physical border I have described – do not match the land edged red as described in Plan B, which was attached to the Order and which appears here as Annex 2 to this judgment. More particularly:

(1) One of Mr Cuciurean's contentions, which I consider below, was that there was a mismatch between the land edged red on Plan B (which was the land that Mr Cuciurean was injuncted from entering: the "Crackley Land") and the physical demarcation of the perimeters of what the Claimants contended was the Crackley Land, those perimeters having been put in place by the Claimants.

(2) In other words, Mr Cuciurean contended that the Claimants had not established and/or he was not actually on the Crackley Land. He might have penetrated the physical perimeter (this Mr Cuciurean rarely denied), but in doing so he did not infringe the land edged in red on Plan B and so did not breach the Order.

I consider this point below. For the purposes of describing the Incidents, however, it is inevitable that I refer to the physical perimeter using the term the "Crackley Land". I do so, in order to make findings as to what Mr Cuciurean did. I stress that these findings are not necessarily findings that the Order was breached (even though I refer to Mr Cuciurean entering (for example) the "Crackley Land"). That is because I have yet to consider and determine the point made by Mr Cuciurean that there was a mismatch between Plan B and the physical perimeter. The table below must be read with that important qualification in mind:

Date	Occurrence
17 March 2020	The Order was granted by Andrews J.
24 March 2020	The injunction under the Order came into force from 4:00pm and the Writ is issued.
25 March 2020	The date of service of the Order, pursuant to its terms.
26 March 2020	Eviction action pursuant to the Writ took place on the Crackley Land. Camp 1 was closed down; and Camp 2 commenced effective operation.
26 March 2020	PROW165X is closed.
4 April 2020	Mr Cuciurean arrived at Camp 2. Incidents 1 to 4 took place during the evening of 4 April 2020. Incident 5 – which is related – took place in the early hours of 5 April 2020.
8:30pm	**Incident 1** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. Mr Cuciurean entered the Strip between the Hoarding Fence and the TPROW Fencing. He unclipped one of the Heras fence panels comprising the TPROW Fencing and entered on to the TPROW. He was asked to leave, and was told that he was on land in breach of an order of the court. He refused to leave, was restrained and arrested. He was then "de-arrested", when it was clear that Warwickshire police would not attend. Mr Cuciurean was released at about 9:00pm.
9:35pm	**Incident 2** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the

	Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His activities were monitored by the Claimants' agents. When they sought to approach him, he retreated back over the Hoarding Fence.
10:45pm	**Incident 3** Mr Cuciurean entered Area A of the Crackley Land, traversing the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His movements were monitored by two of the Claimants' enforcement officers. Through the TPROW Fencing, Mr Cuciurean was told he was trespassing. Mr Cuciurean exited the Crackley Land by climbing over the Hoarding Fence and returning to Camp 2.
11:25pm	**Incident 4** This Incident took place at the perimeter of Crackley Land (East) between Points 2 and 3. A Heras fence panel was pulled over by protestors. It was later retrieved and re-installed. Mr Cuciurean was one of the protestors detained but not arrested. Mr Cuciurean and the others were released and returned to Camp 2. I am not satisfied so that I am sure that Mr Cuciurean himself was involved in physically pulling down the Heras fence panel. That would, in my judgment, have involved entering upon the Crackley Land. However, Mr Cuciurean may have been supporting others whilst standing outside the Crackley Land. I am not satisfied so that I am sure that Mr Cuciurean was on the Crackley Land.
5 April 2020	Although Incident 5 formed part of the pattern of Incidents taking place on 4 April, it occurred after midnight. Incidents 6, 7 and 8 occurred later on that day.
00:25am	**Incident 5** Mr Cuciurean and two other protestors were reported as being by the Heras fence panels between Points 2 and 3. That would not necessarily have involved entering the Crackley Land. Mr Cuciurean then climbed the Hoarding Fence (between Points 3 and 4), and approached the TPROW Fencing, walking on the Strip, but he did not enter the TPROW. The protestors were reminded that they were on the Claimants' land, although I have insufficient evidence as to the exact words used. Two of the Claimants' enforcement officers removed a Heras fence panel from the TPROW Fencing in order to arrest Mr Cuciurean. Mr Cucuirean retreated to Camp 2.
10:52am	**Incident 6** Mr Cuciurean removed the clips from a Heras fence panel forming part of the perimeter between Points 2 and 3, and removed the panel from the fence line abutting the Hoarding Fence. He (with others) entered upon the Crackley Land. Mr Bovan informed Mr Cuciurean that he was on the Crackley Land. Mr Bovan attempted to reinstate the Heras fence panel that had been removed, and the protestors (including Mr Cuciurean) left the Crackley Land and returned to Camp 2.

10:55am	**Incident 7** Mr Cuciurean and other protestors entered the Crackley Land at the same place – and by the same means – as in Incident 6. Mr Bovan again attempted to reinstate the Heras fence panel, and the protestors (including Mr Cucuirean) again retreated to Camp 2.
11:25am	**Incident 8** Incident 8 was very similar to Incidents 6 and 7, albeit that this Incident involved the removal of two Heras fence panels from the perimeter between Points 2 and 3. Attempts were made to restore the perimeter fence panels, which was met by resistance from the protesters, including Mr Cuciurean. The protestors took Heras fence panels intended to fill the gap created back to Camp 2. There was a subsequent further attempt by Mr Cuciurean to enter upon the Crackley Land in the same way. Mr Cuciurean was repelled by the Claimants' officers, but not detained.
7 Apr 2020	Incidents 9, 10 and 11 all took place on 7 April 2020.
12:24pm	**Incident 9** The Schedule describes this as a "specimen example of repeated acts of contempt". Incident 9 concerned Mr Cuciurean climbing the Post and Wire Fence on the Northern border of the Crackley Land between Points 7 and 8. It is said that Mr Cuciurean did this on a daily basis, in order to distract the Claimants' staff or to facilitate others entering the Land or to examine the fences for weaknesses. I am satisfied that Incident 9 took place, as described. However, I am not prepared to include it as a "specimen example", and it must stand alone. Equally, I am not satisfied as to Mr Cuciurean's precise motives in entering the Crackley Land here.
1:32pm	**Incident 10** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. Mr Cuciurean and another protestor attempted to remove Heras fence panels and the footers that keep them upright. When approached by the Claimants' enforcement officers, they left the Crackley Land and returned to Camp 2.
1:39pm	**Incident 11** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the area between the Hoarding Fence and the TPROW Fencing and penetrated the TPROW Fencing, entering upon the TPROW.
14 April 2020	Incidents 12 and 13 took place on 14 April 2020.
2:33pm	**Incident 12** Incident 12 is *mutatis mutandis* the same as Incident 9.

1:58pm[86]	**Incident 13** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW.
15 April 2020	
11:50am	**Incident 14** This is the Incident described in paragraph 12(3)(c) above, where Mr Mr Cuciurean penetrated *Ad Hoc* Fencing within the Crackley Land (East) and locked himself to the boom of a machine used by the Claimants for the HS2 works.
17 April 2020	
15:24pm	**Incident 15** Mr Cuciurean and other persons penetrated *Ad Hoc* Fencing on the Crackley Land (East).
21 Apr 2020	
10:40am	**Incident 16** Mr Cuciurean, one of a group of around 12 protestors, penetrated *Ad Hoc* Fencing on the Crackley Land (East). Mr Cuciurean was asked to leave on several occasions and warned of arrest. He resisted removal from the site, and was arrested. There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.
26 Apr 2020	
7:30am	**Incident 17** Mr Cuciurean and four other protestors climbed trees on Crackley Land (East). They were warned that they were trespassing by Mr Bovan and asked to climb down. They declined to do so, and specialist climbers had to be deloyed by the Claimants to remove them, using "cherry pickers". There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.

102. I am satisfied, so that I am sure, that all of the Incidents that I have described, with the exception of Incident 4, took place on what the Claimants contend was the Crackley Land. Whether these findings are sufficient to amount to findings that the Order was breached depends upon Mr Cuciurean's contention that what the Claimants said was Crackley Land was not, in fact, the land identified in the Order. So far as Incident 4 is concerned, I am not satisfied that it has been established that Mr Cuciurean was even on land that the Claimants contended was Crackley Land.

[86] The timing of this Incident in the Schedule appears to be out of chronological sequence. I do not consider that anything turns on this.

(d) Points taken by Mr Cuciurean

(i) Introduction

103. Mr Cuciurean contended that he was not in breach of the Order – notwithstanding the facts that I have found – for the following reasons:

(1) The boundaries of the Crackley Land were wrongly demarcated and did not reflect the Crackley Land defined in the Order – namely, the land identified as edged in red on Plan B.

(2) The boundaries of the Crackley Land were, in any event, unclear and confusing.

(3) Mr Cuciurean had a licence to enter upon the Crackley Land.

I shall consider each of these points in turn in the following paragraphs.

(ii) The boundaries of the Crackley Land were wrongly demarcated

104. It is clear – and Mr Cuciurean did not contest – that the Order defines the geographical scope of the Crackley Land (by reference to Plan B) and that if Mr Cuciurean entered upon the Crackley Land so defined, Mr Cuciurean will have breached the Order.

105. Mr Cuciurean's point was that it was incumbent upon the Claimants to prove that Mr Cuciurean's actions – as I have described them in the Incidents above – took place on the Crackley Land as defined in the Order and not merely on land that the Claimants asserted to be Crackley Land falling within the Order.

106. It seems to me that this must be right. I consider – contrary to the submissions of the Claimants – that I must be satisfied to the criminal standard that Mr Cuciurean breached the Order, which means that I must be satisfied (so that I am sure) that Mr Cuciurean entered land that he was enjoined from entering by the Order, namely the land "edged in red on Plan B".[87]

107. It was to deal with this point that the Claimants adduced the evidence of Mr Sah. Mr Sah's evidence (in part) addressed the question of how the Claimants caused the physical perimeter of the Crackley Land to be established by reference to GPS measurements. I shall not refer in any detail to the evidence of Mr Sah. That is because – for the reasons given in paragraph 12(3) above – I do not consider that I can place any weight on Mr Sah's evidence.

108. Mr Cuciurean's point was that the evidence of Mr Sah was the only evidence to support the contention that the physical perimeter and the trespass signs were actually on the red-edged land and that – since I could not be satisfied in relation to the evidence of Mr Sah – the Application must fail. In his written closing submissions, Mr Wagner on behalf of Cuciurean submitted that:[88]

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[87] The Order also refers to the colours on the plan, but these are all within the red-edging, and add nothing to the definition of the geographical scope of the Land.

[88] At paragraph 49.6.

"There is therefore no authoritative evidence before the Court as to the precise land boundaries, and certainly not enough to prove those boundaries to the criminal standard of proof."

109. I accept – as I have already noted – that Mr Sah's evidence cannot be relied upon. However, I do not consider that the point made by Mr Cuciurean is, without more, correct. It is necessary to consider the Incidents – and their geographical location – in greater detail:

(1) I have, in the course of this judgment, attempted to describe the physical perimeter of Crackley Land (East) in some detail, so that the location of the Incidents may be understood. It is very clear that this is far easier to do in the case of Area A than Area B. That is because – as I have described – the perimeter of Area B is largely without perimeter fencing, whereas Area A is entirely fenced in.

(2) It follows that Incidents occurring in Area B – or Incidents where it is not clear, from the Schedule, whether they took place within Area A or Area B – are far harder to give a precise location to, compared to those Incidents were a precise penetration of the physical perimeter has been shown.

(3) Thus, there is, to my mind, a very sharp distinction to be drawn between Incidents 14, 15, 16 and 17 and the other Incidents (with the exception of Incident 4, which I do not consider involved entry on the Crackley Land, even as understood by the Claimants).

(4) Incidents 14, 15, 16 and 17 all have a vagueness to them which has not enabled me to pin down, in my findings in relation to these Incidents, a very precise geographic location. All of the Incidents are (in the evidence before me) detached from the physical geography of the site, as I have described it, such that I do not consider that I can (to the requisite standard) conclude that the Incidents took place on the Crackley Land as defined in the Order. I am quite sure that the Claimants consider that these Incidents took place on the Crackley Land, but that is not enough. Although the Schedule was accompanied by plans purporting to show the actual location of all of the Incidents, Mr Bovan had to accept that this was no more than a rough indicator of location.

(5) Although I appreciate that Mr Cuciurean did not advance any positive case as to location, but only put the Claimants to proof, I do not consider that the Claimants have met that standard in relation to Incidents 14, 15, 16 and 17.[89]

(6) Matters are very different as regards the remaining Incidents (excepting Incident 4, which I shall not refer to again). These Incidents can be pinned down to a precise geographic location, as I have described. It is thus possible to state – as I have stated – that the perimeter of Area A was breached in a very specific way.

(7) Of course, this does not preclude the possibility that there is a mismatch between the physical perimeter of Area A, as I have described it, and the demarcation of

[89] There was, between the parties, debate as to whether expert evidence as to the geographical ambit of the Crackley Land was required. The Claimants did not consider that such evidence was necessary, and Mr Cuciurean never pursued an application to adduce expert evidence himself.

the Crackley Land as set out in the Order. However, on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical. I consider that the Claimants have established, to the requisite standard, that these Incidents (1 to 3 and 5 to 13) did involve a breach of the Order. It seems to me that Mr Cuciurean's case involves an assertion that the Claimants have been exercising possessory rights over someone else's land in a most aggressive way and in circumstances where one would expect – if that were the case – clear challenge to the exercise of those rights by those whose interests were being usurped. More specifically:

(a) The physical boundaries that I have described were up at the time of Andrews J's Judgment and Order.[90] If there was a serious argument that the Claimants were operating on land to which they had no claim, then that argument would have been articulated before Andrews J. As she noted in her Judgment, one of the purposes of the defendants before her was to monitor the conduct of the Claimants, so as to ensure they did not act unlawfully.[91]

(b) Equally, it is unlikely in the extreme that neighbouring landowners would permit the erection, on their land, of barriers like the Hoarding Fence without objection, particularly given the controversial nature of the HS2 Scheme.

(c) Nor do I consider that the Claimants would dare to pursue the aggressive vindication of their rights (erecting barriers and notices; ejecting persons; arresting them; diverting and closing footpaths) without being very sure that they were acting clearly within their rights.

(8) If Mr Cuciurean had mounted a positive case that the Claimants had overreached, then of course that case would have to be considered by me and determined. But no evidence has been advanced by Mr Cuciurean in this regard, and the Claimants have simply been put to proof. Such a course is absolutely within Mr Cuciurean's rights, and I take the burden and standard of proof – which rests on the Claimants – extremely seriously. But, in the case of Incidents 1 to 3 and 5 to 13, I am satisfied that that burden has been met taking all of the evidence before me into account.

I have used the term "aggressive" in describing the Claimants' vindication of its rights. By this, I do not mean to suggest anything disproportionate or wrong in the Claimants' conduct. The importance of the term lies in the overtness of the Claimants' conduct. This was not a case where the Claimants were, hidden from sight, asserting their rights. Given this overtness, some form of pushpack would be inevitable if the Claimants' were asserting rights that they did not have.

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[90] See, for instance, [13] of the Judgment, referring to the Heras fences.

[91] See [9] of the Judgment in relation to the Crackley Land.

(iii) The boundaries of the Crackley Land were unclear

110. It was contended that the boundaries of the Crackley Land were unclear. A great deal of the evidence adduced by Mr Cuciurean (including in particular the evidence described in paragraph 12(4) above) went to this point. Thus, it was suggested that the Injunction Notices and Injunction Warning Notices were not present; that the multiple layers of No Trespass Notices were confusing; that the agents of the Claimants were unclear as to the boundaries they were patrolling; that the fence lines – in particular the Internal Boundary and the *Ad Hoc* Fencing – were confusing; and that much more could have been done to clarify the position.

111. I do not accept this evidence. It seems to me that once the conclusion has been reached that the physical perimeter around Area A matched the land edged in red defined in the Order, there was little or no scope for misunderstanding the perimeter of the Crackley Land. The suggestion that the boundaries of the Crackley Land were unclear to the protestors in general, and to Mr Cuciurean in particular, rather misstates the purpose of the protests and the purpose of Mr Cuciurean's conduct at the Crackley Land. Mr Cuciurean was not an unknowing roamer of the countryside, accidently coming across the Hoarding Fence and deciding to climb it. He was – as he fully acknowledged – a committed opponent of the HS2 Scheme and his conduct and commitment must be seen in that light. Mr Cuciurean was not, by some terrible mistake that could have been avoided if only the Claimants had been clearer, penetrating the perimeter of the Crackley Land several times in one night (Incidents 1 to 5). He was doing so because (as I have noted) he was seeking to lend as much force to his objections to the HS2 Scheme as he could, by inconveniencing the Claimants as much as possible.

112. In short, whilst I do not consider that the Claimants could (within reason[92]) have been any clearer about the perimeter of Area A, it is my settled view that even if additional steps had been taken to publicize the Area A perimeter, those steps would have made no difference to Mr Cuciurean's conduct.

113. I should add, by way of postscript, that I consider the clarity or otherwise of the boundaries of the Crackley Land to be a matter essentially irrelevant to the outcome of the Application. It seems to me that either Mr Cuciurean entered upon the Crackley Land or he did not. If he did – as I have concluded he did – he was in breach of the Order.

(iv) A licence was granted to Mr Cuciurean to cross the Crackley Land

114. This contention has, as I understand it, two bases: the first is what Mr Cuciurean suggested was the unlawful failure to open the TPROW; the second arises out of paragraph 30 of Bovan 2, which states:

> "…This access across the Crackley Land was tolerated by the [Claimants] as the entirety of the Crackley Land was not required for all times for Phase One works. I have also been informed by employees of LM (the contractor employed by the Second [Claimant]) that there would be a significant and disproportionate cost to fence the entire perimeter…"

[92] It would, of course, have been possible – but economically mad – to have encircled the Crackley Land with an insurmountable barrier.

115. It is convenient to deal with the second point first. It is evident that Mr Bovan is here describing the Claimants' attitude in relation to the unfenced part of Crackley Land (East), what I have termed Area B.[93] I regard the contention that the Claimants were – by reason of the unfenced nature of Area B – consenting to trespasses of the sort described in Incidents 1 to 3 and 5 to 13 as unarguable.[94] In these Incidents, Mr Cuciurean was obviously entering upon land where he was not welcome, and where his presence was quite the reverse of being consented to. He was, in these Incidents, either driven from the land, escorted off it or arrested. The suggestion that his presence was or had been consented to – or even tolerated – is fanciful.

116. Although it is immaterial to the outcome, it seems to me necessary to state that the mere passage and re-passage of persons across Area B cannot, of itself, be enough to establish consent on the part of the Claimants to such passage and re-passage. As Mr Bovan described, the Crackley Land is a large tract of land, which cannot (economically) be completely fenced in. The mere fact that trespass is easily possible in no way means it is permitted.

117. I turn, then, to the question of whether the conduct of the Claimants in relation to PROW165X and TPROW can give rise to any kind of justification for the Incidents (by which I mean Incidents 1 to 3 and 5 to 13) so as to avoid the conclusion that Mr Cuciurean was in breach of the Order. As to this:

(1) The starting point must be the terms of the Order itself, and the relevant part of the Order is paragraph 5.1. As I have described,[95] conduct which would otherwise be an infringement of paragraph 4.2 of the Order (entry upon the Crackley Land) is not an infringement where a person is exercising his or her rights of way over any open public right of way over the land.[96]

(2) It is clear – and not contested – that PROW165X was lawfully closed.[97] Mr Cuciurean contended that the consequence of this was that the TPROW was open and that the Claimants, by their conduct, improperly closed it. As a result, Mr Cuciurean contended, he was entitled to be on the TPROW and was entitled to use "self-help" remedies if (as was the case) the Claimants blocked the access to the TPROW.[98]

(3) I consider that these contentions to be basically misconceived and wrong. They can provide no justification for what would otherwise be a breach of the Order. My reasons for reaching this conclusion are multiple. In the first place, in none of the Incidents did Mr Cuciurean actually seek to use the TPROW. By this, I mean he never sought to pass or re-pass along it from its Southern starting point

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[93] See paragraph 87 above, where the limited perimeter fencing is described.

[94] These are the Incidents where I have concluded that there was – to the requisite standard – entry upon the Crackley Land and therefore – absent consent of the Claimants – a breach of the Order.

[95] See paragraph 6(5) above.

[96] My emphasis. Andrews J had well in mind the power in the Claimants to close public rights of way.

[97] See paragraphs 93(1) and 94 above.

[98] See paragraph 94 above, which describes the manner in which the TPROW was kept closed by the Claimants.

between Point 1 and Point 2.[99] Instead, he either climbed or circumvented the Hoarding Fence (an unjustifiable entry onto the Crackley Land) and entered upon the Strip between the perimeter and the TPROW Fencing (another unjustifiable entry onto the Crackley Land) and (from time to time) scaled the TPROW Fencing (which is not passage or re-passage along the TPROW). In short, Mr Cuciurean was not exercising his right over a public right of way – even assuming, in his favour, that the TPROW was a public right of way within the meaning of paragraph 5.1 of the Order.

(4) On behalf of Mr Cuciurean, it was suggested that the obstruction, by the Claimants, of the access point to the TPROW justified "self-help" in the form of the Incidents I have described. I reject this contention. Whilst I accept – assuming the TPROW to have been open or unlawfully not opened – Mr Cuciurean might have been justified in circumventing the obstruction and entering at the lawful point, that did not justify surmounting or circumventing the Hoarding Fence, thereby gaining access to land (i.e. the Strip) that – on no view – constituted the TPROW (or any right of way).[100]

(5) Moreover, I do not consider that the TPROW was ever open in the sense that a right of way was conferred on the public. The position was that PROW165X was closed, and no footpath was opened to replace it. I accept that this may very well have been a breach of the Claimants' public law powers under High Speed Rail (London – West Midlands) Act 2017. I shall – without deciding the point – assume that the terms of the Claimants' consultation with Warwickshire Country Council[101] were such that it was (in the public law sense) unlawful for the Claimants to close PROW165X without opening the TPROW. Making that assumption in Mr Cuciurean's favour, this might have given him the right to review juducially the Claimants' decision to close PROW165X. But it could in no way confer upon him the right to pass or repass in any way along the TPROW.

118. For these reasons, I do not consider that the exception to paragraph 4 of the Order, contained in paragraph 5.1, was engaged.

(e) Conclusion on breach

119. For all these reasons, the Order, which was clear and unambiguous, was breached by Mr Cucuirean when he committed Incidents 1 to 3 and 5 to 13.

(4) Deliberation

120. Deliberation refers to the mental element or *mens rea* in civil contempt. Proudman J helpfully set out the matters that have to be established where contempt by breach of an order is alleged in *FW Farnsworth Ltd v.* Lacy:[102]

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[99] See paragraphs 91 and 93(4) above.

[100] The reliance on *Stacey v. Sherrin*, (1913) 29 TLR 555 was, for this reason, misconceived.

[101] See paragraph 93 above.

[102] [2013] WHC 3487 (Ch) at [20].

"A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

121. The *mens rea* or mental element for civil contempt (which this Application is concerned with) is considered in *Arlidge*, which both parties before me relied upon:[103]

"12-93 Warrington J expressed the principle in *Stancomb v. Trowbridge UDC*:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it there was no direct intention to disobey the order."

That this expresses the true position has since been confirmed by the Court of Appeal and also by the House of Lords in *Heatons Transport (St Helens) Ltd v. TGWU*, in *Director Genral of Fair Trading v. Pioneer Concrete (UK) Ltd* and in *M: M v. Home Office, Re*. Motive is immaterial to the question of liability.

12-94 What was traditionally required was to demonstrate that the alleged contemnor's *conduct* was intentional (in the sense that what he actually did, or omitted to do, was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence. By reason of CPR 81.8(1) in the case of a prohibitory order, the court may dispense with service of a copy of the order if satisfied that the person had been present when the judgment was given or the order made. As Christopher Clarke J explained in *Masri v. Consolidated Contractors* "it would not…be just to exercise a contempt jurisdiction against a defendant who had not had notice of the order in order to be able to comply with it". This will not necessarily, however, in itself demonstrate that the alleged contemnor actually knows of the order. The problem was highlighted by Eveleigh LJ in *Z Ltd v. A-Z and AA-LL*:

> "In the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation is said to be acting knowingly."

12-95 Yet there is no need to go so far as to show that the respondent *realised* that his conduct would constitute a breach, or even that he had read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general."

---

[103] Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) (omitting footnotes and references).

122. Thus, the element of "deliberation" is actually a very attenuated requirement, which in reality requires no more than that the alleged contemnor do the acts that constitute a breach of the order with deliberation, as opposed to by accident or unconsciously. The low standard of the mental element is very well illustrated by the decision of Jacob J in *Adam Phones Ltd v. Gideon Goldschmidt*,[104] where the Jacob J nevertheless (albeit with some reluctance) considered a contempt to be established even where the contemnor had thought he was obeying the court's order:

> "The claimant says that provided that Gideon intended to do what he did, that is enough to prove contempt. It is no defence to say "I thought was obeying the order" if in fact you were wrong.
>
> The claimant relies upon what was said by Mr Justice Millett in *Spectravest v. Aperknit*:
>
> > "To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order.
> >
> > Authority for this conclusion may be found in *Heatons Transport (St. Helen's) Ltd v Transport & General Workers' Union*, [1973] AC 15 at 108-110, and *Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137. In the first of those cases, Lord Wilberforce described as contempt conduct which was "neither casual nor accidental and unintentional". That phrase was carefully chosen and repeated several times. It clearly describes only two alternatives, not three. Conduct which is deliberate but unintentional, in the sense in which that word was used by Mrs Giret, cannot be brought within Lord Wilbeforce's formula.
> >
> > In the Mileage case, the defendants had given undertakings to the court not to enter into a particular agreement or any agreement "to the like effect". The question whether one agreement is of like effect to another is a question of fact and degree, as the court expressly held. The court, nevertheless, held that a contempt had been established. At 1162 the court said:
> >
> > "We conclude, therefore, that the breaches of undertaking here were contempts of court, even though it were to be shown that they were things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."
> >
> > A little later on he said:
> >
> > "Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt. *Bona fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant and sometimes very important as mitigation. The extent of such mitigation must, however, depend upon the circumstances of the particular case, and the evidence adduced."
>
> The cases referred to by Millett J support his conclusion. It is also the generally received view, see e.g. the Supreme Court Practice 1999 paragraph 45/5/5:
>
> > "It is no answer to say that the Act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order".

[104] [2000] FSR 163 at 170-171.

123. Although Jacob J considered contrary authority, and expressed the view that "it is appropriate for the mental element of contempt of court to be reconsidered by a higher court",[105] his conclusion was that the law as stated by Millett J and cited by him was the law he was bound to apply.[106] That remains the position in this case.

124. I am satisfied that Mr Cuciurean breached the Order deliberately, in that he consciously and deliberately entered the Crackley Land. That is all the Order enjoined. In case I am wrong about the attenuated nature of the requirement of deliberation, I should make clear the following findings:

(1) Mr Cuciurean obviously entered the Crackley Land wilfully, intending to enter upon land where he knew he should not be. I consider his conduct in crossing the Area A perimeter in the way he did in Incidents 1 to 3 and 5 to 13 to demonstrate a subjective understanding that he was trespassing on another's land, and that he was doing so in the face of a clear determination on the part of the Claimants that he should not do so.

(2) I consider that Mr Cuciurean entered upon the Crackley Land with the subjective intention to further the HS2 protest, and to inhibit or thwart the HS2 Scheme to the best of his ability.

(3) I find that he did so in knowledge of the Order. I cannot say that he knew the full terms of the Order. Mr Cuciurean may very well have taken the course of adopting wilful blindness of its terms. But in light of the events described in this judgment, I conclude that Mr Cuciurean fully understood the terms of paragraph 4.2 of the Order, namely that he was not to enter upon the Crackley Land.

F. CONCLUSIONS

125. For all these reasons, I am satisfied that of the alleged grounds of contempt described in Statement of Case and in the Schedule thereto, Incidents 1 to 3 and 5 to 13 are made out to the requisite standard, and that Mr Cucuirean has breached the Order and is in contempt of court in these respects.

126. At the hearing at which I heard the parties' helpful closing submissions on 17 September 2020, it was agreed that if (as I have found) Mr Cuciurean was in contempt of court, his counsel, Mr Wagner, would wish some time to consider points in mitigation. That is, of course, entirely right.

127. I have listed this matter for hearing on 16 October 2020, when I propose formally to hand down this judgment (subject to any typographical corrections the parties may have). However, it should be noted that this judgment was circulated to the parties, in draft, on 2 October 2020, so as to enable Mr Cuciurean and his legal team to consider it.

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[105] At 172.

[106] At 172.

ANNEX 1

TERMS USED IN THE JUDGMENT

(footnote 1 in the judgment)

TERM	PARAGRAPH IN THE JUDGMENT IN WHICH THE TERM IS FIRST USED
Ad Hoc Fencing	§86(3)
Annex 1	§1 (footnote 1)
Annex 2	§3
Annex 3	§86
Annex 4	§93(4)
Application	§7
Area A	§87
Area B	§85(4)
Beaumont 1	§12(4)(f)
Beim 1	§55(2)
Bovan 1	§7
Bovan 2	§12(1)
Bovan 3	§12(1)
Cairns 1	§12(4)(d)
Camp 1	§7 (footnote 4)
Camp 2	§7 (footnote 4)
Category 3 Defendants	§41
Claimants	§2
Corcos 1	§12(4)(a)
Crackley Land	§3
Crackley Land (East)	§84
Crackley Land (West)	§84
Cuciurean 1	§12(3)(a)
Cuciurean 2	§12(3)(a)
Defendants	§2
HCE	§7 (in quotation)
Heras fence panels	§86(2)

Hicks 1	§12(4)(c)
Hicks 2	§12(4)(c)
Hillier 1	§12(4)(b)
Hoarding Fence	§89(3)
HS2	§2
HS2 Scheme	§10(1)
Incident(s)	§8
Injunction Notice	§57(3)(a)(i)
Injunction Warning Notice	§57(3)(a)(ii)
Internal Boundary	§86(4)
Judgment	§1
Land	§3
No Trespass Notice	§57(3)(d)
Order	§1
Penal Notice	§5
Pitwell 1	§12(4)(e)
Plan B	§3
Point 1	§89
Point 2	§89(1)
Point 3	§89(2)
Point 4	§89(3)
Point 5	§89(4)
Point 6	§89(4)
Point 7	§89(4)
Point 8	§89(5)
Pook 1	§12(4)(g)
Post and Wire Fence	§89(5)
Proceedings	§7 (in quotation)
PROW165X	§91
Remaining Portion	§85(3)
Sah 1	§12(2)
Schedule	§8
Second Defendants	§2
Shaw 1	§29(4)

Square	§85(1)
Statement of Case	§7
Strip	§93(4)(b)
TPROW	§93(3)
TPROW Fencing	§93(4)(c)
Triangle	§85(2)
Writ	§12(1)

ANNEX 2

"PLAN B": THE PLAN OF THE CRACKLEY LAND ATTACHED TO THE ORDER

(paragraph 3 in the judgment)

ANNEX 3

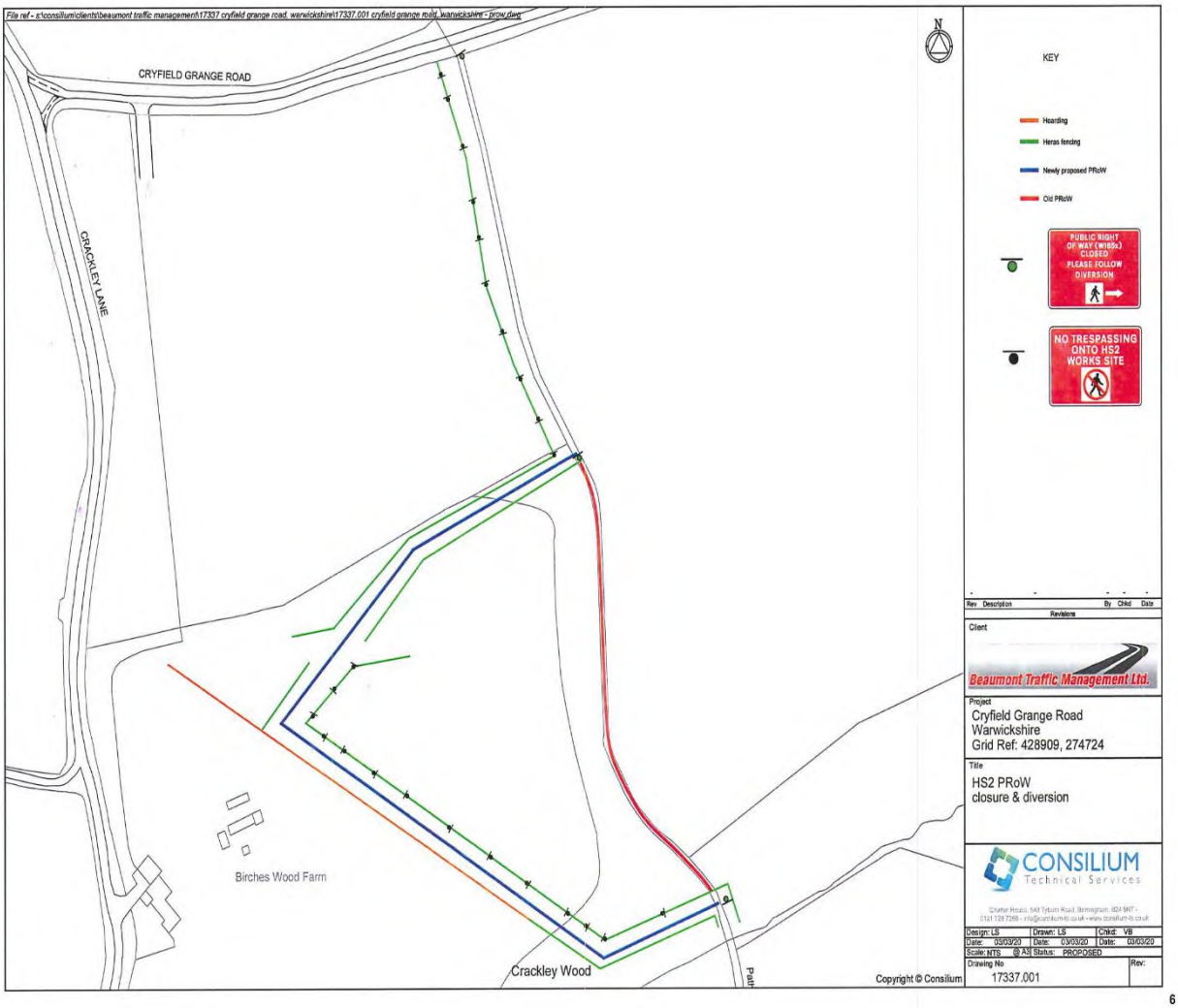
"PLAN B" MARKED UP FOR THE PURPOSE OF THIS JUDGMENT

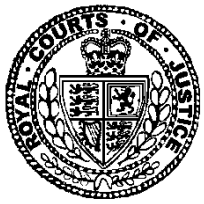
(paragraph 86 in the judgment)

ANNEX 4

THE PLAN SHOWING THE INTENDED DIVERSION OF PROW165X TO A TPROW

(paragraph 93(4) in the judgment)





Neutral Citation Number: [2020] EWCA Civ 303

Case No: A2/2019/2604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Nicklin J
[2019] EWHC 2459 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

Between :

CANADA GOOSE UK RETAIL LIMITED (1)
James HAYTON (for and on behalf of the Employees, Security Personnel and Protected Persons pursuant to CPR 19.6) (2) — **Appellants**

- and -

PERSONS UNKNOWN WHO ARE PROTESTORS AGAINST THE MANUFACTURE AND SALE OF CLOTHING MADE OF OR CONTAINING ANIMAL PRODUCTS AND AGAINST THE SALE OF SUCH CLOTHING AT CANADA GOOSE, 244 REGENT STREET, LONDON W1B 3BR (1)
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA) FOUNDATION
(a charitable company limited by guarantee, in its own right and for and on behalf of its employees and members pursuant to CPR 19.6) (2) — **Respondents**

- -

Ranjit Bhose QC and **Michael Buckpitt** (instructed by **Lewis Silkin LLP**) for the **Appellants**
The **Respondents** did not appear and were not represented
Sarah Wilkinson appeared as Advocate to the Court

Hearing dates : 4 & 5 February 2020

- -

Approved Judgment

AUTH-272

Sir Terence Etherton MR, Lord Justice David Richards and Lord Justice Coulson :

1. This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests.

2. The first appellant, Canada Goose Retail Limited UK ("Canada Goose"), is the UK trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

3. The first respondents ("the Unknown Persons respondents"), who are the first defendants in the proceedings, were described in the claim form as: "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]". The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation ("PETA").

4. This is an appeal from the order of Nicklin J of 20 September 2019 by which he dismissed the application of the appellants for summary judgment for injunctive relief against the respondents and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by HHJ Moloney QC (sitting as a Judge of the High Court) on 15 December 2017.

Factual background

5. From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose's use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J's judgment at [132]-[134]. The following is a brief summary.

6. A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been coordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have joined the on-going protest as individuals who were not part of any wider group.

7. The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose's employees.

8. A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2018, the front doors of the store were vandalised with "*Don't shop here*" and "*We sell cruelty*" painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, 300, and 100, respectively) had a serious impact on the operation of the store. The police were present on each of those occasions. On one occasion five arrests were made. On 18 November 2017 the police closed one lane of the carriageway on Regent Street. There is also evidence of criminal offences by certain individual protestors, including an offence of violence reported to the police during the large protest on 18 November 2017.

The proceedings

9. Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as:

> "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR"

10. They are described in paragraph 6 of the particulars of claim as including "all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign". The "Campaign" was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.

11. The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:

> (1) Assaulting, molesting, or threatening the Protected Persons [defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers];
>
> (2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards Protected Persons.
>
> (3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the Protected Persons;
>
> (4) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the Protected Persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the First Claimant's retail business to or with Employees by telephone, email or letter;

(7) Entering the Store;

(8) Blocking or otherwise obstructing the Entrances to the Store;

(9) Demonstrating at the Stores within the Inner Exclusion Zone;

(10) Demonstrating at the Stores within the Outer Exclusion Zone save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone or otherwise within 50 metres of the Building Line of the Store.

12. On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:

"(1) Assaulting, molesting, or threatening the Protected Persons (defined as including Canada Goose's employees, security personnel working at the store, customer and any other person visiting or seeking to visit the store);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of Protected Persons;

(3) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of Animal Products;

(4) Making in any way whatsoever any abusive or threatening electronic communication to the Protected Persons;

(5) Entering the Store;

(6) Blocking or otherwise obstructing the Entrance to the Store;

(7) Banging on the windows of the Store;

(8) Painting, spraying and/or affixing things to the outside of the Store;

> (9) Projecting images on the outside of the Store;
>
> (10) Demonstrating at the Store within the Inner Exclusion Zone;
>
> (11) Demonstrating at the Store within the Outer Exclusion Zone A save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets within the Outer Exclusion Zone A (but not within the Inner Exclusion Zone provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (12) Demonstrating at the Store within the Outer Exclusion Zone B [as defined in the order] save that no more than 5 Protestors may at any one time demonstrate and hand out leaflets within Outer Exclusion Zone B (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (13) Using at any time a Loudhailer [as defined] within the Inner Exclusion Zone and Outer Exclusion Zones or otherwise within 10 metres of the Building Line of the Store;
>
> (14) Using a Loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

13. A plan attached to the order showed the Inner and Outer Exclusion Zones. Essentially those Zones (with a combined width of 7.5 metres) covered roughly a 180-degree radius around the entrance to the store. The Inner Exclusion Zone extended out from the store front for 2.5 metres. The Outer Exclusion Zone extended a further 5m outwards. The Outer Exclusion Zone was divided into Zone A (a section of pavement on Regent Street) and Zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined Exclusion Zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

14. The order permitted the claimant to serve the order on "any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order". It provided for alternative service of the order, stating that "The claimants shall serve this order by the following alternative method namely by serving the same by email to 'contact@surgeactivism.com' and 'info@peta.org.uk'".

15. The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16. The order was sent on 29 November 2017 to the two email addresses mentioned in the order: 'contact@surgeactivism.com' and 'info@peta.org.uk'. The claim form and the particulars of claim were also sent to those email addresses.

17. On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J's order.

18. On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.

19. At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under Article 10 of the European Convention on Human Rights ("the ECHR") and to freedom of assembly under Article 12 of the ECHR.

20. Judge Moloney continued the interim injunction but varied it by amalgamating Zones A and B in the Outer Exclusion Zone and increasing the number of protestors permitted within the Outer Exclusion Zone to 12 people. He also varied paragraph (14) of Teare J's order, substituting a prohibition on:

> "… using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone… [and] using a Loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2pm and 8pm a single Loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

21. Judge Moloney's order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22. Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23. On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Part 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application

differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the restrictions applicable to the Zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

> "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Limited and are involved in any of the acts prohibited by the terms of this order"

24. Canada Goose says that the further written submissions made clear that it no longer pursued summary judgment against PETA.

25. Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147, and *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further sets of written submissions on behalf of Canada Goose.

26. Bearing in mind that only one party was represented before him, Nicklin J's judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.

27. The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue as to the substance of the application for summary judgment.

28. Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR 6.5, and there had been no order permitting alternative service under CPR 6.15. Teare J's order only permitted alternative service of his order. Nicklin J declined to amend Teare J's order under the "slip rule" in CPR 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR 6.16 without a proper application before him.

29. Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protesters who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30. He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37 protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown

Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31. Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protesters, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.

32. Nicklin J said the following (at [163]), in conclusion on the form of the proposed final injunction:

> "For the reasons I have addressed above, it is not impossible to name the persons against whom relief is sought and, more importantly, the terms of the injunction would impose restrictions on otherwise lawful conduct. Further, the interim injunction (and in particular the size and location of the Exclusion Zones) practically limits the number of people who can demonstrate outside the Store to 12. This figure is arbitrary; not justified by any evidence; disproportionate (in the sense there is no evidence that permitting a larger group would not achieve the same object); assumes that all demonstrators share the same objectives and so could be 'represented' by 12 people; and wrong in principle ... Who is to decide who should be one of the permitted 12 demonstrators? Is it 'first-come-first-served'? What if other protestors do not agree with the message being advanced by the 12 'authorised' protestors?"

33. His conclusion on whether the respondents had a real prospect of defending the claim were stated as follows:

> "164. The Second Defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the Second Defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> 165. In relation to the First Defendants, and those for whom the Second Defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual Defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the Claimants have demonstrated that the Defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of "persons unknown" who

> have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various Defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

34. For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said:

> "I am also satisfied that, applying the principles from *Cameron* and *Ineos*, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the Claimants need to address regarding the validity of the Claim Form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not a claim can be properly maintained against "persons unknown" for particular civil wrongs (e.g. trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the Particulars of Claim and any interim injunction granted against "persons unknown" must comply with the requirements suggested in *Ineos*."

The grounds of appeal

35. The grounds of appeal are as follows.

> "Ground 1 (Service of the Claim Form): In relation to the service of the Claim Form, the Judge:
>
> Erred in refusing to amend the Order of 29 November 2017, pursuant to CPR 40.12 or the court's inherent jurisdiction, to provide that service by email was permissible alternative service under CPR 6.15; alternatively
>
> Erred in failing to consider, alternatively in refusing to order, that the steps taken by the Appellants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR 6.15(2); alternatively
>
> Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the Claim Form

> under CPR 6.16, alternatively erred in law in refusing to exercise that power of dispensation.
>
> Ground 2 (Description of First Respondents): The Judge erred in law in holding that the Appellants' proposed re-formulation of the description of the First Respondents was an impermissible one.
>
> Ground 3 (Approach to Summary Judgment): In determining whether summary judgment should be granted for a final prohibitory *quia timet* injunction against the First Respondents (as described in accordance with the proposed reformulation) the Judge erred in law in the approach he took. In particular, and without derogating from the generality of this, the Judge:
>
> Erred in concluding that the proper approach was to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protester (whether or not that individual was formally joined as a party); and/or
>
> Erred in concluding that the Appellants were bound to differentiate, for the purposes of the description of the First Respondents, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or
>
> Erred in concluding that evidence of wrongdoing of some individuals within the potential class of the First Respondents could not form the basis for a case for injunctive relief against the class as a whole.
>
> Ground 4 (Approach to and assessment of the evidence): The judge erred in his approach to alternatively his assessment of the evidence before him, reaching conclusions which he was not permitted to reach."

36. In a "supplemental note" Canada Goose asks that, if the appeal is allowed, the summary judgment application be remitted.

Discussion

Appeal Ground 1: Service

37. The order of Teare J dated 29 November 2017 directed pursuant to CPR 6.15 that his order for an interim injunction be served by the alternative method of service by email to two email addresses, one for Surge (contact@surgeactivism.com) and one for PETA (info@petga.org.uk). There was no provision for alternative service of the claim form and the particulars of claim or of any other document, other than the order itself. In fact, the claim form and the particulars of claim were sent to the same email addresses as were specified in Teare J's order for alternative service of the order itself.

38. Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect email service as provided for below of the Order, the Claim Form and Particulars of Claim and application notice and evidence in support".

39. Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.

40. Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.

41. In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR 6.16.

42. We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.

43. CPR 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co. v Baker Noton Pharmaceuticals Inc (No. 2)* [2001] EWCA Civ 414, [2001] RPC 45.

44. We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR 40.12.

45. Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR 6.15(2)) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* at [14] the general rule is

that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and, at [17]:

> "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

46. Lord Sumption, having observed (at [20]) that CPR 6.3 considerably broadens the permissible methods of service, said that the object of all of them was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time. He went on to say (at [21]), with reference to the provision for alternative service in CPR 6.15, that:

> "subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant".

47. Sending the claim form to Surge's email address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.

48. The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR 6.16 to dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR 6.16.

49. Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.

50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention

of protesters at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protesters and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

51. Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protester than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.

52. We have already mentioned, by reference to Lord Sumption's comments in *Cameron*, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protesters who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to apply to be joined as a party, can justify using the power under CPR 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protesters to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR 6.16.

53. In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was plainly the case, that service of the claim form by sending it to PETA's email address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR 6.16 dispensing with service on PETA.

54. Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial

discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

55. For those reasons we dismiss Appeal Ground 1.

Appeal Ground 2 and Appeal Ground 3: Interim and Final Injunctions

56. It is convenient to take both these grounds of appeal together. Ground 3 is explicitly related to Nicklin J's dismissal of Canada Goose's application for summary judgment. Appeal Ground 2 appears to be directed at, or at least is capable of applying to, both the dismissal of the summary judgment application and also Nicklin J's discharge of the interim injunction originally granted on 29 November 2017 and continued by the order of Judge Moloney of 15 December 2017. We shall consider, first, the interim injunction, and then the application for a final injunction.

Interim relief against "persons unknown"

57. It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* and put into effect by the Court of Appeal in the context of protesters in *Ineos* and *Cuadrilla Bowland Limited v Persons Unknown* [2020] EWCA Civ 9.

58. In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59. Lord Sumption, referred (at [9]) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at [10]) that English judges had allowed some exceptions to the general rule, he said (at [11]) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance.

60. Lord Sumption identified (at [13]) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61. That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.

62. Lord Sumption said (at [15]) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at [26]), such a person cannot be sued under a pseudonym or description.

63. It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

64. Lord Sumption also referred (at [11]) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65. The claimants in *Ineos* were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protesters. Each of the first five defendants was a group of persons described as "Persons unknown" followed by an unlawful activity, such as "entering or remaining without the consent of the claimants on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass … over private access roads", or "interfering with the right of way enjoyed by the claimants … over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order". The first instance Judge made interim injunctions, as requested, apart from one relating to harassment.

66. One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgement, with which the other two

members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at [29]) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only come into existence in the future. Longmore LJ concluded (at [30]) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67. Longmore LJ said (at [31]) that a court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance. He also referred (at [33]) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under Article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at [34]) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

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

68. Applying those requirements to the order of the first instance judge, Longmore LJ said that there was no difficulty with the first three requirements. He considered, however, against the background of the right to freedom of peaceful assembly guaranteed by both the common law and Article 11 of the ECHR, that the order was both too wide and insufficiently clear in, for example, restraining the fifth defendants from combining together to commit the act or offence of obstructing free passage along the public highway (or to access to or from a public highway) by slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

69. Longmore LJ said (at [40]) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at [40]) that it was unsatisfactory that the injunctions contained no temporal limit.

70. The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.

71. *Cuadrilla* was another case concerning injunctions restraining the unlawful actions of fracking protesters. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72. The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising the jurisdiction to grant a *quia timet* interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth *Ineo*s requirements required some qualification.

73. Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] 1 QB 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74. Although the point did not arise for decision in *Cuadrilla*, the point is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited

demonstrating within the Inner Exclusion Zone and limited the number of protesters at any one time and their actions within the Outer Exclusion Zone.

75. In *Hubbard v Pitt* [1976] 1 QB 142 the issue was whether the first instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp. 187-188) that the injunction was not wider that was necessary for the purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p. 190):

> "Mr. Turner-Samuels, however, also advanced an alternative argument that, even if he was wrong in his submission that no interlocutory relief should have been granted, the terms of the injunction were too wide in that it would prevent the defendants from doing that which, as he claimed and as I am for the present purposes prepared to accept, it was not unlawful for them to do, namely, to assemble outside the plaintiffs' premises for the sole purpose of imparting or receiving information. I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76. In *Burris* the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp.1377 and 1380-1381):

> "It would not seem to me to be a valid objection to the making of an "exclusion zone" order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest … Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest —

> and also, but indirectly, the defendant's — a wider measure of restraint is called for.

77. Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

78. It is open to us, as suggested by the Court of Appeal in *Cuadrilla*, to qualify the fourth *Ineos* requirement in the light of *Hubbard* and *Burris*, as neither of those cases was cited in *Ineos*. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or Articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.

79. The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* was the fifth requirement – that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance … with a view to slowing down or stopping the traffic … with the intention of causing inconvenience or delay to the claimants".

80. Leggatt LJ said (at [65]) that he could not accept that there is anything objectionable in principle about including a requirement of intention in an injunction. He acknowledged (at [67]) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at [68]) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at [74]) that there was no reason in principle

why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

81. We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

82. Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases like the present one:

> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
>
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
>
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
>
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as

> trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
>
> (7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application.

83. Applying those principles to the present proceedings, it is clear that the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible.

84. As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as:

> "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR".

85. This description is impermissibly wide. As Nicklin J said (at [23(iii)] and [146]), it is capable of applying to person who has never been at the store and has no intention of ever going there. It would, as the Judge pointedly observed, include a peaceful protester in Penzance.

86. The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the Inner Zone or the Outer Zone, using a loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to Ground 1 above) by the specified method of emailing the order to the respective email addresses of Surge and PETA. The order of Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87. Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary

judgment by 1 December 2018, the claim would stand dismissed and the injunction discharged without further order.

88. Nicklin J was bound to dismiss Canada Goose's application for summary judgment, both because of non-service of the proceedings and for the further reasons we set out below. For the reasons we have given above, he was correct at the same time to discharge the interim injunctions granted by Teare J and Judge Moloney.

Final order against "persons unknown"

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in *Attorney-General v Times Newspapers* of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim

relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93. As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of 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.

94. In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

95. In all those circumstances, Nicklin J having concluded (at [145] and [164]) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

Appeal Ground 4: Evidence

96. This ground of appeal was not developed by Mr Bhose in his oral submissions. In any event, in the light of our conclusions on the other grounds of appeal, it is not necessary for us to address it.

Conclusion

97. For all those reasons, we dismiss this appeal.