CLAIM NO: KBD-2026-BHM-000043

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

BIRMINGHAM DISTRICT REGISTRY

BETWEEN:

BIRMINGHAM CITY COUNCIL

Claimant

-and-

PERSONS UNKNOWN (AS DEFINED IN THE CLAIM FORM)

Defendants

AUTHORITIES BUNDLE

TAB	AUTHORITY
LEGISLATION	
1	s.219 Trade Union Labour Relations (Consolidation) Act 1992
2	s.220 Trade Union Labour Relations (Consolidation) Act 1992
3	s.224 Trade Union Labour Relations (Consolidation) Act 1992
4	s.137 Highways Act 1980
CASELAW	
5	*Canada Goose UK Retail Ltd and another v Persons Unknown and another* [2020] 1 WLR 2802
6	*Cuadrilla Bowland Ltd and others v Persons Unknown and others* [2020] 4 WLR 29
7	*Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23
8	*HS2 & Ors v Persons Unknown & Ors* [2022] EWHC 2360 (KB)
9	*Valero Energy & Ors v Persons Unknown* [2024] EWHC 134 (KB)
10	*Wolverhampton City Council and others v London Gypsies and Travellers and others* [2024] AC 983
11	*Sheffield Environmental Services & Others v Persons Unknown* [2025] EWHC 2141 KB

Trade Union and Labour Relations (Consolidation) Act 1992 c. 52
s. 219 Protection from certain tort liabilities.

Law In Force With Amendments Pending

Version 5 of 6

18 December 2025 - Present

Subjects
Employment

Keywords
Interference with contracts; Liabilities; Procuring breach of contract; Statutory immunity; Torts; Trade disputes

219.— Protection from certain tort liabilities.

(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—

(a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or

(b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.

(2) An agreement or combination by two or more persons to do or procure the doing of an act in contemplation or furtherance of a trade dispute is not actionable in tort if the act is one which if done without any such agreement or combination would not be actionable in tort.

(3) Nothing in subsections (1) and (2) prevents an act done in the course of picketing from being actionable in tort [unless —] [1] [

(a) it is done in the course of attendance declared lawful by section 220 (peaceful picketing), and

(b) in the case of picketing to which section 220A applies, the requirements in that section (union supervision of picketing) are complied with.

] [1]

(4) Subsections (1) and (2) have effect subject [to—] [2] [[

(a) sections 222 to 225 (action excluded from protection),

(b) section 226 (requirement of ballot before action by trade union), and

(c) section 234A (requirement of notice to employer of industrial action);

] [2] and in those sections *"not protected"* means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person.] [3]

© 2026 Thomson Reuters.

Notes

1 Word and s.219(3)(a) and (b) substituted for words by Trade Union Act 2016 c. 15 s.10(1) (March 1, 2017: substitution has effect subject to transitional provisions specified in SI 2017/139 reg.3)

2 Word and s.219(4)(a)-(c) substituted for word and s.219(4)(a)-(d) by Employment Rights Act 2025 c. 36 Pt 4 s.78(2)(a) (December 18, 2025)

3 Word and s.219(4)(a)-(d) substituted for words by Strikes (Minimum Service Levels) Act 2023 c. 39 Sch.1(2) para.4 (July 20, 2023)

Part V INDUSTRIAL ACTION > Protection of acts in contemplation or furtherance of trade dispute > s. 219 Protection from certain tort liabilities.

Contains public sector information licensed under the Open Government Licence v3.0.

Trade Union and Labour Relations (Consolidation) Act 1992 c. 52
s. 220 Peaceful picketing.

Law In Force

Version 1 of 1

16 October 1992 - Present

Subjects
Employment

Keywords
Picketing; Trade disputes

220.— Peaceful picketing.

(1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend—

(a) at or near his own place of work, or

(b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents,

for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

(2) If a person works or normally works—

(a) otherwise than at any one place, or

(b) at a place the location of which is such that attendance there for a purpose mentioned in subsection (1) is impracticable,

his place of work for the purposes of that subsection shall be any premises of his employer from which he works or from which his work is administered.

(3) In the case of a worker not in employment where—

(a) his last employment was terminated in connection with a trade dispute, or

(b) the termination of his employment was one of the circumstances giving rise to a trade dispute,

in relation to that dispute his former place of work shall be treated for the purposes of subsection (1) as being his place of work.

(4) A person who is an official of a trade union by virtue only of having been elected or appointed to be a representative of some of the members of the union shall be regarded for the purposes of subsection (1) as representing only those members; but otherwise an official of a union shall be regarded for those purposes as representing all its members.

Part V INDUSTRIAL ACTION > Protection of acts in contemplation or furtherance of trade dispute > s. 220 Peaceful picketing.

Contains public sector information licensed under the Open Government Licence v3.0.

Trade Union and Labour Relations (Consolidation) Act 1992 c. 52
s. 224 Secondary action.

Law In Force

Version 1 of 1

16 October 1992 - Present

Subjects
Employment

Keywords
Exclusion; Picketing; Secondary action; Statutory definition

224.— Secondary action.

(1) An act is not protected if one of the facts relied on for the purpose of establishing liability is that there has been secondary action which is not lawful picketing.

(2) There is secondary action in relation to a trade dispute when, and only when, a person—

(a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or

(b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance,

and the employer under the contract of employment is not the employer party to the dispute.

(3) Lawful picketing means acts done in the course of such attendance as is declared lawful by section 220 (peaceful picketing) —

(a) by a worker employed (or, in the case of a worker not in employment, last employed) by the employer party to the dispute, or

(b) by a trade union official whose attendance is lawful by virtue of subsection (1)(b) of that section.

(4) For the purposes of this section an employer shall not be treated as party to a dispute between another employer and workers of that employer; and where more than one employer is in dispute with his workers, the dispute between each employer and his workers shall be treated as a separate dispute. In this subsection *"worker"* has the same meaning as in section 244 (meaning of "trade dispute").

(5) An act in contemplation or furtherance of a trade dispute which is primary action in relation to that dispute may not be relied on as secondary action in relation to another trade dispute. Primary action means such action as is mentioned in paragraph (a) or (b) of subsection (2) where the employer under the contract of employment is the employer party to the dispute.

(6) In this section *"contract of employment"* includes any contract under which one person personally does work or performs services for another, and related expressions shall be construed accordingly.

© 2026 Thomson Reuters.

Contains public sector information licensed under the Open Government Licence v3.0.

Highways Act 1980 c. 66
s. 137 Penalty for wilful obstruction.

Law In Force

Version 2 of 2

12 May 2022 - Present

Subjects
Criminal law; Road traffic; Sentencing

Keywords
Obstruction of highway; Offences; Sentencing

137.— Penalty for wilful obstruction.

(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to [imprisonment for a term not exceeding 51 weeks or] [1] a fine [or both] [2].

[

(1A) In relation to an offence committed before the coming into force of section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales), the reference in subsection (1) to 51 weeks is to be read as a reference to 6 months.

(1B) For the purposes of this section it does not matter whether free passage along the highway in question has already been temporarily restricted or temporarily prohibited (whether by a constable, a traffic authority or otherwise).

(1C) In subsection (1B), *"traffic authority"* has the same meaning as in the Road Traffic Regulation Act 1984 (see section 121A of that Act).

] [3] [...] [4]

Notes

1 Words inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 3 s.80(2)(a) (May 12, 2022 subject to transitional provision specified in SI 2022/520 reg.8)
2 Words substituted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 3 s.80(2)(b) (May 12, 2022 subject to transitional provision specified in SI 2022/520 reg.8)
3 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 3 s.80(3) (May 12, 2022 subject to transitional provision specified in SI 2022/520 reg.8)
4 Repealed by Police and Criminal Evidence Act 1984 (c.60), s. 119, Sch. 7 Pt. I

Contains public sector information licensed under the Open Government Licence v3.0.

© 2026 Thomson Reuters.

Court of Appeal

*Canada Goose UK Retail Ltd and another *v* Persons Unknown and another

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5

Sir Terence Etherton MR, David Richards, Coulson LJJ

Practice — Parties — Unnamed defendant — Claimants applying for injunction against protestors to restrain harassment and other wrongdoing — Without notice interim injunction granted against "persons unknown" — Numerous protestors served with injunction but none served with claim form — Whether service defective — Guidance on proper formulation of interim injunctions — Limitations on grant of final injunction against persons unknown — Whether claimants entitled to summary judgment — CPR rr 6.15, 6.16

The claimants, a retail clothing company and the manager of its London store, brought a claim seeking injunctions against people demonstrating outside the store on the grounds that their actions amounted to harassment, trespass and/or nuisance. A without notice interim injunction was granted against the first defendants, described in the claim form and the injunction as persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the store. The terms of the court's order did not impose any requirement on the claimants to serve the claim form on the "persons unknown" but merely 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, alternatively, by e-mail service at two stated e-mail addresses, that of an activist group and that of an animal rights organisation which was subsequently added as second defendant to the claim at its own request. The claimants served 385 copies of the interim injunction, including on 121 identifiable individuals, 37 of whom were identified by name, but the claimants did not attempt to join any of those individuals as parties to the proceedings whether by serving them with the claim form or otherwise. The claim form was served only by e-mail to the two addresses specified for service of the interim injunction and to one other individual who had requested a copy. On the claimants' application for summary judgment on their claim the judge: (i) held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service of the claim form pursuant to CPR r 6.16[1]; (ii) discharged the interim injunction; and (iii) refused to grant a final injunction.

On the claimants' appeal—

Held, dismissing the appeal, (1) that since service was the act by which a defendant was subjected to the court's jurisdiction, the court had to be satisfied that the method used for service either had put the defendant 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; that given that sending the claim form by e-mail to the

[1] CPR r 6.15: "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place. (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

R 6.16: "(1) The court may dispense with service of a claim form in exceptional circumstances. (2) An application for an order to dispense with service may be made at any time and— (a) must be supported by evidence; and (b) may be made without notice."

© 2020 The Incorporated Council of Law Reporting for England and Wales

activist group could not reasonably be expected to have brought the proceedings to the attention of the "persons unknown" defendants, the judge had been correct to refuse to order pursuant to CPR r 6.15(2) that such steps constituted good service; and that neither speculative estimates of the number of protestors who were likely to have learned of the proceedings without ever having been served with the interim injunction nor the fact that of the 121 persons served with the injunction none had applied to vary or discharge the injunction or be joined as a party, could provide a warrant for dispensation from service under rule 6.16 (post, paras 45–52).

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] 1 WLR 1471, SC(E) applied.

(2) That since an interim injunction could be granted in appropriate circumstances against persons unknown who wished to join an ongoing protest, it was in principle open to the court in appropriate circumstances to limit even lawful activity where there was no other proportionate means of protecting the claimant's rights; that, further, although it was better practice to formulate an injunction without reference to the defendant's intention if the prohibited tortious act could be described in ordinary language without doing so, it was permissible in principle to refer in an injunction to the defendant's intention provided that was done in non-technical language which a defendant was capable of understanding and the intention was capable of proof without undue complexity; that, however, in the present case the claim form was defective and the interim injunction was impermissible since (i) the description of the "persons unknown" defendants in both was impermissibly wide, being capable of applying to a person who had never been to the store and had no intention of ever going there, (ii) the prohibited acts specified in the interim injunction were not inevitably confined to unlawful acts and (iii) the interim injunction failed to provide a method of alternative service that was likely to bring the order to the attention of persons unknown; and that, accordingly, the judge had been right to discharge the interim injunction (post, paras 78–81, 85–86, 97).

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] 4 WLR 100, CA and *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, SC(E) applied.

Hubbard v Pitt [1976] QB 142, CA, *Burris v Azadani* [1995] 1 WLR 1372, CA and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, CA considered.

(3) That it was perfectly legitimate to make a final injunction against "persons unknown" provided they were anonymous defendants who were identifiable as having committed the relevant unlawful acts prior to the date of the final order and had been served prior to that date; but that a final injunction could not be granted in a protestor case against persons unknown who were not parties at the date of the final order, in other words persons joining an ongoing protest who had not by that time committed the prohibited acts and so did not fall within the description of the persons unknown and who had not been served with the claim form; and that, accordingly, since the final injunction proposed by the claimants in the present case was not so limited and since it suffered from some of the same defects as the interim injunction, the judge had been right to dismiss the claim for summary judgment (post, paras 89–91, 94, 95, 97).

Birmingham City Council v Afsar [2019] EWHC 3217 (QB) approved.

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 distinguished.

Per curiam. (i) It would have been open to the claimants at any time since the commencement of proceedings to obtain an order under CPR r 6.15(1) for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media to reach a wide audience of potential protestors and by attaching and otherwise exhibiting copies of the order and of the claim form at or nearby those premises. The court's power to dispense with service under CPR r 6.16 should not be used to overcome that failure (post, para 50).

© 2020 The Incorporated Council of Law Reporting for England and Wales

(ii) Private law remedies are not well suited to the task of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. What are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. 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 (post, para 93).

Procedural guidelines for interim relief proceedings against "persons unknown" in cases concerning protestors (post, para 82).

Decision of Nicklin J [2019] EWHC 2459 (QB); [2020] 1 WLR 417 affirmed.

The following cases are referred to in the judgment of the court:

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Birmingham City Council v Afsar [2019] EWHC 3217 (QB)

Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2) [2001] EWCA Civ 414; [2001] RPC 45, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802; [1996] 1 FLR 266, CA

Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA

Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79, CA

Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

The following additional cases were cited in argument:

Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA

Attorney General v Punch Ltd [2001] EWCA Civ 403; [2001] QB 1028; [2001] 2 WLR 1713; [2001] 2 All ER 655, CA

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA

Jockey Club v Buffham [2002] EWHC 1866 (QB); [2003] QB 462; [2003] 2 WLR 178

Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583; [2014] 1 WLR 1264, CA

© 2020 The Incorporated Council of Law Reporting for England and Wales

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2009] PTSR 547; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stone v WXY [2012] EWHC 3184 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

The following additional cases, although not cited, were referred to in the skeleton arguments:

Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Arch Co Properties Ltd v Persons Unknown [2019] EWHC 2298 (QB)
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Epsom and Ewell Borough Council v Persons Unknown (unreported) 20 May 2019, Leigh-ann Mulcahy QC
Grant v Dawn Meats (UK) [2018] EWCA Civ 2212, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Huntingdon Life Sciences Group plc v Stop Huntingdon Animal Cruelty [2007] EWHC 522 (QB)
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

APPEAL from Nicklin J

By a claim form issued on 29 November 2017 the claimants, Canada Goose UK Retail Ltd, the United Kingdom trading arm of an international retail clothing company, and James Hayton, the manager of the first claimant's London store acting pursuant to CPR r 19.6 for and on behalf of employees, security personnel and customers and other visitors to the store, sought injunctions against the first defendants, persons unknown who were protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at the first claimant's store, on the grounds that their actions amounted to, inter alia, harassment, trespass and/or nuisance. On the same date Teare J granted a without notice interim injunction. On 13 December 2017 Judge Moloney QC sitting as a judge of the Queen's Bench Division [2017] EWHC 3735 (QB) granted an application by the People for the Ethical Treatment of Animals (PETA) Foundation, to be added as second defendant to the proceedings in order to represent its "employees and members" under CPR r 19. By order dated 15 December 2017 Judge Moloney QC granted the claimants' application for a continuation of the interim injunction but made limited modifications to its terms and stayed the proceedings, with the stay to continue unless a named party gave notice to re-activate the proceedings, in which event the claimants, within 21 days thereafter, were to apply for summary judgment. By an application notice dated 30 November 2018 the claimants sought summary judgment on their claim, pursuant to CPR r 24.2, and a final injunction. By a judgment dated 20 September 2019 Nicklin J [2019] EWHC 2459 (QB); [2002] 1 WLR 417 refused the application for summary judgment and a final

© 2020 The Incorporated Council of Law Reporting for England and Wales

injunction and discharged the interim injunction, staying part of the order for discharge.

By an appellant's notice filed on 18 October 2019 and with permission granted by Nicklin J the claimants appealed on the following grounds. (1) The judge had erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively the judge had erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively the judge had adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively had erred in law in refusing to exercise that power of dispensation. (2) The judge had erred in law in holding that the claimants' proposed reformulation of the description of the first defendants was impermissible. (3) In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first defendants (as described in the proposed reformulation of persons unknown) the judge had erred in law in the approach he took. In particular, the judge had erred in concluding that the proper approach was to focus only on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or had erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first defendants, 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 had erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first defendants could not form the basis for a case for injunctive relief against the class as a whole. (4) The judge had erred in his approach to his assessment of the evidence before him, reaching conclusions which he was not permitted to reach.

The facts are stated in the judgment of the court, post, paras 5–8.

Ranjit Bhose QC and *Michael Buckpitt* (instructed by *Lewis Silkin llp*) for the claimants.

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration.

5 March 2020. **SIR TERENCE ETHERTON MR, DAVID RICHARDS** and **COULSON LJJ** delivered the following judgment of the court.

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 UK Retail Ltd ("Canada Goose"), is the United Kingdom 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A 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: B "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 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 C which he dismissed the application of the claimants for summary judgment for injunctive relief against the defendants and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney QC (sitting as a judge of the Queen's Bench Division) on 15 December 2017.

Factual background

D

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 paras 132–134. The following is a brief summary.

E 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 co-ordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have F 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 G employees.

8 A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2017, 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 H 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.

© 2020 The Incorporated Council of Law Reporting for England and Wales

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, e-mail 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 three 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, customers and any other person visiting or seeking to visit the store];

© 2020 The Incorporated Council of Law Reporting for England and Wales

A "(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
B 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;

C "(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 three protestors may at any one time demonstrate and hand out leaflets within the outer exclusion zone A (but not within
D 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 five 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
E 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 ten 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."

F **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 five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent
G 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.

H **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."

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 e-mail 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 e-mail 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 e-mail 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 sitting as a judge of the Queen's Bench Division 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 for the Protection of Human Rights and Fundamental Freedoms ("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 2 p m and 8 p m 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A 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 Pt 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 B 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:

C > "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 Ltd and are involved in any of the acts prohibited by the terms of this order ('Protestors')."

24 Canada Goose says that the further written submissions made clear that it no longer pursued summary judgment against PETA.

D **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 Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, and *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [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 E 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 F 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 r 6.5, and there had been no order permitting alternative service under CPR r 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" G in CPR r 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR r 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 protestors who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the H 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 protestors, 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 para 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 conclusions 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."

© 2020 The Incorporated Council of Law Reporting for England and Wales

A **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 (at para 167):

"I am also satisfied that, applying the principles from *Cameron* [2019] B 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, 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 C 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 D 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 E claim form, the judge:

"Erred in refusing to amend the order of 29 November 2017, pursuant to CPR r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively

"Erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to F Teare J on 29 November 2017 constituted alternative good service under CPR r 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 r 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 G in holding that the claimants' proposed reformulation 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, H 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 protestor (whether or not that individual was formally joined as a party); and/or

© 2020 The Incorporated Council of Law Reporting for England and Wales

"Erred in concluding that the claimants 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 r 6.15 that his order for an interim injunction be served by the alternative method of service by e-mail to two e-mail addresses, one for Surge (contact@surgeactivism.com) and one for PETA (info@peta.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 e-mail 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 e-mail service as provided 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 r 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 r 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 r 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 r 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 Norton Pharmaceuticals Inc (No 2)* [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 r 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 r 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* [2019] 1 WLR 1471, para 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 para 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 para 20) that CPR r 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 para 21) with reference to the provision for alternative service in CPR r 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 e-mail 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 r 6.16 to

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 r 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 protestors 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 protestors 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 protestor 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* [2019] 1 WLR 1471, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protestors 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 be joined as a party, can justify using the power under CPR r 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 protestors to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR r 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A plainly the case, that service of the claim form by sending it to PETA's e-mail 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 r 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR r 6.16 dispensing with service on PETA.

B **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
C 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 r 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
D 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.

E **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
F 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.

G 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* [2019] 1 WLR 1471 and put into effect by the Court of Appeal in the context of protestors in *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

H **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

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 para 9) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR r 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at para 10) that English judges had allowed some exceptions to the general rule, he said (at para 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 protestors, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance [2017] EWHC 2945 (Ch).

60 Lord Sumption identified (at para 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 para 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 r 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 Pt 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 para 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 para 15) with approval to *South Cambridgeshire District Council v Gammell* [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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A 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 para 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 B protestors, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65 The claimants in *Ineos* [2019] 4 WLR 100 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 protestors. Each of the first five defendants was a group C of persons described as "Persons unknown" followed by an unlawful activity, such as "Entering or remaining without the consent of the claimant(s) 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 11 D of the [relevant] order with the intention set out in paragraph 11 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 judgment, E 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 para 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 F come into existence in the future. Longmore LJ concluded (at para 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 para 31) that a court should be inherently cautious about granting injunctions against unknown persons since the G reach of such an injunction is necessarily difficult to assess in advance. He also referred (para 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 H 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

para 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 para 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 para 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* [2020] 4 WLR 29 was another case concerning injunctions restraining the unlawful actions of fracking protestors. 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A 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 B 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 C *Ineos* 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] QB D 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 E 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 protestors at any one time and their actions within the outer exclusion zone.

75 In *Hubbard v Pitt* [1976] QB 142 the issue was whether the first F 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 than was necessary for the G 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 H 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

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* [1995] 1 WLR 1372 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* [2020] 4 WLR 29, to qualify the fourth *Ineos* requirement in the light of *Hubbard* [1976] QB 142 and *Burris* [1995] 1 WLR 1372, as neither of those cases was cited in *Ineos* [2019] 4 WLR 100. 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

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* [2020] 4 WLR 29 was the fifth requirement—
B 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
C 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 para 65) that he could not accept that there is anything objectionable in principle about including a requirement of
D intention in an injunction. He acknowledged (at para 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 para 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
E 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 para 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.

F 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
G 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.

H 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, by definition, people who have not been identified at the time of the commencement of the

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 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."

85 This description is impermissibly wide. As Nicklin J said (at paras 23(iii) and 146) it is capable of applying to a 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 protestor 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

© 2020 The Incorporated Council of Law Reporting for England and Wales

A 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 B 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 e-mailing the order to the respective e-mail addresses of Surge and PETA. The order of C 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 D 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 E by Teare J and Judge Moloney.

Final order against "persons unknown"

89 A final injunction cannot be granted in a protestor 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 F 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. Protestor 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 G proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471, para 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* [2019] 4 WLR 2 H (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* [2019] 4 WLR 100 and the decision of the Supreme Court in *Cameron*. Furthermore, there was no

© 2020 The Incorporated Council of Law Reporting for England and Wales

reference in *Vastint* to the confirmation in *Attorney General v Times Newspapers (No 3)* 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 para 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 protestors. 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 protestors. 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* [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.

© 2020 The Incorporated Council of Law Reporting for England and Wales

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 paras 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.

Appeal dismissed.
No order as to costs.

Susan Denny, Barrister

© 2020 The Incorporated Council of Law Reporting for England and Wales

Court of Appeal

Cuadrilla Bowland Ltd and others *v* Persons Unknown and others

[2020] EWCA Civ 9

2019 Dec 10, 11; 2020 Jan 23 Underhill, David Richards, Leggatt LJJ

Contempt of court — Committal proceedings — Appeal — Protestors deliberately disobeying injunction found guilty of contempt and sentenced to imprisonment — Whether injunction insufficiently clear and certain to allow committal — Whether suspended orders for imprisonment appropriate sanction

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". The claimants had been granted an injunction against the first to third defendants, who were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group, to prevent 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. The judge subsequently made an order committing three protestors to prison for contempt of court. Their contempt consisted in deliberately disobeying the injunction and as punishment for two deliberate breaches of the injunction, the judge committed one of the protestors to prison for two months plus four weeks. The other two were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that each obeyed the injunction for a period of two years. The protestors appealed against the committal orders contending that the judge erred in committing them under two paragraphs of the injunction—paragraph 4 (trespass) and paragraph 7 (unlawful means conspiracy)—as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

On the appeal—

Held, dismissing the appeal in part, (1) that the terms of an injunction might be unclear if a term was ambiguous in that the words used had more than one meaning, vague in so far as there were borderline cases to which it was inherently uncertain whether the term applied, or by its language too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction was addressed; that all those kinds of clarity (or lack of it) were relevant at the stage of deciding whether to grant an injunction and, if so, in what terms; that they were also relevant where an application was made to enforce compliance or punish breach of an injunction by seeking an order for committal; that, in principle, people should not be at risk of being penalised for breach of a court order if they acted in a way which the order did not clearly prohibit so that a person should not be held to be in contempt of court if it was unclear whether their conduct was covered by the terms of the order; that that was so whether the term in question was unclear because it was ambiguous, vague or inaccessible and it was important to note that whether a term of an order was unclear in any of those ways was dependent on context; that there was nothing objectionable in principle about including a requirement of intention in an injunction, nor was there was anything in such a requirement which was inherently unclear or which required any legal training or knowledge to comprehend; that it was not in fact correct that the requirement of the tort of conspiracy to show damage could only be incorporated into a quia timet injunction by reference to the defendant's intention, since it was perfectly possible to frame a prohibition which applied only to future conduct that actually caused damage; that it was, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that was lawful, it was necessary to include a requirement that the defendant's conduct was intended to cause damage to the claimant and there was nothing ambiguous, vague or difficult to understand about such a requirement; that limiting the scope of a prohibition by reference to the intention required to make the act wrongful

© 2020. The Incorporated Council of Law Reporting for England & Wales

avoided restraining conduct that was lawful; that in so far as it created difficulty of proof, that was a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provided an additional protection; and that, accordingly, although the inclusion of multiple references to intention risked introducing an undesirable degree of complexity, 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 the terms of the injunction in the present case provided a reason not to enforce it by committal (post, paras 57–60, 65, 69, 74, 110, 111, 112).

Dicta of Longmore LJ in *Ineos Upstream Ltd and others v Persons Unknown and others (Friends of the Earth intervening)* [2019] 4 WLR 100, para 40 not followed.

(2) That it was clear from the case law that, even where protest took the form of intentional disruption of the lawful activities of others, as it did here, such protest still fell within the scope of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that any restrictions imposed on such protestors were therefore lawful only if they satisfied the requirements set out in articles 10(2) and 11(2) and that was so even where the protestors' actions involved disobeying a court order; that although the protestors' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2); that the judge was entitled to conclude that the restrictions which he imposed on the liberty of the protestors by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority, which was an aim specifically identified in article 10(2), and to prevent disorder as identified in both articles 10(2) and 11(2); that in deciding what sanctions were appropriate, the judge had approached the decision, correctly, by considering both the culpability of the protestors and the harm caused, intended, or likely to be caused by their breaches of the injunction; that there was no merit in the protestors' argument that, in making that assessment, he had misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order; and that, as to the sanction applied, the court would vary the committal order made in relation to the first protestor by substituting for the period of imprisonment of two months a period of four weeks (post, paras 100–102, 110, 111, 112).

Per curiam. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule (post, para 50, 111, 112).

APPEAL from Judge Pelling QC, sitting as a judge of the High Court

Pursuant to an application by Cuadrilla Bowland Ltd and others for an injunction to prevent 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, Judge Pelling QC, sitting as a judge of the High Court granted an injunction on 11 July 2018 to run until 1 June 2020 against persons unknown.

On 3 September 2019 the judge made an order to commit three protestors, Katrina Lawrie, Lee Walsh and Christopher Wilson to prison for contempt of court. As punishment for two deliberate breaches of the injunction, the judge committed the first protestor to prison for two months plus four weeks. The other two protestors were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that they obeyed the injunction for a period of two years.

By an appellant's notice dated 24 September 2019, the protestors sought permission to appeal against the committal order with appeal to follow. The grounds of appeal were that, in relation to the two incidents on which the order for committal was based: (1) the judge had erred in committing the protestors under paragraphs 4 (nuisance) and 7 (unlawful means conspiracy) of the injunction, as those paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge had erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

The facts are stated in the judgment of Leggatt LJ, post, paras 3–23.

Kirsty Brimelow QC, *Adam Wagner* and *Richard Brigden* (instructed by *Robert Lizar Solicitors, Manchester*) for the protestors.

Tom Roscoe (instructed by *Eversheds Sutherland (International) llp*) for the claimants.

© 2020. The Incorporated Council of Law Reporting for England & Wales

The court took time for consideration.

23 January 2020. The following judgments were handed down.

LEGGATT LJ

Introduction

1 On 3 September 2019 Judge Pelling QC, sitting as a judge of the High Court, made an order committing the three appellants to prison for contempt of court. Their contempt consisted in deliberately disobeying an earlier court order, which I will refer to as "the Injunction", made on 11 July 2018 with the aim of 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 ("Cuadrilla"). As punishment for two deliberate breaches of the Injunction, the judge committed one of the appellants, Katrina Lawrie, to prison for two months plus four weeks. The other appellants, Lee Walsh and Christopher Wilson, were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that the appellant obeys the Injunction for a period of two years.

2 The appellants have exercised their rights of appeal against the committal order. They appeal on the grounds (1) that the relevant terms of the Injunction were insufficiently clear and certain to be enforceable by committal because those terms made the question whether conduct was prohibited depend on the intention of the person concerned; and (2) that imposing the sanction of imprisonment (albeit suspended) was inappropriate and unduly harsh in the circumstances of this case. Relevant circumstances include the facts that the Injunction was granted, not against the appellants as named individuals, but against "persons unknown" who committed specified acts, and that the acts done by the appellants in breach of the Injunction were part of a campaign of protest involving "direct action" designed to disrupt Cuadrilla's activities. This context is one in which the appellants' rights to freedom of expression and assembly are engaged.

Background

3 Cuadrilla and the other claimants own an area of land off the Preston New Road (A583), near Blackpool in Lancashire, on which Cuadrilla has engaged in the hydraulic fracturing, or "fracking", of rock deep underground for the purpose of extracting shale gas. It is not in dispute that all Cuadrilla's activities have been carried out in accordance with the law. Equally, there is no dispute that Cuadrilla's activities are controversial and that a significant number of people, including the appellants, have sincere and strongly held views that fracking ought not to take place because of its impact on the environment. It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. The right of protest is protected both by the common law of England and Wales and by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention") which is incorporated into UK law by the Human Rights Act 1998.

4 Protests on and near Cuadrilla's site started in 2014, well before any drilling or preparatory work had commenced, when part of the site was occupied by a group of protestors. On 21 August 2014 Cuadrilla issued proceedings to recover possession of the land and for an injunction to prohibit further trespassing. Such an injunction was granted until 6 October 2016.

5 Protests intensified after work in preparation for exploratory drilling at the site started in January 2017. The evidence adduced by the claimants when they applied for a further injunction in May 2018 showed that, since January 2017, Cuadrilla and its employees, contractors and suppliers had been subjected to numerous "direct action" protests, designed to obstruct works on the site. The actions taken by some protestors included "locking on"—that is, chaining oneself to an object or another person—at the entrance to the site in order to prevent vehicles from entering or leaving it; "slow walking"—that is, walking on the highway as slowly as possible in front of vehicles attempting to enter or leave the site; and climbing onto vehicles to prevent them from moving.

6 The overall scale of such protest activity is indicated by the fact that, between January 2017 and May 2018, the police had made over 350 arrests in connection with protests against Cuadrilla's operations, including 160 arrests for obstructing the highway, and substantial police resources had to be deployed in order to deal with the actions of protestors, with around 100 officers directly involved each day and at a total policing cost of some £7m.

© 2020. The Incorporated Council of Law Reporting for England & Wales

7 In July 2017 a group calling themselves "Reclaim the Power" organised a "month of action" targeting Cuadrilla. Of the many actions taken by protestors during that month to attempt to disrupt transport to and from the Preston New Road site, one particularly disruptive incident involved criminal offences and led to sentences which were the subject of an appeal to the Criminal Division of the Court of Appeal: see *R v Roberts (Richard) (Liberty intervening)* [2018] EWCA Crim 2739; [2019] 1 WLR 2577. That incident began on the morning of 25 July 2017, when two protestors managed to climb on top of lorries approaching the site along the Preston New Road, forcing the lorries to stop to avoid putting the safety of the two men at risk. Two more men later climbed on top of the lorries. Each of the protestors stayed there for two or three days and the last one did not come down until 29 July 2017. For all this time the lorries were therefore unable to move, with the result that one carriageway of the road remained blocked. Substantial disruption was caused to local residents and other members of the public.

8 Further particularly serious disruption occurred on 31 July 2017. The events of that day were described in a letter from Assistant Chief Constable Terry Woods put in evidence by Cuadrilla, as follows:

> "The last day of the RTP [Reclaim the Power] rolling resistance month of action saw a final lock-in involving a supposedly one tonne weight concrete barrel lock-on in the rear of a van with a prominent RTP activist attached to it via an arm tube. This action, coupled with an already tense atmosphere amongst the RTP activists, anti-fracking activists and local protestors, resulted in confrontation with police and they arrested two protestors. During the evening the protestors then became aware of a convoy en route to the drill site resulting in four protestors deploying in two pairs with arm tube lock-ons and blocking the A583. Further confrontation and aggression towards police ensued, with one of the locked-on protestors also assaulting a police officer. A security staff van was then mobbed by protestors and damaged, with a further protestor being arrested from that incident. Protestors also blockaded three vans of police protest liaison officers outside the Maple Farm Camp. The vehicle of a drill site staff member's partner dropping them off was then confronted by protestors, with a number of protestors climbing on the roof of the vehicle as it attempted to reverse away. The A583 was finally reopened to traffic at around 21:00 once police had removed all the protestors locked on, resulting in four arrests …"

9 At the hearing of the application for an injunction on 31 May and 1 June 2018, evidence was also adduced that the "Reclaim the Power" protest group was planning and promoting a further campaign of sustained direct action targeting Cuadrilla from 11 June to 1 July 2018. The group had openly stated their intention to organise a mass blockade of the Preston New Road dubbed "Block around the Clock" with the aim of completely preventing access to and egress from Cuadrilla's site for four days from 27 June to 1 July 2018.

The Injunction

10 It was against this background that Judge Pelling QC granted an interim injunction on 1 June 2018 to restrain four named individuals and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with the claimants' rights of passage to and from their land and unlawfully interfering with Cuadrilla's supply chain. This injunction was granted until 11 July 2018. On that date it was replaced by a further order in similar terms, to continue until 1 June 2020 (unless varied or discharged in the meantime). This is the Injunction that was in force when the appellants did the acts which led to their committal for contempt of court.

11 As with the order initially made on 1 June 2018, the Injunction had three limbs, each designed to prevent a different type of wrong (tort) being done to the claimants.

Paragraph 2: trespass

12 The first type of wrong, prohibited by paragraph 2 of the Injunction, was trespassing on the claimants' land situated off the Preston New Road. The land was identified by reference to the title numbers under which it is registered at the Land Registry and was denoted in the order as "the PNR Land".

Paragraph 4: nuisance

13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct

© 2020. The Incorporated Council of Law Reporting for England & Wales

or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181.

14 These rights protected by the law of nuisance underpinned paragraph 4 of the Injunction, which applied to the second defendant. The second defendant to the proceedings is described as:

> "Persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highway known as Preston New Road."

Paragraph 4 of the Injunction prohibited persons falling within this description from carrying out the following acts on any part of "the PNR Access Route":

> "4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;
>
> "4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;
>
> "4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance; in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees."

An exception was made in paragraph 5 for a weekly walk or march from Maple Farm on the Preston New Road to the Site Entrance followed by a meeting or assembly for up to 15 minutes at the bell-mouth of the Site Entrance.

15 The "PNR Access Route" was defined in paragraph 3 to mean:

> "The whole of the Preston New Road (A583) between the junction with Peel Hill to the northwest and 50 metres to the east of the vehicular entrance to the PNR Site ("the Site Entrance" —as marked on the plan annexed to this Order as Annex 2) …"

Paragraph 7: unlawful means conspiracy

16 The third type of wrong which the Injunction was designed to prevent was unlawful interference with Cuadrilla's supply chain. This was the subject of paragraph 7 of the Injunction, which prohibited persons unknown from "committing any of the following offences or unlawful acts by or with the agreement or understanding of any other person":

> "7.2 obstructing the free passage along a public highway, or the access to or from a public highway, by: (i) blocking the highway or access thereto with persons or things when done with a view to slowing down or stopping vehicular or pedestrian traffic, and with the intention of causing inconvenience and delay; (ii) slow walking in front of vehicles with the object of slowing them down, and with the intention of causing inconvenience and delay; (iii) climbing onto or attaching themselves to vehicles … in each case with an intention of damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors, sub-contractors, suppliers or service providers engaged by [Cuadrilla], in connection with [Cuadrilla's] searching or boring for or getting any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata at the PNR Site or on the PNR Land."

17 The tort underpinning this limb of the Injunction was that of conspiracy to injure by unlawful means.

18 Conspiracy is one of a group of "economic torts" which are an exception to the general rule that there is no duty in tort to avoid causing economic loss to another person unless the loss is parasitic upon some injury to person or damage to property. As explained by Lord Sumption JSC and Lord Lloyd-Jones JSC in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2018] 2 WLR 1125, para 7, the modern law of conspiracy developed in the late 19th and early 20th centuries as a basis for imposing civil liability on the organisers of strikes and other industrial action. In the form of the tort relevant for present purposes, the matters which the claimant must

© 2020. The Incorporated Council of Law Reporting for England & Wales

prove to establish liability are: (i) an unlawful act by the defendant, (ii) done with the intention of injuring the claimant, (iii) pursuant to an agreement (whether express or tacit) with one or more other persons, and (iv) which actually does injure the claimant.

The breaches of the Injunction

19 As required by the terms of the Injunction, extensive steps were taken to publicise it and bring it to the notice of protestors. These steps included: (i) fixing sealed copies of the Injunction in transparent envelopes to posts, gates, fences and hedges and positioning signs at no fewer than 20 conspicuous locations around the PNR Land including at the Site Entrance and at either side of the public highway in each direction from the Site Entrance advertising the existence of the Injunction; (ii) leaving a sealed copy of the Injunction at protest camps; (iii) advertising and making copies of the Injunction available online; and (iv) sending a press release and copies of the Injunction to 16 specified news outlets.

20 Despite this publicity, a number of incidents occurred in the period July to September 2018 which led Cuadrilla on 11 October 2018 to issue a committal application.

The incident on 24 July 2018

21 The first main incident occurred on 24 July 2018 and involved all three appellants. The facts alleged, which were not seriously disputed by the appellants, were that at around 7 am on the morning of that day they (and three other individuals) lay down in pairs on the road across the Site Entrance. Each person was attached to the other person in the pair by an "arm tube" device. This was done in such a way as to prevent any vehicle from entering or leaving the site. The protestors remained in place for some six and a half hours until around 1.30 pm, when they were cut out of the arm tube devices and removed by the police.

The incident on 3 August 2018

22 The second main incident occurred on 3 August 2018 and involved Ms Lawrie alone. It took place on the "PNR Access Route" (as defined in paragraph 3 of the Injunction) about 1200 metres to the west of the Site Entrance. At about 12.55 pm Ms Lawrie, along with three other people, attempted to stop a tanker lorry which was on its way to the site in order to collect rainwater. In doing so she stood in the path of the lorry, raising her arms above her head. To avoid hitting her, the lorry had to veer across the centre line of the carriageway into the opposite lane. These facts were proved by video evidence from a camera on the dashboard of the lorry cab.

The other breaches of the Injunction

23 There were three more minor incidents: (1) On 1 August 2018 Ms Lawrie trespassed on the PNR Land for approximately two minutes. (2) Also on 1 August 2018, Mr Walsh sat down on the road in front of the Site Entrance until he was forcibly removed by police officers. (3) On 22 September 2018, as a sewage tanker was attempting to enter the site, Ms Lawrie ran into its path, forcing it to stop. She then lay on the ground in front of the lorry before being helped to her feet by security staff and persuaded to move.

The findings of contempt of court

24 Although two other individuals were also named as respondents, the committal application was pursued only against the three current appellants. The application was heard in two stages. The first stage was a hearing over four days from 25 to 28 June 2019 to decide whether the appellants were guilty of contempt of court.

The legal test for contempt

25 It was common ground at that hearing 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 is, beyond reasonable doubt) 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 *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) at [20]. 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.

26 For reasons given in a judgment delivered on 28 June 2018, the judge found all the relevant factual allegations proved to the requisite criminal standard of proof. There is no appeal against any of his factual findings.

Knowledge of the Injunction

27 The main factual dispute at the hearing concerned the appellants' knowledge of the Injunction at the time when the incidents occurred. Although they gave evidence to the effect

© 2020. The Incorporated Council of Law Reporting for England & Wales

that they did not know of its terms, the judge rejected that evidence as inherently incredible and untruthful.

28 The judge explained in detail his reasons for reaching that conclusion. In the case of Ms Lawrie, the relevant evidence included her own admissions that there was a lot of discussion about the Injunction around the time that it was granted and that she was concerned about its effect on lawful protesting. As the judge observed, that evidence only made sense on the basis that she was aware of its terms. There were also photographs showing Ms Lawrie placing decorations on the fence around the site "in such close proximity to the notices summarising the effect of the [Injunction] as to make it virtually impossible for her not to have read the information in the notice unless she was deliberately choosing not to do so". In the case of Mr Walsh, the relevant evidence included social media posts that he had shared with others that referred to or summarised the main effects of the Injunction. The third appellant, Mr Wilson, accepted that he was aware of the Injunction and that it affected protests at the site entrance. There was also video evidence of Cuadrilla's security guards seeking to draw the Injunction to the attention of the appellants by providing them with copies of it, which they refused to take.

The intentions proved

29 In relation to the first main incident on 24 July 2018, in which each of the appellants lay in the road across the Site Entrance attached to another person by an arm tube device, they all gave evidence that in taking this action they intended to protest. The judge accepted this but thought it obvious from what they did, and was satisfied beyond reasonable doubt, that they also intended to stop vehicles from entering or leaving the site and thereby cause inconvenience and delay to Cuadrilla. Having found on this basis that the appellants were in breach of paragraph 4 of the Injunction, he considered it unnecessary to decide whether they were also in breach of paragraph 7.

30 In relation to the second main incident which occurred on 3 August 2018, Ms Lawrie admitted that she together with others was attempting to stop the lorry. The judge found it proved beyond reasonable doubt that she was acting with the agreement or understanding of others present and with the intention of slowing down or stopping the vehicle, causing inconvenience and delay, and thereby damaging Cuadrilla by interfering with the activities undertaken at the site. He accordingly found that she was in breach of paragraph 7 of the Injunction.

31 The judge also found that the three more minor incidents (referred to at para 23 above) all involved intentional breaches of the Injunction, but he did not consider that it was in the public interest to impose any sanction for those breaches.

The committal order

32 The second stage of the committal application was a hearing held on 2 and 3 September 2019 to decide what sanctions to impose for the two principal breaches of the Injunction found proved at the earlier hearing. The judge had already made it clear that he would not impose immediate terms of imprisonment, so that the available penalties were (a) no order (except in relation to costs), (b) a fine or (c) a suspended term of imprisonment.

33 The judge was satisfied that, in relation to both incidents, the custody threshold was passed such that it was necessary to make orders for committal to prison, although their effect should be suspended. In reaching that conclusion and in fixing the length of the suspended prison terms, the judge had regard to his finding that the breaches were intentional and to the need not only to punish the appellants for their intentional disobedience of the court's order, but also to deter future breaches of the order (whether by them or others).

34 The judge recognised that the breaches were committed as part of a protest but was not persuaded that this should result in lesser penalties. The judge also had regard, by analogy, to the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. This guideline identifies three levels of culpability, where level A represents a very serious or persistent breach, level B a deliberate breach falling between levels A and C, and level C a minor breach or one just short of reasonable excuse. Harm—which includes not only any harm actually caused but any risk of harm posed by the breach—is also divided into three categories. Category 1 applies where the breach causes very serious harm or distress or "demonstrates a continuing risk of serious criminal and/or anti-social behaviour". Category 3 applies where the breach causes little or no harm or distress or "demonstrates a continuing risk of minor criminal and/or anti-social behaviour". Category 2 applies to cases falling between categories 1 and 3.

35 In the case of the first incident involving all three appellants, where the Site Entrance was blocked by a "lock-on" for several hours, the judge assessed the level of culpability as

© 2020. The Incorporated Council of Law Reporting for England & Wales

falling at the lower end of level B and the harm caused together with the continuing risk of breach demonstrated as falling at the lower end of category 2. The guideline indicates that the starting point in sentencing for breach of a criminal behaviour order in category 2B is 12 weeks' custody, with a category range between a medium level community order and one year's custody. A community order is not an available sanction for contempt of court. In the circumstances the judge concluded that the appropriate penalty was a short suspended term of imprisonment, which he fixed at four weeks.

36 In relation to the second main incident, involving Ms Lawrie alone, the judge assessed the level of culpability as at the top end of level B within the guideline and the degree of harm that was at risk of being caused as in the top half of category 2. In making that assessment, he said:

> "The risk I have identified was a serious one, involving the risk of death or injury to Ms Lawrie; to the driver of the vehicle she was attempting to stop by standing in front of it in the highway; and those driving on the other side of the road into which the lorry was forced by reason of the presence of Ms Lawrie in the road. Those risks were worsened by the fact that the incident occurred during a period of heavy rain …"

The judge also found that the breach was aggravated by "the failure of Ms Lawrie to acknowledge the danger posed by her conduct, or to apologise for it, or to offer any assurance that it will not happen again".

37 The sanction imposed for this contempt of court was committal to prison for two months. As with the penalties imposed in relation to the first incident, execution of the order was suspended on condition that the Injunction is obeyed for a period of two years.

Variation of the Injunction

38 In the same judgment given on 3 September 2019 in which he decided what sanctions to impose, Judge Pelling QC also dealt with an application by the appellants to vary the Injunction, in particular by removing paragraphs 4 and 7. In making that application, the appellants relied on the decision of this court in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] EWCA Civ 515; [2019] 4 WLR 100, which I will discuss shortly. For the moment I note that, while the judge on 3 September 2019 made some variations to the wording of the Injunction, he rejected the appellants' contention that the original wording was impermissibly wide or uncertain. Furthermore, none of the variations made on 3 September 2019 would, had they been incorporated in the original wording of the Injunction, have rendered the appellants' conduct not a breach.

39 The appellants applied for permission to appeal against the decision not to vary the Injunction by removing paragraphs 4 and 7. However, on 2 November 2019 the Government announced a moratorium on fracking with immediate effect. In the light of the moratorium, the claimants themselves applied on 19 November 2019 to remove paragraphs 4 and 7 of the Injunction for the future on the ground that they no longer require this protection, as Cuadrilla has ceased fracking operations on the site and will not be able to resume such operations unless and until the moratorium is lifted. On 25 November 2019 the judge granted the claimants' application. In these circumstances the appellants withdrew their appeal against the judge's previous refusal to vary the Injunction in that way, as the relief which they were seeking had been granted (albeit for different reasons from those which they were advancing).

The right to protest

40 Before I come to the grounds of the appeal against the committal order, I need to say something more about the two contextual features of this case which I mentioned at the start of this judgment. The first is the legal relevance of the fact, properly emphasised by counsel for the appellants, that the appellants' breaches of the Injunction were a form of non-violent protest against activities to which they strongly object.

41 The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.

42 Exercise of the right to protest—for example, holding a demonstration in a public place—often results in some disruption to ordinary life and inconvenience to other citizens. That

© 2020. The Incorporated Council of Law Reporting for England & Wales

by itself does not justify restricting the exercise of the right. As Laws LJ said in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 at [43]: "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them". Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.

43 The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.

44 The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in *Kudrevicius v Lithuania* CE:ECHR:2015:1015JUD003755305; 62 EHRR 34; 40 BHRC 114. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention. In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:

> "In the court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention."

Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).

45 In the present case the claimants accept that the conduct of the appellants which constituted contempt of court likewise fell within the scope of articles 10 and 11 of the Human Rights Convention, even though disruption of Cuadrilla's activities was not merely a side-effect but an intended aim of the appellants' conduct. It follows that both the Injunction prohibiting this conduct and the sanctions imposed for disobeying the Injunction were restrictions on the appellants' exercise of their rights under articles 10(1) and 11(1) which could only be justified if those restrictions satisfied the requirements of articles 10(2) and 11(2) of the Convention.

The Ineos case

46 A second significant feature of this case is that the Injunction was granted not against the current appellants as named individuals but against "persons unknown". Injunctions of this kind were considered in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, which forms an essential part of the backdrop to the issues raised on this appeal.

47 Like the present case, the *Ineos* case concerned an injunction granted on the application of a company engaged or planning to engage in "fracking" to restrain unlawful interference with its activities by protestors whom it was unable to name. In the *Ineos* case, however, the court was not concerned, as it is here, with breaches of such an injunction. The appeal involved a challenge to the making of an injunction against persons unknown before any allegedly unlawful interference with the claimants' activities had yet occurred. This context is important in understanding the decision.

48 The main question raised on the appeal was whether it was appropriate in principle to grant an injunction against "persons unknown". That question was decided in favour of the claimant companies. The court held that there is no conceptual or legal prohibition on suing

© 2020. The Incorporated Council of Law Reporting for England & Wales

persons unknown who are not currently in existence but will come into existence if and when they commit a threatened tort. Nor is there any such prohibition on granting a "quia timet" injunction to restrain such persons from committing a tort which has not yet been committed. None the less, Longmore LJ (with whose judgment David Richards LJ and I agreed) warned that a court should be inherently cautious about granting such injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance (see para 31).

49 Longmore LJ stated the requirements necessary for the grant of an injunction of this nature "tentatively" (at para 34) in the following way:

> "(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."

50 In the light of precedents which were not cited in the *Ineos* case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate 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. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); [2020] 1 WLR 417 and in these circumstances I express no opinion on the point.

51 In the *Ineos* case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar—although in some respects wider and more vaguely worded—terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach—which simply accepted the claimants' evidence at face value—did not adequately justify granting a quia timet injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty. I will come back to one aspect of the reasoning on that point when discussing the first ground of appeal.

This appeal

52 I turn now to the issues raised on this appeal. The appellants' notice puts forward three grounds. However, Ms Brimelow QC, who now represents the appellants, did not pursue one of them. This challenged the judge's finding that Ms Lawrie was in contempt of court by trespassing on the "PNR Land" on 1 August 2018 in breach of paragraph 2 of the Injunction. As Ms Brimelow accepted, a challenge to that finding, even if successful, would provide no reason for disturbing the committal order, as the judge considered that there was no public interest in taking any further action in relation to the three minor incidents, of which the trespass incident was one, and made no order in respect of them. The order under appeal was based only on the "lock-on" at the Site Entrance by all three appellants on 24 July 2018 and Ms Lawrie's action in standing

© 2020. The Incorporated Council of Law Reporting for England & Wales

in the path of a lorry on 3 August 2018. Nothing turns, therefore, on whether or not Ms Lawrie trespassed on the "PNR Land" on 1 August 2018.

53 The two grounds of appeal pursued are that, in relation to the two incidents on which the order for committal was based: (1) the judge erred in committing the appellants under paragraphs 4 and 7 of the Injunction, as these paragraphs were insufficiently clear and certain because they included references to intention; (2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

(1) Was the Injunction unclear?

54 It is a well-established principle that an injunction must be expressed in terms which are clear and certain so as to make plain what is permitted and what is prohibited: see eg *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, para 35. This is just as, if not even more, essential where the injunction is addressed to "persons unknown" rather than named defendants. As Longmore LJ said in the *Ineos* case, para 34, in stating the fifth of the requirements quoted at para 49 above: "the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

55 A similar need for clarity and precision "to a degree that is reasonable in the circumstances" forms part of the requirement in articles 10(2) and 11(2) of the Convention that any interference with the rights to freedom of expression and assembly must be "prescribed by law": see *Sunday Times v United Kingdom* CE:ECHR:1979:0426JUD000653874; 2 EHRR 245, para 49; *Kudrevicius v Lithuania* 62 EHRR 34, para 109.

The references to intention in the Injunction

56 As mentioned, the aspect of paragraphs 4 and 7 of the Injunction which the appellants contend made those terms insufficiently clear and certain to support findings of contempt was the fact that they included references to the defendant's intention. Paragraph 4.1, of which all three appellants were found to be in breach by their "lock on" at the Site Entrance on 24 July 2018, prohibited "blocking any part of the bell mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic" and "with the intention of causing inconvenience or delay to the claimants". Establishing a breach of this term therefore required proof of two intentions. Paragraph 7.2(1), of which Ms Lawrie was found to have been in breach when she stood in front of a lorry on 3 August 2018, required proof of three intentions: namely, those of "slowing down or stopping vehicular or pedestrian traffic", "causing inconvenience and delay", and "damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors …" It was also necessary to prove that the act was done with the agreement or understanding of another person.

Types of unclarity

57 There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against "unreasonably" obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a "short" distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as "short".

58 A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against "persons unknown", it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.

© 2020. The Incorporated Council of Law Reporting for England & Wales

59 All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

60 It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the "PNR Land" was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial.

The concept of intention

61 Of these three types of unclarity, it is the third that is said to be material in the present case. For the appellants, Ms Brimelow argued that references to intention in an injunction addressed to "persons unknown" made the terms insufficiently clear because intention is a legal concept which is difficult for a member of the public to understand. In the judgment given on 28 June 2019 in which he made findings of contempt of court, the judge referred to the maxim that a person "is presumed to intend the natural and probable consequences of his acts", citing a passage from the speech of Lord Bridge of Harwich in *R v Maloney* [1985] AC 905, 928–929. Ms Brimelow submitted that a person with no legal knowledge or training would not understand that, even if they do not have in mind a particular consequence of their action, they will be held to intend any natural and probable consequence of it. Such a person might reasonably consider that their intention was, for example, to prevent fracking, or to protect the environment, or to protest, rather than, say, to cause inconvenience and delay to Cuadrilla, even if such inconvenience and delay was a natural or probable consequence of what they did.

62 I do not accept that the references in the terms of the Injunction to intention had any special legal meaning or were difficult for a member of the public to understand. In criminal law there has not for more than 50 years been any rule of law that persons are presumed to intend the natural and probable consequences of their acts. That notion was given its quietus by section 8 of the Criminal Justice Act 1967, which provides:

> "A court or jury, in determining whether a person has committed an offence — (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

63 This was the point that Lord Bridge was making in the *Maloney* case in the passage to which Judge Pelling QC referred. The House of Lords made it clear in that case that juries should no longer, save in rare cases, be given legal directions as to what is meant by intention. Lord Bridge described it (at p 926) as the "golden rule" that, when directing a jury on intent, a judge should avoid any elaboration or paraphrase of what is meant by intent and should leave it to the jury's good sense to decide whether the person accused acted with the intention required to be guilty of a crime. Just as no elaboration of the concept of intention is required for juries, so equally its meaning does not need to be explained to members of the public to whom a court order is addressed. It is not a technical term nor one that, when used in an injunction prohibiting acts done with a specific intention, is to be understood in any special or unusual sense. It is an ordinary English word to be given its ordinary meaning and with which anyone who read the Injunction would be perfectly familiar.

64 That is not to say that proof of an intention is always straightforward. Often it causes no difficulty. A person's immediate intention may be obvious from their actions. Thus, when the appellants and three others lay across the Site Entrance on 24 July 2018 in pairs linked by

© 2020. The Incorporated Council of Law Reporting for England & Wales

arm tube devices, it was obvious that they were intending to stop vehicles from entering or leaving the site. Had that not been their intention, they would not have positioned themselves where they did. Similarly, when in the incident on 3 August 2018 Ms Lawrie stood in the road in front of a lorry, waving her arms, there could be no doubt that her intention was to cause the vehicle to stop. To determine whether less direct consequences or potential consequences of a person's actions are intended may require further knowledge of, or inference as to, their plans or goals. In so far as there is evidential uncertainty, however, a person alleged to be in contempt of court by disobeying an injunction is protected by the requirement that the relevant facts must be proved to the criminal standard of proof. Hence where the injunction prohibits an act done with a particular intention, if there is any reasonable doubt about whether the defendant acted with that intention, contempt of court will not be established.

65 I accordingly cannot accept that there is anything objectionable in principle about including a requirement of intention in an injunction. Nor do I accept that there is anything in such a requirement which is inherently unclear or which requires any legal training or knowledge to comprehend.

Dicta in the Ineos case

66 Nevertheless, I acknowledge that the appellants' argument gains some traction from a statement in the judgment of Longmore LJ in the *Ineos* case. One of the terms of the injunction granted by the judge at first instance in that case, like paragraph 7 of the Injunction in this case, was designed to protect the claimants from financial damage caused by an unlawful means conspiracy. In the *Ineos* case the term in question prohibited persons unknown from "combining together to commit the act or offence of obstructing free passage along a public highway (or 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." The wording of this prohibition was held to be insufficiently clear, both because it contained language which was too vague ("slow walking" and "unreasonably and/or without lawful authority or excuse obstructing the highway") and because, as Longmore LJ put it, "an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse": see *Ineos Upstream Ltd v Persons Unknown* at para 40.

67 In addition to making these points, however, Longmore LJ also agreed with a submission that one of the "problems with a quia timet order in this form" was that "it is of the essence of the tort [of conspiracy] that it must cause damage". He commented, at para 40:

> "While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible to change and, for that reason, should not be incorporated into the order."

68 Although this was not an essential part of the court's reasoning, I agreed with the judgment of Longmore LJ in the *Ineos* case and therefore share responsibility for these observations. However, while I continue to agree with the other reasons given for finding the form of order made by the judge in the *Ineos* case unclear as well as too widely drawn, with the benefit of the further scrutiny that the point has received on this appeal I now consider the concern expressed about the reference to the defendants' intention to have been misplaced.

69 It is not in fact correct, as suggested in the passage quoted above, that the requirement of the tort of conspiracy to show damage can only be incorporated into a quia timet injunction by reference to the defendants' intention. It is perfectly possible to frame a prohibition which applies only to future conduct that actually causes damage. It is, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that is lawful, it is necessary to include a requirement that the defendants' conduct was intended to cause damage to the claimant. As already discussed, there is nothing ambiguous, vague or difficult to understand about such a requirement. The only potential difficulty created by its inclusion is one of proof.

© 2020. The Incorporated Council of Law Reporting for England & Wales

The Hampshire Waste case

70 The case of *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9, to which Longmore LJ referred, involved an application by companies which owned and operated waste incineration sites for an injunction to restrain persons from trespassing on their sites in connection with a planned day of protest by environmental protestors described as "Global Day of Action Against Incinerators". On similar occasions in the past protestors had invaded sites owned by the claimants and caused substantial irrecoverable costs.

71 The injunction was sought against defendants described in the draft order as "Persons intending to trespass and/or trespassing" on six specified sites "in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003". Sir Andrew Morritt V-C considered that the case for granting an injunction to prevent the threatened trespass to the claimants' property was clearly made out and that, in circumstances where the claimants were unable to name any of the protestors who might be involved, it was appropriate to grant the injunction against persons unknown. He raised two points, however, about the proposed description of the defendants (see para 9). The two points were that:

> "it seems to me to be wrong that the description of the defendant should involve a legal conclusion such as is implicit in the use of the word 'trespass'. Similarly, it seems to me to be undesirable to use a description such as 'intending to trespass' because that depends on the subjective intention of the individual which is not necessarily known to the outside world and in particular the claimants, and is susceptible of change."

To address these points, the Vice-Chancellor amended the opening words of the proposed description of the defendants to refer to: "Persons entering or remaining without the consent of the claimants" on the specified sites.

72 I take the Vice-Chancellor's objection to the use of the word "trespass" to have been that trespass is a legal concept and that the class of persons affected by the injunction ought to be identified in language which does not use a legal term of art. His objection to the reference to intention was different. It was not that intention is a legal concept which might not be clear to persons notified of the injunction. It was that "the outside world and in particular the claimants" would not necessarily know whether a person did or did not have the relevant intention and also that this state of affairs was susceptible of change.

73 Although the Vice-Chancellor did not spell this out, what was particularly unsatisfactory, as it seems to me, about the proposed description was that it would have made the question whether a person was a defendant to the proceedings dependent not on anything which that person had done (with or without a specific intention) but *solely* on their state of mind at any given time (which might change). Thus, a person who had formed an intention of joining a protest which would involve entering on the claimants' land would fall within the scope of the injunction even if he or she had done nothing which interfered with the claimants' legal rights or which was even preparatory or gave rise to a risk of such interference. It is easy to see why the Vice-Chancellor regarded this as undesirable.

74 I do not consider that the same objection applies to a term of an injunction which prohibits doing specified acts with a specified intention. Limiting the scope of a prohibition by reference to the intention required to make the act wrongful avoids restraining conduct that is lawful. In so far as it creates difficulty of proof, that is a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provides an additional protection. Accordingly, although the inclusion of multiple references to intention —as in paragraph 7 of the Injunction in this case—risks introducing an undesirable degree of complexity, I would reject the suggestion that there is any reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the Injunction in the present case provided a reason not to enforce it by committal.

The width of the Injunction

75 I mentioned earlier that the appellants withdrew their appeal against the judge's decision on 3 September 2019 to refuse their application to vary the injunction, when the relief which they were seeking was granted for different reasons following the Government's moratorium on fracking. The arguments which the appellants would have made on that appeal, however, did not disappear from the picture.

76 It is no defence to an application for the committal of a defendant who has disobeyed a court order for the defendant to say that the order is not one that ought to have been made.

© 2020. The Incorporated Council of Law Reporting for England & Wales

As a matter of principle, a court order takes effect when it is made and remains binding unless and until it is revoked by the court that made it or on an appeal; and for as long as the order is in effect, it is a contempt of court to disobey the order whether or not the court was right to make it in the first place: see eg *M v Home Office* [1992] QB 270, 298–299, *Burris v Azadani* [1995] 1 WLR 1372, 1381. In the present case, therefore, it is not open to the appellants to argue that they were not guilty of contempt of court because the Injunction should not have been granted or should not have been granted in terms which prohibited the acts which they chose to commit in defiance of the court's order.

77 If it were shown that the court was wrong to grant an injunction which prohibited the appellants' conduct, that would none the less be relevant to the question whether it was appropriate to punish the appellants' contempt of court by ordering their committal to prison. Although no such argument was raised in the appellants' grounds of appeal against the committal order, in the course of her oral submissions Ms Brimelow suggested that this was the case. She did so, as I understood it, by reference to the grounds on which the appellants had sought permission to appeal against the judge's refusal to remove paragraphs 4 and 7 of the Injunction (before that appeal was withdrawn). Although there was no formal application to rely on those grounds for the purpose of the appeal against the committal order, it would be unreasonable not to permit this.

78 The grounds on which the appellants argued that paragraphs 4 and 7 should not have been included in the Injunction were essentially the same, however, as the grounds on which they argued that those terms could not properly form the basis of findings of contempt of court —namely, that the terms were insufficiently clear and certain because of their references to intention. For the reasons already given, I do not consider this to be a valid objection.

79 I would add that it has not been argued—and I see no reason to think—that on the facts of this case paragraph 4 of the Injunction, as it stood when the breaches occurred, was too widely drawn. Although a similarly worded term was criticised by this court in the *Ineos* case, there was in that case, as I have emphasised, no previous history of interference with the claimants' rights. The injunction sought was therefore what might be called a "pure" quia timet injunction, in that it was not aimed at preventing repetition of wrongful acts which had caused harm to the claimants but at preventing such acts in circumstances where none had yet taken place. The significance which the court attached to this can be seen from para 42 of the judgment of Longmore LJ, where he said:

> "[Counsel] for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."

80 In the present case, by contrast, there was a well documented history of obstruction and attempts to obstruct access to and egress from Cuadrilla's site by blocking the Site Entrance and by obstructing the highway or otherwise interfering with traffic on the part of the Preston New Road defined in paragraph 3 of the Injunction as the "PNR Access Route". That history of conduct which clearly infringed the claimants' rights of free passage provided a solid basis for the prohibition in paragraph 4.

81 Paragraph 7 is a different matter. The only breach of paragraph 7 in issue on this appeal, however, is Ms Lawrie's conduct on 3 August 2018 in standing in the road in an attempt to stop a lorry which was approaching the Site Entrance and with the intention of causing inconvenience and delay to Cuadrilla. Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct. It clearly amounted to an actionable public nuisance. As such, the prohibition in paragraph 4 could have been framed so as to prohibit such conduct. Indeed, one of the variations made to the Injunction on 3 September 2019 was an amendment to paragraph 4 to prohibit:

> "Standing, sitting, walking or lying in front of any vehicle on the carriageway with the effect of interfering with the vehicular passage along the PNR Access Route by the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees;"

© 2020. The Incorporated Council of Law Reporting for England & Wales

This squarely covered conduct of the kind which occurred on 3 August 2018.

82 The word "effect" was included in the variations made on 3 September 2019 to avoid referring to intention. In my view, reference to intention should not have been removed because there is nothing unclear in such a requirement and I see no sufficient justification for framing the prohibition more widely so as to catch unintended effects. But what matters for present purposes is that the terms of the Injunction were not criticised—and it seems to me could not reasonably be criticised—as too wide in so far as they prohibited the conduct of Ms Lawrie on 3 August 2018, as they did both before and after the variations were made.

83 I am therefore satisfied that, when considering the sanctions imposed on the appellants, it cannot be said in mitigation that the acts which formed the basis of the committal order were not acts which ought to have been prohibited by the Injunction.

(2) Were the sanctions too harsh?

84 The second ground of appeal pursued by the appellants is that—on the footing that the relevant restrictions placed on their conduct by the Injunction were legally justified—the judge was nevertheless wrong to punish their breaches of the Injunction by ordering their committal to prison (albeit that execution of the order was suspended).

The standard of review on appeal

85 In deciding what sanction to impose for a contempt of court, a judge has to assess and weigh a number of different factors. The law recognises that a decision of this nature involves an exercise of judgment which is best made by the judge who deals with the case at first instance and with which an appeal court should be slow to interfere. It will generally do so only if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge. It follows that there is limited scope for challenging on an appeal a sanction imposed for contempt of court as being excessive (or unduly lenient). If, however, the appeal court is satisfied that the decision of the lower court was wrong on one of the above grounds, it will reverse the decision and either substitute its own decision or remit the case to the judge for further consideration of sanction. See *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA 392; [2019] 1 WLR 3833, paras 44–46 and *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524; [2019] 4 WLR 65, paras 37–38.

86 The appellants' case that the judge's decision was wrong is put in two ways. First, it is argued that the judge made an error of principle and/or failed to take into account a material factor in treating as irrelevant the fact that, when they disobeyed the Injunction, the appellants were exercising rights of protest which are protected by the common law and by articles 10 and 11 of the Convention. Secondly, it is argued that, in having regard (as the judge did) to the guideline issued by the Sentencing Council which applies to sentencing in criminal cases for breach of a criminal behaviour order, the judge misapplied that guideline and, in consequence, reached a decision that was unduly harsh.

Sentencing protestors

87 The fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest will seldom provide a defence to a criminal charge. But it is well established that it is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case. On behalf of the appellants, Ms Brimelow QC emphasised the following observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

88 This passage was quoted with approval by Lord Burnett of Maldon CJ, giving the judgment of the Court of Appeal (Criminal Division) in *R v Roberts* [2019] 1 WLR 2577, the case

© 2020. The Incorporated Council of Law Reporting for England & Wales

mentioned earlier that arose from "direct action" protests at Cuadrilla's site in July 2017 by four men who climbed on top of lorries. Three of the protestors were sentenced to immediate terms of imprisonment, but on appeal those sentences were replaced by orders for their conditional discharge, having regard to the fact that they had already spent three weeks in prison before their appeals were heard. The Court of Appeal indicated that the appropriate sentence would otherwise have been a community sentence with a punitive element involving work (or perhaps a curfew). The Lord Chief Justice (at para 34) summarised the proper approach to sentencing in cases of this kind as being that:

> "the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

89 Ms Brimelow submitted that this approach to sentencing should have been, but was not, followed in the present case when deciding what sanction to impose for the breaches of the Injunction committed by the appellants.

Were custodial sentences wrong in principle?

90 At one point in her oral submissions Ms Brimelow sought to argue that, where a deliberate breach of a court order is committed in the course of a peaceful protest, it is wrong in principle to punish the breach by imprisonment, even if the sanction is suspended on condition that there is no further breach within a specified period. This mirrored a submission which she made when representing the protestors in the *Roberts* case. The submission was rejected in the *Roberts* case (at para 43) and I would likewise reject it as contrary to both principle and authority.

91 There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used. Court orders would become toothless if such an approach were adopted—particularly in relation to those for whom a financial penalty holds no deterrent because it cannot be enforced as they do not have funds from which to pay it. Unsurprisingly, no case law was cited in which such an approach has been endorsed. Not only, as mentioned, was it rejected in the *Roberts* case in the context of sentencing for criminal offences, but it is also inconsistent with the jurisprudence of the European Court of Human Rights.

92 Thus, in *Kudrevicius v Lithuania* 62 EHRR 34 mentioned earlier, the Grand Chamber of the European Court saw nothing disproportionate in the decision to impose on the applicants a 60-day custodial sentence suspended for one year (along with some restrictions on their freedom of movement)—a sentence which the court described as "lenient" (see para 178). The Grand Chamber also referred with approval to earlier cases in which sentences of imprisonment imposed on demonstrators who intentionally caused disruption had been held not to violate articles 10 and 11 of the Convention. For example, in *Barraco v France* CE:ECHR:2009:0305JUD003168405; (Application No 31684/05) 5 March 2009, the applicant had taken part in a protest which involved blocking traffic on a motorway for several hours. The European Court held that his conviction and sentence to a suspended term of three months' imprisonment (together with a fine of €1,500) did not violate article 11.

93 Another case cited by the Grand Chamber in *Kudrevicius* that is particularly in point because it involved defiance of court orders is *Steel v United Kingdom* CE:ECHR:1998:0923JUD002483894; 28 EHRR 603; 5 BHRC 339. In that case the first applicant took part in a protest against a grouse shoot in which she intentionally obstructed a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing. She was convicted of a public order offence, fined and ordered to be bound over to keep the peace for 12 months. Having refused to be bound over, the applicant was committed to prison for 28 days. The second applicant took part in a protest against the building of a motorway extension in which she stood under the bucket of a JCB digger in order to impede construction work. She was likewise convicted of a public order offence, fined and ordered to be bound over. She also refused to be bound over and was committed to prison for seven days. The European Court held that in each of these cases the measures taken against the protestors interfered with their rights under article 10 of the Convention but that in each case the measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and also (in relation to

© 2020. The Incorporated Council of Law Reporting for England & Wales

their committal to prison for refusing to agree to be bound over) maintaining the authority of the judiciary.

94 The common feature of these cases, as the court observed in the *Kudrevicius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case—like the *Kudrevicius* case—involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see para 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.

95 Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.

96 On the other hand, courts are frequently reluctant to make orders for the *immediate* imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct action protest for conscientious reasons. It is notable that in the *Kudrevicius* case and in the earlier cases there cited in which custodial sentences were held by the European Court to be a proportionate restriction on the rights of protestors, in all but one instance the sentence imposed was a suspended sentence. The exception was *Steel v United Kingdom*, but in that case too the protestors were not immediately sentenced to imprisonment: it was only when they refused to be bound over to keep the peace that they were sent to prison. A similar reluctance to make (or uphold) orders for immediate imprisonment is apparent in the domestic cases to which counsel for the appellants referred, including the *Roberts* case. As Lord Burnett CJ summed up the position in that case (at para 43): "There are no bright lines, but particular caution attaches to immediate custodial sentences." There are good reasons for this, which stem from the nature of acts which may properly be characterised as acts of civil disobedience.

Civil disobedience

97 Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see eg John Rawls, *A Theory of Justice* (1971) p 364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act—in contrast to the actions of other law-breakers who generally seek to avoid detection—is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.

98 It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally—apart from their protest activity—a law-abiding citizen, there is reason to expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in 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 lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of

© 2020. The Incorporated Council of Law Reporting for England & Wales

what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases".

99 These considerations explain why, in a case where an act of civil disobedience constitutes a criminal offence or contempt of a court order which is so serious that it crosses the custody threshold, it will none the less very often be appropriate to suspend the operation of the sanction on condition there is no further breach during a specified period of time. Of course, if the defendant does not comply with that condition, he or she must expect that the order for imprisonment will be implemented.

The judge's approach

100 The judge had regard to the fact that the breaches of the Injunction committed by the appellants in this case were part of a protest but did not accept that this was relevant in deciding what sanction to impose. That was an error. As I have indicated, it is clear from the case law that, even where protest takes the form of intentional disruption of the lawful activities of others, as it did here, such protest still falls within the scope of articles 10 and 11 of the Convention. Any restrictions imposed on such protestors are therefore lawful only if they satisfy the requirements set out in articles 10(2) and 11(2). That is so even where the protestors' actions involve disobeying a court order. Although—as the judge observed—the appellants' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2) of the Convention.

101 That said, the judge was in my opinion entitled to conclude—as he made it clear that he did—that the restrictions which he imposed on the liberty of the appellants by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority. The latter aim is specifically identified in article 10(2) as a purpose capable of justifying restrictions on the exercise of freedom of expression. It is also, as it seems to me, essential for the legitimate purpose identified in both articles 10(2) and 11(2) of preventing disorder.

Reference to the Sentencing Council guideline

102 In deciding what sanctions were appropriate, the judge approached the decision, correctly, by considering both the culpability of the appellants and the harm caused, intended or likely to be caused by their breaches of the Injunction. I see no merit in the appellants' argument that, in making this assessment, he misapplied the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. In *Venables v News Group Newspapers Ltd* [2019] EWHC 241 (QB) at [26], the Divisional Court thought it appropriate to have regard to that guideline in deciding what penalty to impose for contempt of court in breaching an injunction. As the court noted, however, the guideline does not apply to proceedings for committal. There is therefore no obligation on a judge to follow the guideline in such proceedings and I do not consider that, if a judge does not have regard to it, this can be said to be an error of law. The criminal sentencing guideline provides, at most, a useful comparison.

103 Caution is needed in any such comparison, however, as the maximum penalty for contempt of court is two years' imprisonment as opposed to five years for breach of a criminal behaviour order. It would be a mistake to assume that the starting points and category ranges indicated in the sentencing guideline should on that account be made the subject of a linear adjustment such that, for example, the starting point for a contempt of court that would fall in the most serious category in the guideline (category 1A) should only be of the order of ten months' custody (which is roughly 40% of the guideline starting point of two years' custody). As the Court of Appeal observed in *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65, para 40:

> "[Counsel for the appellant] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

104 A further material difference is that, in proceedings for contempt of court, a community order is not available as a lesser alternative to the sanction of imprisonment. There may therefore be cases where, although the sentencing guideline for breach offences might suggest that a

© 2020. The Incorporated Council of Law Reporting for England & Wales

community order would be an appropriate sentence, it is necessary to punish a contempt of court by an order for imprisonment because the contempt is so serious that neither of the only alternative sanctions of a fine and/or an order for costs could be justified.

Sanction for the first incident

105 In relation to the first incident on 24 July 2018 involving all three appellants, there is no basis for saying that the judge's assessment of culpability and harm by reference to the sentencing guideline for breach offences, or his decision on sanction in the light of that assessment, was wrong on any of the grounds listed in para 85 above. The judge was right to start from the position that a deliberate breach of a court order is itself a serious matter. He was entitled, as he also did, to treat the appellants' culpability as aggravated by the element of planning involved in their use of lock-on devices and to take account of (i) the number of hours of disruption and delay caused by their conduct, (ii) evidence that the incident caused Cuadrilla additional (and irrecoverable) costs of around £1,000, and (iii) the fact that the incident only ended when police were deployed to cut through the arm lock devices and remove the appellants. It was also relevant that the appellants expressed no remorse and gave no indication that they would not commit further breaches of the Injunction. Nor were they entitled to any credit for admitting their contempt, as they declined to do so, thereby necessitating a trial at which evidence had to be called.

106 Had it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience in the sense I have described, short immediate custodial terms would in my view have been warranted. As it is, it cannot be said that the judge's decision to impose suspended terms of imprisonment of four weeks was wrong in principle or outside the range of decisions reasonably open to him.

Sanction for the second incident

107 In relation to the second incident on 3 August 2018 involving Ms Lawrie alone, somewhat different considerations apply. Although Ms Lawrie's action in standing in the path of a lorry to try to stop it was also found to be a deliberate breach of the court's order, there was no evidence of planning and the incident was far shorter in duration lasting only a few seconds. In assessing the harm caused or risked by Ms Lawrie's breach of the Injunction, the judge emphasised the danger of injury or death to which her action had exposed Ms Lawrie herself, the driver of the lorry and other road-users. However, as David Richards LJ pointed out in the course of argument, in approaching the matter in this way the judge seems to have lost sight of the fact that the purpose of paragraph 7 of the Injunction, which he was punishing Ms Lawrie for disobeying, was not to protect the safety of road-users but was to protect Cuadrilla from suffering economic loss as a result of conspiracy to disrupt its supply chain by unlawful means. In assessing the seriousness of the breach, the judge should have focused on the extent to which the breach caused, or was intended to cause or risked causing, harm of the kind which the relevant term of the Injunction was intended to prevent. Had he done this, the judge would have been bound to conclude not only that no harm was actually caused but that the amount of economic loss intended or threatened by delaying a lorry on its way to collect rainwater from the site was slight.

108 The judge was, I consider, entitled to take into account as aggravating Ms Lawrie's culpability the nature of the unlawful means used and the fact that, on his findings, it amounted not merely to a public nuisance through obstruction of the highway but to an offence of causing danger to road-users contrary to section 22A of the Road Traffic Act 1988. To be guilty of an offence under that statutory provision, it is not necessary that the person concerned should have intended to cause, or realised that they were causing, danger to life or limb, and the judge made no such finding in relation to Ms Lawrie. It is sufficient that it would be obvious to a reasonable person that their action would be dangerous—a matter of which the judge was clearly satisfied on the evidence.

109 Ms Lawrie was not prosecuted, however, and the judge was not sentencing her for a criminal offence under the Road Traffic Act. In the circumstances, giving all due weight to the nature of the unlawful means used, the fact that this was Ms Lawrie's second deliberate breach of the Injunction and her complete lack of contrition, I do not consider that the term of imprisonment of two months which the judge imposed was justified. In my judgment, although the judge was right to conclude that the custody threshold was crossed, the appropriate penalty for this contempt of court was the same as that imposed for the earlier contempt committed by all three appellants—that is, a suspended term of imprisonment of four weeks.

© 2020. The Incorporated Council of Law Reporting for England & Wales

Conclusion

110 For these reasons, I would vary the committal order made by Judge Pelling QC on 3 September 2019 by substituting for the period of imprisonment of two months in paragraph 2 of the order a period of four weeks. In all other respects I would dismiss the appeal.

DAVID RICHARDS LJ

111 I agree.

UNDERHILL LJ

112 I agree with Leggatt LJ, for the reasons which he gives, that this appeal should be dismissed save in the one respect which he identifies. The courts attach great weight to the right of peaceful protest, even where this causes disruption to others; but it is also important for the rule of law that deliberate breaches of court orders attract a real penalty, and I can see nothing wrong in principle in the judge's conclusion that the appellants' conduct here merited a custodial sentence, albeit suspended.

Appeal dismissed in part.
Variation of committal order.

ALISON SYLVESTER, Barrister

© 2020. The Incorporated Council of Law Reporting for England & Wales

Director of Public Prosecutions v Ziegler and others

[2021] UKSC 23

SUPREME COURT

LORD HODGE DP, LADY ARDEN, LORD SALES, LORD HAMBLEN AND LORD STEPHENS SCJJ

12 JANUARY, 25 JUNE 2021

Case stated – Practice – Appropriate test on appeal – Issues of proportionality in relation to human rights – Correct test to be applied by appellate court to assessment of decision of trial court in respect of statutory defence of 'lawful excuse' when convention rights engaged in criminal matter – Magistrates' Courts Act 1980, s 111.

Human rights – Freedom of expression – Freedom of assembly – Protestors – Wilful obstruction of highway – Appellants obstructing highway as part of protest against arms fair – Whether deliberate physically obstructive conduct by protesters capable of constituting lawful excuse where impact of deliberate obstruction on other highway users more than de minimis, and preventing, or capable of preventing, them from passing along highway – Factors to be considered when evaluating proportionality of interference with convention rights – Highways Act 1980, s 137 – Human Rights Act 1998, Sch 1, Pt I, arts 10, 11.

In the days prior to the opening of an arms fair, equipment and other items were being delivered to the fair venue. The appellants were strongly opposed to the arms trade and to the fair and took action that was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the venue. That action consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the venue, and locking themselves to two lock boxes with pipes sticking out from either side. Police officers were already at the venue in anticipation of demonstrations, and approached the appellants almost immediately. When they refused to move, the appellants were arrested. However, it then took some 90 minutes to remove them from the road, because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble. The appellants were charged with wilful obstruction of a highway contrary to s 137[a] of the Highways Act 1980. They were acquitted by the district judge who, having regard to the appellants' rights to freedom of expression and freedom of peaceful assembly under arts 10[b] and 11[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) found that 'on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'. The prosecution appealed by

a Section 137, so far as material, is set out at [8], below.

b Article 10, so far as material, is set out at [14], below.

c Article 11, so far as material, is set out at [15], below.

way of case stated pursuant to s 111[d] of the Magistrates' Courts Act 1980. The Divisional Court allowed that appeal, holding that (i) in relation to proportionality, the appropriate test on appeal was that set out in *Re B* (*a child*) (*care order: proportionality: criterion for review*) [2013] 3 All ER 929, namely whether the judge below was 'wrong', and, applying that test, (ii) the district judge's assessment of proportionality had been wrong because (a) he had taken into account certain considerations that were irrelevant, and (b) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the venue was completely blocked and that that was so for significant periods of time, between approximately 80 and 100 minutes. The appellants appealed. Two issues fell to be determined. First, what test was to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights were engaged in a criminal matter. Secondly, whether deliberate physically obstructive conduct by protesters was capable of constituting a lawful excuse for the purposes of s 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway.

Held – The appeal would be allowed (Lord Sales and Lord Hodge DP dissenting in part) for the following reasons—

(1) The test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights were engaged in a criminal matter was the same as that applicable generally to appeals on questions of law in a case stated under s 111 of the 1980 Act, namely that set out in *Edwards* (*Inspector of Taxes*) *v Bairstow* [1955] 3 All ER 48. That meant that an appeal would be allowed where there was an error of law material to the decision reached which was apparent on the face of the case, or if the decision was one that no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. It would be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. Nonetheless, *Re B* (as explained in subsequent case law) might be relevant to appeals by way of case stated that turned on issues of proportionality. In cases stated that turned on an assessment of proportionality, the factors that the court considered to be relevant to that assessment were likely to be the subject of findings set out in the case stated. If there was an error or flaw in the reasoning that undermined the cogency of the conclusion on proportionality that was, therefore, likely to be apparent on the face of the case stated. In accordance with *Re B*, as clarified by the later case law, such an error could be regarded as an error of law on the face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. Any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings that no reasonable tribunal could have reached. The review was of the judgment and any relevant findings, not any relevant evidence (see [29], [35], [42]–[54], [88], [99], [107], [118], below); *Edwards* (*Inspector of Taxes*) *v Bairstow* [1955] 3 All ER 48 applied; *Re B* (*a child*) (*care order:*

d Section 111, so far as material, is set out at [36], below.

proportionality: criterion for review) [2013] 3 All ER 929 explained; *R* (*on the application of R*) *v Chief Constable of Greater Manchester Police* [2019] 1 All ER 391 considered.

(2) Determination of the proportionality of an interference with Convention rights was a fact-specific enquiry which required the evaluation of the circumstances in the individual case. In a criminal case the prosecution had the burden of proving to the criminal standard all the facts upon which it relied to establish to the same standard that the interference with the art 10 and 11 rights of the protesters was proportionate. If the facts were established then a judge (or a jury) should evaluate those facts to determine whether or not they were sure that the interference was proportionate. It was clear from the case law of the European Court of Human Rights that intentional action by protesters to disrupt by obstructing others enjoyed the guarantees of arts 10 and 11, but both disruption and whether it was intentional were relevant factors in relation to an evaluation of proportionality. Intentional action even with an effect that was more than de minimis did not automatically lead to the conclusion that any interference with the protesters' art 10 and 11 rights was proportionate. Rather, there had to be an assessment of the facts in each individual case to determine whether the interference with art 10 or art 11 rights was necessary in a democratic society. In carrying out the evaluation of proportionality, the following factors might be relevant (albeit that not all of them would be relevant to every conceivable situation and the examination of the factors had to be open textured without being given any pre-ordained weight): the extent to which the continuation of the protest would breach domestic law; the importance of the precise location to the protesters; the duration of the protest; the degree to which the protesters occupied the land; the extent of the actual interference the protest caused to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public; whether the views giving rise to the protest related to very important issues and whether they were views that many would see as being of considerable breadth, depth and relevance; whether the protesters believed in the views they were expressing; the place where the obstruction occurred; the extent of the actual interference the protest caused to the rights of others; whether the obstruction was targeted at the object of the protest; the importance of the precise location to the protesters; and prior notification to and co-operation with the police, especially if the protest was likely to be contentious or to provoke disorder. The proportionality assessment that potentially led to a conviction could only take into account the obstruction of the highway that actually occurred. The appellants could not be convicted on the basis that had the police not intervened their protest would have been longer. The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under s 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. There was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality (see [59]–[61], [64], [67], [70], [83], [87], [88], [96], [99], [116], [117], [118], below); *Nagy v Weston* [1965] 1 All ER 78, *Steel v UK* (App no 24838/94) (1998) 5 BHRC 339, *City of London Corp v Samede* [2012] 2 All ER 1039, *Primov v Russia* (App no 17391/06) [2014] ECHR 17391/06, *Kudrevicius v Lithuania* (App no 37553/05) (2015) 40 BHRC 114 and *Lashmankin v Russia* (App no 57818/09) (2017) 68 EHRR 1 considered.

Decision of the Divisional Court [2019] All ER (D) 120 (Jan) reversed.

Notes

For the powers of the High Court on an appeal by way of case stated, see *Halsbury's Laws* CRIMINAL PROCEDURE vol 28 (2021) para 676.

For proportionality in relation to the freedoms of expression and assembly, see *Halsbury's Laws* RIGHTS AND FREEDOMS vol 88A (2018) paras 478, 514.

For the Highways Act 1980, s 137, see *Halsbury's Statutes* vol 36 (2021 reissue) 1184.

For the Magistrates' Courts Act 1980, s 111, see *Halsbury's Statutes* vol 11(1) (2020 reissue) 832.

For the Human Rights Act 1998, Sch 1, Pt I, arts 10, 11, see *Halsbury's Statutes* vol 7(1) (2019 reissue) 888, 889.

Cases referred to

A v Secretary of State for the Home Dept, X v Secretary of State for the Home Dept [2004] UKHL 56, [2005] 3 All ER 169, [2005] 2 AC 68, [2005] 5 LRC 34, [2005] 2 WLR 87.

Abdul v DPP [2011] EWHC 247 (Admin), [2011] Crim LR 553, [2011] All ER (D) 181 (Feb).

Arrowsmith v Jenkins [1963] 2 All ER 210, [1963] 2 QB 561, (1963) 61 LGR 312, [1963] 2 WLR 856.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

B (a child) (care order: proportionality: criterion for review), Re [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911, [2013] 2 FLR 1075.

Balçik v Turkey (App no 25/02) [2007] ECHR 25/02, ECtHR.

Bracegirdle v Oxley [1947] 1 All ER 126, [1947] KB 349, (1946) 45 LGR 69.

Bukta v Hungary (App no 25691/04) (2007) 51 EHRR 601, [2007] ECHR 25691/04, ECtHR.

City of London Corp v Samede [2012] EWCA Civ 160, [2012] 2 All ER 1039, [2012] PTSR 1624, [2012] LGR 372.

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1985] IRLR 28, [1984] 3 WLR 1174, HL.

DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7, [2017] NI 301, [2017] 3 LRC 252.

D'Souza v DPP [1992] 4 All ER 545, [1992] 1 WLR 1073, (1992) 10 BMLR 139, HL.

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, (1955) 36 TC 207, HL.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, [1985] FLR 894, HL.

Garry v CPS [2019] EWHC 636 (Admin), [2019] 1 WLR 3630, [2019] 2 Cr App Rep 32, [2019] Crim LR 801.

Google LLC v Oracle America Inc (2021) 141 S Ct 1183, US SC.

Gough v DPP [2013] EWHC 3267 (Admin), (2013) 177 JP 669.

H v DPP [2007] EWHC 2192 (Admin).

Hammond v DPP [2004] EWHC 69 (Admin), [2004] Crim LR 851, [2004] All ER (D) 50 (Jan).

Hashman v UK (App no 25594/94) (1999) 8 BHRC 104, (1999) 30 EHRR 241, [2000] Crim LR 185, ECtHR.

Hitch v Stone (Inspector of Taxes) [2001] EWCA Civ 63, [2001] STC 214.

Huang v Secretary of State for the Home Dept [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167, [2007] 5 LRC 320, [2007] 2 WLR 581.

Kudrevicius v Lithuania (App no 37553/05) (2015) 40 BHRC 114, (2015) 62 EHRR 1107, ECtHR.

Kuznetsov v Russia (App no 10877/04) [2008] ECHR 10877/04, ECtHR.

Lashmankin v Russia (App no 57818/09) (2017) 68 EHRR 1, ECtHR.

Love v Govt of the United States of America [2018] EWHC 172 (Admin), [2018] 2 All ER 911, [2018] 1 WLR 2889.

Mayor of London v Hall [2010] EWCA Civ 817, [2011] 1 WLR 504, [2010] 30 LS Gaz R 12.

Molnar v Hungary (App no 10346/05) [2008] ECHR 10346/05, ECtHR.

Nagy v Weston [1965] 1 All ER 78, [1965] 1 WLR 280, DC.

Navalnyy v Russia (App no 29580/12) (2018) 46 BHRC 452, ECtHR.

New Windsor Corp v Mellor [1974] 2 All ER 510, [1974] 1 WLR 1504, (1974) 72 LGR 682.

Norwood v DPP [2003] EWHC 1564 (Admin), [2003] Crim LR 888, [2003] All ER (D) 59 (Jul).

Oladimeji v DPP [2006] EWHC 1199 (Admin), [2006] All ER (D) 156 (May).

Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1981] 2 All ER 1030, [1982] AC 724, [1980–84] LRC (Comm) 391, [1981] 3 WLR 292, HL.

Primov v Russia (App no 17391/06) [2014] ECHR 17391/06, ECtHR.

R (on the application of Aguilar Quila) v Secretary of State for the Home Dept (Aguilar, interested party), R (on the application of Bibi) v Secretary of State for the Home Dept [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621, [2012] 1 FLR 788, [2011] 3 WLR 836.

R (on the application of Begum) v Head Teacher and Governors of Denbigh High School [2006] UKHL 15, [2006] 2 All ER 487, [2006] 4 LRC 543, sub nom *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [2006] 2 WLR 719.

R (on the application of C) v Secretary of State for Work and Pensions [2016] EWCA Civ 47, [2016] PTSR 1344, [2016] All ER (D) 107 (Feb).

R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55, [2007] 2 All ER 529, [2007] 2 AC 105, [2007] 4 LRC 468, [2007] 2 WLR 46.

R (on the application of P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin), [2006] ELR 386, [2006] All ER (D) 211 (Mar).

R (on the application of R) v Chief Constable of Greater Manchester Police [2018] UKSC 47, [2019] 1 All ER 391, [2018] 1 WLR 4079, (2018) 46 BHRC 111.

R (on the application of Z) v Hackney London BC [2019] EWCA Civ 1099, [2019] PTSR 2272, [2019] HLR 786; *affd* [2020] UKSC 40, [2021] 2 All ER 539, [2020] 1 WLR 4327, [2020] PTSR 1830.

R v North West Suffolk (Mildenhall) Magistrates' Court, ex p Forest Heath DC [1998] Env LR 9, CA.

R v Secretary of State for the Home Dept, ex p Daly [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 4 LRC 345, [2001] 2 WLR 1622.

Redmond-Bate v DPP (1999) 7 BHRC 375, (1999) 163 JP 789, [1999] Crim LR 998.

Sáska v Hungary (App no 58050/08) [2012] ECHR 58050/08, ECtHR.

Smith v UK (App nos 33985/96, 33986/96) [1999] IRLR 734, (2000) 29 EHRR 493, [1999] ECHR 33985/96, ECtHR.

Steel v UK (App no 24838/94) (1998) 5 BHRC 339, (1998) 28 EHRR 603, [1998] ECHR 24838/94, ECtHR.

Vogt v Germany (App no 17851/91) [1996] ELR 232, (1995) 21 EHRR 205, ECtHR.

Appeal

The appellants, Ziegler and others, appealed with permission of the Supreme Court on the issues set out at [7], below, from the judgment of the Divisional Court (Singh LJ and Farbey J) of 22 January 2019 ([2019] EWHC 71 (Admin), [2019] LLR 509, [2020] QB 253) allowing the prosecution's appeal by way of case stated from the decisions of District Judge Hamilton sitting at Stratford Magistrates' Court on 7 and 20 February 2018 acquitting the appellants of the charge of obstruction of the highway, contrary to s 137 of the Highways Act 1980. The facts are set out in the judgment of Lord Hamblen and Lord Stephens.

Henry Blaxland QC, *Blinne Ni Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the appellants.

John McGuinness QC (instructed by *CPS Appeals and Review Unit*) for the respondent.

Judgment was reserved.

25 June 2021. The following judgments were delivered.

LORD HAMBLEN AND LORD STEPHENS.

1. INTRODUCTION

[**1**] In September 2017, the biennial Defence and Security International ('DSEI') arms fair was held at the Excel Centre in East London. In the days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

[**2**] The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

[**3**] There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the '5 stage process' to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

[**4**] The appellants were charged with wilful obstruction of a highway contrary to s 137 of the Highways Act 1980 ('the 1980 Act'). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under art 10 of the European Convention on Human

Rights ('ECHR') and their right to freedom of peaceful assembly under art 11 ECHR, the district judge found that 'on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'.

[**5**] The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2019, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2019] EWHC 71 (Admin), [2019] LLR 509, [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

[**6**] On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr, Lord Hodge and Lady Arden) granted permission to appeal.

[**7**] The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

> (1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?
>
> (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of s 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than *de minimis*, and prevents them, or is capable of preventing them, from passing along the highway?

2. THE LEGAL BACKGROUND

[**8**] Section 137 of the 1980 Act provides:

> **'137 Penalty for wilful obstruction**
>
> (1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale.'

[**9**] In *Nagy v Weston* [1965] 1 All ER 78, [1965] 1 WLR 280 it was held by the Divisional Court that 'lawful excuse' encompasses 'reasonableness'. Lord Parker CJ said ([1965] 1 All ER 78 at 80, [1965] 1 WLR 280 at 284) that these are 'really the same ground' and that—

> 'there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and, of course, whether it does it fact cause an actual obstruction as opposed to a potential obstruction.'

[**10**] In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ('the HRA') needs to be read in the light of the HRA.

[**11**] Section 3(1) of the HRA provides: *a*

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[**12**] Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (s 6(3)(a)), as are the police. *b*

[**13**] The Convention rights are set out in Sch 1 to the HRA 1998. The rights relevant to this appeal are those under art 10 ECHR, the right to freedom of expression, and art 11 ECHR, the right to freedom of peaceful assembly.

[**14**] Article 10 ECHR materially provides: *c*

> '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' *d* *e*

[**15**] Article 11 ECHR materially provides:

> '(1) Everyone has the right to freedom of peaceful assembly …
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others …' *f*

[**16**] In the present case the Divisional Court explained how s 137(1) of the 1980 Act can be interpreted compatibly with the rights in arts 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows: *g*

> '[62] The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of Arts 10 or 11, such that an interference would be unlawful under s 6(1) of the HRA, a person will by definition have "lawful excuse". Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in s 137(1). *h*
>
> [63] That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions: *j*
>
> (1) Is what the defendant did in exercise of one of the rights in Arts 10 or 11?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it "prescribed by law"?

(4) If so, is the interference in pursuit of a legitimate aim as set out in para (2) of Art 10 or Art 11, for example, the protection of the rights of others?

(5) If so, is the interference "necessary in a democratic society" to achieve that legitimate aim?

[64] That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

(1) Is the aim sufficiently important to justify interference with a fundamental right?

(2) Is there a rational connection between the means chosen and the aim in view?

(3) Are there less restrictive alternative means available to achieve that aim?

(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

[65] In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry.'

[17] Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of London Corp v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul's Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras [39]–[41]:

'[39] As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

[40] The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the judge said (at [155]):

> "It is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protesters' views to the fore. The convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command … [T]he court cannot – indeed, must not – attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of arts 10 and 11 of the convention … [T]he right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous."

[41] Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the judge accepted that the topics of concern to the Occupy Movement were "of very great political importance": at [155]. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia* [2008] ECHR 10877/04 (para 45):

> "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …"

The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate.'

3. THE CASE STATED

[**18**] The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

[**19**] All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

> 'All … defendants described their action as "carefully targeted" and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route.'

[**20**] The district judge identified the issue for decision at para 37 of the case stated, as being—

'whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway.'

[**21**] He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

'a. The actions were entirely peaceful – they were the very epitome of a peaceful protests [sic].

b. The defendants' actions did not give rise either directly or indirectly to any form of disorder

c. The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

d. The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair … I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether "non-DSEI traffic" was or was not in fact obstructed since the authorities cited above appeared to envisage "reasonable" obstructions causing some inconvenience to the "general public" rather than only to the particular subject of a demonstration …

e. The action clearly related to a "*matter of general concern*" … namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

f. The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests – which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer "free agents" but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of "wilfulness" which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes …

g. I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

h. Lastly, although compared to the other points this is a relatively minor issue, I note the longstanding commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other

entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble.'

[**22**] The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

'The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases.'

4. THE DECISION OF THE DIVISIONAL COURT

[**23**] It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

[**24**] At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury in *Re B* (*a child*) (*care order: proportionality: criterion for review*) [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger stated at [91]–[92]:

'[91] That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was "plainly" wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson says at [44], either "plainly" adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been "merely" wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.

[92] I appreciate that the attachment of adverbs to "wrong" was impliedly approved by Lord Fraser in the passage cited from *G v G* [1985] 2 All ER 225 at 229, [1985] 1 WLR 647 at 652 by Lord Wilson at [38], and has something of a pedigree – see eg per Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group* (*BSC*) [2003] 1 All ER (Comm) 140 at [195], [2003] 1 WLR 577 (although aspects of his approach have been disapproved—see *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 4 All ER 765 at [46], [2007] 1 WLR 1325). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an

appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases).'

[**25**] *Re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] EWHC 172 (Admin), [2018] 2 All ER 911, [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para [103]:

'We can see no principled basis for confining the approach in *Re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger of Abbotsbury in that case related to the approach to be taken by an appellate court to the assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law.'

[**26**] Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong 'because (i) he took into account certain considerations which were irrelevant; and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes' (para [129]).

[**27**] Of the factors listed at paras 38(a) to (h) of the case stated as cited in para [21] above, the Divisional Court considered those set out at paras 38(a), (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of 'limited duration'. The Divisional Court considered that to be a 'significant period of time'. Its core criticism was of para 38(d), in relation to which it stated as follows at para [112]:

'At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not a case where, as commonly occurs, *some part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said (depending on the facts) that a "fair balance" is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*.' (Emphasis added.)

[**28**] The Divisional Court explained at para [117] that the 'fundamental reason' why it considered the district judge's assessment of proportionality to be wrong was that—

> 'there was no "fair balance" struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake.' (Emphasis added.)

5. WHAT IS THE TEST TO BE APPLIED BY AN APPELLATE COURT TO AN ASSESSMENT OF THE DECISION OF THE TRIAL COURT IN RESPECT OF A STATUTORY DEFENCE OF 'LAWFUL EXCUSE' WHEN CONVENTION RIGHTS ARE ENGAGED IN A CRIMINAL MATTER?

The conventional approach

[**29**] As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it – ie is not *Wednesbury* irrational or perverse. This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

[**30**] *Oladimeji v DPP* [2006] EWHC 1199 (Admin), [2006] All ER (D) 156 (May) concerned an appeal by way of case stated from the decision of magistrates to reject a 'reasonable excuse' defence to an offence of failing to provide a specimen of breath when required to do so, contrary to s 7(6) Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para [22] identified the relevant issue as being as follows:

> '… the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them.'

[**31**] *H v DPP* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ('PACE'). At para [19] Auld LJ stated the proper approach on such an appeal to be as follows:

> 'Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to s 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680) or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do.'

[**32**] More recently, in *Garry v CPS* [2019] EWHC 636 (Admin), [2019] 1 WLR 3630, [2019] 2 Cr App Rep 32 the issue on the appeal was the operation of the

'reasonable excuse' defence to the offence of carrying an offensive weapon contrary to s 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v DPP* as to the appropriate standard of review, stating at para [25] as follows:

> 'On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223): *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not Wednesbury irrational let alone perverse.'

[**33**] There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it – see, for example, *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888, [2003] All ER (D) 59 (Jul) (at para [40]) (Auld LJ) (art 10 ECHR); *Hammond v DPP* [2004] EWHC 69 (Admin), [2004] Crim LR 851, [2004] All ER (D) 50 (Jan) (at para [33]) (May LJ) (arts 9 and 10 ECHR), and *Gough v DPP* [2013] EWHC 3267 (Admin), (2013) 177 JP 669 (at para [21]) (Sir Brian Leveson P) (art 10 ECHR).

[**34**] *Abdul v DPP* [2011] EWHC 247 (Admin), [2011] Crim LR 553, [2011] All ER (D) 181 (Feb) was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under s 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under art 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included 'British soldiers murderers', 'Rapists all of you' and 'Baby killers'. In giving the main judgment of the Divisional Court, Gross LJ said that 'even if there is otherwise a prima facie case for contending that an offence has been committed under s 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order' (para [49](viii)). He noted at para [49](vi) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> 'The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one she could not properly have reached.'

[**35**] None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in *Re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

[**36**] The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that

an appeal by way of case stated is an appeal from the tribunal of fact which is only permissible on a question of law (or excess of jurisdiction). As stated in s 111(1) of the Magistrates' Courts Act 1980 ('MCA'):

> '(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved …' (Emphasis added.)

[**37**] It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards* (*Inspector of Taxes*) *v Bairstow* [1955] 3 All ER 48, [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an 'adventure … in the nature of trade'. The commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows ([1955] 3 All ER 48 at 57, [1956] AC 14 at 36):

> 'When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law … the true and only reasonable conclusion contradicts the determination.'

[**38**] This approach has been followed for other case stated appeal procedures – see, for example, *New Windsor Corp v Mellor* [1974] 2 All ER 510, [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1981] 2 All ER 1030, [1982] AC 724 the question arose as to the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at ([1981] 2 All ER 1030 at 1047, [1982] AC 724 at 752–753):

> 'My Lords, in *Edwards* (*Inspector of Taxes*) *v Bairstow* [1955] 3 All ER 48 at 57, [1956] AC 14 at 36 Lord Radcliffe made it plain that the court should only interfere with the conclusion of special commissioners if it were

shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that on those facts and applying that test it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact.'

[**39**] The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

[**40**] In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] 1 All ER 126 at 127, [1947] KB 349 at 353:

'It is, of course, said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive … if justices come to a decision to which no reasonable bench of justices, applying their minds to proper considerations and giving themselves proper directions, can come, then this court can interfere, because the position then is exactly the same as though the justices have come to a decision of fact which there was no evidence to support.'

In *R v North West Suffolk (Mildenhall) Magistrates' Court, ex p Forest Heath DC* [1998] Env LR 9 at 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

'It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley and Cobley*. But it is not perverse, even if it may be mistaken, to prefer the evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court.'

[**41**] In *D'Souza v DPP* [1992] 4 All ER 545, [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way of case stated in criminal proceedings concerning whether the appellant, who had absconded

from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was 'unlawfully at large and whom [the police constables were] pursuing' under s 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as 'a question of fact' but one which 'must be answered within the relevant legal principles and paying regard to the meaning in their context of the relevant words' ([1992] 4 All ER 545 at 554, [1992] 1 WLR 1073 at 1082). Lord Lowry's conclusion ([1992] 4 All ER 545 at 558, [1992] 1 WLR 1073 at 1086), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> 'I do not consider that it was open to the Crown Court to find that "those seeking to retake the escaped patient", and in particular the constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion.'

Re B

[**42**] In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under s 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

[**43**] *Re B* was a family law case and involved the appellate test under CPR 52.21(3) that an appeal will be allowed where the decision of the lower court is 'wrong', whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* but that too involves a wide right of appeal 'on a question of law or fact' (ss 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if: 'the district judge ought to have decided a question before him differently' and 'had he decided it as he ought to have done, he would have been required to discharge the appellant' – see ss 27(3) and 104(3). In argument, reliance was also placed on the application of *Re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a Magistrates' Court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review – see, for example, *R (on the application of P) v Liverpool City Magistrates' Court* [2006] EWHC 887 (Admin), [2006] ELR 386, [2006] All ER (D) 211 (Mar) (at para [5]).

[**44**] It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

[**45**] A prosecution under s 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful

authority or excuse. Some cases stated in relation to s 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

[**46**] Whilst we do not consider that *Re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *Re B* has been developed in later cases. In *Re B* at para [88] Lord Neuberger stated as follows:

> 'If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless).'

[**47**] This approach was qualified by the Supreme Court in *R (on the application of R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2019] 1 All ER 391, [2018] 1 WLR 4079. In that case Lord Carnwath (with whom the other justices agreed) said at para [64]:

> 'In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle – whether of law, policy or practice – which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (on the application of C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47, [2016] PTSR 1344, [2016] All ER (D) 107 (Feb) (para [34])):
>
> > "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …" '

[**48**] As Lewison LJ stated in *R (Z) v Hackney London BC* [2019] EWCA Civ 1099, [2019] PTSR 2272, [2019] HLR 786 (para [66]):

> 'It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality.'

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court *R (on the application of Z) v Hackney London BC* [2020] UKSC 40, [2021] 2 All ER 539, [2020] 1 WLR 4327 – see the judgment of Lord Sales at para [74] and that of Lady Arden at paras [118]–[120].

[**49**] In cases stated which turn on an assessment of proportionality, the factors which the court considers to be relevant to that assessment are likely to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *Re B*, as clarified by the later case law, such an error may be regarded as an error of law on the face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not 'any relevant evidence'.

[**50**] In his judgment Lord Sales sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

[**51**] As Lady Arden's analysis at para [101] of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal, Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal, Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

[**52**] Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *Re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

[**53**] In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

[**54**] For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under s 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *Re B*, where the statutory defence depends upon an assessment of

proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

6. IS DELIBERATE PHYSICALLY OBSTRUCTIVE CONDUCT BY PROTESTERS CAPABLE OF CONSTITUTING A LAWFUL EXCUSE FOR THE PURPOSES OF SECTION 137 OF THE HIGHWAYS ACT 1980, WHERE THE IMPACT OF THE DELIBERATE OBSTRUCTION ON OTHER HIGHWAY USERS IS MORE THAN DE MINIMIS, AND PREVENTS THEM, OR IS CAPABLE OF PREVENTING THEM, FROM PASSING ALONG THE HIGHWAY?

The second certified question

[**55**] As the Divisional Court explained, (see para [28] above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that 'the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these respondents for a significant period of time'. That fundamental reason led the Divisional Court to certify the second question which the parties agreed as being in the terms set out in para [7](2) above ('the second certified question'). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of s 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of preventing users, from passing along the highway. In those circumstances, the interference with the protesters' art 10 and art 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to s 137 of the 1980 Act.

[**56**] On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of constituting a lawful excuse for the purposes of s 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's order directing convictions should be set aside and that this court should issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

[**57**] The second certified question relates to both the right to freedom of expression in art 10 and the right to freedom of assembly in art 11. Both rights are qualified in the manner set out respectively in arts 10(2) and 11(2): see paras [14]–[15] above. Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society …' In *Kudrevicius v Lithuania* (App no 37553/05) (2015) 40 BHRC 114, 62 EHRR 1107, para 100 the European Court of Human Rights ('ECtHR') stated that

'The term "restrictions" in art 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly'. Arrest, prosecution, conviction, and sentence are all 'restrictions' within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest, which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under arts 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales (see for instance paras [120], [153] and [154]) who considers that the defence of 'lawful excuse' under s 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden at para [94] that 'the more appropriate question is whether the convictions of the appellants for offences under s 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not' (emphasis added).

[**58**] As the Divisional Court identified at para [63] the issues that arise under arts 10 and 11 require consideration of five questions: see para [16] above. In relation to those questions it is common ground that: (i) what the appellants did was in the exercise of one of the rights in arts 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was 'necessary in a democratic society' so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

[**59**] Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

[**60**] In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the arts 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

[**61**] In this case both arts 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under art 10 or art 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the

court. In *Kudrevicius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that art 11 constitutes the *lex specialis* pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (App no 17391/06) [2014] ECHR 17391/06. However, given that art 11 is to be interpreted in the light of art 10, said to constitute the *lex generalis*, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

Deliberate obstruction with more than a de minimis impact

[**62**] The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under arts 10 and 11 ECHR.

[**63**] The issue of purposeful disruption of others was considered by the ECtHR in *Hashman v UK* (App no 25594/94) (1999) 8 BHRC 104, (1999) 30 EHRR 241, paras 27–28 and *Steel v UK* (App no 24838/94) (1998) 5 BHRC 339, (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevicius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

[**64**] The case of *Steel v UK* did not involve obstructive behaviour on a highway but rather involved an attempt by the first applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to s 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She complained to the European Commission of Human Rights ('the Commission') on the basis, in particular, of violations of arts 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that 'the first … applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the activities against which [she was] protesting*' (emphasis added). In addressing this issue, the Commission recalled 'that freedom of expression under art 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of art 10'. Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that 'there was a clear interference with the applicants' freedom under art 10 of the Convention'. Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and,

(b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

[**65**] The case of *Hashman v UK* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their art 10 rights. At para 28 the ECtHR noted that 'the protest took the form of impeding the activities of which they disapproved' but considered 'nonetheless that it constituted an expression of opinion within the meaning of art 10' and that 'The measures taken against the applicants were, therefore, an interference with their right to freedom of expression'. Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

[**66**] In *Kudrevicius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to art 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by arts 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the

Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to reallocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage had not been calculated.

[**67**] The ECtHR in *Kudrevicius* at para 97 recognised that intentional disruption of traffic was 'not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies'. However, the court continued that 'physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by art 11 of the Convention' (emphasis added). The court also added that 'This state of affairs *might* have implications for any assessment of "necessity" to be carried out under the second paragraph of art 11' (emphasis added). It is apparent from *Kudrevicius* that purposely obstructing traffic still engages art 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it '*might*', not '*would*', have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the 'prevention of disorder' and 'protection of the rights and freedoms of others' and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

[**68**] The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants breached their right to freedom of expression and to peaceful assembly, guaranteed by arts 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usuklchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> 'The Court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art 11 of the Convention is not to be deprived of its substance (see [*Galstyan v Armenia* (No 26986/03) at paras 116–117, and *Bukta v Hungary* (App no 25691/04) (2007) 51 EHRR 601, [2007] ECHR 25691/04, at para 37]). The appropriate "degree of tolerance" cannot be defined in abstracto: the Court must look at the particular circumstances of the case and particularly to the extent of the "disruption of ordinary life".'

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

[**69**] This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of art 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to 'peaceful assembly'. As the ECtHR stated at para 92 of *Kudrevicius*:

> '[The] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of art 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society.'

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of art 11 at para 98 of *Kudrevicius*. At para 155 of its judgment in *Primov v Russia* the ECtHR stated that 'Article 11 does not cover demonstrations where the organisers and participants have violent intentions … However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour …' Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

[**70**] It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of arts 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' arts 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with art 10 or art 11 rights was 'necessary in a democratic society'.

Factors in the evaluation of proportionality

[**71**] In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

[**72**] A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para [39] of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corp v Samede* (see para [17] above). The factors included 'the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public'. At paras [40]–[41] Lord Neuberger identified two further factors as being: (a) whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of considerable breadth, depth and

relevance'; and, (b) whether the protesters 'believed in the views they were expressing'. In relation to (b) it is hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

[**73**] In *Nagy v Weston* (see para [9] above) one of the factors identified was 'the place where [the obstruction] occurs'. It is apparent, as in this case, that an obstruction can have different impacts depending on the commercial or residential nature of the location of the highway.

[**74**] A factor listed in *City of London Corp v Samede* was 'the extent of the actual interference the protest causes to the rights of others'. Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in relation to proportionality by the ECtHR was the availability of 'alternative thoroughfares where the traffic could have been diverted by the police'.

[**75**] Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevicius* in that it took into account that 'the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products'. So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

[**76**] Another factor identified in *City of London Corp v Samede* was 'the importance of the precise location to the protesters'. In *Mayor of London v Hall* [2010] EWCA Civ 817, [2011] 1 WLR 504, [2010] 30 LS Gaz R 12 (para [37]) it was acknowledged by Lord Neuberger, with whom Arden and Stanley Burnton LJJ agreed, that 'The right to express views publicly … and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends … to the location where they wish to express and exchange their views'. In *Sáska v Hungary* (App no 58050/08) [2012] ECHR 58050/08 at para 21 the ECtHR stated that 'the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in para 2 of art 11'. This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia* (App no 57818/09) (2017) 68 EHRR 1. At para 405 it was stated that:

> '… the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target object and at a time when the message may have the strongest impact*.' (Emphasis added.)

In this case the appellants ascribed a particular 'symbolic force' to the location of their protest, in the road, leading to the Excel Centre.

[**77**] It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corp v Samede*, namely 'the extent to which the continuation of the protest would breach domestic law'. So, the manner and form of a protest on a highway will potentially

involve the commission of an offence contrary to s 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (App no 25/02) [2007] ECHR 25/02 at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case 'presented a danger to public order, apart from possibly blocking the tram line'. So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

[**78**] Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnar v Hungary* (App no 10346/05) [2008] ECHR 10346/05 (paras 34–38) and *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, [2017] NI 301, [2017] 3 LRC 252 (para [61]).

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

[**79**] A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the Case Stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the arts 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

[**80**] The Divisional Court at paras [111]–[118] considered the assessment of proportionality carried out by the district judge (see para [21] above). The Divisional Court considered that the factors at 38(a)–(c) were of little or no relevance. We disagree. In relation to the factor at 38(a), art 11 protects peaceful assembly. The ECtHR requires 'a certain degree of tolerance towards peaceful gatherings', see *Primov v Russia* at para [62] above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being

any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no 'clashes' with the police. The factor taken into account by the district judge at 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corp v Samede* (see para [17] above) in which one of the factors listed was 'the extent to which the continuation of the protest would breach domestic law'. The Divisional Court considered that none of these factors prevented the offence of obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether the appellants should be convicted under s 137 of the 1980 Act.

[**81**] The Divisional Court's core criticism related to the factor considered by the district judge at 38(d). We have set out in para [27] above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para [112] the Divisional Court stated that the 'highway *to and from* the Excel Centre was completely obstructed' but later stated that 'members of the public were *completely prevented* from' using 'the highway for passage *to* get to the Excel Centre' (emphasis added). We also note that at para [114] the Divisional Court again stated that there was there was '*a complete obstruction of the highway*'. In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not 'completely prevented' from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that 'actions' were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair was relevant: see para [75] above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para [21] above). He made no finding as to whether 'non-DSEI' traffic was or was not in fact obstructed since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para [76] above.

(iv) The Divisional Court considered that the obstruction was for a 'significant period of time' whilst the district judge considered that the 'action was limited in duration'. As we explain in paras [83]–[84] below whether the period of 90 to 100 minutes of actual obstruction was 'significant' or 'limited' depends on the context. It was open to the district

judge to conclude on the facts of this case that the duration was 'limited' and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to 'members of the public'. However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para [19] above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

[**82**] The Divisional Court agreed at para [113] with the factor taken into account by the district judge at para 38(e) of the case stated—

> 'that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant insofar as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved.'

That was an appropriate factor to be taken into account: see para [72] above. As in *Primov v Russia* at paras 132–136 the appellant's message 'undeniably concerned a serious matter of public concern and related to the sphere of political debate'. There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

[**83**] The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para [112] referred to the period of obstruction as having 'occurred for a significant period of time'. Then at para [114] the Divisional Court stated:

> 'On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality.' (Emphasis added.)

As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually

obstructed. Lord Sales at para [144] states that the district judge ought to have taken into account any longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden at para [96] that the appellants 'cannot be convicted on the basis that had the police not intervened their protest would have been longer'. We agree that the proportionality assessment which potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

[**84**] It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of 'limited duration' or was for 'a not insignificant amount of time' or for 'a significant period of time' was a fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para [19] above.

[**85**] The Divisional Court considered at para [115] that the factor taken into account by the district judge at para 38(g) of the case stated 'was of little if any relevance to the assessment of proportionality'. The factor was that he had—

> 'heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.'

In relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that 'The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this'. We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

[**86**] The Divisional Court at para [116] considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a 'relatively minor issue', noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that 'This was not a group of people who randomly chose to attend this event hoping to cause trouble'. The Divisional Court held that this factor had 'no relevance to the assessment which the court was required to carry out when applying the

principle of proportionality' and that 'It came perilously close to expressing approval of the viewpoint of the defendants, something which … is not appropriate for a neutral court to do in a democratic society'. However, as set out at para [67] above whether the appellants 'believed in the views they were expressing' was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike 'vapid tittle-tattle' are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

[**87**] We would answer the second certified question 'yes'. The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under s 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. OVERALL CONCLUSION

[**88**] For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para [49] above; answering the certified question set out in para 7(2) 'yes'; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN.

THE CONTEXT IN WHICH THE CERTIFIED QUESTIONS ARISE

[**89**] This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two certified questions set out in para [7] of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in art 11 of the European Convention on Human Rights 1950 ('the Convention'), one of the rights now guaranteed in our domestic law by the Human Rights Act 1998. The European Court of Human Rights ('the Strasbourg court') has described this important right as follows:

> '[T]he right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of

this judgment] is one of the foundations of such a society. Thus it should not be interpreted restrictively.' (*Kudrevicius v Lithuania* (App no 37553/05) (2015) 40 BHRC 114, 62 EHRR 1107, para 91.)

[**90**] The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

'1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ("DSEI") weapons fair taking place at the centre.

2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ("lock box"), using a carabiner.

3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the "5 stage process", intended to persuade them to remove themselves voluntarily from the public highway.

4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).

5. The left-hand dual lane carriageway of the public highway leading to the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.

6. The appellants were charged with obstructing the highway contrary to section 137 of the Highways Act 1980.

7. They were tried before District Judge (Magistrates' Court) ("DJ(MC)") Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.

8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under arts 10 and 11, "*on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable.*"' (Case Stated, para 40.)

[**91**] Section 137 of the Highways Act 1980 provides:

'(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale].'

[**92**] As Lord Sales, with whom Lord Hodge agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by arts 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 All ER 210, [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not

lawful. As Lord Bingham observed in *R* (*on the application of Laporte*) *v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 All ER 529, [2007] 2 AC 105 (para [34]):

> 'The 1998 Act, giving domestic effect to arts 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v DPP* (1999) 7 BHRC 375 at 380, aptly called a "constitutional shift".'

[**93**] Article 11, which I set out in para [95] below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to art 10 of the Convention (freedom of expression), as well as art 11, but its importance as a Convention right must also be acknowledged.

[**94**] I pause here to address a point made by Lord Sales and Lord Hodge that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is art 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself art 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair – a high profile and controversial event – and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was art 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under s 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under art 11 or not.

[**95**] Article 11 provides:

> '(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

[**96**] Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the

appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an end marks the end of the duration of any offence under s 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under s 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales and Lord Hodge in Lord Sales' judgment, the appellants did not in fact intend that their protest should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the Case Stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (Written ruling of DJ (MC) Hamilton, para 11).

[**97**] It follows from the structure of art 11 and the importance of the right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (App no 29580/12) (2018) 46 BHRC 452, GC:

> '137. The Court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius*, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in para 1 of s 16 of the Public Events Act. This was not the case in the episodes at hand.'

THE CERTIFIED QUESTIONS

[**98**] The issues of law in the appeal, as certified by the Divisional Court, are:

> (1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter and, in particular the lower court's assessment of whether an interference with Convention rights was proportionate?
>
> (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of s 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time?

OVERVIEW OF MY ANSWERS TO THE TWO CERTIFIED QUESTIONS

[**99**] For the reasons explained below, my answers to the two certified questions are in outline as follows:

> (1) *Standard of Appellate Review Applying to a Proportionality Assessment*. The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that

laid down in *R (on the application of R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2019] 1 All ER 391, [2018] 1 WLR 4079 (*'R (R)'*), at [64], which refines the test in *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911 (*'Re B'*), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary and secondary facts to which (in this case) the test in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 continues to apply. That test imposes an 'unreasonableness' standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens agree with this: analysis of the standard applying to the findings of fact (judgment, para [49]).

(2) *Whether the exercise of arts 10 and 11 rights may involve legitimate levels of obstruction*: my answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did.

CERTIFIED QUESTION 1: STANDARD OF APPELLATE REVIEW APPLYING TO PROPORTIONALITY ASSESSMENT

[**100**] People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these types of appellate review is clear.

[**101**] But there are many other standards. In appeals by Case Stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, s 111). As Lord Hamblen and Lord Stephens have explained, the standard of review is that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214, [2001] All ER (D) 181 (Jan).

[**102**] Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one end of the gamut of possibilities, there is the de novo hearing and the pure correctness

standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, which even though for well-intentioned reasons may also be inconsistent with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

[**103**] I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 at 1200 (US Supreme Court), a case involving alleged 'fair use' of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated 'subsidiary facts' found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court.

[**104**] As to the standard of appellate review of proportionality assessments, no-one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *Re B*, a family case. However, in *R* (*R*) this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para [64] of the judgment of Lord Carnwath with whom the other members of this court agreed:

> '[64] In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle – whether of law, policy or practice – which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some

material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R* (*on the application of C*) *v Secretary of State for Work and Pensions* [2016] EWCA Civ 47, [2016] PTSR 1344, [2016] All ER (D) 107 (Feb) (para [34])): "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …".'

[**105**] The refinement by this court of the *Re B* test in *R* (*R*) as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations.

[**106**] In short, I would hold that the standard of appellate review applicable in judicial review following *R* (*R*) should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it.

[**107**] Since circulating the first draft of this judgment I have had the privilege of reading paras [49] to [54] and [78] of the joint judgment of Lord Hamblen and Lord Stephens. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R* (*R*) which I have already set out in para [104] of this judgment, Lord Carnwath was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for example, what actually was the legitimate aim and how far was it furthered by the action of the state and was there any less restrictive means of achieving the legitimate end.

[**108**] In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para [102] above).

[**109**] As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales and Lord Hodge for two reasons. First, they hold that the district judge was in error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was 'completely blocked' by the appellants' actions (Lord Sales' judgment, para [142]). But, as para 5 of the statement of facts and issues set out in para [90] above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute that such routes were available. As the district judge said at para 16 of the Case Stated:

> 'All eight defendants described their action as "carefully targeted" and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route*.' (Emphasis added.)

[**110**] The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete impediment to other road-users that that conclusion could be challenged under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the Case Stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

[**111**] The second point on which Lord Sales and Lord Hodge hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para [96] above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under s 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

[**112**] This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the Case Stated which reads:

> 'The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests – which in both cases was a matter of minutes. I considered this since, at the

point when they were arrested the defendants were no longer "free agents" but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of "wilfulness" which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes.'

[**113**] As I read that subparagraph, the district judge was prepared to accept that the duration of the protest was either the few minutes that the appellants were free to make their protest before they were arrested or the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ('whether the defendants were "free agents" [or] were in the custody of' the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some 'identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion' (see para [104] above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

CERTIFIED QUESTION 2: CONVENTION-LEGITIMACY OF OBSTRUCTION AND CONCLUDING OBSERVATIONS ON THE DISTRICT JUDGE'S FACT FINDING IN THIS CASE

[**114**] As I have already explained, before the Human Rights Act 1998 came into force an offence under s 137(1) of the Highway Act 1980 or its predecessor, s 121 of the Highways Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted and brought into force, the courts interpret s 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their art 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (App no 10877/04) [2008] ECHR 10877/04, at para 44:

'Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by art 11 of the Convention is not to be deprived of all substance.'

[**115**] In the Case Stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of arts 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

[**116**] I agree with Lord Hamblen and Lord Stephens' thorough review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales and Lord Hodge consider were rightly made. So, I make only some brief concluding points at this stage.

[**117**] Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Criminal Procedure Rules, r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales and Lord Hodge, which could enable the prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the Case Stated.

CONCLUSION

[**118**] For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens.

LORD SALES (dissenting in part) (with whom Lord Hodge DP agrees).

[**119**] This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton ('the district judge') in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under s 137 of the Highways Act 1980 ('s 137'). The case stated procedure is governed by s 111 of the Magistrates' Courts Act 1980 and s 28A of the Senior Courts Act 1981. So far as relevant, s 111 only permits the appeal court to allow an appeal if the decision is 'wrong in law': s 111(1).

[**120**] I respectfully disagree with what Lord Hamblen and Lord Stephens say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' under s 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. I emphasise this last point, because there will be cases where the defence of 'lawful excuse' does not depend on an assessment of what the police do.

[**121**] The second question of law certified by the Divisional Court concerns whether, in principle, a 'lawful excuse' defence under s 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens say at paras [62]–[70]. In principle, a 'lawful excuse' defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In

general terms, I agree with the discussion of Lord Hamblen and Lord Stephens at paras [71]–[78] regarding factors which are relevant to assessment of proportionality in this context.

[**122**] I respectfully disagree with Lord Hamblen and Lord Stephens regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens, to require that the case be remitted to the magistrates' court.

HUMAN RIGHTS COMPLIANT INTERPRETATION OF SECTION 137 OF THE HIGHWAYS ACT

[**123**] Section 3(1) of the Human Rights Act 1998 ('the HRA') requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Sch 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention on Human Rights ('the ECHR'), including art 10 (the right to freedom of expression) and art 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, s 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application s 6. So is a court: s 6(3)(a).

[**124**] The Divisional Court construed s 137 in light of the interpretive obligation in s 3(1) of the HRA and having regard to the duties of public authorities under s 6 of that Act. No one has criticised their construction of s 137 and I would endorse it. As the Divisional Court held (paras [61]–[65]), the way in which s 137 can be read so as to be compatible with the Convention rights in art 10 and art 11 is through the interpretation of the phrase 'without lawful … excuse' in s 137. In circumstances where a public authority such as the police would violate the rights of protesters under art 10 or art 11 by arresting or moving them, and hence would act unlawfully under s 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

[**125**] This interpretation of s 137 means that the commission of an offence under it depends upon the application of what would otherwise be an issue of public law regarding the duty of a public authority such as the police under s 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under art 10(1) or the right to peaceful assembly under art 11(1), under art 10(2) or art 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, the interference must be 'necessary in a democratic society' in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim?

(iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality *stricto sensu*.

[**126**] In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

[**127**] At a trial for an alleged offence under s 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to s 6(1) of the HRA in taking action against him or her. But that does not change the conceptual basis on which the offence under s 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

[**128**] It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under art 10 and art 11, alleging that their arrest and removal by the police would be in breach of those rights and hence in breach of duty under s 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to s 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an alleged offence under s 137 based on similar facts, although the burden and standard of proof would be different.

THE ROLE OF THE DISTRICT JUDGE AND THE ROLE OF THE DIVISIONAL COURT ON APPEAL

[**129**] The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under s 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of art 10 and art 11 and therefore held that a protester had no 'lawful excuse' defence under s 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

[**130**] It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Dept, X v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 3 All ER 169, [2005] 2 AC 68 ('the *Belmarsh* case') (paras [40]–[42] and [44]) (per Lord Bingham of Cornhill, with whom a majority of the nine-member appellate committee agreed); *Huang v Secretary of State for the Home Dept* [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167 (para [11]); *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School* [2006] UKHL 15, [2006] 2 All ER 487, sub nom *R (SB) v Governors of*

Denbigh High School [2007] 1 AC 100 (paras [29]–[31] (Lord Bingham) and [68] (Lord Hoffmann)); and *R (on the application of Aguilar Quila) v Secretary of State for the Home Dept (Aguilar, interested party), R (on the application of Bibi) v Secretary of State for the Home Dept* [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621 (paras [46] (Lord Wilson), [61] (Lady Hale) and [91]) (Lord Brown) (Lord Phillips and Lord Clarke agreed with Lord Wilson and Lady Hale)). This reflects the features that the Convention rights are freestanding rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality *stricto sensu*, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

[**131**] Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in s 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as art 10 or art 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para [44]. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham noted at para [40] that in the judgment of the European Court of Human Rights in *Smith v UK* (App nos 33985/96, 33986/96) [1999] IRLR 734, (2000) 29 EHRR 493 'the traditional *Wednesbury* approach to judicial review … was held to afford inadequate protection' for Convention rights and that it was recognised that 'domestic courts must themselves form a judgment whether a Convention right has been breached' and that 'the intensity of review is somewhat greater than under the rationality approach' (citing *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532 (paras [23] and [27])). At para [44], Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> 'The European Court of Human Rights does not approach questions of proportionality as questions of pure fact (see, for example, *Smith v UK* …) Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [ie by an appellate court].'

[**132**] Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from the test set out in CPR Pt 52.11 (now contained in Pt 52.21). An appellate court is entitled to find an error of law if the decision of the lower court or tribunal is 'wrong', in the sense understood in that provision: see *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911 (paras [88]–[92]) (Lord Neuberger of Abbotsbury, with whom Lord Wilson and Lord Clarke agreed); *R (on the application of R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2019] 1 All ER 391, [2018] 1 WLR 4079 (paras [53]–[65]) (Lord Carnwath, explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (on the application of Z) v Hackney London BC* [2020] UKSC 40, [2021] 2 All ER 539, [2020] 1 WLR 4327 (paras [56] and [74]). In the latter case it was explained at para [74] that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do. In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *Re B (a child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London BC*.

[**133**] In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with art 10 or art 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was 'wrong' according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

[**134**] I respectfully disagree with Lord Hamblen and Lord Stephens in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

[**135**] By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against

the police, to enforce their obligation under s 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of s 137. The approach on an appeal in such judicial review proceedings would be that set out in *Re B* (*a child*) and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

[**136**] To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *Re B* (*a child*) is not inconsistent with the leading authority of *Edwards* (*Inspector of Taxes*) *v Bairstow* [1955] 3 All ER 48, [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said ([1955] 3 All ER 48 at 55–56, [1956] AC 14 at 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word 'trade' or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits 'within which it would be permissible to say that a "trade" [within the meaning of the statutory rule] does, or does not, exist'. If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows ([1955] 3 All ER 48 at 57–58, [1956] AC 14 at 36):

> 'If the Case [as stated] contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur.'

[**137**] In a well-known passage in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 951, [1985] AC 374 at 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB

223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law. However, as stated by Lord Bingham in the *Belmarsh* case and other authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of proportionality.

[**138**] Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath said in *R (R) v Chief Constable of Greater Manchester Police* at para [64] (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens also draw attention:

> '… to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle – whether of law, policy or practice – which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (on the application of C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47, [2016] PTSR 1344, [2016] All ER (D) 107 (Feb) (para [34])):
>
> > "… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …" '

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

[**139**] I find myself in respectful disagreement with para [45] of the judgment of Lord Hamblen and Lord Stephens. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow*. The effect of the rights-compatible interpretation of s 137 pursuant

to s 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of 'lawful excuse' in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

[**140**] It is clearly right to say, as Lady Arden emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (App no 17851/91) [1996] ELR 232, (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under art 10 (para 52(iii), omitting footnotes):

> 'The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Art 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Art 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.'

Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

THE DECISION OF THE DISTRICT JUDGE

[**141**] I turn, then, to the decision of the district judge in applying s 137, in order to assess whether the case stated discloses any error of law.

[**142**] Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective way: see *Kudrevicius v Lithuania* (App no 37553/05) (2015) 40 BHRC 114, 62 EHRR 1107, para 97. The district judge directed himself correctly as to the interpretation of s 137 and the significance of an assessment of the proportionality of the intervention by the police.

[**143**] However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para [112] of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the proportionality of police action to clear the highway, this was a highly material

feature of the case. Since it was not referred to by the district judge, he failed to take account of 'a material factor' (in the words of Lord Carnwath) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

[**144**] Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para [114] of its judgment, the Divisional Court said:

> 'In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the police intervened to make arrests and to remove the respondents from the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality.'

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce.

[**145**] Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

[**146**] In my opinion, by reason of both these material errors by the district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *Re B* (*a child*) and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of proportionality and that his overall assessment was 'wrong' in the requisite sense: paras [117] and [129].

THE DECISION OF THE DIVISIONAL COURT

[**147**] Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the appeal pursuant to s 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

[**148**] The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

> 'The High Court shall hear and determine the question arising on the case … and shall—
>
> (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
>
> (b) remit the matter to the magistrates' court … with the opinion of the High Court,
>
> and may make such other order in relation to the matter (including as to costs) as it thinks fit.'

[**149**] The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of s 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under art 10(1) and art 11(1), with the result that the appellants had no 'lawful excuse' for their activity for the purpose of s 137, and therefore substituted convictions of the appellants for offences under that provision.

[**150**] In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect would have been that there was a mistrial and further examination of the facts would have to be by way of a re-trial.

[**151**] I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the convictions which the Divisional Court ordered should be entered.

[**152**] In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the

protesters had committed the offences under s 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens, I do not myself read the Divisional Court as saying that points (a) to (c) in para 38 of the case stated were of little or no relevance; at para [111] of its judgment the court only said that none of those points 'prevents the offence of obstruction of the highway being committed in a case such as this'. The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens that the Divisional Court's assessment of point (h) at para [116] was flawed: para [80] above and *City of London Corp v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, [2012] PTSR 1624 (paras [39]–[41]). This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

[153] I would answer the first question certified by the Divisional Court (para [7](1) above) as follows: in a case like the present, where the defence of 'lawful excuse' under s 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *Re B* (*a child*) and the cases which follow and apply it.

[154] I would answer the second question certified by the Divisional Court (para [7](2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a 'lawful excuse' for the purposes of s 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

Appeal allowed.

Aaron Turpin Barrister.

Neutral Citation Number: [2022] EWHC 2360 (KB)

Case No: QB-2022-BHM-000044

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 20/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

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

- and –

FOUR CATEGORIES OF PERSONS UNKNOWN

-and-

ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS

Defendants

- -
- -

Richard Kimblin KC, Michael Fry, Sioned Davies and Jonathan Welch (instructed by **DLA Piper UK LLP**) for the **Claimants**

Tim Moloney KC and Owen Greenhall (instructed by **Robert Lizar Solicitors**) for the **Sixth Named Defendant (James Knaggs)**

A number of Defendants appeared in person and/or filed written submissions

Hearing dates: **26-27 May 2022**

- -

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. If and when it is completed HS2 will be a high speed railway line between London and the North of England, via the Midlands. Parts of it are already under construction. The First Claimant in this case, High Speed Two (HS2) Limited, is the company responsible for constructing HS2. It is funded by grant-in-aid from the Government (ie, sums of money provided to it by the Government in support of its objectives).

2. To avoid confusion, in this judgment I will refer to the railway line itself as HS2, and separately to the First Claimant as the company carrying out its construction. The Second Claimant is responsible for the successful delivery of the HS2 Scheme.

3. This is an application by the Claimants, by way of Claim Form and Application Notice dated 25 March 2022, for injunctive relief to restrain what they say are unlawful protests against the building of HS2 which have hindered its construction. They say those protesting have committed trespass and nuisance.

4. There is a dedicated website in relation to this application where the relevant files can be accessed: https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings. I will refer to this as 'the Website'.

5. Specifically, the Claimants seek: (a) an injunction, including an anticipatory injunction, to protect HS2 from unlawful and disruptive protests; (b) an order for alternative service; and (c) the discharge of previous injunctions (as set out in the Amended Particulars of Claim (APOC) at [7]). The latter two matters are contained in the Amended Draft Injunction Order of 6 May 2022 at Bundle B, B049.

6. There are four categories of unnamed defendant (see Appendix 1 to this judgment). There are also a large number of named defendants.

7. The Claimants have made clear that any Defendant who enters into suitable undertakings will be removed from the scope of the injunction (if granted). The named Defendants to whom this application relates has been in a state of flux. The Claimants must, upon receipt of this judgment, in the event I grant an injunction, produce a clear list of those Defendants (to be contained in a Schedule to it) to whom it, and those to whom it does not apply (whether because they have entered into undertakings, or for any other reason).

8. The Application Notice seeks an interim injunction ('… Interim injunctive relief against the Defendants at Cash's Pit, and the HS2 Land …). However, Mr Kimblin KC, as I understood him, said that what he was seeking was a final injunction.

9. I note the discussion in *London Borough of Barking and Dagenham v Persons Unknown* [2022] 2 WLR 946, [89], that there may be little difference between the two sorts of injunction in the unknown protester context. However, in this case there are named Defendants. Some of them may wish to dispute the case against them. Mr Moloney on behalf of D6 (who has filed a Defence) objected to a final injunction. I cannot, in these circumstances, grant a final injunction. There may have to be a trial. Any injunction that I grant must therefore be an interim injunction. The Claimant's draft injunction provides for a long-stop date of 31 May 2023 and also provides for annual reviews in May.

10. The papers in this case are extremely voluminous and run to many thousands of pages. D36, Mark Keir, alone filed circa 3000 pages of evidence. There are a number of witness statements and exhibits on behalf of the Claimants. The Claimants provided me with an Administrative Note shortly before the hearing. I also had two Skeleton Arguments from the Claimants (one on legal principles, and one on the merits of their application); and a Skeleton Argument from Mr Moloney KC and Mr Greenhall on behalf of D6, James Knaggs. There were then post-hearing written submissions from the Claimants and on behalf of Mr Knaggs. There are also written submissions from a large number of defendants and also others. These are summarised in Appendix 2 to this judgment. A considerable bundle of authorities was filed. All of this has taken time to consider.

11. The suggested application on behalf of D6 to cross-examine two of the Claimants' witnesses was not, in the end, pursued. I grant any necessary permission to rely on documents and evidence, even if served out of time.

12. The land over which the injunction is sought is very extensive. In effect, the Claimants seek an injunction over the whole of the proposed HS2 route, and other land which I will describe later. I will refer to the land collectively as the HS2 Land. The injunction would prevent the defendants from: entering or remaining upon HS2 Land; obstructing or otherwise interfering with vehicles accessing it or leaving it; interfering with any fence or gate at its perimeter.

13. The Application Notice also related to a discrete parcel of land known as Cash's Pit, in Staffordshire. Cotter J granted a possession order and an injunction in respect of that land on 11 April 2022, on the Claimants' application, and adjourned off the other application, which is now before me.

Democracy and opposition to HS2

14. It must be understood at the outset that I am not concerned with the rights or wrongs of HS2. I am not holding a public inquiry. It is obviously a project about which people hold sincere views. It is not for me to agree or disagree with these. But I should make clear that I am not being 'weaponised' against protest, as at least one person said at the hearing. My task is solely to decide whether the Claimants are properly entitled to the injunction they seek, in accordance with the law, the evidence, and the submissions which were made to me.

15. It should also be understood that the injunction that is sought will not prohibit lawful protest. That is made clear in the recitals in the draft injunction:

> "UPON the Claimants' application by an Application Notice dated 25 March 2022
>
> …
>
> AND UPON the Claimants confirming that this Order is not intended to prohibit lawful protest which does not involve trespass upon the HS2 Land and does not block, slow down, obstruct or otherwise interfere with the Claimants' access to or egress from the HS2 Land."

16. HS2 is the culmination of a democratic process. In other words, it is being built under specific powers granted by Parliament. As would be expected in relation to such a major national infrastructure project, the scheme was preceded by extensive consultation, and it then received detailed consideration in Parliament. As early as 2009, the Government published a paper, 'Britain's Transport Infrastructure: High Speed Two'. The process which followed thereafter is described in the first witness statement of Julie Dilcock (Dilcock 1), [11] et seq. She is the First Claimant's Litigation Counsel (Land and Property). She has made four witness statements (Dilcock 1, 2, 3 and 4.)

17. The HS2 Bills which Parliament passed into law were hybrid Bills. These are proposed laws which affect the public in general, but particularly affect certain groups of people. Hybrid Bills go through a longer Parliamentary process than purely Public Bills (ie, in simple terms, Bills which affect all of the public equally). Those particularly affected by hybrid Bills may submit petitions to Parliament, and may state their case before a Parliamentary Select Committee as part of the legislative process.

18. HS2 is in two parts: Phase 1, from London to the West Midlands, and Phase 2a, from the West Midlands – Crewe.

19. Parliament voted to proceed with HS2 via, in particular, the High Speed Rail (London - West Midlands) Act 2017 (the Phase One Act) and the High Speed Rail (West Midlands - Crewe) Act 2021 (the Phase 2a Act) (together, the HS2 Acts). There is also a lot of subordinate legislation.

20. Many petitions were submitted in relation to HS2 during the legislative process. For example, in *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch), [16]-[18], the evidence filed on behalf of the Claimants in relation to the Phase One Act was that:

> "… the Bill which became the Act was a hybrid Bill and, as such, subject to a petitioning process following its deposit with Parliament. In total [the Claimants' witness] says 3,408 petitions were lodged against the Bill and its additional provisions, 2,586 in the Commons and 822 in the Lords and select committees were established in each House to consider these petitions.
>
> 17. She says the government was able to satisfy a significant number of petitioners without the need for a hearing before the committees. In some cases in the Commons this involved making changes to the project to reduce impacts or enhance local mitigation measures and many of these were included in one of the additional provisions to the Bill deposited during the Commons select committee stage.
>
> 18. Of the 822 petitions submitted to the House of Lords select committee, the locus of 278 petitions was successfully challenged. Of the remaining 544 petitions, the select committee heard 314 petitions in formal session with the remainder withdrawing, or choosing not to appear before the select committee, mainly as a result of successful prior negotiation with the Claimants."

21. In his submissions of 16 May 2022, Mr Keir said at [5] that HS2 was a project which 'the people of the country do not want but over which we have been roundly ignored by Parliament'. In light of the above, I cannot agree. 'What the public wants', is reflected in what Parliament decided. That is democracy. Those who were against HS2 were not ignored during the legislative process. People could petition directly to express their views, and thousands did so. Their views were considered. Parliament then took its decision to approve HS2 knowing that many would disagree with it. It follows, it seems to me, that the primary remedy for those who do not want HS2 is to elect MPs who will cancel it. (In fact, whilst not directly relevant to the matter before me, I understand that the original planned leg of the route towards Leeds/York from the Midlands has now been abandoned).

22. All of this is, I hope, consistent with what the Divisional Court said in *DPP v Cuciurean* [2022] EWHC 736 (Admin). That concerned a criminal conviction under s 68 of the Criminal Justice and Public Order Act 1994 (aggravated trespass) arising out of a protest against HS2. Lord Burnett of Maldon CJ said at [84]:

> "… Those lawful activities in this case [viz, the building of HS2] had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest. One object of section 68 is to discourage disruption of the kind committed by the respondent, which, according to the will of Parliament, is against the public interest … The Strasbourg Court has often observed that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the Common Law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament."

23. The Government's website on HS2 says this:

> "Our vision is for HS2 to be a catalyst for growth across Britain. HS2 will be the backbone of Britain's rail network. It will better connect the country's major cities and economic hubs. It will help deliver a stronger, more balanced economy better able to compete on the global stage. It will open up local and regional markets. It will attract investment and improve job opportunities for hundreds of thousands of people across the whole country."

See: https://www.gov.uk/government/organisations/high-speed-two limited/about

24. As I have said, many people do not agree, and think that HS2 will cause irremediable damage to swathes of the countryside – including many areas of natural beauty and ancient woodlands - and that it will be bad for the environment in general. There have been many protests against it, and it has generated much litigation in the form, in particular, of applications by the Claimants and others for injunctions to restrain groups of persons (many of whom are unknown) from engaging in activities which were

interfering with HS2's construction: see eg, *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch); *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Cubbington and Crackley)* [2020] EWHC 671 (Ch); *Ackroyd and others v High Speed (HS2) Limited and another* [2020] EWHC 1460 (QB); *London Borough of Hillingdon v Persons Unknown* [2020] EWHC 2153 (QB); *R (Maxey) v High Speed 2 (HS2) Limited and others* [2021] EWHC 246 (Admin).

25. These earlier decisions contain a great deal of information about HS2 and the protests against it. I do not need to repeat all of the detail in this judgment: the reader is referred to them. As I have said, the Claimants' draft order proposes the discharge of these earlier injunctions as they will be otiose if the present application is granted as it will encompass the relevant areas of land.

26. Richard Jordan is the First Claimant's Interim Quality and Assurance Director and was formerly its Chief Security and Resilience Officer. In that role, he was responsible for the delivery of corporate security support to the First Claimant in line with its security strategy, and the provision of advice on all security related matters. In his witness statement of 23 March 2022 (Jordan 1) he described the nature of the protests against HS2. I will return to his evidence later.

The Claimants' land rights

27. Parliament has given the Claimants a number of powers over land for the purposes of constructing HS2.

28. Dilcock 1, [14]-[16], explains that on 24 February 2017 the First Claimant was appointed as nominated undertaker pursuant to s 45 of the Phase One Act by way of the High Speed Rail (London-West Midlands) (Nomination) Order 2017 (SI 2017/184).

29. Section 4(1) of the Phase One Act gives the First Claimant power to acquire so much of the land within the Phase One Act limits as may be required for Phase One purposes. The First Claimant may acquire rights over land by way of General Vesting Declaration (GVD) or the Notice to Treat (NTT) or Notice of Entry (NoE) procedures.

30. Section 15 and Sch 16 of the Phase One Act give the First Claimant the power to take temporary possession of land within the Phase One Act limits for Phase One purposes. So, for example, [1] of Sch 16 provides:

> "(1) The nominated undertaker may enter upon and take possession of the land specified in the table in Part 4 of this Schedule -
>
> (a) for the purpose specified in relation to the land in column (3) of the table in connection with the authorised works specified in column (4) of the table,
>
> (b) for the purpose of constructing such works as are mentioned in column (5) of the table in relation to the land, or
>
> (c) otherwise for Phase One purposes.

> (2) The nominated undertaker may (subject to paragraph 2(1)) enter upon and take possession of any other land within the Act limits for Phase One purposes.
>
> (3) The reference in sub-paragraph (1)(a) to the authorised works specified in column (4) of the table includes a reference to any works which are necessary or expedient for the purposes of or in connection with those works."

31. 'Phase One purposes' is defined in s 67 and 'Act limits' is defined in s 68. The table mentioned in [1(1)(a)] is very detailed and specifies precisely the land affected, and the works that are permitted.

32. In relation to Phase 2a, on 12 February 2021 the First Claimant was appointed as nominated undertaker pursuant to s 42 of the Phase 2a Act by way of the High Speed Rail (West Midlands - Crewe) (Nomination) Order 2021 (SI 2021/148).

33. Section 4(1) of the Phase 2a Act gives the First Claimant power to acquire so much of the land within the Phase 2a Act limits as may be required for Phase 2a purposes. Again, the First Claimant may acquire land rights by way of the GVD, NTT and NoE procedures.

34. Section 13 and Sch 15 of the Phase 2a Act give the First Claimant the power to take temporary possession of land within the Phase 2a Act limits for Phase 2a purposes. Paragraph 1 of Sch 15 is broadly analogous to [1] of Sch 16 to the Phase One Act that I set out earlier.

35. It is not necessary for me to go much further into all the technicalities surrounding these provisions. Suffice it to say that the Claimants have been given extremely wide powers to obtain land, or take possession of it, or the right to immediate possession, even where they do not acquire freehold or leasehold title to the land in question. In short, if they need access to land in order to construct or maintain HS2 as provided for in the HS2 Acts then, one way or another, they have the powers to do so providing that they follow the prescribed procedures.

36. So for example, [4(1) and (2)] of Sch 16 to the Phase 1 Act provide:

> "(1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.
>
> (2) The nominated undertaker may not, without the agreement of the owners of the land, remain in possession of land under paragraph 1(1) or (2) after the end of the period of one year beginning with the date of completion of the work for which temporary possession of the land was taken."

37. The Claimants have produced plans showing the HS2 Land coloured pink and green. These span several hundred pages and can be viewed electronically on the Website. There have been two versions: the HS2 Land Plans, and the Revised HS2 Land Plans.

38. In their original form, the HS2 Land Plans were exhibited as Ex JAD1 to Dilcock 1 and explained at [29]-[33] of that statement. In simple terms, the (then) colours reflected the various forms of title or right to possession which the First Claimant has in respect of the land in question:

> "29. The First or the Second Claimant are the owner of the land coloured pink on the HS2 Land Plans, with either freehold or leasehold title (the "Pink Land"). The Claimants' ownership of much of the Pink Land is registered at HM Land Registry, but the registration of some acquisitions has yet to be completed. The basis of the Claimants' title is explained in the spreadsheets named "Table 1" and "Table 3" at JAD2. Table 1 reflects land that has been acquired by the GVD process and Table 3 reflects land that has been acquired by other means. A further table ("Table 2") has been included to assist with cross referencing GVD numbers with title numbers. Where the Claimants' acquisition has not yet been registered with the Land Registry, the most common basis of the Claimants' title is by way of executed GVDs under Section 4 of the HS2 Acts, with the vesting date having passed.
>
> 30. Some of the land included in the Pink Land comprises property that the Claimants have let or underlet to third parties. At the present time, the constraints of the First Claimant's GIS data do not allow for that land to be extracted from the overall landholding. The Claimants are of the view that this should not present an issue for the present application as the tenants of that land (and their invitees) are persons on the land with the consent of the Claimants.
>
> 31. The Claimants' interest in the Pink Land excludes any rights of the public that remain over public highways and other public rights of way and the proposed draft order deals with this point. The Claimant's interest in the Pink Land also excludes the rights of statutory undertakers over the land and the proposed draft order also deals with this point.
>
> 32. The First Claimant is the owner of leasehold title to the land coloured blue on the HS2 Land Plans (the "Blue Land"), which has been acquired by entering into leases voluntarily, mostly for land outside of the limits of the land over which compulsory powers of acquisition extend under the HS2 Acts. The details of the leases under which the Blue Land is held are in Table 3.
>
> 33. The First Claimant has served the requisite notices under the HS2 Acts and is entitled to temporary possession of that part of the HS2 Land coloured green on the HS2 Land Plans ("the Green Land") pursuant to section 15 and Schedule 16 of the Phase One Act and section 13 and Schedule 15 of the Phase 2a Act. A

> spreadsheet setting out the details of the notices served and the dates on which the First Claimant was entitled to take possession pursuant to those notices is at Table 4 of JAD2."

39. The plans were then revised, as Ms Dilcock explains in Dilcock 3 at [39]. Hence, my calling them the Revised HS2 Land Plans. There is now just pink and green land.

40. The land coloured pink is owned by the First or Second Claimants with either freehold or leasehold title. The land coloured green is land over which they have temporary possession (or the immediate right to possession) under the statutory powers I have mentioned. Land which has been let to third parties has been removed from the scope of the pink land (see Dilcock 3, [39]).

41. Ms Dilcock has produced voluminous spreadsheets as Ex JAD2 setting out the bases of the Claimants' right to possession of the HS2 Land.

42. Ms Dilcock gives some further helpful detail about the statutory provisions in Dilcock 3, [28] et seq. At [31]-[34] she said:

> "31. As explained by Mr Justice Holland QC at paragraphs 30 to 32 of the 2019 *Harvil Rd Judgment* (*SSfT and High Speed Two (HS2) Limited -v- Persons Unknown* [2019] EWHC 1437 (Ch)), the First Claimant is entitled to possession of land under these provisions provided that it has followed the process set down in Schedules 15 and 16 respectively, which requires the First Claimant to serve not less than 28 days' notice to the owners and occupiers of the land. As was found in all of the above cases, this gives the First Claimant the right to bring possession proceedings and trespass proceedings in respect of the land and to seek an injunction protecting its right to possession against those who would trespass on the land.
>
> 32. For completeness and as it was raised for discussion at the hearing on 11.04.2022, the HS2 Acts import the provisions of section 13 of the Compulsory Purchase Act 1965 on confer the right on the First Claimant to issue a warrant to a High Court Enforcement Officer empowering the Officer to deliver possession of land the First Claimant in circumstances where, having served the requisite notice there is a refusal to give up possession of the land or such a refusal is apprehended. That procedure is limited to the point at which the First Claimant first goes to take possession of the land in question (it is not available in circumstances where possession has been secured by the First Claimant and trespassers subsequently enter onto the land). The process does not require the involvement of the Court. The availability of that process to the First Claimant does not preclude the First Claimant from seeking an order for possession from the Court, as has been found in all of the above mentioned cases.

> 33. Invoking the temporary possession procedure gives the First Claimant a better right to possession of the land than anyone else – even the landowner. The First Claimant does not take ownership of the land under this process, nor does it step into the shoes of the landowner. It does not become bound by any contractual arrangements that the landowner may have entered into in respect of the land and is entitled to possession as against everyone. The HS2 Acts contain provisions for the payment of compensation by the First Claimant for the exercise of this power.
>
> 34. The power to take temporary possession is not unique to the HS2 Acts and is found across compulsory purchase - see for example the Crossrail Act 2008, Transport and Works Act Orders and Development Consent Orders. It is also set to be even more widely applicable when Chapter 1 of the Neighbourhood Planning Act 2017 is brought into force."

43. Ms Dilcock goes on to explain that:

> "35. …the First Claimant is entitled to take possession of temporary possession land following the above procedure and in doing so to exclude the landowner from that land until such time as the First Claimant is ready to or obliged under the provisions of the HS2 Acts to hand it back. If a landowner were to enter onto land held by the First Claimant under temporary possession without the First Claimant's consent, that landowner would be trespassing."

44. In addition to the powers of acquisition and temporary possession under the Phase One Act and the Phase 2a Act, some of the HS2 Land has been acquired by the First Claimant under the statutory blight regime pursuant to Chapter II of the Town and Country Planning Act 1990. The First Claimant has acquired other parts of the HS2 Land via transactions under the various discretionary HS2 Schemes set up by the Government to assist property owners affected by the HS2 Scheme.

45. Further parts of the HS2 Land have been acquired from landowners by consent and without the need to exercise powers. There are no limits on the interests in land which the First Claimant may acquire by agreement. Among the land held by the First Claimant under a lease are its registered offices in Birmingham and London (at Euston), both of which it says have been subject to trespass and (in the case of Euston) criminal damage by activists opposed to the HS2 Scheme.. The incident of trespass and criminal damage at Euston on 6 May 2021 is described in more detail in Jordan 1**,** [29.3.2].

46. I am satisfied, as previous judges have been satisfied, that the Claimants do have the powers they assert they have over the land in question, and that are either in lawful occupation or possession of that land, or have the immediate right to possession (without more, the appropriate statutory notices having been served). I reject any submissions to the contrary.

47. One of the points taken by D6 is that because the Claimants are not in actual possession of some of the green land, they are not entitled to a precautionary injunction in relation

to that land, and this application is therefore, in effect, premature. I will return to this later.

The Claimants' case

48. The Claimants' action is for trespass and nuisance. They say that pursuant to their statutory powers they have possession of, or the right to immediate possession of, the HS2 Land and therefore have better title than the protesters. Their case is that the protests against HS2 involve unlawful trespass on the HS2 Land; disruption of works on the HS2 Land; and disruption of the use of roads in the vicinity of the HS2 Land, causing inconvenience and danger to the Claimants and to other road users. They say all of this amounts to trespass and nuisance.

49. Mr Kimblin on behalf of the Claimants accepted that he had to demonstrate trespass and nuisance, and a real and imminent risk of recurrence. He said, in particular, that the protests have: on numerous occasions put at risk protesters' lives and those of others (including the Claimants' contractors); caused disruption, delay and nuisance to works on the HS2 Land; prevented the Claimants and their contractors and others (including members of the public) from exercising their ordinary rights to use the public highway or inconvenienced them in so doing, eg by blocking access gates. Further, he said that the Defendants' actions amount to a public nuisance which have caused the Claimants particular damage over and above the general inconvenience and injury suffered by the public, including costs incurred in additional managerial and staffing time in order to deal with the protest action, and costs and losses incurred as a result of delays to the HS2 construction programme; and other costs incurred in remedying the alleged wrongs and seeking to prevent further wrongs.

50. Based on previous experience, and on statements made by protesters as to their intentions, the Claimants say they reasonably fear that the Defendants will continue to interfere with the HS2 Scheme along the whole of the route by trespassing, interfering with works, and interfering with the fencing or gates at the perimeter of the HS2 Land and so hinder access to the public highway.

51. They argue, by reference in particular to the evidence in Mr Jordan's and Ms Dilcock's statements and exhibits, that there is a real and imminent risk of trespass and nuisance in relation to the whole of the HS2 Land, thus justifying an anticipatory injunction.

52. They say that Defendants, or some of them, have stated an intention to continue to take part in direct action protests against HS2, moving from one parcel of land to another in order to cause maximum disruption.

53. Thus, the Claimants say they are entitled to a route wide injunction, extensive though this is. They draw an analogy with the injunctions granted over thousands of miles of roads in relation to continuing and moving road protests by a group loosely known as 'Insulate Britain': see, in particular, *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB) (Lavender J); *National Highways Limited v Persons Unknown and others* [2022] EWHC 1105 (QB) (Bennathan J)**.**

54. I have the Revised HS2 Land Plans in hard copy form. I have studied them. They are clear, detailed and precise. I reject any suggestion that they are unclear. They clearly

show the land to which the injunction, if granted, will apply. Whether it should be granted is a different question.

The Defendants' cases

55. Mr Moloney addressed me on behalf of Mr Knaggs (D6), and I was also addressed by a number of unrepresented defendants (and others). I thought it appropriate to allow anyone present in court to address me, in recognition of the strength of feeling which HS2 generates. I exercised my case management powers to ensure these were kept within proper bounds. I had in mind an approach analogous to that set out by the Court of Appeal in *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160, [63]. Mr Kimblin did not object to this course.

56. I have considered all of the points which were made, whether orally or in writing. The failure to mention a particular point in this judgment does not mean that it has been overlooked. I am satisfied that everyone had the opportunity to make any point they wanted.

57. D6's case can be summarised as follows. Mr Moloney submitted that the Claimants are not entitled to the relief which they seek because (Skeleton Argument, [2]]): (a) they are seeking to restrain trespass in relation to land to which there is no demonstrated immediate right of possession; (b) they are seeking to restrain lawful protest on the highway; (c) the test for a precautionary injunction is not met because of a lack of real and imminent risk, which is the necessary test for which a 'strong case' is required; (d) it is wrong in principle to make a final injunction in the present case (I have dealt with that); (e) the definition of 'Persons Unknown' is overly broad and does not comply with the *Canada Goose* requirements (see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, [82]); (f) the service provisions are inadequate; (g) the terms of the injunction are overly broad and vague; (h) discretionary relief should not be granted; and (i) the proposed order would have a disproportionate chilling effect.

58. Developing these arguments, Mr Moloney said that the Claimants have not yet taken possession of much of the HS2 Land – which can only arise in the statutorily prescribed circumstances - and so its possessory right needed to found an action in trespass had not yet crystallised and its application was premature. There is hence a fundamental difference between land where works are currently ongoing or due to commence imminently (for which, subject to notification requirements, the Claimants have a cause of action in trespass at the present date) and land where works are not due to commence for a considerable period (for which no cause of action in trespass currently arises for the Claimants). He distinguished the earlier injunctions in relation to land where work had commenced on that basis.

59. Notwithstanding the decision of the Court of Appeal in *Barking and Dagenham* to the effect that final injunctions may in principle be made against persons unknown, they remain inappropriate in protest cases in which the Article 10 and 11 rights of the individual must be finely balanced against the rights of the Claimants.

60. Next, Mr Moloney submitted that there was not the necessary strong case of a real and imminent danger to justify the grant of a precautionary injunction. He said the Claimant had to establish that there is a risk of actual damage occurring on the HS2 Land subject

to the injunction that is imminent and real. Mr Moloney said this was not borne out on the evidence, given no work or protests were ongoing over much of the HS2 Land.

61. The next point is that D6 says the categories of unknown Defendant are too broad and will catch, for example, persons on the public highway that fall within the scope of HS2 Land. The second category of Unknown Defendant (ie, D2) (as set out in the APOC and in Appendix 1 below) is:

> "(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT https://www.gov.uk/government/publications/hs2-route-wide-injunction-
> proceedings ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES"

62. Paragraph 54(i) of D6's Skeleton Argument asserts that D2 will catch:

> "It includes those present on HS2 land on public highways. A person who walks over HS2 land on a public footpath is covered by the definition (subject to the consent of the Claimants). A demonstration on a public footpath which had the effect (intended or not) of hindering those connected to the Claimants (for any degree) would be caught within the definition."

63. I can deal with this submission now. I think it is unmeritorious. Paragraph 3 of the draft injunction prohibits various activities eg, [3(b)], 'obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land …'. However, [4(a)] provides that nothing in [3], 'shall prevent any person from exercising their rights over any open public right of way over the HS2 Land'. Paragraph 4(c) provides that nothing in [3], 'shall prevent any person from exercising their lawful rights over any public highway'. Contrary to the submission, such people therefore do not fall within [3] and do not need the First Claimant's consent. I also find it difficult to envisage that a walk or protest on a public footpath would infringe [3(a)]. As I have already said, the proposed order does not prevent lawful protest.

64. In [54(ii)] D6 also argued that the injunction would include those present on HS2 land which has been sublet. It was argued that a person present on sublet HS2 land with the permission of the sub-lettor, but without the consent of HS2, is covered by the definition of D2.

65. Again, I can deal with that point now. As I have set out, the Revised HS2 Land Plans produced by Ms Dilcock exclude let land; the original version of the Plans did not

because of lack of data when those plans were drawn up, but that has now been corrected ([Dilcock 3, [39]). Two of the Recitals to the order put the matter beyond doubt:

> "AND UPON the Claimants confirming that they do not intend for any freeholder or leaseholder with a lawful interest in the HS2 Land to fall within the Defendants to this Order, and undertaking not to make any committal application in respect of a breach of this Order, where the breach is carried out by a freeholder or leaseholder with a lawful interest in the HS2 Land on the land upon which that person has
> an interest.
>
> AND UPON the Claimants confirming that this Order is not intended to act against any guests or invitees of any freeholder or leaseholder with a lawful interest in the HS2 Land unless that guest or invitee undertakes actions with the effect of damaging, delaying or otherwise hindering the HS2 Scheme on the land held by the freeholder or leaseholder with a lawful interest in the HS2 Land."

66. Mr Moloney then went on to criticise the proposed methods of service in the draft injunction at [8]-[11] as being inadequate. The fundamental submission is that the steps for alternative service cannot reasonably be expected to bring the proceedings to the attention of someone proposing to protest against HS2 (Skeleton Argument, [98]).

67. Various points about the wording of the injunction were then made to the effect, for example, that it was too vague (Skeleton Argument, [105] et seq).

68. Turning to the points made by those who addressed me in court, I can summarise these (briefly, but I hope fairly) as follows. There were complaints about poor service of the injunction application. However, given those people were able to attend the hearing, service was obviously effective. It was said that HS2 would 'hammer another nail into the coffin of the climate crisis', and that land and trees should be nurtured. It was then said that there was no need for another railway line. It was in the public interest to protest against HS2 which is a 'classist project'. It was said that there had been violence, and racist and homophobic abuse of protesters by HS2 security guards, who had acted in a disproportionate manner. Many of the written submissions also complained about the behaviour of HS2's security guards. The injunction would condone that behaviour. Some named defendants said that there was insufficient evidence against them. The injunction was intended to 'terrorise' and 'coerce', and the judiciary was being 'weaponised' against protest (a point I have already rejected). It was a 'fantasy' to say that HS2 would benefit the environment; there had been environmental damage and the First Claimant had failed to honour the environmental obligations it said it would fulfil. It was said that the First Claimant was committing 'wildlife crimes' on a daily basis. Several people indicated they had signed undertakings and so should not be injuncted (as I have said, any such persons who have entered into appropriate undertakings will be exempted from the scope of any injunction). There had been an impact on journalistic freedom to report on HS2. The maps showing HS2 Land are hard to make out and/or are unclear.

69. In reply, Mr Kimblin said there was nothing about the application which was novel. The grant of injunctions against groups of unknown protesters to prevent trespass and nuisance had become common in recent times. He accepted the land affected was extensive, but pointed to injunctions over the country's road networks granted in recent years which are even more extensive. He said, specifically in relation to the green land and in response to the First Claimant's right of possession not having 'crystallised', that all of the relevant statutory notices had been served, and the First Claimant therefore had the right to take immediate possession of that land at a time of its choosing where it was not already in actual possession. That was sufficient. He also said that there is a system for receiving complaints, and that complaints were frequent and were always investigated. There was always scope to amend the order if necessary, and Mr Kimblin ended by emphasising that the injunction would have no effect on, and would not prevent, lawful protest.

70. Turning to the material filed by Mr Keir, I reiterate I am not concerned with the merits of HS2. Parliament has decided that question. The grounds advanced by Mr Keir are that: (a) the area of land subject to this claim is incorrect in a number of respects; (b) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (c) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (d) the project is harmful and should not have been consented to, or has not been properly consented to, by Parliament.

71. Appendix 2 to this judgment sets out in summary form points made by those who filed written submissions. I have considered these points.

Discussion

Legal principles

72. The first part of this section of my judgment addresses the relevant legal principles. Many of these have emerged recently in cases concerned with large scale protests akin to those involved in this matter.

(i) Trespass and nuisance

73. I begin with trespass and nuisance, the Claimants' causes of action.

74. A landowner whose title is not disputed is *prima facie* entitled to an injunction to restrain a threatened or apprehended trespass on his land: Snell's Equity (34th Edn) at [18-012].

75. It has already been established that even the temporary possession powers in the HS2 Acts give the Claimants sufficient title to sue for trespass. The question of trespass on HS2 Land was considered in *Secretary of State for Transport and another v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch) at [7]. [30]-[32]. The judge said:

> "7. There are subject to the order three different categories of land. First of all, there is land within the freehold ownership of the First Claimant that is coloured blue on both sets of plans, and is referred to as "the blue land". Secondly, there is land acquired by the First Claimant pursuant to its compulsory purchase powers

> in the High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 Act"). That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans
>
> ….
>
> 30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act …
>
> 31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and 'take possession'. That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.
>
> 32. In paragraph 40 of his judgment in *Ineos* at first instance [*Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)], Mr. Justice Morgan says this:
>
> > "The cause of action for trespass on private land needs no further exposition in this case."
>
> Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass."

76. Mr Moloney for D6 sought to distinguish this and other HS2 cases on the basis that work was ongoing on the sites in question, and so the First Claimant was in possession, whereas the present application related to green land which the First Claimant was not currently in possession of.

77. In relation to trespass, all that needs to be demonstrated by the claimant is a better right to possession than the occupiers: *Manchester Airport plc v Dutton* [2000] QB 133, 147. In that case the Airport was granted an order for possession over land for which it had been granted a licence in order to construct a second runway, but which it was not yet in actual possession of.

78. I can therefore, at this point, deal with D6's 'prematurity' point. As I have said, Mr Kimblin was quite explicit that the Claimants do, as of now, have the right to immediate possession over the green land because the relevant statutory notices have been served, albeit (to speak colloquially) the diggers have not yet moved in. That does not matter, in

my judgment. I am satisfied that the Claimants do, as a consequence, have a better title to possession that the current occupiers – and certainly any protesters who might wish to come on site. Actual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ's judgment at p151; the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled. That is what the First Claimant has in relation to the green land.

79. This conclusion is supported by what Warby LJ said in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)] (emphasis added):

> "9. The following general principles are well-settled, and uncontroversial on this appeal.
>
> (1) Peaceful protest falls within the scope of the fundamental rights of 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, protected by 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."

80. In relation to defences to trespass, genuine and *bona fide* concerns on the part of the protestors about HS2 or the proposed HS2 Scheme works do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *Samede*, [63].

81. A protestor's rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access: see the passage from Warby LJ's judgment in *Cuciurean* I quoted earlier, *Harvil Road*, [136]; and *DPP v Cuciurean* at [45]-[49] and [73]-[77]. There is no right to undertake direct action protest on private land: *Crackley and Cubbington*, [35], [42]. In the most recent of these decisions, *DPP v Cuciurean*, the Lord Chief Justice said:

"45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.

46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47. We now return to *Richardson* [*v Director of Public Prosecutions* [2014] AC 635] and the important statement made by Lord Hughes JSC at [3]:

> 'By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights

> were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences.'

48. *Richardson* was a case concerned with the meaning of 'lawful activity', the second of the four ingredients of section 68 identified by Lord Hughes (see [12] above). Accordingly, it is common ground between the parties (and we accept) that the statement was *obiter*. Nonetheless, all members of the Supreme Court agreed with the judgment of Lord Hughes. The *dictum* should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

48. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

49. For the reasons we gave in para. [8] above, we do not determine Ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg Court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case.

…

73. The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.

> 74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).
>
> 75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.
>
> 76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.
>
> 77. Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly."

82. I will return to the issue of Convention rights later.

83. The second cause of action pleaded by the Claimants in the APOC is nuisance. Nuisances may either be public or private.

84. A public nuisance is one which inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere or neighbourhood of its operation. It may, however, affect some to a greater extent than others: *Soltau v De Held* (1851) 2 Sim NS 133, 142.

85. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land: *Bamford v Turnley* (1862) 3 B & S; *West v Sharp* [1999] 79 P&CR 327, 332:

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right

> of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

86. The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [13]; and can be an unlawful interference with one or more of the claimant's rights of way over land privately owned by a third party: *Gale on Easements*, 13-01.

87. In *Cuadrilla*, [13], the Court said:

> "13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181."

88. The position in relation to actions which amount to an obstruction of the highway, for the purposes of public nuisance, is described in *Halsbury's Laws*, 5th ed. (2012). [325], where it is said (in a passage cited in *Ineos*, [44], (Morgan J)): (a) whether an obstruction amounts to a nuisance is a question of fact; (b) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (c) generally, it is a nuisance to interfere with any part of the highway; and (d) it is not a defence to show that although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public.

89. In *Harper v G N Haden & Sons* [1933] Ch 298, 320, Romer LJ said:

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

90. A member of the public has a right to sue for a public nuisance if he has suffered particular damage over and above the ordinary damage suffered by the public at large: *R v Rimmington* [2006] AC 459, [7], [44]:

> "44. The law of nuisance and of public nuisance can be traced back for centuries, but the answers to the questions confronting the House are not to be found in the details of that history. What may, perhaps, be worth noticing is that in 2 Institutes 406 Coke adopts a threefold classification of nuisance: public or general, common, private or special. Common nuisances are public nuisances which, for some reason, are not prosecutable. See *Ibbetson, A Historical Introduction to the Law of Obligations*, p 106 nn 62 and 65. So for Coke, while all public nuisances are common, not all common nuisances are public. Later writers tend to elide the distinction between common and public nuisances but, throughout, it has remained an essential characteristic of a public nuisance that it affects the community, members of the public as a whole, rather than merely individuals. For that reason, the appropriate remedy is prosecution in the public interest or, in more recent times, a relator action brought by the Attorney General. A private individual can sue only if he can show that the public nuisance has caused him special injury over and above that suffered by the public in general. These procedural specialties derive from the effect of the public nuisance on the community, rather than the other way round.

(ii) The test for the grant of an injunction

91. In relation to remedy, the starting point, if not the primary remedy in most cases, will be an injunction to bring the nuisance to an end: *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322-323, per A L Smith LJ; *Hunter v Canary Wharf Ltd* [1997] AC 655, 692 per Lord Goff; *Lawrence v Fen Tigers Ltd and others* [2014] AC 822, [120]-[124] per Lord Neuberger. In that case his Lordship said at [121] (discussing when and whether damages rather than an injunction for nuisance should be granted):

> "I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not."

92. The High Court may grant an injunction (whether interlocutory or final) in all cases in which it appears to the court to be just and convenient: s 37(1) of the Senior Courts Act 1981 (the SCA 1981).

93. The general function of an interim injunction is to 'hold the ring' pending final determination of a claim (*United States of America v Abacha* [2015] 1 WLR 1917). The basic underlying principle of that function is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or another: *National Commercial Bank Jamaica Limited v Olint Corp Ltd (Practice note)* [2009 1 WLR 105 at [17].

94. The general test for the grant of an interim injunction requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience): *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

95. The threshold for obtaining an injunction is normally lower where wrongs have already been committed by the defendant: *Secretary of State for Transport and HS2 Limited v Persons Unknown* [2019] EWHC 1437 (Ch) at [122] to [124]. Snell's Equity states at [18-028]:

> "In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts."

96. This, it seems to me, is not a rule of law but one of evidence which broadly reflects common sense. Where a defendant can be shown to have already infringed the claimant's rights (eg, by committing trespass and/or nuisance), then the court *may* decide that that weighs in the claimant's favour as tending to show the risk of a further breach, alongside other evidence, if the claimant seeks an anticipatory injunction to restrain further such acts by the defendant.

97. However, *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [44]-[48] (CA) makes clear, in light of s 12(3) of the Human Rights Act 1998, that the Court must be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried (see also *Crackley and Cubbington*, [35]). 'Likely' in this context usually means more likely than not: *Cream Holdings Limited v Banerjee* [2005] 1 AC 253, [22].

98. This is accepted by the Claimants (Principles Skeleton Argument, [19]), and it is the test that I will apply. The draft injunction has a long stop date and will be subject to regular review by the court, as I have said. There is the usual provision allowing for applications to vary or discharge it.

99. Where the relief sought is a precautionary injunction (formerly called a *quia timet* injunction, however Latin is no longer to be used in this area of the law, per *Barking and Dagenham*, [8]), the question is whether there is an *imminent* and *real* risk of harm: *Ineos* at [34(1)] (Court of Appeal) and the first instance decision of Morgan J ([2017] EWHC 2945 (Ch)), [88].

100. 'Imminent' means that the circumstances must be such that the remedy sought is not premature. In *Hooper v Rogers* [1975] Ch 43, 49-50, Russell LJ said:

> "I do not regard the use of the word 'imminent' in those passages as negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely.
>
> …

> In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and *quia timet* injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances."

101. In *Canada Goose*, [82(3)] the Court said:

> "(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief."

102. As I have already said, one of the points made by Mr Moloney is that the 'imminent and real' test is not satisfied over the whole of the HS2 route because over much of it, work has not started and there have been no protests.

(iii) The Canada Goose *requirements*

103. I turn to the requirements governing the sort of injunction which the Claimants seek in this case against unknown persons (ie, D1-D4). So, for example, I set out the definition of D2 earlier.

104. The guidelines set out by the Court of Appeal in *Canada Goose*, [82], are as follows:

> "(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 [precautionary] 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."

105. In *National Highways Limited*, [41], Bennathan J said this:

> "41. Injunctions against unidentified defendants were considered by the Court of Appeal in the cases of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ["*Ineos*"] and *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ['*Canada Goose*']. I summarise their combined affect 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*]."

106. The authorities in this area, including in particular, *Canada Goose*, were reviewed by the Court of Appeal in *Barking and Dagenham*. Although some parts of the decision in

Canada Goose were not followed, the guidelines in [82], were approved (at [56]) and I will apply them.

107. The parts of *Canada Goose* which the Court of Appeal in *Barking and Dagenham* disagreed with were the following paragraphs (see at [78] of the latter decision), where the Court also made clear they were not part of its *ratio*:

> "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 para 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."
>
> 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 para 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 969trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that."

108. Some points emerging from the discussion of these paragraphs in *Barking and Dagenham* are as follows:

    a. the Court undoubtedly has the power under s 37 of the SCA 1981 to grant final injunctions that bind non-parties to the proceedings ([71]).

    b. the remedy can be fairly described as 'exceptional', albeit that formulation should not be used to lay down limitations on the Court's broad discretion. The categories in which such injunctions can be granted are not closed and they may be appropriate in protest cases ([120]);

    c. there is no real distinction between interim and final injunctions in the context of injunctions granted against persons unknown ([89] and [93]). While the guidance regarding identification of persons unknown in *Canada Goose* was given in the context of an application for an interim injunction, the same principles apply in relation to the grant of final injunctions ([89]; see also [102] and [117];

    d. as to the position of a non-party who behaves so as satisfy the definition of persons unknown only after the injunction has been granted (ie, a 'newcomer'), such a person becomes a party on knowingly committing an act that brings them within the description of persons unknown set out in the injunction: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, [32]. There is no need for a claimant to apply to join newcomers as defendants. 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': *Boyd*, [30];

    e. procedural protections available to ensure a permanent injunction against persons unknown is just and proportionate include the provision of a mechanism for review by the Court: 'Orders need to be kept under review. 'For as long as the court is concerned with the enforcement of an order, the action is not at end' ([89]); '… all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases' ([91]); 'It is good practice to provide for a periodic review, even when a final order is made' ([108]);

    f. in the unauthorised encampment cases, the Court of Appeal has suggested that borough-wide injunctions should be limited to one year at a time before a review: *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, [106].

109. So far as keeping the injunction in this case under review is concerned, the draft order provides for a long stop date of 31 May 2023, when it will expire unless renewed (at [3]). It also provides for yearly reviews around May time (ie roughly the anniversary of the

hearing before me) in order 'to determine whether there is a continued threat which justifies continuation of this Order' (at [15]), and there are the usual provisions allowing for persons affected to apply to vary or discharge it (at [16] and [18]).

(iv) Geographical scope of the order sought

110. I turn to the question of the geographical scope of the injunction sought. As I have said, the proposed injunction stretches along the whole of the HS2 route. Massive tracts of land are potentially affected. The Claimants say that of itself is not a bar to injunctive relief, to which there is no geographical limit (at least as a matter of law).

111. Specifically in relation to trespass and nuisance, the Claimants said that this Court (Lavender J) was not troubled by a 4,300 mile injunction against environmental protesters along most of the Strategic Roads Network (namely motorways and major A roads) in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB), [24(7)]:

> "… the geographical extent is considerable, since it covers 4,300 miles of roads, but this is in response to the unpredictable and itinerant nature of the Insulate Britain protests".

112. See also his judgment at [15], and also Bennathan J's judgment at [2022] EWHC 1105 (QB), [3], where they referenced other geographically wide-ranging injunctions against environmental road protesters. For example, on 24 September 2021 Cavanagh J granted an interim injunction which applied to the A2, A20, A2070, M2 and M20 in Claim No QB-2021-003626.

113. Lavender J at [24(7)(c)] found additionally that if a claimant is entitled to an injunction, it would not be appropriate to require it to apply for separate injunctions for separate roads, requiring the claimant in effect to 'chase' protestors around the country from location to location, not knowing where they will go next:

114. For these reasons, the Claimants submitted that there is a real and imminent risk of torts being carried out unless this injunction is granted across the whole of the HS2 Land.

115. The Claimants also submitted that although an individual protest may appear small in the context of HS2 as a whole, that was not a reason to overlook its impact. They relied on *DPP v Cuciurean*, [87], where the Lord Chief Justice said:

> "87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to 'only' £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect."

(v) European Convention on Human Rights

116. I turn next to the important issue of the European Convention on Human Rights (the ECHR). The ECHR is given effect in domestic law by the Human Rights Act 1998 (the HRA 1998). Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Court is a public authority: s 6(3)(a).

117. The key provisions for these purposes are Article 10 (freedom of expression); Article 11 (freedom of assembly); and Article 1 of Protocol 1 (A1P1) (right to peaceful enjoyment of property).

118. Articles 10 and 11 provide:

> "*Article 10 Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> *Article 11 Freedom of assembly and association*
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

119. A1P1 provides:

> "*Article 1 Protection of property*

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

120. Articles 10 and 11 potentially pull in one direction (that of the Defendants) whilst A1P1 pulls in the Claimants' favour. That tension was one of the matters discussed in *DPP v Cuciurean*, [84]:

> "84. The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest. One object of section 68 is to discourage disruption of the kind committed by the respondent, which, according to the will of Parliament, is against the public interest. The respondent (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg Court has often observed that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the Common Law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament."

121. Section 12 provides:

> "12. - Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied -
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the
>
> court is satisfied that the applicant is likely to establish that publication should not be allowed."

122. 'Publication' in s 12(3) has been interpreted by the courts as extending beyond the literal meaning of the word to encompass 'any application for prior restraint of any form of communication that falls within Article 10 of the Convention': *Birmingham City Council v Afsar* [2019] ELR 373, [60]-[61].

123. It is convenient here to deal with a point raised in particular by D6 about whether the First Claimant, as (at least) a hybrid public authority, can rely on A1P1. He flagged up this point in his Skeleton Argument and Mr Moloney also addressed me on it. After the hearing Mr Moloney and Mr Greenhall filed further submissions arguing, in summary, that: (a) the First Claimant is a core public authority, alternatively a hybrid public authority and a governmental organisation, being wholly owned by the Secretary of State and publicly funded: see *Aston Cantlow* [2004] 1 AC 546; (b) the burden lies on the First Claimant to establish in law and in fact that it may rely on its A1P1 rights; (c) so far as previous cases say otherwise, they are wrongly decided or distinguishable; (d) the exercise of compulsory purchase powers falls within 'functions of a public nature'; (e) thus, the First Claimant may not rely on A1P1 rights in support of the application.

124. The Claimants filed submissions in response.

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

> "28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a 'non-

> governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law …"

126. D6's submissions are also inconsistent with Warby LJ's judgment in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)], which I quoted earlier.

127. D6's submissions are also inconsistent with the approach of Arnold J (as he then was) in *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch). The judge accepted the submission that the Authority had A1P1 rights which went into the balance against the protesters' Article 10/11 rights, at [22]:

> "22. In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1 AC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each."

128. The Olympic Authority was unquestionably a public body. The judge described it at [2] as:

> "… an executive non-departmental public body and statutory corporation established by section 3 of the London Olympic Games and Paralympic Games Act 2006 to be responsible for the planning and delivery of the Olympic Games 2012, including the development and building of Games venues."

129. In a later judgment in the same case ([2012] EWHC 1114 (Ch)), the judge said:

> "23. The protestors who have addressed me have made the point that they have sought to engage with the planning process in the normal way, and they have considered the possibility of seeking judicial review. As is so often the case, they say that they are handicapped by the lack of professional legal representation and the lack of finances to instruct lawyers of the calibre instructed by the ODA. They have also sought to engage normal democratic processes in order to make their points. It is because those processes have failed, as the protestors see it, that they have engaged in their protests.

> 24. That is all very understandable, but it does not, in my judgment, detract from the basic position which confronts the court. The ODA has rights as exclusive licensee of the land in question under Article 1 of the First Protocol to the Convention. As I observed in my judgment on 4 April 2012, the protestors' rights under Articles 10 and 11 are not unqualified rights. They must give way, where it is necessary and proportionate to do so, to the Convention rights of others, and specifically in the present case, of the ODA. The form of injunction sought by the ODA and which I granted on the last occasion does not, in and of itself, prevent or inhibit lawful and peaceful protest. It does not prevent or inhibit the protestors who wish to protest about the matters I have described from doing so in ways which do not interfere with the ODA's enjoyment of its rights in respect of the land

130. Articles 10 and 11 were considered in respect of protest on the highway in *Samede* at [38] – [41]. The Court said:

> "38. This argument raises the question which the Judge identified at the start of his judgment, namely 'the limits to the right of lawful assembly and protest on the highway', using the word 'protest' in its broad sense of meaning the expression and dissemination of opinions. In that connection, as the Judge observed at [2012] EWHC 34 (QB), para 100, it is clear that, unless the law is that 'assembly on the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied' – quoting Lord Irvine LC in *DPP v Jones* [1999] 2 AC 240, 259E. However, as the Judge also went on to say at [2012] EWHC 34 (QB), para 145:
>
> > 'To camp on the highway as a means of protest was not held lawful in *DPP v Jones.* Limitations on the public right of assembly on the highway were noticed, both at common law and under Article 11 of the Convention (see Lord Irvine at p 259A-G, Lord Slynn at p 265C-G, Lord Hope of Craighead at p 277D-p 278D, and Lord Clyde at p 280F). In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping.'
>
> 39. As the Judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the Judge said at [2012] EWHC 34 (QB), para 155:

> '[I]t is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command. … [T]he court cannot – indeed, must not – attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of Articles 10 and 11 of the Convention. … [T]he right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the Judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance' - [2012] EWHC 34 (QB), para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov* [2008] ECHR 1170, para 45:

> 'Any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means'.

The Judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

131. However, there is a more restrictive approach (ie, more restrictive against protest) where the protest takes place on private land. This approach was explained by the Strasbourg Court in *Appleby v United Kingdom* [2003] 27 EHRR 38, [43], [47]. The applicants had been prevented from collecting signatures in a private shopping centre for a petition against proposed building work to which they objected. They said this violated their rights under Articles 10 and 11. The Court disagreed:

> "43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.
>
> …
>
> 47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example."

132. The passage from *Samede* I set out earlier was cited with approval by the Supreme Court in *DPP v Ziegler* [2022] AC 408 at [17], [72], [74] to [77], [80] and [152]. In that case, the defendants were charged with obstructing the highway, contrary to s 137 of the Highways Act 1980, by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the road and making it difficult for police to remove them by locking themselves to structures.

133. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted 'without lawful … excuse' within the meaning of s 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under Articles 10 and 11 of the ECHR. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The

prosecution appealed by way of case stated, pursuant to s 111 of the Magistrates Courts Act 1980.

134. The Divisional Court allowed the prosecution's appeal, holding that the district judge's assessment of proportionality had been wrong. The defendant appealed to the Supreme Court. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under Articles 10 or 11 by reason of the prosecution.

135. The Supreme Court allowed the defendants' appeal. It highlighted the features that should be taken into account in determining the issue of proportionality, as including: (a) the place where the obstruction occurred; (b) the extent of the actual interference the protest caused to the rights of others, including the availability of alternative thoroughfares; (c) whether the protest had been aimed directly at an activity of which protestors disapproved, or another activity which had no direct connection with the object of the protest; (d) the importance of the precise location to the protestors; and (e) the extent to which continuation of the protest breaches domestic law.

136. At [16] and [58], the Supreme Court endorsed what have become known as the '*Ziegler* questions', which must be considered where Articles 10 and 11 are engaged:

    a. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

    b. If so, is there an interference by a public authority with that right?

    c. If there is an interference, is it 'prescribed by law'?

    d. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?

    e. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

137. This last question can be sub-divided into a number of further questions, as follows:

    a. Is the aim sufficiently important to justify interference with a fundamental right?

    b. Is there a rational connection between the means chosen and the aim in view?

    c. Are there less restrictive alternative means available to achieve that aim?

    d. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

138. Also, in *Ziegler*, [57], the Supreme Court said:

> "57. Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society'. In *Kudrevicius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that 'The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a

gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly. Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles."

139. The structured approach provided by the *Ziegler* questions is one which the Court of Appeal has said courts would be 'well-advised' to follow at each stage of a process which might restrict Article 10 or 11 rights: *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [13]. Also in that case, at [28]-[34], the Court summarised the relevant Convention principles:

> "28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a 'non-governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10 (2) and 11 (2) of the ECHR qualify the rights created by articles 10 (1) and 11 (1) respectively. Article 10 (2) relevantly provides that:
>
> > "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of health or morals, for the protection of the reputation or rights of others… or for maintaining the authority… of the judiciary."
>
> 29. Article 11 (2) relevantly provides:
>
> > "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others."
>
> 30. There is no doubt that the right to freedom of expression and the right of peaceful assembly both extend to protesters. In *Hashman v United Kingdom* (2000) EHHR 241, for example, the European Court of Human Rights held that the activity of hunt

saboteurs in disrupting a hunt by the blowing of hunting horns fell within the ambit of article 10 of the ECHR. In *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624 protesters who were part of the 'Occupy London' movement set up a protest camp in the churchyard of St Paul's Cathedral. This court held that their activities fell within the ambit of both article 10 and also article 11.

31. On the other hand, articles 10 and 11 do not entitle a protester to protest on any land of his choice. They do not, for example, entitle a protester to protest on private land: *Appleby v United Kingdom* (2003) 37 EHHR 38; *Samede* at [26]. The Divisional Court so held in another HS2 protest case, involving Mr Cuciurean himself who at that time was living in a tunnel for the purpose of disrupting HS2: *DPP v Cuciurean* [2022] EWHC 736 (Admin). In that case the court (Lord Burnett CJ and Holgate J) said at [45]:

> "We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights."

32. Even the right to protest on a public highway has its limits. In *DPP v Ziegler* protesters were charged with obstructing the highway without lawful excuse. The Supreme Court held that whether there was a 'lawful excuse' depended on the proportionality of any interference with the protesters' rights under articles 10 and 11. Lords Hamblen and Stephens said at [70]:

> 'It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional

> action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'.'

33. But that proportionality exercise does not apply in a case in which the protest takes place on private land. In *DPP v Cuciurean* the court said:

> "66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.
>
> 67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights."

34. Where a land owner, such as the claimants in the present case, seeks an injunction restraining action which is carried on in the exercise of the right of freedom of expression or the right of peaceful assembly (or both) on private land, the time for the proportionality assessment (to the extent that it arises at all) is at the stage when the injunction is granted. Any 'chilling effect' will also be taken into account at that stage: see for example the decision of Mr John Male QC in *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252 (Ch), especially at [104] to [121], [158] to [167] and [176] (another case of protest predominantly on the highway); and the decision of Lavender J in *National Highways Ltd v Heyatawin* [2021] EWHC 3081 (QB) (also a case of protest on the highway). Once the injunction has been granted then, absent any appeal or application to vary, the balance between the competing rights has been struck: see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB) at [44]; *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) at [30]."

140. The Claimants say that, in having regard to the balance of convenience and the appropriate weight to be had to the Defendants' Convention rights, there is no right to protest on private land (*Appleby*, [43] and *Samede*, [26]) and therefore Articles 10 and 11 rights are not engaged in relation to those protests (see *Ineos* at [36], and *DPP v Cuciurean*, [46], [50] and [77]). In other words, there is no 'freedom of forum' for protest (Ibid, [45]). A protest which involves serious disruption or obstruction to the lawful activities of other parties may amount to 'reprehensible conduct', so that Articles 10 and 11 are not violated: Ibid, [76].

141. The Claimants say that constant direct action protest and trespass to the HS2 Land is against the public interest and rely on *DPP v Cuciurean*, [84], which I quoted earlier. They placed special weight on the Lord Chief Justice's condemnation of endless 'guerrilla tactics'.

142. To the extent that protest is on public land (eg by blocking gates from the highway), to which Articles 10 and 11 do apply, the Claimants say that the interference with that right represented by the injunction is modest and proportionate.

(vi) Service

143. I turn to the question of service. This was something which I canvassed with counsel at the preliminary hearing in April. It is a fundamental principle of justice that a person cannot be subject to the court's jurisdiction without having notice of the proceedings: *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, [14].

144. The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant: *Cameron*, [21], and *Cuciurean v Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 357, [14] – [15], [25] – 26], [60] and [70]; *Canada Goose*, [82]. Posting on social media and attaching copies at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants: *Canada Goose*, [50]:

> **"**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 protestors 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 protestors 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."

145. There is a difference between service of proceedings, and service of an injunction order. A person unknown is a newcomer, and is served and made a party to proceedings, when they violate an order of which they have knowledge; it is not necessary for them to be personally served with it: *Barking and Dagenham*, [84]-[85], [91], approving *South*

Cambridgeshire District Conucil v Gammell [2005] EWCA Civ 1429, [34]. In the former case, the Court of Appeal said:

> "84. In the first two sentences of para 91, *Canada Goose* seeks to limit persons unknown subject to final injunctions 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 [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.
>
> 85. The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of para 91 are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron.*
>
> …
>
> 91**.** The reasoning in para 92 is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought 976normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases."

146. Service provisions must deal with the question of notice to an unknown and fluctuating body of potential defendants. There may be cases where the service provisions in an order

have been complied with, but the person subject to the order can show that the service provisions have operated unjustly against him or her. In such a case, service might be challengeable: *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [60].

147. In *National Highways Limited*, [50]-[52], Bennathan J adopted the following solution in relation to an injunction affecting a large part of the road network:

> "50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.
>
> 51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB [Insulate Britain] and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.
>
> 52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J [in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB)], 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 IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction."

Merits

148. The second part of this section of the judgment addresses the merits of the Claimants' application in light of these principles.

149. I plan to deal with the following topics: (a) trespass and nuisance; (b) whether there is a real and imminent risk of unlawfulness; (c) whether there are sufficient reasons to grant the order against known defendants; (d) whether are sufficient reasons to grant the order against unknown defendants; (e) scope of the order; (f) service and knowledge.

150. At [6] and [7] of their Merits Skeleton Argument the Claimants said this:

> "6. The purpose of the order, if granted, is simply to allow the First and Second Claimant to get on with building a large piece of linear infrastructure. Its purpose is not to inhibit normal activities generally, nor to inhibit the expression of whatever views may be held. The fundamental disagreement with those who appear to defend these proceedings is as to what constitutes lawful protest. The Claimants say that they are faced with deliberate interference with their land and work with a view to bringing the HS2 Scheme to a halt.
>
> 7. That is not lawful, and it is not lawful protest."

(i) Trespass and nuisance

151. I begin with the question of title over the HS2 Land. I am satisfied, as other judges have been on previous occasions, that HS2 has sufficient title over the HS2 Land to bring an action in trespass against trespassers. I set out the statutory scheme earlier, and it is described in Dilcock 1, [10] eq seq and Dilcock 4, [21], et seq.

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

153. I note D36's (Mark Keir's submissions) about the Revised HS2 Land Plans produced by Ms Dilcock. I am satisfied that the points he made are fully answered by Ms Dilcock, in particular, in Dilcock 4, [21] et seq.

154. Turning to the evidence of trespass relied on by the Claimants, I am satisfied that the evidence is plentiful. Jordan 1 is lengthy and contains much detail. It is accompanied by many pages of exhibits containing further specifics. I am satisfied that this evidence shows there has been many episodes of trespass by (primarily) persons unknown – but also by known persons - both on Cash's Pit, and elsewhere along the HS2 Scheme route. Mr Jordan's evidence is that trespassing activities have ranged widely across the HS2 Land as protesters carry out their direct-action activities:

> "10. Those engaged in protest action opposed to the HS2 Scheme are made up of a broad cross-section of society, including concerned local residents, committed environmentalists, academics and also numerous multi-cause transient protestors whom have been resident at a number of protest camps associated with a number of different 'causes'. Groups such as Extinction Rebellion (often known as 'XR') often garner much of the

mainstream media attention and widely publicise their actions. They often only travel into an area for a short period (specific 'days of action' or 'weeks of action'), however once present they are able to execute comprehensive and highly disruptive direct action campaigns, whipping up an almost religious fervour amongst those present. Their campaigns often include direct action training, logistical and welfare support and complimentary media submissions, guaranteeing national media exposure. Such incidents have a significant impact on the HS2 Scheme but make up only a proportion of overall direct action protest against the HS2 Scheme, which occurs on an almost daily basis.

11. By way of explanation of a term that will be found in the evidence exhibited to this statement, activists often seek to anonymise themselves during direct action by referring to themselves and each other as "Bradley". Activists also often go by pseudonyms, in part to avoid revealing their real identities. A number of the Defendants' pseudonyms are provided in the schedule of Named Defendants and those working in security on the HS2 Scheme are very familiar with the individuals involved and the pseudonyms they use.

12. On a day to day basis direct action protest is orchestrated and conducted by both choate groups dedicated to disruption of the HS2 Scheme (such as HS2 Rebellion and Stop HS2) and inchoate groups of individuals who can comprise local activists and more seasoned 'core' activists with experience of conducting direct action campaigns against numerous "causes". The aims of this type of action are made very explicitly clear by those engaged in it, as can be seen in the exhibits to this statement. It is less about expressing the activists' views about the HS2 Scheme and more about causing direct and repeated harm to the HS2 Scheme in the form of delays to works, sabotage of works, damage to equipment, psychological and physical injury to those working on the HS2 Scheme and financial cost, with the overall aim of 'stopping' or 'cancelling' the HS2 Scheme.

13. In general, the Claimants and their contractors and sub-contractors have been subject to a near constant level of disruption to works on the HS2 Scheme, including trespass on and obstruction of access to the HS2 Land, since October 2017. The Defendants have clearly stated - both to contractors and via mainstream and social media - their intention to significantly slow down or stop work on the HS2 Scheme because they are opposed to it. They have trespassed on HS2 Land on multiple occasions and have issued encouragement via social media to others to come and trespass on HS2 Land. Their activities have impeded the First Claimant's staff, contractors and sub-contractors going about their lawful business on the HS2 Land and hampered the work on the HS2 Scheme, causing delays and extremely significant costs

to the taxpayer and creating an unreasonably difficult and stressful working environment for those who work on the HS2 Land."

155. At [14]-[15] Mr Jordan wrote:

> "At page 1 [of Ex RJ1] is a graphic illustration of the number of incidents experienced by the Claimants on Phase One of the HS2 Scheme that have impacted on operational activity and the costs to the Claimant of dealing with those incidents. That shows a total of 1007 incidents that have had an impact on operational activity between the last quarter of 2017 and December 2021. Our incident reporting systems have improved over time and refined since we first began experiencing incidents of direct action protest in October 2017 and it is therefore considered that the total number of incidents shown within our overall reporting is likely fewer than the true total.
>
> 15. The illustration also shows the costs incurred in dealing with the incidents. These costs comprise the costs of the First Claimant's security; contractor security and other contractor costs such as damage and repairs; and prolongation costs (delays to the programme) and show that a total of £121.62 million has been incurred in dealing with direct action protest up to the end of December 2021. The HS2 Scheme is a publicly funded project and accordingly the costs incurred are a cost to the tax-payer and come from the public purse. The illustration at page 2 shows the amount of the total costs that are attributable to security provision."

156. At [29.1] under the heading 'Trespass' Mr Jordan said:

> "Put simply, activists enter onto HS2 Land without consent. The objective of such action is to delay and disrupt works on the HS2 Scheme. All forms of trespass cause disruption to the HS2 Scheme and have financial implications for the Claimants. Some of the more extreme forms of trespass, such as tunnelling (described in detail in the sections on Euston Square Gardens and Small Dean below) cause significant damage and health and safety risks and the losses suffered by the Claimants via the costs of removal and programme delay run into the millions of pounds. In entering onto work sites, the activists create a significant health and safety hazard, thus staff are compelled to stop work in order to ensure the safety of staff and those trespassing (see, for example, the social media posts at pages 38 to 39 about trespassers at the HS2 Scheme Capper's Lane compound in Lichfield where there have been repeated incursions onto an active site where heavy plant and machinery and large vehicles are in operation, forcing works to cease for safety and security reasons. A video taken by a trespasser during an incursion on 16

> March 2022 and uploaded to social media is at Video (7). Worryingly, such actions are often committed by activists in ignorance of the site operations and or equipment functionality, which could potentially result in severe unintended consequences. For example, heavy plant being operated upon the worksite may not afford the operator clear sight of trespassers at ground level. Safety is at the heart of the Claimants' activities on the HS2 Scheme and staff, contractors and sub-contractors working on the HS2 Land are provided with intensive training and inductions and appropriate personal protective equipment. The First Claimant's staff, contractors and sub-contractors will always prioritise safety thus compounding the trespassers' objective of causing disruption and delay. Much of the HS2 Land is or will be construction sites and even in the early phases of survey and clearance works there are multiple hazards that present a risk to those entering onto the land without permission. The Claimants have very serious concerns that if incidents of trespass and obstruction of access continue, there is a high likelihood that activists will be seriously injured."

157. Mr Jordan went on to describe (at [29.1.1] et seq) some of the activities which protesters against HS2 have undertaken since works began. As well as trespass these include: breaching fencing and damaging equipment; climbing and occupying trees on trespassed land; climbing onto vehicles (aka, 'surfing'); climbing under vehicles; climbing onto equipment, eg, cranes; using lock-on devices; theft, property damage and abuse of staff, including staff being slapped, punched, spat at, and having human waste thrown at them; obstruction; (somewhat ironically) ecological and environmental damage, such as spiking trees to obstruct the felling of them; waste and fly tipping, which has required, for example, the removal of human waste from encampments; protest at height (which requires specialist removal teams); and tunnelling.

158. Mr Jordan said that some protesters will often deliberately put themselves and others in danger (eg, by occupying tunnels with potentially lethal levels of carbon dioxide, and protesting at height) because they know that the process of removing them from these situations will be difficult and time-consuming, often requiring specialist teams, thereby maximising the hindrance to the construction works.

159. I am also satisfied that the Claimants have made out to the requisite standard at this stage their claim in nuisance, for essentially the same reasons.

160. The HS2 Scheme is specifically authorised by the HS2 Acts, as I have said. Whilst mindful of the strong opposition against it in some quarters, Parliament decided that the project was in the public interest.

161. I am satisfied that there has been significant violence, criminality and sometimes risk to the life of the activists, HS2 staff and contractors. As Mr Jordan set out in Jordan 1, [14] and [23], 129 individuals were arrested for 407 offences from November 2019 - October 2020.

162. I accept Mr Jordan's evidence at [12] of Jordan 1, which I set out earlier, that much of the direct action seems to have been less about expressing the activists' views about the HS2

Scheme, and more about trying to cause as much nuisance as possible, with the overall aim of delaying, stopping or cancelling it via, in effect, a war of attrition.

163. At [21.2] of Jordan 1, he wrote:

> "21.2 Interviews with the BBC on 19.05.2020 and posted on the Wendover Active Resistance Camp Facebook page. D5 (Report Map at page 32) was interviewed and said: 'The longevity is that we will defend this woodland as long as we can. If they cut this woodland down, there will still be activists and community members and protectors on the ground. We're not just going to let HS2 build here free will. As long as HS2 are here and they continue in the vein they have been doing, I think you'll find there will be legal resistance, there'll be on the ground resistance and there will be community resistance.' In the same interview, another individual said: 'We are holding it to account as they go along which is causing delays, but also those delays mean that more and more people can come into action. In a way, the more we can get our protectors to help us to stall it, to hold it back now, the more we can try and use that leverage with how out of control it is, how much it is costing the economy, to try to bring it to account and get it halted.' A copy of the video is at Video 1."

164. I am entirely satisfied that the activities which Mr Jordan describes, in particular in [29] et seq of Jordan 1, and the other matters he deals with, constitute a nuisance. I additionally note that even following the order made in relation to Cash's Pit by Cotter J on 11 April 2022, resistance to removal in the form of digging tunnels has continued: Dilcock 4, [33]-[43].

165. It is perhaps convenient here to mention a point which emerged at the hearing when we were watching some of the video footage, and about which I expressed concern at the time. There was some footage of a confrontation between HS2 security staff and protesters. One clip appeared to show a member of staff kneeling on the neck of a protester in order to restrain them. One does not need to think of George Floyd to know that that is an incredibly dangerous thing to do. I acknowledge that I only saw a clip, and that I do not know the full context of what occurred. I also acknowledge that there is evidence that some protesters have also been guilty of anti-social behaviour towards security staff. But I hope that those responsible on the part of the Claimants took note of my concerns, and will take steps to ensure that dangerous restraint techniques are not used in the future.

166. I also take seriously the numerous complaints made before me orally and in writing about the behaviour of some security staff. I deprecate any homophobic, racist or sexist, etc, abuse of protesters by security guards (or indeed by anyone, in any walk of life). I can do no more than emphasise that such allegations must be taken seriously, investigated, and if found proved, dealt with appropriately.

167. Equally, however, those protesting must also understand that their right to do so lawfully – which, as I have said, any order I make will clearly state - comes with responsibilities, including not to behave unpleasantly towards men and women who are

just trying to do their jobs.

(ii) Whether there is a real and imminent risk of continued unlawfulness so as to justify an anticipatory injunction

168. I am satisfied that the trespass and nuisance will continue, unless restrained, and that the risk is both real and imminent. My reasons, in summary, are: the number of incidents that have been recorded; the protesters' expressed intentions; the repeated unlawful protests to date that have led to injunctions being granted; and the fact that the construction of HS2 is set to continue for many years.

169. The principal evidence is set out in Jordan 1, [20], et seq. Mr Jordan said at [20]:

> "20. There are a number of reasons for the Claimants' belief that unlawful action against the HS2 Scheme will continue if unchecked by the Court. A large number of threats have been made by a number of the Defendants and general threats by groups opposed to the HS2 Scheme to continue direct action against the HS2 Scheme until the HS2 Scheme is "stopped". These threats have been made on a near daily basis - often numerous times a day - since 2017 and have been made in person (at activist meetings and to staff and contractors); to mainstream media; and across social media. They are so numerous that it has only been possible to put a small selection of examples into evidence in this application to illustrate the position to the Court. I have also included maps for some individuals who have made threats against the HS2 Scheme and who have repeatedly engaged in unlawful activity that show where those individuals have been reported by security teams along the HS2 Scheme route ("Report Map"). These maps clearly demonstrate that a number of the Defendants have engaged in unlawful activity at multiple locations along the route and the Claimants reasonably fear that they will continue to target the length of the route unless restrained by the Court."

170. In *Harvil Road,* [79]-[81], the judge recorded statements by protesters in the evidence in that case which I think are a broad reflection of the mind-set of many protesters against HS2:

> "79. 'Two arrested. Still need people here. Need to hold them up at every opportunity.'
>
> …
>
> 'No, Lainey, these trees are alongside the road so they needed a road closure to do so. They can't have another road closure for 20 days. Meanwhile they have to worry BIG time about being targeted by extinction rebellion and, what's more, they're going to see more from us at other places on the route VERY soon. Tremble HS2, tremble.

…

> "We have no route open to us but to protest. And however much we have sat in camp waving flags, and waving at passersby tooting their support, that was never and will never be the protest that gets our voices heard. We are ordinary people fighting with absolute integrity for truth that is simple and stark. We are ordinary people fighting an overwhelming vast government project. But we will be heard. We must be heard."

> 81. I fully accept that this expresses the passion with which the Fourth Defendant opposes the HS2 scheme and while they may not indicate that the Fourth Defendant will personally breach any order or be guilty of any future trespass, I think there is, I frankly find, a faintly sinister ring to these comments which in light of all that has gone before causes me to agree with Mr. Roscoe and the Claimants that there is a distinct risk of further objectionable activity should an injunction not be granted."

171. Other salient points on the same theme include the following (paragraph numbers refer to Jordan 1):

a. Interview with *The Guardian* on 13 February 2021 given by D27 after he was removed from the tunnels dug and occupied by activists under HS2 Land at Euston Square Gardens, in which he said: 'As you can see from the recent Highbury Corner eviction, this tunnel is just a start. There are countless people I know who will do what it takes to stop HS2.' In the same article he also said: 'I can't divulge any of my future plans for tactical reasons, but I'm nowhere near finished with protesting.'

b. In March 2021 D32 obstructed the First Claimant's works at Wormwood Scrubs and put a call out on Twitter on 24 March 2021 asking for support to prevent HS2 route-wide. He also suggested targeting the First Claimant's supply chain.

c. On 23 February 2022 D6 stated that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they, 'will just hit all the other gates' and 'if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate' ([21.12]).

d. D6 on 24 February 2022 stated if the Cash's Pit camp is evicted, 'we'll just move on. And we'll just do it again and again and again' ([21.13]).

e. As set out in [21.14] on 10 March 2022 D17, D18, D19, D31, D63 and a number of persons unknown spent the morning trespassing on HS2 Land adjacent to Cash's Pit Land, where works were being carried out for a gas diversion by Cadent Gas and land on which archaeological works for the HS2 Scheme were taking place. This incident is described in detail at [78] of Jordan 1. In a video posted on Facebook after the morning's incidents, D17 said:

> "Hey everyone! So, just bringing you a final update from down in Swynnerton. Today has been a really – or this morning today - has been a really successful one. We've blocked the gates for several hours. We had the team block the gates down at the main compound that we usually block and we had – yeah, we've had people running around a field over here and grabbing stuff and getting on grabbers and diggers (or attempting to), but in the meantime, completely slowing down all the works. There are still people blocking the gates down here as you can see and we've still got loads of security about. You can see there's two juicy diggers over there, just waiting to be surfed and there's plenty of opportunities disrupt – and another one over there as well. It's a huge, huge area so it takes a lot of them to, kind of, keep us all under control, particularly when we spread out. So yeah. If you wanna get involved with direct action in the very near future, then please get in touch with us at Bluebell or send me a message and we'll let you know where we are, where we're gonna be, what we're gonna be doing and how you can get involved and stuff like that. Loads of different roles, you've not just, people don't have to run around fields and get arrested or be jumping on top of stuff or anything like that, there's lots of gate blocking to do and stuff as well, yeah so you don't necessarily have to be arrested to cause a lot of disruption down here and we all work together to cause maximum disruption. So yeah, that's that. Keep checking in to Bluebell's page, go on the events and you'll see that we've got loads of stuff going on, and as I say pretty much most days we're doing direct action now down in Swynnerton, there's loads going on at the camp, so come and get involved and get in touch with us and we'll let you know what's happening the next day. Ok, lots of love. Share this video, let's get it out there and let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you."

Hence, comments Mr Jordan, D17 was here making explicit threats to continue to trespass on HS2 Land and to try to climb onto vehicles and machinery and encourages others to engage in similar unlawful activity.

f. Further detail is given of recent and future likely activities around Cash's Pit and other HS2 Land in the Swynnerton area at Jordan 1**,** [72]-[79] and Dilcock 4, [33], et seq.

172. These matters and all of the other examples quoted by Mr Jordan and Ms Dilcock, to my mind, evidence an intention to continue committing trespass and nuisance along the whole of the HS2 route.

173. I also take into account material supplied by the Claimants following the hearing that occupation of Cash's Pit has continued even in the face of Cotter J's order of 11 April 2022 and that committal proceedings have been necessary.

174. The Claimants reasonably anticipate that the activists will move their activities from location to location along the route of the HS2 Scheme. Given the size of the HS2 Scheme, the Claimants say that it is impossible for them to reasonably protect the entirety of the HS2 Land by active security patrol or even fencing.

175. I have carefully considered D6's argument that the Claimants must prove that there is an imminent danger of very substantial damage, and (per Skeleton, [48]):

> "The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction."

176. I do not find this a persuasive argument, and I reject it. Given the evidence that the protesters' stated intention is to protest wherever, and whenever, along HS2's route, I am satisfied there is the relevant imminent risk of very substantial damage. To my mind, it is not an attractive argument for the protesters to say: 'Because you have not started work on a particular piece of land, and even though when you do we will commit trespass and nuisance, as we have said we will, you are not entitled to a precautionary injunction to prevent us from doing so until you start work and we actually start doing so.' As the authorities make clear, the terms 'real' and 'imminent' are to be judged in context and the court's overall task is to do justice between the parties and to guard against prematurity. I consider therefore that the relevant point to consider is not now, as I write this judgment, but at the point something occurs which would trigger unlawful protests. That may be now, or it may be later. Furthermore, protesters do not always wait for the diggers to arrive before they begin to trespass. The fact that the route of HS2 is now publicly available means that protesters have the means and ability to decide where they are going to interfere next, even in advance of work starting.

177. In other words, adopting the *Hooper v Rogers* approach that the degree of probability of future injury is not an absolute standard, and that what is to be aimed at is justice between the parties, having regard to all the relevant circumstances, I am satisfied that (all other things being equal) a precautionary injunction is appropriate given the protesters' expressed intentions. To accede to D6's submission would, it seems to me, be to licence the sort of 'guerrilla tactics' which the Lord Chief Justice deprecated in *DPP v Cucicirean*.

178. Here I think it is helpful to quote Morgan J's judgment in *Ineos*, [87]-[95] (and especially [94]-[95]), where he considered an application for a precautionary injunction against protests at fracking sites where work had not actually begun:

> "87. The interim injunctions which are sought are mostly, but not exclusively, claimed on a *quia timet* basis. There are respects in which the Claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a *quia timet* basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to,

seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the Claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will approach the present applications as if they are made solely on the quia timet basis.

88. The general test to be applied by a court faced with an application for a *quia timet* injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in *London Borough of Islington v Elliott* [2012] EWCA Civ 56, per Patten LJ at 29, as follows:

> '29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."

89. In *London Borough of Islington v Elliott*, the court considered a number of earlier authorities. The authorities concerned claims to *quia timet* injunctions at the trial of the action. In such cases, particularly where the injunction claimed is a mandatory injunction, the court acts with caution in view of the possibility that the contemplated unlawful act, or the contemplated damage from it, might not occur and a mandatory order, or the full extent of the mandatory order, might not be necessary. Even where the injunction claimed is a prohibitory injunction, it is not enough for the claimant to say that the injunction only restrains the defendant from doing something which he is not entitled to do and causes him no harm: see Paul *(KS) (Printing Machinery) v Southern Instruments (Communications)* [1964] RPC 118 at 122; there must still be a real risk of the unlawful act being committed. As to whether the contemplated harm is 'imminent', this word is used

in the sense that the circumstances must be such that the remedy sought is not premature: see *Hooper v Rogers* [1975] Ch 43 at 49-50. Further, there is the general consideration that 'Preventing justice excelleth punishing justice': see *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] Ch 235 at 242, quoting the Second Institute of Sir Edward Coke at page 299.

90. In the present case, the Claimants are applying for *quia timet* injunctions on an interim basis, rather than at trial. The passage quoted above from *London Borough of Islington v Elliott* indicated that different considerations might arise on an interim application. The passage might be read as suggesting that it might be easier to obtain a *quia timet* injunction on an interim basis. That might be so in a case where the court applies the test in *American Cyanamid* where all that has to be shown is a serious issue to be tried and then the court considers the adequacy of damages and the balance of justice. Conversely, on an interim application, the court is concerned to deal with the position prior to a trial and at a time when it does not know who will be held to be ultimately right as to the underlying dispute. That might lead the court to be less ready to grant quia timet relief particularly of a mandatory character on an interim basis.

91. I consider that the correct approach to a claim to a *quia timet* injunction on an interim basis is, normally, to apply the test in *American Cyanamid*. The parts of the test dealing with the adequacy of damages and the balance of justice, applied to the relevant time period, will deal with most if not all cases where there is argument about whether a claimant needs the protection of the court. However, in the present case, I do have to apply section 12(3) of the Human Rights Act 1998 and ask what order the court is likely to make at a trial of the claim.

92. I have dealt with the question of *quia timet* relief in a little detail because it was the subject of extensive argument. However, that should not obscure the fact that the decision in this case as to the grant of *quia timet* relief on an interim basis is not an unduly difficult one.

93. What is the situation here? On the assumption that the evidence does not yet show that protestors have sought to subject Ineos to their direct action protests, I consider that the evidence makes it plain that (in the absence of injunctions) the protestors will seek to do so. The protestors have taken direct action against other fracking operators and there is no reason why they would not include Ineos in the future. The only reason that other operators have been the subject of protests in the past and Ineos has not been (if it has not been) is that Ineos is a more recent entrant into the industry. There is no reason to think that (absent injunctions) Ineos will be treated any differently in the future

> from the way in which the other fracking operators have been treated in the past. I therefore consider that the risk of the infringement of Ineos' rights is real.
>
> 94. The next question is whether the risk of infringement of Ineos' rights is imminent. I have described earlier the sites where Ineos wish to carry out seismic testing and drilling. It seems likely that drilling will not commence in a matter of weeks or even months. However, there have been acts of trespass in other cases on land intended to be used for fracking even before planning permission for fracking had been granted and fracking had begun. I consider that the risk of trespass on Ineos' land by protestors is sufficiently imminent to justify appropriate intervention by the court. Further, there have already been extensive protests outside the depots of third party contractors providing services to fracking operators. One of those contractors is P R Marriott. Ineos uses and intends to use the services of P R Marriott. Accordingly, absent injunctions, there is a continuing risk of obstruction of the highway outside P R Marriott's depot and when that contractor is engaged to provide services to Ineos, those obstructions will harm Ineos.
>
> 95. To hold that the risk of an infringement of the rights of Ineos is not imminent with the result that the court did not intervene with injunctions at this stage would leave Ineos in a position where the time at which the protestors might take action against it would be left to the free choice of the protestors without Ineos having any protection from an order of the court. I do not consider that Ineos should be told to wait until it suffers harm from unlawful actions and then react at that time. This particularly applies to the injunctions to restrain trespass on land. If protestors were to set up a protest camp on Ineos land, the evidence shows that it will take a considerable amount of time before Ineos will be able to recover possession of such land. In addition, Ineos has stated in its evidence on its application that it wishes to have clarity as to what is permitted by way of protest and what is not. That seems to me to be a reasonable request and if the court is able to give that clarity that would seem to be helpful to the Claimants and it ought to have been considered to be helpful by the Defendants. A clear injunction would allow the protestors to know what is permitted and what is not."

179. This part of the judgment was not challenged on appeal: see at [35] of the Court of Appeal's judgment: [2019] 4 WLR 100.

180. I think my conclusion is consistent with this approach, and also to that taken by the judges in the *National Highways* cases, where the claimants could not specifically say where the next road protests were going to occur, but could only say that there was a risk they could arise anywhere, at any time because of the protesters' previous behaviour. That uncertainty did not defeat the injunctions.

181. I find further support for my conclusion on this aspect of the Claimants' case in the history of injunctive relief sought by the Claimants over various discrete parcels of land within the HS2 Land. These earlier injunctions are primarily described in Dilcock 1 at [37] – [41]. They show a repeat and continued pattern of behaviour.

(iii) Whether an injunction should be granted against the named Defendants

182. I set out the *Canada Goose* requirements earlier. One of them is that in applications such as this, defendants whose names are known should be named. The basis upon which the named Defendants have been sued in this case is explained in Dilcock 1 at [42]-[46]:

> "42. The Claimants have named as Defendants to this application individuals known to the Claimants (sometimes only by pseudonyms) the following categories of individuals:
>
> 42.1 Individuals identified as believed to be in occupation of the Cash's Pit Land whether permanently or from time to time (D5 to D20, D22, D31 and D63);
>
> 42.2 the named defendants in the Harvil Road Injunction (D28; D32 to D34; and D36 to D59);
>
> 42.3 The named defendants in the Cubbington and Crackley Injunction (D32 to D35); and
>
> 42.4 Individuals whose participation in incidents is described in the evidence in support of this claim and the injunction application and not otherwise named in one of the above categories.
>
> 43. It is, of course open to other individuals who wish to defend the proceedings and/or the application for an injunction to seek to be joined as named defendants. Further, if any of the individuals identified wish to be removed as defendants, the Claimants will agree to their removal upon the giving of an undertaking to the Court in the terms of the injunction sought. Specifically, in the case of D32, who (as described in Jordan 1) has already given a wide-ranging undertaking not to interfere with the HS2 Scheme, the Claimants have only named him because he is a named defendant to the proceedings for both pre-existing injunctions. If D32 wishes to provide his consent to the application made in these proceedings, in view of the undertaking he has already given, the Claimants will consent to him being removed as a named defendant.
>
> 44. This statement is also given in support of the First Claimant's possession claim in respect of the Cash's Pit Land and which the Cash's Pit Defendants have dubbed: "Bluebell Wood". The

> unauthorised encampment and trespass on the Cash's Pit Land is the latest in a series of unauthorised encampments established and occupied by various of the Defendants on HS2 Land (more details of which are set out in Jordan 1).
>
> 45. The possession proceedings concern a wooded area of land and a section of roadside verge, which is shown coloured orange on the plan at Annex A of the Particulars of Claim ("Plan A"). The HS2 Scheme railway line will pass through the Cash's Pit Land, which is required for Phase 2a purposes and is within the Phase 2a Act limits.
>
> 46. The First Claimant is entitled to possession of the Cash's Pit Land having exercised its powers pursuant to section 13 and Schedule 15 of the Phase 2a Act. Copies of the notices served pursuant to paragraph 4(1) of Schedule 15 of the Phase 2a Act are at pages 30 to 97 of JAD3. For the avoidance of doubt, these notices were also served on the Cash's Pit Land addressed to "the unknown occupiers". Notices requiring the Defendants to vacate the Cash's Pit Land and warning that Court proceedings may be commenced in the event that they did not vacate were also served on the Cash's Pit Land. A statement from the process server that effected service of the notices addressed to "the unknown occupiers" and the Notice to Vacate is at pages 98 to 112 of JAD3 and copies of the temporary possession notice addressed to the occupiers of the Cash's Pit Land and the notice to Vacate are exhibited to that statement."

183. Appendix 2, to which I have already referred, summarises the defences which have been filed, and the representations received from non-Defendants. The main points made are (with my responses), in summary, as follows:

    a. The actions complained of are justifiable because the HS2 Scheme causes environmental damage. That is not a matter for me. Parliament approved HS2.

    b. The order would interfere with protesters' rights under Articles 10 and 11. I deal with the Convention later.

    c. Lawful protest would be prevented. As I have made clear, it would not and the draft order so provides.

    d. The order would restrict rights to use the public highway and public rights of way. These are specifically carved out in the order (paragraph 4).

    e. Concern about those who occupy or use HS2 Land pursuant to a lease or licence with the First Claimant. That has now been addressed in the Revised Land Plans.

    f. Complaints about HS2's security guards. I have dealt with that.

(iv) Whether there are reasons to grant the order against persons unknown

184. I am satisfied that the Defendants have all been properly identified either generally, where they are unknown, or specifically where their identities are known. Those who have been identified and joined individually as Defendants to these proceedings are the 'named Defendants' and are listed in the Schedule on the RWI wesbsite. The 'Defendants' (generally) includes both the named Defendants and those persons unknown who have not yet been individually identified. The names of all the persons engaged in unlawful trespass were not known at the date of filing the proceedings (and are largely still not known). That is why different categories of 'persons unknown' are generically identified in the relevant Schedule. That is an appropriate means of seeking relief against unknown categories of people in these circumstances: see *Boyd and another v Ineos Upstream Ltd and others* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose*, [82], which I set out earlier.

185. I am satisfied that this is one of those cases (as in other HS2 and non-HS2 protest cases) in which it is appropriate to make an order against groups of unknown persons, who are generically described by reference to different forms of activity to be restrained. I quoted the principles contained in *Canada Goose*, [82] earlier. I am satisfied the order meets those requirements, in particular [82(1) and (2)].

186. I am satisfied that the definitions of 'persons unknown' set in Appendix 1 are apt and appropriately narrow in scope in accordance with the *Canada Goose* principles. The definitions would not capture innocent or inadvertent trespass.

187. I accept (and as is clear from the evidence I have set out) that the activists involved in this case are a rolling and evolving group. The 'call to arms' from D17 that I set out earlier was a clear invitation to others, who had not yet become involved in protests – and hence by definition were not known - to do so. The group is an unknown and fluctuating body of potential defendants. It is not effective to simply include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant.

(v) Scope

188. Paragraphs 3-6 provide for what is prohibited:

> "3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
>
> a. entering or remaining upon the HS2 Land;
>
> b. obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or
>
> c. interfering with any fence or gate on or at the perimeter of the HS2 Land.
>
> 4. Nothing in paragraph 3 of this Order:

a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.

b. Shall affect any private rights of access over the HS2 Land.

c. Shall prevent any person from exercising their lawful rights over any public highway.

d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.

e. Shall extend to any interest in land held by statutory undertakers.

5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to):

a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;

b. digging, erecting any structure or otherwise placing or leaving any object or thing on the carriageway which may slow or impede the safe and uninterrupted passage of vehicles or persons onto or from the HS2 Land;

c. affixing or attaching their person to the surface of the carriageway where it may slow or impede the safe and uninterrupted passage of vehicles onto or from the HS2 Land;

d. affixing any other object to the HS2 Land which may delay or impede the free passage of any vehicle or person to or from the HS2 Land;

e. climbing on to or affixing any object or person to any vehicle in the vicinity of the HS2 Land; and

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

6. For the purposes of paragraph 3(c) prohibited acts of interference shall include (but not be limited to):

a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the HS2 Land;

> b. the prohibition includes carrying out the aforementioned acts in respect of the fences and gates; and
>
> c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate."

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

190. The two changes I require are as follows. The first, per *National Highways*, Lavender J, at [22] and [24(6), a case in which Mr Greenhall was involved, is to insert the word 'deliberately' in [3(b)] so that it reads:

> "3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
>
> …
>
> b. *deliberately* obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or

191. The second, similarly, is to insert the word, 'deliberate' in [5(f)] so that it reads, '*deliberate* slow walking …'

192. I have also considered the point made by D6 that 'vicinity' in [5(f)] is unduly vague. I note that in at least two cases that term has been used in protester injunctions without objection. In *Canada Goose*, [12(14)], it was used to prevent the use of a loudhailer 'within the vicinity of' Canada Goose's store in Regent Street. There was no complaint about it, and although the application failed ultimately, that was for other reasons. Also, in *National Highways Limited v Springorum* [2022] EWHC 205 (QB), [8(5)], climate protesters were injuncted from blocking, obstructing, etc, the M25, which was given an extensive definition in the order. One of the terms prevented the protesters from 'tunnelling in the vicinity of the M25'. No objection was taken to the use of that term. Overall, I am satisfied that in the circumstances, use of this term is sufficiently clear and precise.

193. As to the wide geographical scope of the order, I satisfied, for reasons already given, that the itinerant nature of the protests, as in the *National Highways* cases, justifies such an extensive order.

(vi) Convention rights

194. This, as I have said, is an important part of the case. The right to peaceful and lawful protest has long been cherished by the common law, and is guaranteed by Articles 10 and 11 of the ECHR and the HRA 1998. However, these rights are not unlimited, as I explained earlier.

195. I begin by emphasising, again, that nothing in the proposed order will prevent the right to conduct peaceful and lawful protest against HS2. I set out the recitals in the order at the beginning of this judgment.

196. I am satisfied there would be no unlawful interference with Article 10 and 11 rights because, in summary: (a) there is no right of protest on private land, and much, although not all, or what protesters have been doing has taken place on such land; and (b) there is no right to cause the type and level of disruption which would be restrained by the order; (c) to the extent that protest takes place on the public highway, or other public land, the interference represented by the injunction is proportionate.

197. Turning, as I must in accordance with the Court of Appeal's guidance, to the *Zeigler* questions, I will set them out again for convenience (adapted to the present context), and answer them in the following way:

Would what the defendants are proposing to do be exercise of one of the rights in Articles 10 or 11?

198. I am prepared to accept in the Defendants' favour that further continued protests of the type they have engaged in in the past potentially engages their rights under these Articles. In line with the principles set out earlier, I acknowledge that Articles 10 and 11 do not confer a right of protest on private land, per *Appleby*, and much of what the Claimants seeks the injunction to restrain relates to activity on private land (in particular, by the unknown groups D1, D2 and D4). But I accept - as I think the Claimants eventually accepted in post-hearing submissions at least – that some protests may on occasion spill over onto the public highway (per Jordan 1, [29.2] in relation to eg, blocking gates), and that such protests do engage Articles 10 and 11.

If so, would there be an interference by a public authority with those rights?

199. Yes. The application for, and the grant of, an injunction to prevent the Defendants interfering with HS2's construction in the ways provided for in the injunction is an interference with their rights by a public authority so far as it touches on protest on public land, such as the highway, where Articles 10 and 11 are engaged.

If there is an interference, is it 'prescribed by law'?

200. Yes. The law in question is s 37 of the SCA 1981 and the cases which have decided how the court's discretion to grant an anticipatory injunction should be exercised: see *National Highways Ltd*, [31(2)] (Lavender J).

If so, would the interference be in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?

201. Yes. It would be for the protection the Claimants' rights and freedoms, and those of their contractors and others, to access and work upon HS2 Land unhindered, in accordance with the powers granted to them by Parliament which, as I have said already, determined HS2 to be in the public interest. The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests.

If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This involves considering the following: Is the aim sufficiently important to justify interference with a fundamental right? Is there a rational connection between the means chosen and the aim in view? Are there less restrictive alternative means available to achieve that aim? Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others ?

202. These are the key questions on this aspect of the case, it seems to me.

203. The question whether an interference with a Convention right is 'necessary in a democratic society' can also be expressed as the question whether the interference is proportionate: *National Highways Limited,* [33] (Lavender J).

204. In *Ziegler*, Lords Hamblen and Stephens stated in [59] of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

205. Lords Hamblen and Stephens also quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *Samede*

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself

> or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in Kuznetsov v Russia, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

206. I have set out this passage, as Lavender J did in *National Highways Limited*, [35], because, given the nature of some of the submissions made to me, I want to underscore the point I made at the outset that I am not concerned with the merits of HS2, or whether it will or will not cause the environmental damage which the protesters fear it will. I readily acknowledge that many of them hold sincere and strongly held views on very important issues. However, it would be wrong for me to express either agreement or disagreement with those views, even if I had the institutional competence to do so, which I do not. Many of the submissions made to me consisted of an invitation to me to agree with the Defendants' views and to decide the case on that basis. But just like Lavender J said in relation to road protests, that is something which I cannot do, just as I could not decide this case on the basis of disagreement with protesters' views.

207. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment in *Ziegler* the factors which may be relevant to the assessment of the proportionality of an interference with the Article 10 and 11 rights of protestors blocking traffic on a road.

208. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary: (a) the peaceful nature of the protest; (b) the fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder; (c) the fact that the defendants did not commit any criminal offences other than obstructing the highway; (d) the fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; (e) the fact that the protest related to a 'matter of general concern'; (f) the limited duration of the protest; (g) the absence of any complaint about the defendants' conduct; and (h) the defendants' longstanding commitment to opposing the arms trade.

209. As Lavender J said in his case at [39], this list of factors is not definitive, but it serves as a useful checklist. I propose now to discuss how they should be answered in this case.

210. The HS2 protests have in significant measure not been peaceful. There have been episodes, for example, of violence, intimidation, criminal damage, and assault, as described by Mr Jordan. There have been many arrests. Even where injunctions have been obtained, protesters have resisted being removed (most recently at Cash's Pit, as described in Dilcock 4 and in other material). It follows that the protests have given rise to considerable disorder. The protesters are specifically targeting HS2, and in that sense are in a somewhat different position to the protesters in the *National Highways Ltd* case, whose protests were aimed at the public as a means of trying to influence government policy. But the HS2 protests do also affect others, such as contractors employed to work on the project (for example Balfour Beatty), those in HS2's supply chain, security staff, etc. I accept that the HS2 protests relate to a matter of general concern, but on the other hand, at the risk of repeating myself, the many and complicated issues involved – including in particular environmental concerns - have been debated in Parliament and the HS2 Acts were passed. The HS2 protests are many in number, continuing, and are threatened to be carried on in the future along the whole of the HS2 route without limit of time. The disruption, expense and inconvenience which they have caused is obvious from the evidence. I do not think that I am in any position to assess the public mood about HS2 protests. No doubt some members of the public are in favour and no doubt some are against. As I have already said, I accept that the defendants are expressing genuine and strongly held views.

211. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows.

212. Firstly, by committing trespass and nuisance, the Defendants are obstructing a large strategic infrastructure project which is important both for very many individuals and for the economy of the UK, and are causing the unnecessary expenditure of large sums of public money. In that context, I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion. I base that

conclusion primarily on the considerable disruption caused by protests to date and the repeated need for injunctive relief for specific pockets of land.

213. Second, I also accept that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow for the unhindered completion of HS2 by the Claimants over land which they are in possession of by law (or have the right to be). Prohibiting activities which interfere with that work is directly connected to that aim.

214. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7].

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.

216. Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this: (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in *Ziegler*, the HS2 protests are not directed at a specific location which is the subject of the protests. They have caused repeated, prolonged and significant disruption to the activities of many individuals and businesses and have done so on a project which is important to the economy of this country. Finally on this, the injunction is to be kept under review by the Court, it is not without limit of time, and can and no doubt will be discharged should the need for it disappear.

217. Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:

    a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour

continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.

b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.

c. The balance of convenience strongly favours the making of the injunction.

(vii) Service

218. Finally, I turn to the question of service and whether the service provisions in the injunction are sufficient.

219. The passages from [82] of *Canada Goose* I quoted earlier show that the method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings (ie, the application) to their attention.

220. I considered service of the application at a directions hearing on 28 April 2022. At that hearing, I made certain suggestions recorded in my order at [2] as to how the application for the injunction was to be served:

> "Pursuant to CPR r. 6.27 and r. 81.4 as regards service of the Claimants' Application dated 25 March 2022:
>
> a. The Court is satisfied that at the date of the certificates of service, good and sufficient service of the Application has been effected on the named defendants and each of them and personal service is dispensed with subject to the Claimants' carrying out the following additional methods within 14 days of the date of this order:
>
> i. advertising the existence of these proceedings in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website.
>
> ii. where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the papers in the proceedings within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish notice boards in the same approximate location.
>
> iii. making social media posts on the HS2 twitter and Facebook pages advertising the existence of these proceedings and the web address of the HS2 Proceedings website.
>
> b. Compliance with 2 (a)(i), (ii) and (iii) above will be good and sufficient service on "persons unknown"'

221. The injunction at [7]-[11] provides under the heading 'Service by Alternative Method – This Order'

> "7. The Court will provide sealed copies of this Order to the Claimant's solicitors for service (whose details are set out below).
>
> 8. Pursuant to CPR r.6.27 and r.81.4:
>
> a. The Claimant shall serve this Order upon the Cash's Pit Defendants by affixing 6 copies of this Order in prominent positions on the perimeter of the Cash's Pit Land.
>
> b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
>
> i. Affixing 6 copies in prominent positions on the perimeter each of the Cash's Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.
>
> ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
>
> iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
>
> iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.
>
> c. Service of this Order on Named Defendants may be effected by personal service where practicable and/or posting a copy of this Order through the letterbox of each Named Defendant (or leaving in a separate mailbox), with a notice drawing the recipient's attention to the fact the package contains a court order. If the premises do not have a letterbox, or mailbox, a package containing this Order may be affixed to or left at the front door or other prominent feature marked with a notice drawing the recipient's attention to the fact that the package contains a court order and should be read urgently. The notices shall be given in prominent lettering in the form set out in Annex B. It is open to any Defendant to contact the Claimants to identify an alternative

> place for service and, if they do so, it is not necessary for a notice or packages to be affixed to or left at the front door or other prominent feature.
>
> d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.
>
> e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has as at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk
>
> 9. Service in accordance with paragraph 8 above shall:
>
> a. be verified by certificates of service to be filed with Court;
>
> b. be deemed effective as at the date of 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.
>
> 10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.
>
> 11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been on, the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court."

222. Further evidence about service is contained in Dilcock 3, [7], et seq, and Dilcock 4, [7] et seq. I can summarise this as follows.

223. Before I made my order, Ms Dilcock explained that the methods of service used by the Claimants as at that date had been based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this application. She said the methods of service to that date had been effective in publicising the application.

224. She said that there had been 1,371 views (at 24 April 2022) of the Website: Dilcock 3**,** [11]; By 17 May 2022 (a week or so before the main hearing, and after my directions

had come into effect) there had been 2,315 page views, of which 1,469 were from unique users: Dilcock 4**,** [17]. So, in round terms, there were an additional 1,000 views after the directions hearing.

225. Twitter accounts have shared information about the injunction application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: Dilcock 3, [16].

226. A non-exhaustive review of Facebook shows that information about the injunction and/or the link to a fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: Dilcock 3, [17].

227. Dilcock 4, [7] – [17], sets out how the Claimants complied with the additional service requirements pursuant to my directions of 28 April 2022. Those measures are not reliant on either notice via website or social media. The Claimants say that they complement and add to the very wide broadcasting of the fact of the proceedings.

228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.

229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75].

Final points

230. I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly. I also reject the suggestion that the First Claimant lacks 'clean hands' so as to preclude injunctive relief.

Conclusion

231. I will therefore grant the injunction in the terms sought in the draft order of 6 May 2022 in Bundle B at B049 (subject to any necessary and consequential amendments to reflect post-hearing matters and in light of this judgment).

APPENDIX 1

UNNAMED DEFENDANTS
(TAKEN FROM THE AMENDED PARTICULARS OF CLAIM DATED 28 APRIL 2022 – WITH TRACKED CHANGED REMOVED)

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

APPENDIX 2

SUMMARY OF DEFENDANTS' RESPONSES

Name	Received and reference in the papers	Summary
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because not demonstrated immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land *and* existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) **[D/3]**	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) **[D/4]**	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) **[D/7]**	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) **[D/8]**	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) **[D/10]**	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) **[D/12]**	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20th May.

D29 – Jessica Maddison	Defence (16.05.22) **[D/14]**	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) **[D/15]**	Complaint about lack of time to prepare for initial hearing.
	Application for more time – N244 (04.04.22)	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) **[D/36/179-D/37/2916]**	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) **[D/16]**	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) **[D/17]**	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) **[D/19]**	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – dispute over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 **[D/20]**	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizbeth Farbrother	11.05.22 **[D/23**]	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) **[D/23]**	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) **[D/24]**	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction

		is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRoW, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) **[D/25]**	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) **[D/26]**	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) [**D/27]**	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) **[D/28]**	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) **[D/29]**	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) **[D/30]**	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) **[D/31]**	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) **[D/32]**	Consider themselves "persons unknown" by living nearby and using nearby PRoW. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) **[D/33]**	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) **[D/34]**	Concerns about public access to PRoW re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) **[D/35]**	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of houses purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		

Val Saunders "statement in support of the defence against the Claim QB-2022-BHM-00044"	Undated **[D/37/2493]** (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith "Witness statement" "statement in support of the defence…"	14.05.22 **[D/37/2509-2520]** (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – "statement in support of the defence…"	Undated **[D/37/2674-2691]** (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – "Seven arguments against HS2"	Undated **2692-2697**	Merits of scheme. Argues for scrapping.
Brenda Bateman – "statement in support of the defence…"	Undated **2698-2699**	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – "statement in support of the Defence…"	Undated **2700-2701**	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – "Defence against the claim…"	Undated **2702-2703**	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – "Statement in support of the Defence…"	Undated **2704**	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – "Statement in support of the Defence…"	Undated **2705-2710**	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – "Witness Statement"; "Statement in support of the Defence…"	12.05.22 **2711-2714**	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2's land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – "statement in support of the Defence…"	Undated **2715-2716**	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – "statement in support of the Defence…"	9.05.22 **2717-2718**	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being

		able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – "Statement in support of the Defence…"	Undated **2719**	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – "statement in support of the Defence…"	Undated **2724-2731**	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – "statement in support of the Defence…"	Undated **2735**	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – "Statement"	Undated **2737-2740**	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – "In support of the Defence…"	15.5.22 **2742**	Merits of scheme. Protests are therefore valid.
Ann Hayward – Letter regarding RWI	6.05.22 **2743-2744**	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – "statement in support of the Defence"	15.05.22 **2745-2746**	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 **2747-2751**	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.

Anonymous (near Cash's Pit occupant)	Undated **2752-2753**	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence…"	Undated **2754-2755**	Criticism of merits of Scheme, argument re right to protest.

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)

(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 re-scheduled 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 such terms 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, 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."

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 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. ..."

...

"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 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* [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 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* [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 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."

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.

(A) Substantive Requirements

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 rights of 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, protected by 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 co-founder 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 quasi-final 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

A

Supreme Court

Wolverhampton City Council and others *v* London Gypsies and Travellers and others

[On appeal from *Barking and Dagenham London Borough Council v Persons Unknown*]

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29

Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs JJSC, Lord Kitchin

C *Injunction — Trespass — Persons unknown — Local authorities obtaining injunctions against persons unknown to restrain unauthorised encampments on land — Whether court having power to grant final injunctions against persons unknown — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37*

With the intention of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued D proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. E The judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

F On appeal by three intervener groups representing the interests of Gypsies and Travellers—

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so G in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new H circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

[1] Senior Courts Act 1981, s 37: see post, para 145.

© 2024 The Incorporated Council of Law Reporting for England and Wales

prohibitions directed at the world at large which operated as an exception to the normal rule that only parties to an action were bound by an injunction (post, paras 16–17, 19, 22, 42, 57, 147–148, 150–153, 238).

Venables v News Group Newspapers Ltd [2001] Fam 430 applied.

Dicta of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361, HL(E) and of Lord Scott of Foscote in *Fourie v Le Roux* [2007] 1 WLR 320, para 25, HL(E) applied.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780, SC(E), *Cameron v Hussain* [2019] 1 WLR 1471, SC(E) and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, CA considered.

South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, CA and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, CA not applied.

(2) That in principle it was such a legitimate extension of the court's practice for it to allow both interim and final injunctions against "newcomers", i e persons who at the time of the grant of the injunction were neither defendants nor identifiable and were described in the injunction only as "persons unknown"; that an injunction against a newcomer, which was necessarily granted on a without notice application, would be effective to bind anyone who had notice of it while it remained 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; that, therefore, there was no immoveable obstacle of jurisdiction or principle in the way of granting injunctions prohibiting unauthorised encampments by Gypsies or Travellers who were "newcomers" on an essentially without notice basis, regardless of whether in form interim or final; that, however, such an injunction was only likely to be justified as a novel exercise of the court's equitable discretionary power if the applicant (i) demonstrated a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other available remedies (including statutory remedies), (ii) built into the application and the injunction sought procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it, (iii) complied in full with the disclosure duty which attached to the making of a without notice application and (iv) showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made; that, if so justified, any injunction made by the court had to (i) spell out clearly and in everyday terms the full extent of the acts it was prohibiting, corresponding as closely as possible to the actual or threatened unlawful conduct, (ii) extend no further than the minimum necessary to achieve the purpose for which it was granted, (iii) be subject to strict temporal and territorial limits, (iv) be actively publicised by the applicant so as to draw it to the attention of all actual and potential respondents and (v) include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the injunction; and that, accordingly, it followed that the challenge to the court's power to grant the impugned injunctions at all failed (post, paras 142–146, 150, 167, 170, 186, 188, 222, 225, 230, 232, 238).

Per curiam. (i) The theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is no reason why newcomer injunctions should never be granted. 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 (post, paras 172, 216).

(i) To the extent that a particular person who has become the subject of a newcomer injunction wishes to raise particular circumstances applicable to them and relevant to a balancing of their article 8 Convention rights against the claim for an injunction, this can be done under the liberty to apply (post, para 183).

(iii) The emphasis in this appeal has been on newcomer injunctions in Gypsy and Traveller cases and nothing said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage

© 2024 The Incorporated Council of Law Reporting for England and Wales

A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11

Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)

Adair v The New River Co (1805) 11 Ves 429

C *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA

Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)

Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA

Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)

D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA

Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR E 49; [2003] 1 All ER 289, HL(E)

Attorney General v Times Newspapers Ltd [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)

Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA

Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER F 487, SC(E)

Birmingham City Council v Afsar [2019] EWHC 1619 (QB)

Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736

Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006

G *British Airways Board v Laker Airways Ltd* [1985] AC 58; [1984] 3 WLR 413; [1984] 3 All ER 39, HL(E)

Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA

Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA

H *CMOC Sales and Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62

Cameron v Hussain [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

© 2024 The Incorporated Council of Law Reporting for England and Wales

Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380
Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare) [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Pvt Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA

© 2024 The Incorporated Council of Law Reporting for England and Wales

Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd [1998] 4 VR 143
Mercedes Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew [1983] Lexis Citation 198; The Times, 25 June 1983, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (The Siskina) [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
United Kingdom Nirex Ltd v Barton [1986] Lexis Citation 644; The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Winch, Persons formerly known as, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556, CA

© 2024 The Incorporated Council of Law Reporting for England and Wales

The following additional cases were cited in argument:

A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)
Abortion Services (Safe Access Zones) (Northern Ireland) Bill, In re [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752; The Times, 11 July 2011, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (M) v Secretary of State for Constitutional Affairs and Lord Chancellor [2004] EWCA Civ 312; [2004] 1 WLR 2298; [2004] 2 All ER 531, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

On 16 October 2020 Nicklin J, with the concurrence of Dame Victoria Sharp P and Stewart J (Judge in Charge of the Queen's Bench Civil List), ordered a number of local authorities which had been involved in 38 sets of proceedings each obtaining injunctions prohibiting "persons unknown" from making unauthorised encampments within their administrative areas, or on specified areas of land within those areas, to complete a questionnaire with a view to identifying those local authorities who wished to maintain such injunctions and those who wished to discontinue them. On 12 May 2021, after receipt of the questionnaires and a subsequent hearing to review the injunctions, Nicklin J [2021] EWHC 1201 (QB); [2022] JPL 43 held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land and, by further order dated 24 May 2021, discharged a number of the injunctions on that ground.

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council;

© 2024 The Incorporated Council of Law Reporting for England and Wales

Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR, Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The following local authorities participated in the appeal as respondents: (i) Wolverhampton City Council; (ii) Walsall Metropolitan Borough Council; (iii) Barking and Dagenham London Borough Council; (iv) Basingstoke and Deane Borough Council and Hampshire County Council; (v) Redbridge London Borough Council; (vi) Havering London Borough Council; (vii) Nuneaton and Bedworth Borough Council and Warwickshire County Council; (viii) Rochdale Metropolitan Borough Council; (ix) Test Valley Borough Council and Hampshire County Council and (x) Thurrock Council. The following bodies were granted permission to intervene in the appeal: Friends of the Earth; Liberty, High Speed Two (HS2) Ltd and the Secretary of State for Transport.

The facts and the agreed issues for the court are stated in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin, post, paras 6–13.

Richard Drabble KC, *Marc Willers KC*, *Tessa Buchanan* and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for the appellants.

The appellants are concerned about the detrimental consequences which the injunctions sought by the local authorities will have for the nomadic lifestyle of Gypsies and Travellers, including a chilling effect on those seeking to practise the traditional Gypsy way of life.

A court cannot exercise its statutory power under section 37 of the Senior Courts Act 1981 so as to grant an injunction which will bind "newcomers" (i e persons who at the time of the grant of the injunction are neither defendants to the application nor identifiable, and who were described in the injunction only as "persons unknown") save on an interim basis or for the protection of Convention rights as an exercise of the jurisdiction first recognised in *Venables v News Group Newspapers Ltd* [2001] Fam 430.

The High Court's power to grant an injunction under section 37 neither expressly permits nor prohibits the making of orders against persons unknown and so does not on its own terms provide an answer to the question. Although it had previously been argued by some of the local authorities below that, regardless of any limitations which applied to section 37, the court had a separate power to grant injunctions against persons unknown by virtue of section 187B of the Town and Country Planning Act 1990 the Court of Appeal held that the procedural limitations under section 37 and section 187B were the same and that the latter did not bestow any

© 2024 The Incorporated Council of Law Reporting for England and Wales

additional or more extensive jurisdiction on the court: see [2023] QB 295, paras 113–118.

A final injunction operates only between the parties to the claim: see *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191. The act by which a person becomes a party is the service of the claim form: see *Cameron v Hussain* [2019] 1 WLR 1471. A person who is unknown and unidentifiable cannot be served with a claim form. He or she will thus not be a party and will not be bound by the final injunction.

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: see *Porter v Freudenberg* [1915] 1 KB 857, 883, 887–888, *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, para 8 and *Cameron*, paras 17–18.

Cameron, in particular, is determinative of the appeal. It dealt with—and the decision is therefore binding as to—the position of newcomers, albeit that the proposed defendant was someone who was said to have committed an unlawful act in the past, rather than a person who might commit an unlawful act in the future. Even if *Cameron*, because of that distinction, was not strictly concerned with newcomers, the application of the Supreme Court's reasoning in that case leads inescapably to the conclusion that such persons cannot be sued.

Newcomers are by their very nature anonymous. A person unknown may, if defined with sufficient particularity, be capable of being identified with a particular person. In the first instance decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 150 Nicklin J suggested that some of the protesters "could readily be identified on . . . camera footage as alleged 'wrongdoers' and, if necessary, given a pseudonym (e g '. . . the man shown in the footage . . . holding the loudhailer')". The person in question will still be anonymous, but he or she is identifiable and whatever the practical difficulties in locating him or her, it is not conceptually impossible to effect service. By contrast, however, designations of the type used in the instant cases, which are intended to capture newcomers ("persons unknown", "persons unknown occupying land", "persons unknown depositing waste", "persons unknown fly-tipping") do not identify anyone. They do not "enable one to know whether any particular person is the one referred to": see *Cameron*, para 16.

The Court of Appeal wrongly held that *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 was authority for the proposition that a final injunction can bind newcomers. That case concerned an interim injunction. It was explained by the Supreme Court as an example of alternative service—not as authority for the proposition that final injunctions bind newcomers—and the Court of Appeal below erred in departing from that interpretation. The other cases relied on by the Court of Appeal below (in particular *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9 and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100) provide no real support for the Court of Appeal's decision. Those cases either (at best) simply accepted, without deciding the point, that final injunctions could

© 2024 The Incorporated Council of Law Reporting for England and Wales

A bind newcomers or, when properly understood, they undermine such a conclusion.

The reasoning in *Gammell* cannot properly be extended to cover final injunctions to bind newcomers. There is a qualitative distinction between interim and final injunctions. Parties must be identified before a final determination takes place so that they have an opportunity to present their case. The courts have long been willing to accept lower—or at least B different—standards of fairness at the interim stage, in recognition of the fact that interim orders are temporary and designed to hold the ring (or limit damage) pending trial. Thus, for example, interim orders may be sought without notice to the defendant, or may control the way in which a defendant deals with his or her property in order to prevent the defendant frustrating any eventual judgment. Interim orders may indeed be more C favourable to a claimant than any final order could be: see, for example, *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224 ("*Spycatcher*").

As Nicklin J recognised at first instance, the courts have recognised that this can create an incentive for a claimant to obtain an interim injunction and then fail to progress the case to trial: see [2021] EWHC 1201 (QB) at D [89]. The answer to this has not been to expand the principle in *Spycatcher* to final orders: instead, the court will put in place directions to ensure that the matter is progressed to a final hearing: see Nicklin J, paras 91–93. Interim relief which binds newcomers can only properly be granted where it is to preserve the position pending trial.

Although in certain cases the court has granted injunctions on a contra mundum basis (see *In re X (A Minor) (Wardship: Injunction)* [1984] E 1 WLR 1422, *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X (formerly Bell) v O'Brien* [2003] EMLR 37, *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB), *OPQ v BJM* [2011] EMLR 23, *RXG v Ministry of Justice* [2020] QB 703 and *D v Persons Unknown* [2021] EWHC 157 (QB)), there is a principled distinction between that line of cases and injunctions prohibiting the unauthorised use or occupation of land. F Those cases were all concerned with the publication of personal information, such as the identity of offenders. Once in the public domain, the subject matter protected by the injunction is irretrievably lost. This court should confirm that an injunction contra mundum should only be granted where to do otherwise would defeat the purpose of the injunction. That principle will not apply in traveller injunction cases.

G *Stephanie Harrison KC*, *Stephen Clark* and *Fatima Jichi* (instructed by *Hodge Jones & Allen LLP*) for Friends of the Earth, intervening.

"Persons unknown" injunctions, although said to be aimed at curtailing unlawful protest, also have a chilling effect on lawful campaigning and protest. They expose wide groups of citizens to the risk of prohibitively costly legal proceedings and punitive sanctions, including unlimited fines and imprisonment for contempt for up to two years. There are serious H obstacles to contesting the claims and a significant inequality of arms when accessing justice with no costs protection.

There is an increasingly widespread use of such injunctions, often on an industry and country-wide basis, with private companies in particular utilising private law proceedings as a default mechanism to address perceived

© 2024 The Incorporated Council of Law Reporting for England and Wales

public order issues despite there being tailored statutory provisions and safeguards provided for by Parliament in the criminal law.

The ruling of the Supreme Court in *Cameron v Hussain* [2019] 1 WLR 1471, paras 11–12 makes clear that it is not simply a matter of the court's wide discretion to entertain a claim if a person (who is not evading service) cannot be served and cannot reasonably be expected to have notice of the claim so that he may have an opportunity to defend it. Identification is necessary so that the court can be satisfied that a person is properly subject to its jurisdiction with the capacity to be a party to legal proceedings. However unjust the outcome for the claimant who may have been wronged (as in the case of the claimant in *Cameron*, who had been injured in a vehicle collision caused by the negligence of another driver of unknown identity), the claim has simply not been validly brought.

One of the purposes of a persons unknown injunction is to deter such newcomers from coming into existence and if it is effective there will only ever have been one party to the claim, namely the claimant. This is not, therefore, properly to be described as a permissible claim against persons unknown in the *Bloomsbury Publishing* sense (see *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633). It is simultaneously a claim against nobody, but can only be effective if it is in principle binding on everybody.

Justice between parties to litigation is not only about a just outcome. That outcome must be arrived at pursuant to a fair and just process. In addition to being contrary to basic principles of procedural fairness and natural justice, in both the Gypsy and Traveller context and in the protest context, newcomer injunctions can have arbitrary and disproportionate adverse impacts on fundamental rights, including the Convention rights under articles 8, 10 and 11 and the common law protections for free speech and assembly.

The notion that a person only becomes a party to proceedings by the acts that put them in breach of an order made in their absence and upon its enforcement against them is fundamentally at odds with such core principles. In contempt cases, the court's approach will not be concerned with whether the injunction should have been granted or the appropriateness of the terms which have led to the contempt. An order of the court has to be obeyed unless and until it has been set aside or varied by the court.

Even if an injunction is subsequently varied or set aside, that is irrelevant to the liability in contempt of a person who breaches the injunction (although it may be relevant to sentence): see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, paras 33–34 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, paras 76–77. Moreover, in *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 at [57]–[62] the Court of Appeal rejected the argument that liability for contempt for breach of a persons unknown injunction required knowledge of its terms.

In the protest context, the courts have recognised the injustice of the enforcement of orders against individuals without giving them an opportunity to be heard and without consideration of their individual circumstances even if bound by the order when made: see *Astellas Pharma*

© 2024 The Incorporated Council of Law Reporting for England and Wales

Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752 and *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

The lack of procedural fairness and natural justice intrinsic to orders against newcomers means that they should not even be imposed at the interim stage. If such injunctions were to be allowed on an interim basis, they should be limited to cases where there is a danger of real and imminent unlawful action, with a view to holding the ring and allowing claimants time to identify unknown but existing defendants.

Jude Bunting KC and *Marlena Valles* (instructed by *Liberty*) for Liberty, intervening.

It is not open to the court to significantly expand the contra mundum jurisdiction so as to permit courts in Gypsy, Roma and Traveller ("GRT") or protester cases to make persons unknown orders (interim or final) which bind newcomers. The Court of Appeal's conclusion in this case demonstrates the serious limitations of seeking to solve complex questions of social policy by deploying a tool of civil law. A court cannot lawfully make a final injunction against newcomers when the injunction is likely to interfere with the human rights of newcomers and there has not been any assessment of the individual facts of their case.

Unlike established orders such as freezing orders, *Anton Piller* orders, or possession orders which are targeted at specific people, final persons unknown injunctions frequently involve severe interference with the rights of a large category of people, often extending to vast swathes of land, entire boroughs or the entirety of the strategic road network. They can cover entirely peaceful, lawful protest.

In both GRT cases (where article 8 rights are involved) and in protest cases (where articles 10 and 11 are involved) an individual assessment of proportionality is required. In the former context, there is a clear line of Strasbourg authority emphasising the strictness of the proportionality test when imposing measures which affect the GRT community, such as injunctions to prevent encampments. A potential breach of planning authorisation, for example, will not be enough: see *Winterstein v France* (Application No 27013/07) (unreported) 17 October 2013. Consideration must be given to individualised matters such as the length of time of the encampment, the consequences of removal and the risk of becoming homeless. Similar considerations apply in protester cases: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 136 and *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 145, 155. This applies not just to Convention rights, but to fundamental common law rights such as the right to a home, to respect for one's ethnic identity and to freedom of expression.

The serious impact of persons unknown injunctions is graphically illustrated by the way in which some claimants have aggressively sought committal of persons who have breached persons unknown injunctions, even in circumstances where the breaches were "trivial and wholly technical" as in *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (QB). In that case a solicitor was prosecuted by a private company for attending a protest site in her professional capacity and was said to have breached the injunction by parking her car for an hour in an "exclusion zone". The committal proceedings lasted two days and were dismissed as "wholly frivolous", but

© 2024 The Incorporated Council of Law Reporting for England and Wales

necessitated the solicitor self-reporting to the Solicitors Regulation Authority and ceasing to work for her firm until authorised to return. A

General category measures involve complex issues of policy and are matters for the legislature, as in the measures considered in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505: see also *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 52. A court at first instance is singularly ill-equipped to make such a category assessment. B

Nigel Giffin KC and *Simon Birks* (instructed by *Walsall Metropolitan Borough Council Legal Services*) for the second respondent local authority.

The essential starting point for addressing these issues is section 37 of the Senior Courts Act 1981, because section 37 is the statutory power which is being exercised when the High Court grants an injunction in a case of this nature (unless it is acting under a specific statutory power). There are three important points to make about what Parliament has enacted in section 37(1). First, it is a statutory power which Parliament has elected to confer in terms of the greatest possible breadth. It is engaged whenever the court considers that the grant of an injunction would be "just and convenient". Secondly, section 37(1) expressly applies both to interlocutory (interim) orders, and to final orders, without drawing any distinction between them whatsoever. Thirdly, the section 37 power is expressly exercisable in "all" cases where the grant of an injunction would be just and convenient. The appellants are therefore wrong to suggest that it is only exercisable in "some" cases, not including cases of the present nature. C D

The courts are well aware that, as with any other broad discretionary power conferred upon it, the section 37 power must be exercised on a principled basis. Thus it is axiomatic, for example, that the grant of injunctive relief in a particular form must represent a proportionate response to the factual situation with which the court is faced; that the court must so far as possible ensure fairness to all those affected by the injunction; and that the injunction is consistent with Convention rights. E

It is wrong to fetter the exercise of the section 37 power in advance, whether by inflexible judge-made rules, or through the division of cases into rigid and potentially artificial categories to which distinct rules apply. Rather, a broad and flexible approach is called for: see *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389. If the grant of an injunction would not be a fair or proportionate measure on particular facts, then it will not be granted. But if an injunction in a particular form would be the appropriate response to the actual or threatened commission of a legal wrong—and especially if such an injunction represents the only effective means of protecting legal rights and preventing significant harm—then the court should be slow to conclude that it is powerless to grant such relief. F G

Newcomer injunctions are just one sub-species of the "precautionary" (quia timet) injunction which is solidly established in English law, and for whose award the courts have long since established a framework of governing principles. The claimants in these proceedings manifestly have an interest which merits protection. H

Cameron v Hussain [2019] 1 WLR 1471 should be seen as a case about the need for the court to guard against exposing people to detrimental legal consequences without their having had an opportunity to be heard or

© 2024 The Incorporated Council of Law Reporting for England and Wales

A otherwise to defend their interests. It did not lay down an absolute conceptual or jurisprudential bar to the grant of newcomer injunctions. Albeit stating that the general rule is that proceedings may not be brought against unnamed parties, Lord Sumption specifically endorsed the approach in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 of granting injunctions against anonymous but identifiable defendants provided B that the injunction is brought to the attention of the putative defendant (for example by posting copies of the documents in some prominent place near the land in question) and the defendant is afforded an opportunity to apply to set it aside

The practice endorsed in *Cameron* applies as much to final orders as it does to interim orders. There is no relevant conceptual difference between the two, and it would be paradoxical if the court's powers were less C extensive when making a final order after trial. Nicklin J in the present case attempted to resolve this paradox by saying that interim injunctions could only be granted against persons unknown for a short period during which they were expected to be identifiable, but there is no sign of any such approach in existing authority, for example *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 or *Ineos Upstream* D *Ltd v Persons Unknown* [2019] 4 WLR 100.

Newcomer injunctions are not intrinsically incompatible with natural justice. There are many situations in which courts make orders without having heard the persons who might be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order E promptly at a hearing inter partes: see *R (M) v Secretary of State for Constitutional Affairs and Lord Chancellor* [2004] 1 WLR 2298, para 39 and *A v British Broadcasting Corpn* [2015] AC 588, para 67.

Guidelines are already in place as to when newcomer injunctions should be granted and as to the safeguards which must be observed: see *Ineos* [2019] 4 WLR 100, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] F 4 WLR 29 and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were to be replaced by a universal prohibition. For examples of the court applying the correct approach to particular facts, see *Hillingdon London Borough Council v Persons Unknown* [2020] PTSR 2179, G paras 95–122, *Cambridge City Council v Traditional Cambridge Tours Ltd* [2018] LLR 458, para 81 and *Birmingham City Council v Nagmadin* [2023] EWHC 56 (KB), at [34]–[37], [49]–[54], [59]–[60]. [Reference was also made to *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant* [2021] 1 WLR 3834.]

The operation of newcomer injunctions is not intrinsically incompatible with Convention principles of proportionality. It is accepted that, depending H on the nature of the injunction in question, Convention rights of newcomers may well (though will not always) be engaged. But they have to be balanced against any competing common law or Convention rights of persons living in close proximity to the land in question who would otherwise be adversely affected by the prohibited acts. This is always a fact-sensitive exercise. The

© 2024 The Incorporated Council of Law Reporting for England and Wales

court is well-equipped to carry out the necessary proportionality test even where the newcomers are not before the court, just as it is when granting injunctions which carry *Spycatcher*-type consequences for third parties: see *Attorney General v Punch Ltd* [2003] 1 AC 1046, paras 108, 113–114, 116, 122–123.

Mark Anderson KC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for the first respondent local authority.

Precautionary injunctions against persons unknown which bind newcomers form a species of injunction against the world, as the Court of Appeal correctly held in the present case: see [2023] QB 295, paras 119–121. The fact that they are exceptional orders that are only granted in narrow circumstances as a last resort (see *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 99 et seq and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, paras 31–34) falsifies any "floodgates" argument.

Section 37 of the Senior Courts Act 1981 frames the question which the courts must ask: is it "just and convenient" to grant an injunction? The appellants' argument would require the Supreme Court to pre-judge this question by holding in advance that it will never be just and convenient to grant an injunction to prevent future wrongs by persons who cannot be identified when the injunction is granted.

This would not only deny a remedy to the victims of unlawful encampments: it would prevent courts from granting injunctions to prevent a wide range of other wrongdoing, such as urban exploring and car cruising. To remove from the armoury of the courts the remedy which the courts have devised over the last 20 years would be to incentivise such wrongful conduct.

Moreover, if wrongdoers know that they cannot be subject to an injunction which does not name them, they will be provided with a perverse incentive to preserve their anonymity.

There is no fundamental distinction between interim and final injunctions. Section 37 includes the power to fashion an injunction which has some of the characteristics of both and such injunctions should be permitted where they are just and convenient. *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 illustrates this.

The courts have laid down guidelines as to when such injunctions should be granted and as to the safeguards which must be observed. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were replaced by a universal prohibition. This would offend principles of justice, most notably the principle that where there is a wrong, the law should provide a remedy: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 25.

It makes no sense to say that such injunctions should only be granted to protect Convention rights. There is no authority that Convention rights must be in play before an injunction against the world can be issued. As the Court of Appeal correctly observed at paras 80 and 120, the fact that protester or encampment cases do not fall within the exceptional category with which *Venables v News Group Newspapers Ltd* [2001] Fam 430 was concerned does not mean that a species of injunction against the world is not also appropriate in protester or encampment cases.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A On the contrary, if it is right for the court to fashion an unconventional injunction, addressed to the whole world, in order to protect a claimant's Convention rights, it is unprincipled to conclude that it must never do so to protect non-Convention rights. The distinction between Convention rights and other rights is arbitrary and artificial.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* B and *Legal Services, Barking and Dagenham London Borough Council*) for the third to tenth respondent local authorities.

Each of the third to tenth respondent local authorities' injunctions in these proceedings were sought and granted pursuant to section 187B of the Town and Country Planning Act 1990. Travellers injunctions under section 187B should be seen as a statutory exception to the "general" rule set C out in *Cameron v Hussain* [2019] 1 WLR 1471, para 9 that proceedings may not be brought against unnamed parties.

By section 187B(1) a local authority may seek an injunction to restrain "any actual or apprehended breach of planning control": hence the local authority only has to "apprehend" a breach in order to apply for an injunction. By subsection (2) the court "may" grant "such injunction as it thinks appropriate", thus giving it the same wide jurisdiction as under D section 37 of the Senior Courts Act 1981. (The permissive "may" in subsection (2) applies not only to the *terms* of any injunction but also to the decision *whether* to grant an injunction: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 28.) And by subsection (3), rules of court (currently to be found in CPR PD 49E) may provide for injunctions to be issued against persons whose identity is unknown. In unauthorised E encampment cases the court may describe the persons targeted by reference to evidence of what might potentially happen on the land sought to be protected, in the same way that persons unknown in unauthorised development cases are often defined by reference to the evidence of what was happening on the land (for example the injunction directed at "persons unknown . . . causing or permitting hardcore to be deposited [and] caravans . . . stationed [on F specified land]" in *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88).

Section 187B does not confine itself to interim injunctions. Nor was the Court of Appeal in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 confining itself to interim injunctions, as may be seen from its reliance (at para 29) on *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460, which was a case about a final injunction (under G section 187B) which bound newcomers as well as the named defendant. [Reference was also made to *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 1–4 and *Redbridge London Borough Council v Stokes* [2018] EWHC 4076 (QB) at [10]–[23].]

Richard Kimblin KC and *Michael Fry* (instructed by *Treasury Solicitor*) for High Speed Two (HS2) Ltd and the Secretary of State, intervening.

H Although the appellants complain about the "chilling effect" of injunctions on the right to protest, consideration should also be given to the beneficial effect of injunctions to deter disruptive, unlawful conduct: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 83. It is no part of the Secretary of State's or HS2's case that lawful

© 2024 The Incorporated Council of Law Reporting for England and Wales

protest should be constrained. However, since 2021 there has been significant disruption to the strategic road network caused by the unlawful conduct of protesters seeking a change of government policy. Similarly, since 2017 there has been significant disruption to the construction of the HS2 rail link by the unlawful conduct of activists opposed to the project. Hence the need for the Secretary of State and HS2 to seek tailored "newcomer" injunctions (see, for example, *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB)) to prevent activities which are not only unlawful but often risk injury to contractors and/or members of the public.

Any person affected by such injunctions will have liberty to apply at any time to vary or discharge the injunction and anyone who successfully discharges an order would in principle be entitled to their costs. Further, claimants are normally required to give a cross-undertaking in damages that, should it later be determined that the interim injunction should not have been granted, they must compensate for any loss caused by the injunction.

Although the term "contra mundum" is frequently used—the ultimate in catch-all terms—it is necessary to consider what it actually means on the particular facts of each case. It is obtuse to consider the appropriateness of a contra mundum order on the basis that everybody is affected: it is not, for example, the whole world which wishes to climb gantries on the M25. Rather, the court should (and does as a matter of practice) take a view about who, in the particular circumstances, might be affected. It will be a cautious view. It is a matter of degree and a judgement which is not difficult to make.

Drabble KC replied.

The court took time for consideration.

29 November 2023. **LORD REED PSC, LORD BRIGGS JSC** and **LORD KITCHIN** (with whom **LORD HODGE DPSC** and **LORD LLOYD-JONES JSC** agreed) handed down the following judgment.

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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 B 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 C 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 D 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.

E **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.

F

(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. G 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 r 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 H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 r 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* [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] 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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* [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:

C (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 (i e rights which are protected under the Human Rights
D 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
E 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?

F *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:

G (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?

H (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

issued, in terms which mean that persons do not become bound by the injunction until they infringe it? A

(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. B

(1) The jurisdiction to grant injunctions C

16 As Lord Scott of Foscote commented in *Fourie v Le Roux* [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. D E

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* [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* [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. F G H

© 2024 The Incorporated Council of Law Reporting for England and Wales

A **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:

B

> "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."

C 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 Cia Naviera SA v International Bulkcarriers 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* [2017] Bus LR 1 (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] 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.

D E F G

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:

H

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [1993] AC 334 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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.
C 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
D 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
E have an injunction except against a party to the suit": *Iveson v Harris* (1802) 7 Ves 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
F 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
G 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 Ord 113.

28 However, it has long been established that in appropriate
H 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 Ord 15, r 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 r 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 r 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] Lexis Citation 198, 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* [1986] Lexis Citation 644, 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 r 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:*

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 (e g 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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

(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] 4 WLR 103 and [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 "Equity, 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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 r 40.9,
B 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 r 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
C 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* [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
D 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* [1948] 1 All ER 406, 407; *Attorney General v Newspaper Publishing plc* [1988] Ch 333,
E 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
F 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
G 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 *Owners of cargo lately laden on board the Siskina v Distos Cia Naviera SA*
H [1979] AC 210 ("*The Siskina*"), at p 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* [2023] AC 389, cited in para 17 above, where the

© 2024 The Incorporated Council of Law Reporting for England and Wales

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2007] Bus LR 44).

47 Another exception is the *Norwich Pharmacal* order, which is available where a third party gets mixed up in the wrongful acts of others, B 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 C intends to seek some form of lawful redress for which the information is needed: see *Ashworth Hospital Authority v MGN Ltd* [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* [1980] 1 WLR 1274 (para 20 above), an order was granted requiring an innocent third party to disclose documents and information which might assist the D 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 E 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* [2017] Bus LR 1 and [2018] 1 WLR 3259, cited at paras 17 and 20 above, the Court of Appeal upheld the grant of injunctions ordering internet service providers F ("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 G this court on the question of costs, Lord Sumption JSC (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.

H *(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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 Hussain* [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 r 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 r 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] 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 [2001] Fam 430—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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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] 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
B 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.

C **56** Conventional methods of service may be impractical where defendants cannot be identified. However, alternative methods of service can be permitted under CPR r 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 r 6.16.

D

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
E 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.

F

(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 [2003] 1 WLR 1633, cited at para 52 above, is one of two decisions of Sir Andrew
G 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
H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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

B **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
C 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
D 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* [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
E 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*
F *Cambridgeshire District Council v Persons Unknown* [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
G 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
H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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] 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] 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 MR'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 of Earlsferry JSC expressed the view that the injunction had been rightly granted, and cited the decisions of Sir Andrew Morritt V-C in *Bloomsbury* and *Hampshire Waste Services*, and the grant of the injunction in the *South Cambs* case, without disapproval (at paras 2–3).

© 2024 The Incorporated Council of Law Reporting for England and Wales

(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 JSC 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).

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 (e g *UK Oil and Gas Investments plc v Persons Unknown* [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

© 2024 The Incorporated Council of Law Reporting for England and Wales

were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [2019] 1 WLR 1471 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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
C 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.

D **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.

E

(7) Ineos

86 In *Ineos Upstream Ltd v Persons Unknown* [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
F 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.

G **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.

H **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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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] 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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] 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* [2020] 1 WLR 2802 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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 B 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 r 6.15) or to dispense with service (under CPR r 6.16); C 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 D 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 E 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 r 6.15 and there was never any proper basis for an order under CPR r 6.16 dispensing with service.

F **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 G (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 H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 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* [2001] Fam 430, 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* [2020] 1 WLR 2802. The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell* [2006] 1 WLR 658, 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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.
B 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* [2020] PTSR 1043 explained, the court needed to keep injunctions
C 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?

D 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.

E 109 The earliest in time is *Venables* [2001] Fam 430 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: i e not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* [2007] 1 WLR 320
F 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
G 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.

H 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] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2017] EMLR 11; *RXG v Ministry of Justice* [2020] QB 703;

© 2024 The Incorporated Council of Law Reporting for England and Wales

In re Persons formerly known as Winch [2021] EMLR 20 and [2021] EWHC 3284 (QB); [2022] ACD 22); 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] 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 [2003] 1 WLR 1633, the facts and reasoning in which were summarised in paras 58–59 above. The case was analysed by Lord Sumption in *Cameron* [2019] 1 WLR 1471 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."

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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.

C **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
D 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.
E 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
F be heard, is an essentially practical matter. As this court explained in *Abela v Baadarani* [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
G 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* [2016] 4 WLR 69, as illustrating circumstances in which
H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

email addresses used by the website owners, who were providers of a proxy registration service (i e 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* [2003] 1 WLR 1633 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 (e g 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* [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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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: e g 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* [2006] 1 WLR 658 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 and 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* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, 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 Pvt 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

identified in *Canada Goose* [2020] 1 WLR 2802. 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, "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" (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 "An interim injunction is temporary relief intended to hold the position until trial", and that "Once 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 (e g 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 (i e 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 (e g 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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.

B **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 C 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, D 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 E 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 F 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 G 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 H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 para 143(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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [2007] 1 WLR 320 (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* [1981] AC 557 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [2023] AC 389 (para 17 above) at paras 57–58 Lord Leggatt JSC (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* [2000] QB 775 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, 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 Pt 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* [2009] 1 WLR 2780 (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 Baroness Hale JSC 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* [1993] 3 NZLR 185 (para 130 above) at p 187, cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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.

C **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* [1976] Ch 55 to the much more sophisticated
D current form annexed to Practice Direction 25A supplementing CPR Pt 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 Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this
E 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
F even jurisdictional constraint) affecting all injunctions apparently laid down by Lord Diplock in *The Siskina* [1979] AC 210 (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
G in the *Broad Idea* case [2023] AC 389 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.

H **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'

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 [2003] 1 WLR 1633 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 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* [1982] QB 558 (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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.

B **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
C 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* [2023] AC 389 at paras 11–21. This is what Lord Leggatt JSC there called the enforcement principle. Search orders are designed to prevent dishonest defendants from destroying
D 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.

E **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
F based upon the application of "ordinary principles of equity": see *Cartier* [2018] 1 WLR 3259 (para 20 above) per Lord Sumption JSC 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
G 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* [2015] Bus LR 298, 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
H 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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 Ord 113, and is now to be found in CPR Pt 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, 428–429 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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
C 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.

D (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 (i e
E 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
F 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
G 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
H 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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, i e 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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A **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.

B **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 C 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, D 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 E 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 F 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 G 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 H 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)

© 2024 The Incorporated Council of Law Reporting for England and Wales

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

trespass: see e g 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] 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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 textbook 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 para 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* (1995) 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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* [2003] 2 AC 558, 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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.

B

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

C 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* [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

D 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;

E 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

F 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

G 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

H

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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
C 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
D 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
E 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
F 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
G 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 (62 & 63 Vict c 30).

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the
H Countryside Act 1949 (12, 13 & 14 Geo 6, c 97) (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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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
B 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
C 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
D 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
E 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.

F

(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)
G 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
H 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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

(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* [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 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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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

© 2024 The Incorporated Council of Law Reporting for England and Wales

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;

© 2024 The Incorporated Council of Law Reporting for England and Wales

A 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

B **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 C 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 D 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 E 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.

F (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.

G (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.

H (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.

© 2024 The Incorporated Council of Law Reporting for England and Wales

(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.

Appeal dismissed.

COLIN BERESFORD, Barrister

© 2024 The Incorporated Council of Law Reporting for England and Wales

Neutral Citation N umber: [2025] EWHC 2141 (KB) Double-click to add NC number

Case No: KB-2025-LDS-000078

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
IN THE LEEDS DISTRICT REGISTRY
SITTING IN THE SHEFFIELD DISTRICT REGISTRY

Sheffield Combined Court The Law Courts 50 West Bar Sheffield S3 8PH

Date: 13 August 2025

Before:

MRS JUSTICE STACEY DBE

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

Between:

(1) SHEFFIELD ENVIRONMENTAL SERVICES — Claimant
(2) VEOLIA ES SHEFFIELD LIMITED
(3) VEOLIA ES (UK) LIMITED

- and -

Defendant

PERSONS UNKNOWN WHO, IN CONNECTION WITH STRIKES ORGANISED BY UNITE THE UNION AND WITHOUT THE CLAIMANTS' CONSENT, ENTER OCCUPY OR REMAIN ON, OR PREVENT SLOW DOWN OR OTHERWISE INTEREFERE WITH THE ACCESS OR EGRESS OF ANY OTHER INDIVIDUAL OR VEHICLE TO OR FROM, THE FOLLOWING SITES:
(A) LUMLEY STREET DEPOT, LUMLEY STREET, SHEFFIELD, S4 7ZJ (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN 1)
(B)LUMLEY STREET WORKSHOP, LUMLEY STREET, SHEFFIELD, S4 7ZJ (AS SHOWN

FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN 2)
(C)THE ENERGY RECOVERY FACILITY AT BERNARD ROAD, SHEFFIELD, S4 7YX (AS SHOWN FOR IDENTIFICATION EDGED RED BUT EXCLUDING THE AREA SHADED PURPLE ON THE ATTACHED PLAN 3)
(D) 93 TINSLEY PARK ROAD, SHEFFIELD, S9 5DL (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN 4)
(E) CROWN WORKS, ROTHERHAM ROAD, BEIGHTON, SHEFFIELD, S20 1AH (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLAN 5

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

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

Mr Yaaser Vanderman and **Ms Jagoda Klimowicz** (instructed by **Simmons & Simmons LLP**) for the **Claimant**

No appearance or representation on behalf of the **Defendants**

Hearing dates: 13 June 2025

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

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 13th August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE STACEY DBE Approved Judgment

Mrs Justice Stacey DBE:

1. The Claimants seek an injunction against persons described as Persons Unknown who, in connection with strikes organised by UNITE the Union and without the Claimants' consent, enter occupy or remain on, or prevent, slow down or otherwise interfere with the access or egress of any other individual or vehicle to or from five sites specified in the Sheffield area ("the Land"). The Claimants are part of a corporate group whose parent entity is Veolia Environnement S.A, ("Veolia"). Through a contract with the First Claimant, Veolia provides waste management services in Sheffield under a contract with Sheffield City Council ("the Sheffield City Council Contract"). The sites which comprise the Land are business premises used to deliver the Sheffield City Council Contract in which the First, Second or Third Claimant are the leaseholder or freeholder.

2. The order sought is that the Defendants must not, without the consent of the Claimants enter, occupy or remain upon the Land and that the Defendants must not, without the consent of the Claimants prevent, slow down or otherwise interfere with the access or egress of any other individual or vehicle to or from the Land. They also seek an order for Defendants to be both prohibited from doing the prohibited acts either by themselves, or in any other way, or by means of another person acting on their behalf or on their instructions.

3. They seek the injunction for a period of three years with a mandatory annual renewal hearing.

The evidence before the Court

4. Before the hearing, the court had before it two witness statements and exhibits (including CCTV footage) from Elizabeth Johnson, Interim Contract Manager at Veolia based at Lumley Street Depot with responsibility for Veolia's delivery of waste collection services in Sheffield dated 4 and 10 June 2025 respectively and one witness statement with exhibits from Donald Macphail, Chief Operating Officer for waste treatment division of Veolia nationally dated 4 June 2025 and correspondence from Veolia's lawyers with both the Court and UNITE the Union ("Unite")'s solicitors, Thompsons LLP.

5. Over the short adjournment during the hearing on 13 June 2025, further evidence was served consisting of two witness statements of Robert Allen, solicitor at Simmons and Simmons LLP, the Claimants' solicitors, which were accepted in evidence by the Court.

6. There was no appearance by or on behalf of the defendants nor evidence served.

7. The background to the application is a dispute between two trade unions. The GMB has an exclusive recognition agreement for collective bargaining with Veolia in respect of, amongst other things, pay, hours and holidays for workers employed by Veolia in the Sheffield City Council Contract. Unite would also like to be recognised for the purposes of collective bargaining by Veolia. GMB does not agree to Unite having a recognition

agreement with Veolia and Veolia respects GMB's wishes. The GMB conducts collective bargaining with Veolia on behalf of all workers in the

bargaining unit within the collective agreement, regardless of which, if any union, the workers belong to.

8. Veolia employs approximately 200 staff on the Sheffield City Council Contract to drive its 60 refuse collection vehicles ("RCV") which are based at their Lumley Street Depot (the name of the leasehold property on the south of Lumley Street, Sheffield, S4 7ZJ registered at the Land Registry SYK574817 of which the First Claimant is the leaseholder (referred to as Site A in the claim form)). The RCVs are scheduled to leave at 6.45am every weekday morning from the Lumley Street Depot to collect the household waste and recycling from the residents of Sheffield City and take it to the appropriate waste or recycling centre, before returning with empty RCVs to the Lumley Street Depot. Nearby to the Lumley Street Depot on the north side of Lumley Street is Veolia's workshop for its RCVs on property (with the same address and postcode) which is leased to the First Claimant by Sheffield City Council registered at the Land Registry under leasehold title SYK437808 (referred to as site B in the claim form).

9. Veolia has three waste disposal sites relevant to the Sheffield City Council Contract. Veolia occupies a site at Bernard Road, Sheffield (listed as site C in the claim form, registered at the Land Registry under leasehold title number SYK437806) under a lease from Sheffield City Council to the First Claimant, where the domestic waste is taken for incineration, called an ERF (Energy Recovery Facility), referred to as the Bernard Road Site. Mixed dry recycling is taken to a waste disposal facility in Tinsley

Park Road which is registered at the Land Registry under two leasehold title numbers, SYK511006 (Tinsley Park Road A) and SYK611970 (Tinsley Park Road B) which Veolia through the Third Claimant occupies under leases from the respective freeholders (site D in the claim form). Paper and card recycling is taken to the third waste disposal facility at Crown Works, Rotherham Road, Beighton, S20 1AH, registered at the Land Registry under freehold title SYK133481, referred to as the Beighton Site. Veolia through the Third Claimant is the freehold owner of this site (referred to as site E in the claim form). During each round an RCV may need to visit the waste disposal facility to off load the waste or recycling a number of times depending on the volume of waste.

10. The operatives and drivers of the RCVs collect the rubbish from the bins on their preassigned route and work on a "Task and Finish" basis which means that they can leave work when they have either finished their round and taken all the waste and recycling to the appropriate site and returned their RCV back to the Lumley Street Depot or at the end of their shift at 3pm, whichever is the earlier. So the quicker they can complete their round, the quicker they can go home, which can sometimes be around noon, but more usually is 1-1.30pm. Crews collect around 70,000 bins per day when they collect the 100% target collection rate. The term for an unemptied or uncollected bin is a dropped bin.

11. Until recently, security at the Lumley Street Depot and Workshop and the Bernard Road Site consisted of CCTV cameras and pedestrian gates.

12. Veolia became aware of Unite's interest in having collective bargaining arrangements with them in respect of the Sheffield City Council Contract in early 2024 and sought to involve the statutory body, Advisory, Conciliation and Arbitration Service ("Acas") in the spring of 2024 to try to settle the dispute between the two unions. However, on

10 May 2024 Acas withdrew assistance since this was an inter-union dispute between two TUC affiliated trade unions and it is their long-standing policy not to become involved in such matters which are for trade unions to seek to resolve between themselves.

13. On 10 June 2024 Unite served a notice on Veolia that it intended to hold a ballot for industrial action under the statutory procedures in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) for their members employed as driver and loader on the Sheffield City Council Contract. Their members were duly balloted to see if they wished to take part in strike action in the trade dispute described as Veolia's refusal to recognise Unite members to have their terms negotiated by their union and the strike action was expected to take place within the period from mid July 2024 to late December 2024. The ballot closed on 2 July 2024. Of the 78 individuals entitled to vote in the ballot, 56 cast a vote, 52 voted in favour of strike action and 4 against. Industrial action in the form of strike action commenced at the end of July 2024 and has continued since then, with following further periodic renewed ballots held every 12 weeks. Initially the strike action was discontinuous for one week in July 2024, but since then has been continuous strike action.

14. The most recent notification of ballot results on 6 February 2025 stated that the number of individuals entitled to vote in the ballot was 59, the number of votes cast was 47 and of those who chose to vote, 45 voted in favour of continued strike action, one voted against and there was one spoilt ballot paper. On 29 May 2025 Unite informed Veolia of its intention to hold a further ballot on 5 June 2025 to canvas the views of its members to take strike action expected to take place from early July to mid December 2025. The balloting constituency has now reduced to 56.

15. As this is an inter-union dispute between two TUC affiliated unions, GMB referred the dispute to the TUC in December 2024 under the Bridlington Principles established to help resolve disputes of this kind. The dispute has not yet been resolved and it is not known what steps the TUC has taken or is intending to take.

16. Unite has also tried to gain recognition with Veolia for its members on the Sheffield City Council Contract through the statutory trade union recognition machinery under TULR(C)A 1992 to the Central Arbitration Committee ("CAC"). Unite made an

application to Veolia under the statutory procedure in February 2025 which was refused by Veolia on grounds of its of existing recognition agreement with GMB. Following Veolia's refusal Unite applied to the CAC as it was entitled to do under the procedure. The CAC refused to accept the application on 3 April 2025, declaring it inadmissible because of the existing recognition agreement in force between Veolia and the GMB which is an independent trade union, covering, as a minimum, pay, hours and holidays. Other than judicial review there is no right of appeal from a CAC decision.

17. From July 2024 Unite has held a picket line outside the Lumley Street Depot which has been conducted in accordance with the BEIS Code of Practice on picketing. The picket line is attended by Unite officials and some of Veolia's staff who are on strike. They play music and seek to persuade their fellow workers to support their cause and are not disrupting operations and acting in accordance with the law.

18. The strikes themselves have had some minimal impact on bin collections within Sheffield City Council. Full details had not been provided in the evidence, but in the course of the last week in March 2024 the number of dropped bins there was a total of 1,727 dropped bins varying from 1 to 996 each day, out of the 350,000 normal weekly collection rate across the city.

19. Following the CAC ruling that Unite's application was inadmissible, the General Secretary of Unite, Sharon Graham, came to Birmingham to address a rally outside the Lumley Street Depot on 11 April 2025. From the CCTV footage approximately 50 people seem to be in attendance. Ms Graham gave a rallying speech reassuring her members that they had Unite's full support, that although Unite had 101 current industrial disputes going on across the country she would do everything in her power to make sure that they would win the dispute and make Veolia recognise Unite. She said that they must now escalate the dispute and she would discuss with the team later what that escalation would look like.

20. At some point in time – it is not clear from the evidence whether this commenced before or after the Sharon Graham visit that day – in addition to the official picket line, a number of individuals associated with Unite wearing hi-vis jackets arrived at Lumley Road Depot from 6am and hand out leaflets, fire air horns, flares and red smoke, play loud music and hand out leaflets to Veolia staff as they are entering the site on their way to work.

21. This application is not a complaint about the picketing by Unite officials and their members employed by Veolia and Veolia does not allege that Unite has breached the Code of Practice on Picketing on the official picket line which it is conducting in accordance with ss.220 and 220A TULR(C)A 1992. It is about the protesters who are not currently thought by Veolia to be part of Unite who are acting apart from the Unite picket line. It is relevant to bear in

mind that picketing outside s.220 is not per se tortious and unlawful. The point of s.220 is to confer immunity against certain tort actions such as inducing breach of contract and conspiracy where the act is done in the contemplation or furtherance of a trade dispute and the union complies with the various balloting provisions under what has come to be known as the "golden formula" set out in s. 219 TULR(C)A. Veolia does not seek for the official picket, or the activities of the individuals handing out leaflets described in paragraph 20 to be subject to the proposed injunction which do not interfere with the operation of the site.

The direct action

22. What Veolia objects to is a third group consisting mostly of masked individuals engaged in what they have termed as termed as direct action which commenced on 15 April 2025 when sometime before 6.45am approximately nine masked individuals began walking slowly in continuous circles in front of the gate at Lumley Street Depot as soon as the gates to the depot opened, blocking the RCVs and preventing them from leaving the depot. From a comparison of the CCTV footage and the boundaries marked on the Land Registry plans it would appear that the slow walkers were mostly on the public highway but part of the circle involved walking on Veolia's land by a matter of a few inches, possibly a foot. The procession continued until 9.15am and had the effect of preventing any RCVs from leaving until 9.15am. As a result, 6,435

bins were dropped that day and it took three days until 17 April for the bin men to catch up and complete the collections scheduled for 15 April.

23. In response to the events on 15 April Veolia implemented a contingency plan. The RCVs were moved from Lumley Street to other of Veolia's sites and Veolia took on a new site on a temporary basis at Beeley Wood specifically to mitigate the effect of the disruption at the Lumley Street Depot. However, the contingency plan was not successful in mitigating the effect of the disruption at the Lumley Street Depot as when the 10 RCVs tried to leave the Beeley Wood site on 17 April 2025, masked individuals prevented them from doing so at both the back and front entrances to the Beeley Wood Site and only one RCV could leave the site. It had been an expensive and time consuming exercise (both logistically and in manpower) to set up the contingency site plan at Beeley Wood.

24. Direct action continued on the dates and times as set out below:

	Date	Location	Start Time	End Time	Impact

1.	15 April 2025	Lumley Street Depot	6.45 am	9.15 am	• 2 hours and 30 mins delay • 6,435 dropped bins • Collection completed on approx. Thursday 17 April 2025.
2.	17 April 2025	Beeley Wood Site	6.20 am	8.45 am	• 2 hours delay • 8,381 dropped bins • Collection completed on approx. Saturday 19 April 2025.
3.	24 April 2025	Lumley Street Depot	6.45 am	8.15 am	• 1 hour and 30 mins delay • 2,901 dropped bins Collection completed on approx. Saturday 26 April 2025.
4.	25 April 2025	Lumley Street Depot	6.45 am	8.30 am	• 1 hour and 45 mins delay • 7,174 dropped bins • Collection completed on approx. Saturday 26 April 2025.
		Workshop	6.45 am	8.30 am	
5.	1 May 2025	Lumley Street Depot	6.45 am	8.05 am	• 1 hour and 25 mins delay • 5,040 dropped bins • Collection completed on approx. Saturday 3 May 2025.
		Workshop	6.45 am	8.10 am	
6.	7 May 2025	Lumley Street Depot	6.30 am	8 am	• Approx. 1 hour and 25 mins delay • 1,790 dropped bins • Collection completed on approx. Thursday 8 May 2025.
		Workshop	6.30 am	8.10 am	
7.	8 May	Lumley Street Depot	6.30 am	8.10 am	• Approx. 1 hour and 25 mins delay 785 dropped

	2025	Workshop	6.30 am	8.10 am	• bins Collection • completed on approx. Friday 9 May 2025.
8.	13 May 2025	Lumley Street Depot	6.15 am	8 am	• Approx. 1 hour and 15 mins delay • 1,861 dropped bins • Collection completed on approx. Thursday 15 May 2025.
		Workshop Worthing Road Exit	6.15 am	8 am	
9.	15 May 2025	Lumley Street Depot	6 am	8 am	• Approx. 1 hour and 15 mins delay • 2,996 dropped bins • Collection completed on approx. Saturday 17 May 2025.
		Workshop	6 am	8 am	
10.	20 May 2025	Lumley Street Depot	6.15 am	8 am	• Approx. 1 hour and 20 mins delay • 1,811 dropped bins • Collection completed on approx. Friday 23 May 2025.
		Workshop	6.15 am	8.05 am	
11.	21 May 2025	Lumley Street Depot	6.15 am	8 am	• Approx. 1 hour and 25 mins delay • 6,075 dropped bins • Collection completed on approx. Saturday 24 May 2025.
		Workshop	6.15 am	8.10 am	
12.	22 May 2025	Lumley Street Depot	6.10 am	8 am	• Approx. 1 hour and 25 mins delay • 2,174 dropped bins • Collection completed on approx. Saturday 24 May 2025.
		Workshop	6.15 am	8.10 am	
13.	28 May 2025	Lumley Street Depot	6.45 am	8 am	• Approx. 1 hour and 15 mins delay •
		Workshop	6.45 am	8 am	

		Tinsley Park Road	10.25 am	11.30 am	• 3,866 dropped bins Collection completed on approx. Friday 30 May 2025
14.	29 May 2025	Lumley Street Depot	6.45 am	8 am	• Approx. 1 hour and 15 mins delay • 4,233 dropped bins • Collection completed on approx. Saturday 31 March 2025.
		Workshop	6.45 am	8 am	
		Tinsley Park Road	10.25 am	11.30 am	
15.	30 May 2025	Lumley Street Depot	6.45 am	8 am	• Approx. 1 hour and 15 mins delay • 10,377 dropped bins • Collection completed on approx. Saturday 31 March 2025.
		Workshop	6.45 am	8 am	
		Tinsley Park Road	10.25 am	11.35 am	
16.	3 June 2025	Lumley Street Depot	6.45 am	7.50 am	• Approx. 65 minutes delay 1,344 dropped bins • Collection completed on • approx. Wednesday 4 June 2025.
		Workshop	6.45 am	7.50 am	
		Tinsley Park Road	10.25 am	11.30 am	
17.	5 June 2025	Lumley Street Depot	6.45 am	7.50 am	• Approx. 65 minutes delay 4,985 dropped bins • Collection completed on • approx. Saturday 7 June 2025.
		Workshop	6.45 am	7.50 am	
		Tinsley Park Road	10.15 am	11.30 am	

25. Since the compiling of the table above and after Veolia took the steps set out below to give notice to the defendants of its application, the direct action has been repeated on three dates at two sites. On 11 June 2025 approximately 20 masked individuals walked in a circle in front of the Lumley Street Depot Entrance, and also at the Workshop Lumley Street Entrance and the Workshop Worthing Road Exit. They arrived at 6.10 am and left at 7.50 am. The direct action caused a 65 minute delay to the RCVs leaving Lumley Street. Masked individuals also arrived at 10.20 am and walked in a circle in front of vehicles attempting to leave the Tinsley Park Road Exit. They left at 11.15 am.

26. On 12 June 2025 approximately 20 masked individuals walked in front of the Lumley Street Depot Entrance, and the Workshop Lumley Street Entrance and the Workshop Worthing

Road Exit. They arrived at 6.10 am and left at 7.50am. The direct action caused a 65 minute delay to the RCVs leaving Lumley Street. On the same day masked individuals walked in a circle in front of vehicles attempting to leave the Tinsley Park Road Exit. They arrived at 10.15 am and left at 11.26 am.

27. On 13 June 2025 RCVs were delayed by 10 minutes from leaving Lumley Street Depot by two groups of protesters walking slowly in circles in front of the gates between 6.45am and 7.50am.

Steps taken by Veolia and chronology from 15 April 2025 to date

28. Veolia have taken a number of other steps in addition to the contingency plan implemented immediately after the 15 April direct action. On 18 April 2025 Veolia erected a Health and Safety Notice at the Lumley Street Depot which stated that it acknowledged the right to lawful protest and wished to ensure the safety of all individuals involved. It stated that they were aware that there had been recent incidents that had resulted in heightened risk to health and safety at this site. It was requested that all should adhere to the following safety guidelines:

> "1. Avoid Moving Vehicles: Please maintain a safe distance from all moving vehicles (taking particular note of areas with large amounts of vehicle traffic such as access used by lorries and other vehicles).
>
> 2. Keep clear of Heavy Machinery: For your safety, do not approach or obstruct heavy machinery. Such machinery can pose significant risk to health and safety if not given adequate space to operate.
>
> 3. Consider your Surroundings: Always remain vigilant and aware of your surroundings to prevent any unintended incidents or risks to your health and safety or the health and safety of others. Your cooperation is greatly appreciated in ensuring a safe environment for everyone. Please ensure you take all reasonable safety precautions into account at all times."

29. Temporary Heras fencing was installed along the boundary between Veolia's land and the public highway on 18 April 2025 which was ineffective to prevent the action taking place. On 1 May 2025 Veolia painted a white line on the tarmac outside the Lumley Street Depot entrance demarcating the boundary between their property and the public highway which

has been effective in reducing trespass onto their land, which is now occasional and minimal. But the circle of slow walkers outside the Lumley Street Depot has simply moved marginally further away from the gate to the site so as not to trespass on Veolia's land as a result and it has not reduced the effectiveness of the direct action in stopping the RCVs from leaving the site.

30. Veolia have asked for police assistance on occasion. When the police have arrived they have allowed the protest activity to continue and consider it to be a civil matter. Veolia has ensured that supervisors are present on each occasion of direct action and additional security guards have been hired.

Harm

31. The harm identified in Ms Johnson's statement is of the increased number of dropped bins since the direct action commenced set out above. The dropped bin data from the direct action on 11 and 12 June 2025 was not available in time for the hearing on 13 April.2025. There have been some complaints from Sheffield residents who have not had their bins emptied on the scheduled days and Veolia is responding to social media complaints informing residents to continue to leave their bins out for collection and the bins have then been emptied within two or three days of the normal collection day.

32. The Tinsley Park site is used by third parties and the road outside is narrow. There is concern, but there have been no problems yet specifically identified, of third party vehicles being trapped inside and vehicles, which include HGVs being unable to enter the site at the times when the entrance is obstructed.

33. The waste collection staff are impacted by their rounds taking longer and sometimes not being complete within their contracted hours, resulting in overtime. Supervisors and managers are finding it stressful and time consuming dealing with the disruption. Morale is being affected and there are concerns of increasing acrimony from the defendants towards the waste disposal staff who are not on strike, especially the GMB rep at the Lumley Street Depot and towards the managers.

34. The additional cost to Veolia is principally in overtime, but it has also incurred additional security costs since 15 April 2025 of around £2,500 per month. The Heras fencing was rented and then purchased costing £7,000 and the licence for the contingency site at Beeley Wood cost £8,000. The total costs have been in excess of £60,000.

Proceedings and notification of proceedings

35. Veolia issued proceedings and this application on 4 June 2025 in the Business and Property Courts of the Leeds District Registry with a certificate of urgency. Arrangements were made for the application to be heard in Sheffield since it is appropriate for the case to be heard as locally as possible to the subject matter of the application.

36. Veolia's solicitors sought to bring the proceedings and this application to the attention of the defendants by three means: by uploading a copy of the claim to their website: https://www.sheffield.veolia.co.uk/ ("the Sheffield Veolia website"); by sending an email to the following email addresses: sharon.graham@unitetheunion.org; onay.kasab@unitetheunion.org; stephen.pinder@unitetheunion.org; clare.keogh@unitetheunion.org; shane.sweeting@unitetheunion.org, stating that a claim has been brought and an application made, and that the documents could be found at the Sheffield Veolia website; and, thirdly by affixing a notice at each Site stating that a claim had been brought and an application made, and that the documents could be found at the Sheffield Veolia website.

37. In her witness statement Ms Johnson confirmed that her colleagues, Steve Taylor and Terry Clements had affixed a notice on each of the sites that were subject to the claim and injunction application, which stated that the Claim had been brought, and the injunction application had been made. Hearing notices were put up online on the 6th of June, which was confirmed by Ian Burrows. Physical Hearing Notices were also put by Mr Clements at (1) The Tinsley Park Road Entrance (2) The Tinsley Park Road Exit, (3) At the Beighton Site by 17:11 on 6 June 2025 on the same date. On the 7 June 2025 the Hearing Notice was put up by another colleague of Elizabeth Johnson's, Shaun Teasdale, Operations Supervisor at Veolia, at the Lumley Street Depot, the Workshop Lumley Street Entrance, the Workshop Worthing Road Exit. Andy Gleason, a contract supervisor at Veolia also placed a Hearing Notice by the ERF exit on the 9th of June.

38. The notification came to the attention of Unite's solicitors, Thompsons, who have corresponded with Veolia about the terms of their proposed order to ensure that the lawful picketing and protesting by Unite is protected and Veolia have agreed to their suggested amendments. Unite is not a party to the proceedings. Thompsons have confirmed how they would like to be notified of the outcome and that they have received instructions from their client, Unite, that further communications be conducted solicitor to solicitor without the need to email the Unite email addresses that were used to draw their attention to the proceedings initially.

39. On 13 June 2025, the day of the hearing of this application, leaflets were handed out at the ERF in Bernard Road, in the early morning to inform passers by of the fact of the High Court injunction happening that day.

40. If an order were to be granted, the Claimants proposed to notify Persons Unknown of any Order granted by similar methods: by uploading a copy of the Order to the Sheffield Veolia website: by sending an email to the same email addresses as had been sent the notice of the proceedings stating that the Order had been made, and that it could be found at the Sheffield Veolia website; by affixing an A4 copy of the Order at each site; and by affixing warning notices of A2 size at each site.

The law and conclusions

41. Helpful guidance has been provided by the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers and ors* [2024] UKSC 47. The law, for now at least, is reasonably well settled. A court, may, in principle grant an injunction against persons unknown or "newcomers", whether on an interim or final basis, whether in an unauthorised traveller encampment or protest case, as a novel exercise of the court's equitable discretionary power, but such an injunction will only ever likely to be justified if the applicant:

    i) has demonstrated a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other available remedies (including statutory remedies),

    ii) built into the application and the injunction sought procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it,

    iii) complied in full with the disclosure duty which attached to the making of a without notice application and

    iv) showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made.

42. If justified, any injunction made by the court had to (i) spell out clearly and in everyday terms the full extent of the acts it was prohibiting, corresponding as closely as possible to the actual or threatened unlawful conduct, (ii) extend no further than the minimum necessary to achieve the purpose for which it was granted, (iii) be subject to strict temporal and territorial limits, (iv) be actively publicised by the applicant so as to draw it to the attention of all actual

and potential respondents and (v) include generous liberty to any person affected by its terms to apply to vary or discharge the

whole or any part of the injunction. The drafting of the order requires, precision, clarity, focus and rigour.

Service of the application and proceedings

43. Prior to any consideration of the substantive requirements it is first necessary to consider if Veolia has taken all reasonable steps to draw the application and the proceedings to the defendants given the inherent difficulties with service given that the defendants' identities are unknown. I am satisfied that Veolia does not know the identity of the protesters involved in the direct action obstructing their RCVs from leaving the Lumley Street Depot and the Tinsley Park Road Site and is unable to identify them as they are wearing masks and are otherwise unknown to them. I am further satisfied that the steps taken outlined above have been taken and constitutes all reasonable steps necessary to draw it to the defendants' attention n accordance with the approach in *Wolverhampton City Council* which were sufficient to bring the fact of the proceedings and this application to the attention of the defendants. If there was any question, it was dispelled by the witness statements served on the day of the hearing exhibiting a notice being handed out at the Lumley Street Depot stated to be "from sympathetic trade unionists" on the morning of 13 June 2025 before the hearing that refers to the hearing and includes details from the evidence served in support of the application: there can therefore be no doubt that the hearing came to the defendants' attention.

44. I am satisfied there has been sufficient compliance with CPR 55.6 and sufficient to amount to an informal approach justified under the alternative service provisions of CPR 16.5 to amount to compliance.

45. I turn next to the substantive requirements, and the tests set out in a number of cases including *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) at [58] and applying the law and the tests set out in *Valero* and *Wolverhampton City Council*, to the facts in this case I find as follows.

46. With the additional statements served I am satisfied that there has been full and frank disclosure by Veolia.

Causes of action

47. Trespass to land is the commission of an intentional act which results in the immediate and direct entry onto land in the possession of another without justification. If land is subject to

a public right of way or similar, a person who unlawfully uses the land for any purpose other than that of exercising the right to which it is subject is a trespasser. However, the public have a right of reasonable use of the highway which may include protest. A protest involving obstructing the highway may be lawful by reason of Articles 10 and 11 ECHR.

48. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a claimant's land or his use or enjoyment of that land. In the case of an easement, such as a right of way, there must be a substantial interference with the enjoyment of it. The unlawful interference with a claimant's right of access to its land via the public highway, where a claimant's land adjoins the public highway, can be a private nuisance.

49. Veolia has provided evidence of its legal rights, entitlement and interest in the land and the sites concerned.

50. Although trespass appears to be minimal since the painting of the lines the walking circle has largely taken place on the highway, from the videos and all evidence served in support of the application there is seemingly very cogent evidence of the commission of the tort of private nuisance by the walking circle causing a substantial and unreasonable interference with Veolia's use of it's land by the blocking of the entrance and exit. There is sufficient to show more than a realistic prospect of success. There is a high risk and imminent threat that the defendants will commit the pleaded torts of nuisance and trespass with the same results as have already occurred since 15 April 2025.

51. As to potential defences, Articles 10 and 11 ECHR are relevant. I am satisfied that the defendants know of the hearing of the application but have chosen not to attend, be represented or ask for more time to respond. Even so, given the short notice given, it is necessary to consider if there may be arguments available to them to defend the application had they, or someone else on their behalf, been here to make them, either as to the law or the cogency of the claimant's evidence. I have scrutinized the claimant's evidence with a particularly keen eye, given the absence of representation on the part of the defendants. It appears thorough and cogent. So too the legal arguments. I find that any potential arguments would be weak and would not succeed. It would not assist with trespass (see *R v Hallam* [2025] 4 WLR 33 [34] and *HS2 Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at [81] and [196]. As for private nuisance, the evidence supports a conclusion that the infringement is both substantial and unreasonably. A difficulty for the defendants is that Veolia has been measured and proportionate in its response to the direct action, seeking first to mitigate the more damaging effects of the direct action by, for example, demarcating their private property from the highway by the lines painted on the road and the erection of the Heras temporary fencing. The contingency plan at the Beeley Wood site was another non-

confrontational way of seeking to ensure continuity of bin collection service, but which was not successful since the direct action continued at that site. So too was the attempt to involve Acas. Veolia has not rushed into this litigation without first seeking to find better ways to deal with the dispute.

52. Veolia appears also to have been very mindful of the additional care required where well established trade union picketing rights are involved and the interplay between the law that has developed under the common law in protest injunctions and the rights under TULR(C)A 1992. The Veolia managers have been scrupulous in disaggregating the harm from the lawful trade union and the direct action protests where a prima facie case of private nuisance has been made out. It is only the third of the three categories of protesters that are the target of this injunction. Having seen the video footage I would agree that the second category appears as good natured and well within the ambit of lawful protest and persuasion. The third category of mainly masked individuals blocking the entrance and exit to the Lumley Street Depot is a different matter however.

53. Subject to some necessary amendments to the wording discussed with counsel during the course of the hearing, the injunction sought is proportionate as its aims are sufficiently important to justify any interference; there is a rational connection between the means chosen and the aims; and, there is a fair balance between the various rights at

issue given. There has been no disruption to the Unite pickets who, in exercise of their Art 10 and 11 rights, continue to seek to persuade their colleagues. But by blocking the entrance the defendants are not seeking to persuade the bin men to support the cause of their striking Unite colleagues, but to compel them not to work by preventing them from leaving the Lumley Street Depot and other sites where the circular walking protest is preventing the RCVs from leaving or entering. It is causing harm to Veolia's delivery of the Sheffield City Council contract and considerable disruption to its working employees working longer than would be normal under the "task and finish" arrangement and then do overtime. The cost to Veolia has been over £60,000 and the direct action protest has gone on, albeit intermittently for eight weeks now.

54. Veolia has explored and exhausted all less restrictive or intrusive and less confrontational measures with no avail. The police safety notice and other measures outlined above have had no effect and I accept that this application is a last resort.

55. Damages would not be an adequate remedy given the nature of the damage, distress, disruption and inconvenience to the residents of Sheffield City Council are not easily quantifiable and nor is the impact of the sense of frustration and disruption to the employees of Veolia.

56. The defendants have been described as precisely as possible by reference to their prior unlawful conduct which I find sufficient to identify them given that Veolia does not and

cannot easily find out their names and they wear masks. The precision in the areas in which they have been taking direct action is sufficiently clear and precise to prevent the risk of bystanders being caught within the terms of the proposed injunction.

57. As for the prohibition in the draft order. It required considerable revision and as first drafted by Mr Vanderman was too vague and imprecise, but he accurately judged the way the wind was blowing and quickly revised the draft to meet the Court's concerns. Minor quibbles were with archaic languages such as "access and egress" when better everyday terms were available. Of concern was the terms such as "slow down" which was too wide and too vague given the lawful activities strikers and their supporters entitled to do to seek to persuade their colleagues.

58. Of particular concern was the length of the proposed injunction which went way beyond the period of the strike action notified in accordance with TULR(C)A 1992 and was therefore unjustified. If there are further strikes notified after the balloting requirements have been adhered to, further applications may be made. I note however that the strike appears to have waning support and the number of Unite members, ballot turnout and support for industrial action has dwindled a little over the last year. This case is an example of the importance of understanding the fact sensitive nature of the dispute, the full context of the inter-union trade union dispute by reference to the wider rights and responsibilities under TUR(C)A 1992 in order to ensure the wording a proposed injunction is tailored to the facts.

59. But all these concerns were met by the redrafting proposals that Mr Vanderman and Ms Klimowicz quickly proposed in substitution.

In summary, Veolia has demonstrated a compelling need for the protection of its civil rights which is not adequately met by any other available remedies; procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it have been built into the order; Veolia has complied in full with the disclosure duty in its evidence served with the application and showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made.

60. I therefore grant the injunction in the terms discussed during the course of the hearing recorded on the order which covers the period of the industrial action at Veolia's Sheffield City Council contract and provides sufficient protection and opportunity for the defendants to apply to have the order varied or discharged and satisfies the matters set out in paragraph 42 above.