IN THE HIGH COURT OF JUSTICE **Claim No PT-2002-000303**
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
PROPERTY TRUSTS AND PROBATE LIST

BETWEEN:

UNITED KINGDOM OIL PIPELINES LIMITED

First Claimant

WEST LONDON PIPELINE AND STORAGE LIMITED

Second Claimant

-and-

PERSONS UNKNOWN

Defendants

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Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

[9th November 1998]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1 The Convention Rights

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) [Article 1 of the Thirteenth Protocol],

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The [Secretary of State] may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 22(3).

Appointment

Appointment: 2 October 2000: see SI 2000/1851, art 2.

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

NOTES

Initial Commencement

To be appointed

To be appointed: see s 22(3).

Appointment

Appointment: 2 October 2000: see SI 2000/1851, art 2.

See Further

See further: the Direct Payments to Farmers (Legislative Continuity) Act 2020, s 2(8).

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.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

NOTES

Initial Commencement

Neutral Citation Number: [2009] EWHC 339 (Ch)

Case No: 7MA91089

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2009

Before:

THE HONOURABLE MR. JUSTICE LEWISON

- -

Between:

EASYAIR LIMITED (Trading As OPENAIR)	**Claimant**
- and -	
OPAL TELECOM LIMITED	**Defendant**

- -
- -

Miss Lesley Anderson QC (instructed by **Cobbetts LLP**) for the **Claimant.**
Mr. Michael J. Booth QC (instructed by **Mason Hayes**) for the **Defendant.**

Hearing dates: 4, 5 February 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR. JUSTICE LEWISON

Mr Justice Lewison:

1. Until the end of April 2004 the Claimant, Easyair Ltd (which traded as "Openair"), operated a business providing SIMs to its business customers under a service provider agreement with O2, the mobile phone network. Openair's customers, in turn, used those SIMs to connect to the O2 network. However, they were not the end users of mobile phones. They connected to the O2 network as GSM gateways. GSM gateways allow a call made from a fixed line telephone to a mobile telephone to be recognized as a mobile to mobile call. The latter may be cheaper for the caller, particularly if he is recognised as being on the same mobile network as the recipient of the call. GSM gateways are often used in conjunction with software which determines whether a particular call will or will not be cheaper if treated as a mobile to mobile call and automatically selects the cheaper alternative.

2. At that time a distinction was drawn by mobile network operators (MNOs) and the regulator (OFCOM) between "private" GSM gateways (used solely by a single end user for its own calls) and "public" GSM gateways (through which intermediaries enabled end users to make calls from fixed lines at potentially lower cost). Subsequently, a three-fold categorisation was adopted, distinguishing self-use gateways, commercial single-user gateways ("COSUGs") and commercial multi-user gateways ("COMUGs"). Openair's pleaded case asserts that its customers inserted the SIMs supplied by Openair into COMUG GSM gateways.

3. At that time there was some doubt about whether an MNO could lawfully permit public gateways to connect to its network, without being in breach of its own licence conditions. O2 published its own policy about gateways. There were at least two versions of the policy. One version, issued in December 2003, stated:

> "The term 'GSM Gateway' is used to describe equipment which enables the routing of voice calls from fixed line equipment to a mobile phone, yet it gives the impression it's a mobile to mobile call.
>
> This type of equipment is being deployed widely across mobile networks without the prior consent of the network operators and is resulting in quality impairments, network congestion and safety/security concerns.
>
> New legislation has been introduced which has allowed us to review our policy on the use of GSM Gateways.
>
> <u>Permitted use</u>
>
> The use of GSM Gateways by private users is permitted providing that the system is operated by or on behalf of the customer for the sole use of that customer
>
> A private GSM Gateway registration process is being introduced in January 2004 which will allow us to strictly control the use of these devices on our network.

Non permitted use

The use of public GSM gateways for the conveyance of third party traffic is not permitted on the O2 UK network and where found we will withdraw the service."

4. Openair ran its business under a service provider agreement with O2. It is not in evidence. It is thus not clear whether, under the terms of its agreement, Openair was bound to comply with O2's statement of policy which does not in terms purport to have contractual force. I will assume that it was not. It is also alleged on behalf of Openair that it had the consent of O2 to facilitate the connection of public (including COMUG) gateways to the O2 network. I will assume this allegation to be true. It is not, however, alleged that any consent given by O2 was irrevocable.

5. As part of its business Openair had a lot of information about its customers. This information was potentially valuable. However, in order to exploit the information itself, Openair need to be able to supply its own customers with O2 airtime. To do this, it needed a contractual relationship with O2. However, for reasons that do not matter O2 refused to renew Openair's service provider agreement, which was due to expire at the end of April 2004.

6. Openair thus looked for another way of making money. It entered into negotiations with Opal Telecom Ltd ("Opal"), which is a subsidiary of The Carphone Warehouse plc. Opal had its own business providing airtime on the O2 network. It is alleged on behalf of Openair that Opal also had consent from O2 to facilitate the connection of public gateways to the O2 network. I will assume this to be true.

7. On 30 April 2004 Openair and Opal entered into two agreements:

   i) A sale and purchase agreement ("the SPA") and

   ii) A dealer agreement.

8. There was another collateral agreement, to which I will return, and another agreement (referred to as the services agreement) which plays no part in this case.

9. Under the terms of the SPA Openair sold to Opal its rights under existing subscriber contracts, and also its subscriber base. Under the terms of the dealer agreement Opal appointed Openair as its non-exclusive agent for attracting subscribers, and agreed to pay commission on business introduced, as well as on continuing contracts that had passed under the SPA.

10. In June 2004 O2 issued a revised version of its policy about GSM gateways. That said:

"1. Prohibition on the use of public GSM Gateways

Public GSM Gateways are not permitted to operate using the O2 network. O2 does not agree to provide service to operators of public GSM Gateway operators. Where they are found to operate, O2 will take steps to withdraw service, on the basis

> that their continued operation effectively puts O2 in breach of its Conditions of Entitlement
>
> 2. Private GSM Gateways should be permitted
>
> The operation of private GSM Gateways does not appear to be inconsistent with legal or regulatory requirements. On that basis, there is no general prohibition. However, Gateway operators should ensure to O2's reasonable satisfaction that they adhere to OFCOM's guidance on the provision of correct CLI information."

11. O2's policy on GSM gateways was enforced by requiring subscribers to sign a form confirming that the SIM cards issued to them would be used exclusively for telecommunications traffic generated by them during the normal course of business and that they accepted the policy.

12. In September 2004 O2 disconnected some 7000 SIMs from its network. Those SIMS had been issued to customers who had formed part of the subscriber base that Openair had sold to Opal. In the run up to the disconnection there had been correspondence between Opal and O2 in which Opal tried to dissuade O2 from disconnecting the SIMs. Opal has said that the reason why the SIMs were disconnected was that they were COMUGs and illegal (in the sense that, as the June 2004 policy statement said, allowing COMUGs to operate would have put O2 in breach of its own licence, which was a standard form licence for operating a mobile telephone network). Openair dispute this. They hint at some sort of hidden agenda, but say that without disclosure they cannot make good or even formulate any real allegation. On the evidence it is clear that the reason why O2 disconnected the Sims was that they were COMUGs and that O2 considered that they were illegal in the sense just mentioned. Openair argued that O2 were wrong to say that COMUGs were illegal, and relied on a decision of the Competition Appeal Tribunal (CAT) in *Floe Telecom Ltd v Office of Communications* [2006] CAT 17. That case concerned (among other things) the interpretation of a licence granted to Vodafone. The CAT decided that, on the true construction of the Vodafone licence, the licence conditions permitted Vodafone to provide a telecommunications service, including COMUGs, provided that the COMUGs complied with the technical requirements of European legislation. At the hearing before me it was known that judgment on an appeal from the CAT was due to be handed down by the Court of Appeal in the following week; and so I deferred judgment until the result of the appeal was known. Both parties made additional written submissions following the hand down of judgment on the appeal. The Court of Appeal reversed the CAT on the question of construction (*Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47). They held:

    i) The Vodafone licence did not, on its true construction, permit the use of GSM gateways, let alone COMUGs;

    ii) The construction of the licence was not affected by European legislation. As Mummery LJ put it (§ 102):

> "It is not, however, correct to construe that directive and then to hold that the licence must be construed to be compatible with that

> directive. It is wrong because the licence is neither domestic law made to implement the EC directive, nor is it any other kind of "law" in the generally understood sense of general rules laid down either in the form of legislation or of case law."

13. In the light of that decision, the legal foundation of Openair's claim that O2 was not entitled to disconnect the SIMs has completely disintegrated. Ms Anderson QC, appearing for Openair, argued that there might still be an issue of European law. However, it is not suggested that O2's standard from of licence differed in any material respect from Vodafone's; and the Court of Appeal has decided that European law is not relevant to interpreting the scope of the licence. There is, in consequence, no live issue of European law.

14. Openair have now brought an action against Opal claiming damages. Although the Particulars of Claim do not identify the nature of the damage which Openair claim to have suffered, it is clear from the evidence that what they claim is the profit that they would have earned under the dealer agreement if the disconnections had not taken place. But the curious thing is that the claim is not based on any alleged breach of the dealer agreement. It is based on a breach of the SPA; and on breach of an alleged fiduciary duty. Openair allege that Opal had an obligation to fight the disconnection; if necessary by taking legal proceedings against O2; and that Opal also had an obligation to procure the registration of its customers under O2's registration scheme for private gateways. Opal say that the claim is not maintainable on the true construction of the SPA or that it has no reasonable prospect of success. They therefore apply to strike out the claim; alternatively for summary judgment. Openair have responded by formulating draft amendments to the Particulars of Claim. In considering Opal's applications I have worked on the basis of the draft amended Particulars of Claim.

15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

    i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

    ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

    iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

    iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

    v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary

judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

16. On the factual assumptions that I have made in Openair's favour, I do not consider that there is any reason to postpone a decision on the construction of the SPA or on the question whether, having regard to the contractual relationship between the parties, the alleged fiduciary duty arose.

17. I turn, then, to the contractual provisions. The SPA recites that Openair "wishes to sell" and Opal "wishes to buy the O2 Subscribers of the Business on the terms of this Agreement." Clause 1.1 contains a number of definitions among which is "Subscriber Contracts" defined as:

> "the contracts between [Openair] and Subscribers for the supply of the Services complete and up-to-date [copies of which] have been supplied to [Opal] at Completion."

18. Clause 2.1 of the SPA provided:

> "At Completion [Openair] shall sell (which expression shall where appropriate include an assignment or novation) and

> [Opal] shall buy the following assets free from all Encumbrances
>
> **Asset**
>
> All rights under an in connection with the benefit of the Subscriber Contracts
>
> The Subscriber Database"

19. Clause 3.3 required Opal to "assume all obligations under the Subscriber Contracts". Clause 4 specified the purchase price as £1 together with the obligation to enter into the Dealer Agreement. Clause 5 provided for completion to take place immediately after execution of the SPA. Clause 6 required Openair to make available on completion an assignment of its rights under the Subscriber Contracts, and the consent of O2 to the transfer together with details of the Subscriber Base and copies of the Subscriber Contracts. Clause 6 dealt with third party consents required under Subscriber Contracts, and said that if a necessary third party consent could not be obtained within two months of a request for consent, then the Subscriber Contract in question would be deemed to be an Excluded Asset.

20. Clause 7.1 is the contractual provision on which the claim for damages is based. It provides:

> "Subject to the following provisions of this clause 7, [Opal] shall perform all obligations required to be performed after [1 May 2004] under those Subscriber Contracts of which complete and up-to-date copies have been provided to [Opal] at Completion."

21. Clause 7.2 carved out certain obligations from the scope of clause 7.1; and clause 7.3 provided that Openair would discharge them and indemnify Opal against liability for them. Clause 11 contained a number of warranties given by Openair; and contained indemnities by Openair against liabilities incurred by Opal arising from or in connection with any breach of the warranties. The warranties included a warranty by Openair that:

> "O2 has given written approval to all subscriber identity module Gateways (whether public or private) used by or in respect of the Subscribers."

22. Clause 12 contained an acknowledgment by Openair that Opal was "buying the Assets in accordance with the terms of this Agreement and that, therefore, [Opal] is entitled to protect the Assets". It also contained restrictive covenants precluding Openair from engaging in mobile phone businesses for a period of five years, or from soliciting subscribers during that period.

23. Clause 25 contained an entire agreement clause which said that the entire agreement was contained in "this Agreement and the documents referred to in it".

24. As foreshadowed by the SPA the dealer agreement was executed on the same day. Openair was called "the Dealer". Its recitals referred to the SPA. Clause 1 contained a number of definitions, including:

"Customer"	means a New Customer and/or an Openair Customer
"New Customer"	means a person who enters into an Opal Contract after the date of this Agreement
"OPAL Contract"	means a written agreement between OPAL and a customer for the provision of Services where the execution of the agreement has been procured by the Dealer
"OPAL Terms"	means the terms and conditions on which OPAL offers to provide Services to customers which terms and conditions OPAL shall determine in its absolute discretion
"Openair Customers"	means those customers of the Dealer for mobile telecommunications services transferred to Opal pursuant to the SPA
"Openair Customer Contracts"	means the contracts entered into by [Openair] with the Openair Customers in relation to the provision of mobile telecommunications services and sold to Opal pursuant to the Opal SPA

25. Clause 2.2 required Opal to supply Openair with the Opal Terms (i.e. its terms of business). Clause 3.2 required Openair to provide Customers and prospective Customers with Opal's tariffs and on behalf of Opal to:

> "ensure that the Customer signs the then current OPAL Terms as provided by OPAL to [Openair] under Clause 2.2…."

26. Clause 5.3 said that Opal had no obligation to accept orders for services placed by customers and clause 5.4 said that Opal was entitled at its sole discretion "from time to time to extend the range of Services, or discontinue any of the same".

27. Clause 6.1 obliged Opal to pay Openair commission, calculated in accordance with a formula:

> "in respect of all Openair Customer Contracts that are in force during the Life of this Agreement and all OPAL Contracts entered into during the Life of this Agreement…"

28. Clause 6.2 provided for commission to be payable monthly.

29. Clause 7.1 provided:

> "If [Openair] disputes the amount of any payment (a "Disputed Payment") by OPAL under this Agreement, [Openair] shall as soon as reasonably practicable issue a notice in writing identifying the Disputed Payment and detailing the nature of and reason for the dispute, accompanied by supporting documentation. In the event that [Openair] fails to issue any such notice within 60 days of the receipt of the Disputed Payment, [Openair] agrees that the payment shall be deemed to have been agreed and that, notwithstanding the issue of any subsequent notice, it shall be deemed to have waived any right or remedy which it might otherwise have enjoyed in respect of any underpayment."

30. Clause 10.3 provided that:

> "Neither Party shall be liable to the other in contract, tort (including negligence and breach of statutory duty) or otherwise howsoever for:
>
> (a) any loss of profit, business, goodwill, contract revenue, anticipated savings or business; or
>
> (b) … or
>
> (c) any special indirect consequential loss or damage of any nature whatsoever, whatever the cause thereof arising out of or in connection with this Agreement."

31. It is this clause that explains why Openair brings its claim under the SPA rather than under the dealer agreement. Clause 20.1 said that nothing in the agreement should be deemed to constitute a partnership between Openair and Opal. Clause 23 contained an entire agreement clause.

32. Although each of the SPA and the dealer agreement contained an entire agreement clause, they were plainly part of one overall package. Indeed apart from the payment of £1, entry into the dealer agreement was the whole purchase price under the SPA. Moreover the entire agreement clause in the SPA said in terms that the entire agreement was contained not only in the SPA but also in the documents referred to in it, which included the dealer agreement. Clearly then, they must be construed together.

33. The important features of the overall deal were in my judgment as follows:

    i) The SPA was just that. It was a sale and purchase. In other words the assets ceased to belong to Openair and became the property of Opal. Openair had no continuing proprietary interest in the sold assets.

    ii) Following the SPA, the only way in which Openair could make money from the assets it had sold was under the dealer agreement.

    iii) Commission was payable under the dealer agreement on two kinds of contract:

a) Contracts which had been sold by Openair to Opal and which continued in force and

b) Contracts between subscribers and Opal which Openair had procured.

iv) Since commission was payable at the same rate for both kinds of contract it was a matter of financial indifference to Openair whether customers in its subscriber base signed up on new Opal terms or remained on Openair contracts;

v) Indeed the dealer agreement positively required Openair to sign up "Customers" (a defined expression which includes Openair's subscribers) on Opal terms;

vi) The parties expressly agreed that neither of them would be liable for loss of profit or revenue under the dealer agreement.

34. It is against that background that clause 7.1 of the SPA must be construed. The essential question is: is it in substance no more than an indemnity; or does it impose a positive obligation on Opal breach of which sounds in substantial damages equivalent to the loss of profit that Openair would have made under the dealer agreement (but which it had agreed would not be recoverable under that agreement)?

35. Valiantly though Ms Anderson argued the latter, I have no doubt that it was only an indemnity. She pointed, naturally enough, to parts of the SPA in which the parties had used the language of indemnity, and contrasted that with clause 7.1 which uses the language of positive obligation. Clause 7.1, she said, imposed a positive obligation on Opal to preserve the subscribers' connection to the O2 network, if necessary by taking proceedings against O2 in the event of disconnection. But that, to my mind, is a detailed linguistic and semantic analysis which makes no business sense.

36. First, clause 7.1 applied only to "Subscriber Contracts" as defined. If a former customer of Openair signed up to a new contract on Opal Terms, its new contract would not qualify as a Subscriber Contract. Since Openair undertook an obligation to bring this about, it would be inconsistent to read clause 7.1 as obliging Opal to preserve Openair contracts. Second, it was common ground that the mechanism for inserting Opal into the shoes of Openair vis-à-vis subscribers was by way of novation, since that is the only way in which contractual burdens can be shifted from one person to another. It was also common ground that a novation took effect as a new contract. So a novated contract would not fall within clause 7.1 if construed as Openair wish to construe it. Third, since Openair was entitled to the same commission whether the subscriber was bound by Openair's terms or by Opal's there was no commercial reason for wishing to preserve the body of Subscriber Contracts, as defined. Fourth, it cannot be supposed that having agreed that neither party would be liable for damages for loss of profit under the dealer agreement, Opal would have undertaken an obligation under clause 7.1 of the SPA which led to the same result.

37. Indemnity clauses cast in the language of positive obligation have a long history in sales and purchases. *In re Poole and Clarke's Contract* [1904] 2 Ch. 173, *Harris v. Boots Cash Chemists (Southern) Ltd* [1904] 2 Ch. 376 and *Reckitt v. Cody* [1920] 2 Ch. 452 are examples. The reason why the court construes such clauses as indemnities

is clear. Once a seller has sold the property in question he has no continuing interest in it, and his only commercial interest is to protect himself against being liable for residual obligations. In my judgment that is the position in the present case. Accordingly in my judgment clause 7.1 of the SPA gives no support to the claim now made against Opal. I am satisfied that the claim for breach of contract has no real prospect of success.

38. The allegation of fiduciary duty is pleaded in paragraph 16 of the draft amended Particulars of Claim as follows:

> "Further or alternatively [Opal] owed [Openair] a fiduciary duty to act (in relation to the Subscriber Base) in the interests of [Openair]. It is the case of [Openair] that such a duty arises because of the circumstances pleaded in paragraphs 4-7 above [which set out certain provisions of the SPA and the dealer agreement] and the fact that [Opal] was in control of the Subscriber Contracts but [Openair] was dependent on the maintenance of the same for the purpose of generating revenues under the [dealer agreement]."

39. It is, in my judgment, plain that the allegation that Openair was dependent on the maintenance of the Subscriber Contracts to generate revenues under the dealer agreement is wrong. As I have said, Openair was entitled to revenues under the dealer agreement not only in respect of Subscriber Contracts but also in relation to Opal Contracts (i.e. customers who signed up on Opal's terms, where Openair had procured the contracts). Thus the underpinning of the allegation of fiduciary duty is hopeless. The pleaded terms of the SPA and the dealer agreement do not support the allegation either. As developed in oral submission, the allegation of fiduciary duty is dependent on establishing that, in some way, Openair had a continuing proprietary interest in the Subscriber Contracts. But once it had sold its interest to Opal, it ceased to have any such interest, and to describe Opal's purchase as being in some sense a joint venture is, in my judgment, unrealistic. The fact is that the parties chose to regulate their relationships in two contracts: one dealing with the sale and purchase and the other dealing with Openair's appointment as agent. Although it is, of course, possible for fiduciary duties to exist alongside contractual relationships, any fiduciary duties must be moulded by the contractual setting. The pleading asserts that Opal owed a duty to act "in the interests of [Openair]". It does not even admit of the possibility of Opal acting in the *joint* interests of itself and Openair, still less in its own interest. In my judgment this allegation is incompatible with Opal's purchase of the assets transferred by the SPA and inconsistent with the recognition in clause 12 of the SPA that Opal was "entitled" (but not obliged) to protect them. It is also inconsistent with Openair's obligation under the dealer agreement to sign up "Customers" on Opal terms. I am satisfied that the allegations of breach of fiduciary duty have no real prospect of success.

40. Thus far I have not based any part of my reasoning on the particular breach of contract and fiduciary duty alleged. But in the light of the decision of the Court of Appeal in the *Floe* case it is plain that any legal action brought against O2 would have failed. It cannot be either a breach of fiduciary duty or (in the absence of the clearest possible words) a breach of contract not to bring proceedings which are bound to fail. This provides another reason for dismissing the main claim. The claim that there was a breach of contract or duty by failing to register users leads nowhere. It is common

ground that all the relevant users were COMUGs. Thus registering those users would have resulted in their disconnection, because the particulars required by O2 would have revealed them as COMUGs. This claim is hopeless.

41. The two remaining pleaded claims relate to the payment of commission. It is now necessary to revert to the collateral agreement that I mentioned earlier. Under the collateral agreement Openair deposited £200,000 with Opal "as a security" for a period of six months. Opal was entitled to have recourse to this deposit in the event that:

> "for each Month (as defined by the Dealer Agreement) falling in a period of six months following [30 April 2004] … (B + D + E) exceeds A where
> B, D and E have the meanings set out in Schedule 2 to the Dealer Agreement; and
> A means the aggregate sums actually paid by customers in respect of the figure represented by "A" in the formula set out in Schedule 2 to the Dealer Agreement.
> Such excess being hereinafter referred to as "the Monthly Excess"."

42. Fleshing this out a little:

i) A is Opal's actual monthly receipt from Customers (less tax, discounts etc);

ii) B is what Opal pays the mobile phone network;

iii) D is 3.25 per cent of A; and

iv) E is £3 per connected SIM of each customer included in the calculation of A.

43. By contrast, in Schedule 2 to the dealer agreement A was not Opal's actual monthly receipt, but its monthly invoice total. At the end of the six month period Opal was required to repay the deposit (or what was left of it) to Openair, although it had 60 days from the end of the period in which to pay.

44. Opal has said that it is entitled to deduct from the deposit the sum of £69,000- odd as representing a debt that it cannot recover from Itelso Ltd, a company which is a subscriber. In the draft amended Particulars of Claim Openair says:

i) It does not accept that Opal cannot recover the debt from Itelso;

ii) The true position is that Itelso has disputed the accuracy of Opal's invoices, and has also claimed a set off;

iii) In any event Opal has not shown that the Itelso debt arose during the period covered by the deposit; and

iv) The formula in the collateral agreement does not entitle Openair simply to deduct a bad debt; but only entitles it to calculate the figure produced by application of the formula, which Opal has not done.

45. Based on these allegations Openair claims an account and inquiry to what amount of the deposit is due to Openair under the collateral agreement; and what (if any) Monthly Excess should be deducted from the deposit.

46. So far as the Itelso debt is concerned, Opal's primary response is that it is too late for Openair to raise this question. Opal says that the position is covered by clause 7.1 of the dealer agreement. That requires Openair to give notice in writing identifying a Disputed Payment, detailing the nature of and reasons for the dispute, accompanied by any supporting documentation. Since Openair did not do that within the 60 days permitted by that clause, it is now deemed to have agreed the payment and to have waived its rights and remedies.

47. I do not consider that clause 7.1 governs the position. Opal's complaint is not that commission has been underpaid under the dealer agreement. Its complaint is that the deposit has not been returned. That is a complaint that arises under the terms of the collateral agreement. Clause 7.1 of the dealer agreement was not incorporated into the collateral agreement. Thus clause 7.1 does not apply. In addition, the deposit was expressly described as a "security". Opal's interest in it was therefore only a security interest. The existence of a security interest is not incompatible with Openair's retention of a beneficial interest in the fund (analogous to an equity of redemption). Where a secure creditor (e.g. a mortgagee) has had possession of the property comprising the security, he is usually under an equitable obligation to account for his dealings with the security. It is, to put it no higher, well arguable that a similar principle applies to a security deposit. And if property is transferred by way of security, contractual time bars (e.g. the standard mortgage covenant to repay the debt in 30 days) have never been enforceable in equity. The equitable right to redeem is based on that principle. I am also influenced by the fact that neither the dealer agreement nor the collateral agreement imposes any obligation on Opal to explain how it has arrived at its calculation. If therefore, it does not explain its calculation how is Openair to formulate any dispute? This is not the usual case of an agent-principal relationship where the agent has the means of knowledge but the principal does not. On the contrary, in this case it is the principal who has the knowledge (how much it has invoiced, how much it has received; what discounts it has allowed; how much it has paid the network operator etc) and the agent who has not. Whether, in these exceptional circumstances, an agent is entitled to an account from his principal was not explored at the hearing. I am not convinced that the answer is obvious.

48. I am not, therefore, persuaded that the claim for an account of dealings with the security deposit has no real prospect of success. Nor am I persuaded that on the special facts of this case the claim for an account of what sums are due by way of commission under the dealer agreement has no reasonable prospect of success.

49. In the result, therefore, I will give judgment for Opal on the claim for damages (in paragraph 1 of the prayer for relief) and allow the claims for payment of the deposit (paragraph 2); an account and inquiry into what amount of the deposit is due (paragraph 3); an account and inquiry into what amount is due by way of commission (paragraph 4) and the ancillary relief sought in paragraphs (5) to (7) to go to trial. I will also allow the amendments contained in paragraphs 20, 21, 22 and 23 of the draft amended Particulars of Claim; but otherwise refuse the amendments.

Neutral Citation Number: [2014] EWHC 2016 (TCC)

Case No: HT-12-360

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2014

Before:

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between:

SAINSBURY'S SUPERMARKETS LIMITED	**Claimant**
- and -	
(1) CONDEK HOLDINGS LIMITED (formerly CONDEK LIMITED) **(2) CONDEK MANUFACTURING LIMITED (In Administration)** **(3) ANDRES PASHOUROS** **(4) CAPITA SYMONDS LIMITED**	**Defendants**

- -
- -

Alexander Hickey (instructed by **SNR Denton UK LLP**) for the **Claimant**
Helena White (instructed by **SGH Martineau LLP**) for the **Third Defendant**
Claire Packman (instructed by **Beale and Company Solicitors LLP**) for the **Fourth Defendant**

Hearing dates: 11 and 12 June 2014

- -

Judgment

Mr Justice Stuart-Smith:

1. The Claimant ["Sainsbury's"] has brought this action against four Defendants arising out of the design and construction of a car park for its supermarket at North Cheam. The construction of the car park took place in 2006 with practical completion being in about November of that year. There was then a maintenance period which appears to have stretched to 2008. Sainsbury's alleges that the car park is defective as a consequence of inadequate design and construction and that it needs to be demolished. It accepts that the defects were apparent by 2008 and that, for the purposes of the law of negligence, its claim is a claim for pure economic loss.

2. The Third and Fourth Defendants ["Mr Pashouros" and "CSL"] now bring applications pursuant to CPR 3.4(2)(a) to strike out the claims against them and pursuant to CPR 24 for summary judgment.

3. At the end of the hearing I indicated that I would find for the Defendants and would give reasons later. This judgment sets out my reasons.

Factual Background

4. Sainsbury's needs no introduction.

5. Mr Pashouros is the inventor of a modular car park system known as the Condek system. The system's modular design enables it to be largely prefabricated and then speedily erected on concrete foundations. Speed of construction is appealing to Sainsbury's because the time taken to construct car parks leads to significant business disruption and loss of revenue when first building or later renovating a store. Although the precise extent of his design involvement would be in dispute at a trial, Mr Pashouros accepts for the purposes of his present application that he was the designer of the North Cheam car park. It is also clear that he conducted his business generally through limited companies called, successively, Rail Direct Ltd and Condek Holdings Ltd ["Condek"], the First Defendant in this action. The Second Defendant is another company associated with Mr Pashouros but was not involved with the North Cheam car park. Mr Pashouros also had a company called Condes Associates Ltd about which little is known.

6. CSL is a limited company (number 2018542) and is a member of the Capita group of companies. It has been joined by Sainsbury's because of its connection with a company called Nickalls Roche McMahon Limited (company number 03235963) ["NRM"]. Its connection arises by virtue of a series of transactions which took place in 2008. On 3 April 2008 another company in the Capita group, Capita Business Services Ltd (company number 02299747) ["CBSL"] acquired the entire issued share capital of NRM. On 20 June 2008, CSL acquired the business and assets of NRM. Then on 21 August 2008 CSL acquired the entire issued share capital of NRM from CBSL. The effective date for the agreements made on 20 June and 21 August 2008 was 4 April 2008. The net effect of these transactions is that, with effect from 4 April 2008, CSL owned the business and assets of, and the entire issued share capital in, NRM. It is important to note at the outset that during the hearing Sainsbury's accepted that it has no claim against CSL in respect of anything done or omitted to be done either by NRM or by CSL on or after 4 April 2008. It is therefore central to Sainsbury's claim that any liability on the part of CSL to Sainsbury's must be a liability that was originally a liability of NRM for which CSL is now responsible.

7. NRM is, so far as the Court is aware, still in existence. It has not been joined by Sainsbury's. Although there has been a suggestion that an application to join NRM may be made, no application has been made to date.

8. The reason why Mr Pashouros and CSL have been joined is that Condek is in liquidation and, so far as is known, does not have any insurance cover because of late notification of the claim. Condek went into Creditor's Voluntary Liquidation on 29 April 2013. The report for the Meeting of Creditors revealed a company with minimal assets and a total deficiency of £7,822 without making any material provision for any liability to Sainsbury's. Sainsbury's therefore has good reason to believe that any judgment against Condek will be worthless and wishes to pin liability upon one or more Defendants with financial substance.

The Procedural History

9. Sainsbury's engaged in pre-action correspondence with Condek, sending a Pre-action Protocol letter on 1 August 2012, which alleged that Condek had designed and constructed the car park pursuant to a contract with Sainsbury's. It says that Mr Pashouros was unhelpful in identifying which of his companies was directly involved with the North Cheam project and that he asserted (wrongly) that the contracting party was not Condek but the Second Defendant. It is not suggested that he said anything to indicate that he had ever acted relevantly in his personal capacity.

10. Proceedings were issued against the four Defendants on 30 October 2012, without any steps having been taken to comply with the Pre-action Protocol for Engineering and Construction Disputes in relation to Mr Pashouros in his personal capacity or in relation to CSL. On 16 April 2013 the action was stayed until 31 July 2013 to allow time to the parties to comply with the Pre-Action Protocol. Sainsbury's then sent Pre-action Protocol letters to Mr Pashouros in his personal capacity and to CSL.

11. In reply, Solicitors acting for Mr Pashouros denied that he had at any stage acted in his personal capacity, asserting that any representation or other dealings he had had with Sainsbury's had been as a representative of Condek or the Second Defendant. CSL's solicitors denied the existence of a duty of care and reserved their position on limitation.

12. In addition to serving Defences on 11 November 2013, Mr Pashouros and CSL issued Part 18 Requests designed to elicit clarity about the nature of the cases being brought against them. Sainsbury's provided limited responses to those requests, frequently asserting that its case was sufficiently pleaded or that the request was a request for evidence. It also served Replies to the Defences of Mr Pashouros and CSL. Mr Pashouros was dissatisfied with the pleading of the case against him and therefore issued a further request for information which remained unanswered on the date of the hearing: the Court was told that Sainsbury's thought it better to set out its case in its skeleton argument.

The Principles to be Applied

13. The principles to be applied on an application to strike out under CPR 3.4(2) and for summary judgment under CPR 24.2 are well known and are not controversial, though their application may be. The standard of proof is high. The phrase "no *real* prospect of succeeding" in CPR 24.2 is explained as meaning that the respondent must have a case which is better than merely arguable. Evidence is admissible on an application for summary judgment, with the overall burden of proof resting on the applicant. If the applicant adduces credible evidence in support of the application, the respondent comes under an evidential burden of proving some real prospect of success or some other reason for having a trial. In deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at trial, namely the balance of probabilities, to the evidence presented: and on an application for summary judgment the court should consider the evidence that could reasonably be expected to be available at trial. However, the Court is not required simply to take all evidence at face value or to accept without question any assertion that may be made: the question is whether the respondent's case carries some degree of conviction.

14. The test to be applied on a strikeout reflects the fact that the question is whether the statement of case itself discloses no reasonable grounds for bringing a claim. So, if the pleaded facts do not disclose any legally recognisable claim against a Defendant, it is liable to be struck out. The Court will, however, consider whether a party should be given an opportunity to amend a legally deficient Statement of Case if it appears that the deficiency can be remedied without injustice to another party. In assessing whether or not permission to amend should be given the features that are likely to be taken into account include (a) whether the party has brought forward a coherent amendment to cure the deficiency, (b) whether there is reason to think that the coherent amendment is supportable, (c) whether the effect of the amendment will or may be to deprive a defendant of an accrued limitation defence and (d) whether the amending party has had reasonable opportunity previously to formulate a legally admissible claim.

15. For the purposes of these applications I adopt the statement of principle provided by Peter Gibson LJ in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266. There the Defendant had brought applications under both CPR 3.4 and CPR 24. Although the application under CPR 24 permitted the court to take account of evidence, none was relied upon and the applications proceeded on the basis that the facts alleged in the Claimant's pleadings were assumed to be true. At [22]-[23], Peter Gibson LJ said:

> "The correct approach is not in doubt: the court must be <u>certain</u> that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see <u>Barrett v Enfield London Borough Council</u> [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson). Lord Browne-Wilkinson went on to add:
>
> "[I]n an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

16. I therefore approach these applications on the basis that I must be certain that the claims against Mr Pashouros and CSL are bound to fail applying the principles that I have summarised at [13]-[14] above.

Mr Pashouros' Application

The Applicable Principles

17. The principles to be applied when considering whether a person who has acted on behalf of another has assumed responsibility so that he is held to be subject to a personal duty of care to prevent economic loss were reviewed by Lord Steyn in *Williams v Natural Life Ltd* [1998] 1 WLR 830 at 834-838, a passage which requires to be read and borne in mind in full. Principles emerging from that review that are of particular relevance to the present case are:

    i) The assumption of responsibility principle enunciated in *Hedley Byrne v Heller* [1964] is not limited to statements but may apply to any assumption of responsibility for the provision of services: 834E-F;

    ii) Once a case is identified as falling within the extended *Hedley Byrne* principle, it is not necessary to embark on any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss: 834G;

    iii) Reliance by the other party is necessary, otherwise causation cannot be shown. But proof of reliance is not of itself sufficient: the test is whether the Claimant could *reasonably* rely on an assumption of personal responsibility by the individual who performed the services on behalf of his company: 834G-H, 837B;

    iv) Where a trader incorporates a company to which he transfers his business, personal liability under the extended *Hedley Byrne* principle will not be established in the absence of a special relationship between the erstwhile trader who is alleged to be a tortfeasor in his personal capacity and the Claimant. In other words, there must have been an assumption of responsibility such as to create a special relationship between the Claimant and the director or employee himself: 835B-C;

    v) The test for an assumption of risk is an objective one, which means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the claimant (i.e. things that "cross the line") rather than upon the state of mind of the defendant: 835F-G;

    vi) A director of a contracting party may only be held liable where it is established by evidence that he assumed liability and that there was the necessary reliance: 837F-G.

18. What emerges with clarity from Lord Steyn's analysis is that it will not be sufficient to establish a special relationship or an assumption of responsibility if the director does no more than act in a way that is consistent with his position as director. So personal liability was not established in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 where the New Zealand Court of Appeal concluded that there was merely

"routine involvement" and "no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation." On the other side of the line, in *Fairline Shipping Corporation v Adamson* [1975] QB 180, the director of a warehousing company wrote a letter on his personal notepaper and in the first person singular offering to store the Claimant's goods in "his" premises because (as Kerr J found at 186G-H) the affairs of the limited company had reached a stage when the defendant wanted to treat the storage of the goods in his cold store as his own venture.[1]

19. Sainsbury's submits that there is a tension between the principles outlined in *Williams* and those applied in *Merrett v Babb* [2001] 1 QB 1174, where an employed valuer who signed a mortgage valuation certificate was held to have assumed personal responsibility to the purchaser who relied upon the valuation. I am unable to detect any tension or conflict between the two cases. The terms of the certificate signed by the valuer are instructive: "I certify that I am not disqualified under Section 13 of the Building Societies Act 1986 from making this report." Section 13 requires the building society to make arrangements to ensure that the person making the assessment is a person competent to value the land in question and not disqualified from making a report on it. The personal standing of the individual valuer was therefore an integral part of the assurance available to the building society and the purchaser; and the terms of the certificate expressly referred to the report being the report of the individual signatory. In these circumstances, it is not surprising that the Court of Appeal held that the principles set out in *Smith v Eric Bush* [1990] 1 AC 831 (which referred to the valuer inferentially or in terms as the individual person who carries out the valuation) were directly applicable.

20. The tension which Sainsbury's wishes to establish is that *Williams* says that a person cannot act in his personal capacity and on behalf of his company at the same time, whereas *Merrett v Babb* says that he can. In fact, *Williams* says no such thing: at 835B Lord Steyn said "Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort *as well as* imposing vicarious or attributed liability upon his principal."[2]

Sainsbury's Pleaded Case Against Mr Pashouros

21. Sainsbury's pleaded case is that Mr Pashouros carried on business under the trading name "Condes" and that he was at all material times the managing director and shareholder of Condek.[3] Condek holds the patent for the Condek modular car park system, with Mr Pashouros being listed as the inventor.[4] Mr Pashouros signed a completed tender offering to carry out the fabrication and erection of the North Cheam Car Park on 9 March 2006.[5] Sainsbury's then issued a letter of intent dated 19

[1] While Lord Steyn in *Williams* treated this as an example of assumption of responsibility in the course of considering the extended *Hedley Byrne* principle, *Fairline* was a case where the Defendant's negligence caused the Claimant's goods to overheat and suffer physical damage. Where physical damage is involved, it is generally unnecessary to establish a *Hedley Byrne*-type special relationship and the negligent defendant will incur personal liability whether or not he was acting in the course of his employment, with his employer being held vicariously liable.
[2] Emphasis added
[3] Particulars of Claim [5]
[4] Particulars of Claim [6]
[5] Particulars of Claim [9]

April 2006 addressed to Condek, which identified Condek as the contractor, and which required Condek to proceed with the design, procurement and preparatory work necessary to enable it to comply with the programme and to proceed with the development of the car park.[6] Mr Pashouros signed the letter of intent and returned it under a letterhead of Condes. He signed the last page of the letter of intent "for and on behalf of" Condek.[7] Condek carried out the works in accordance with Mr Pashouros' design[8] but Condek was and remained the contracting party who had agreed to procure the design, construction and installation of the car park.[9]

22. Sainsbury's alleges that there were express or implied terms of the contract between Sainsbury's and Condek that:

> "(1) CHL would exercise reasonable care and skill in the design, procurement, construction and installation of the modular car-park system at the North Cheam store.
>
> (2) The modular car-park system as designed and constructed would be appropriate for and external environment and traffic, would be safe, resistant to corrosion or other degradation, not give rise to excessive movement and noise, and would be of good and durable quality, durability being required for a minimum of 15 ad expected to last for 50 years as set out in the design parameters;
>
> (3) The materials supplied would be of satisfactory quality, and reasonably fit for the purpose of a car-park in an external environment.
>
> (4) The work would be carried out in a good and workmanlike manner.
>
> (5) The work would be carried out in accordance with British Standards (in particular BS699 – Parts 1 and 2, BS5950 Part 1), Building Regulations, the Design Recommendations for Multi-Storey and Underground Car parks 3rd Edition published by the Institution of Structural Engineers June 2002 and good practice."

23. As originally pleaded, Sainsbury's alleged that Condek owed a common law duty of care to Sainsbury's equivalent to the implied terms of the contract as set out above; and that Mr Pashouros also owed a duty in the same terms which extended to protecting Sainsbury's from economic loss and which "arose because Mr Pashouros, as the inventor and/or designer of the Condek modular car park system, promoted its use at the North Cheam store to the Claimant."[10]

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[6] Particulars of Claim [12]
[7] Particulars of Claim [13]
[8] Particulars of Claim [14]
[9] Particulars of Claim [15]

[10] Particulars of Claim [18]

24. At [28] of the Particulars of Claim, Sainsbury's alleges that the car park as installed was "negligently designed, constructed and installed" as a result of which it was subject to ten categories of defects. At [29] it alleges that "by reason of the aforesaid matters, [Condek] was in breach of contract and its contractual and common law duties of care to carry out the works with the degree of skill and care to be expected of a reasonably competent designer and contractor in that the design and construction of the car park … fell below the standards reasonably to be expected of a reasonably competent designer and contractor installing a steel framed car park." It then alleges at [30] that "further or alternatively, Mr Pashouros was in breach of contract and/or negligent by reason of the matters set out in paragraphs 20-29." By the provision of Further Information in answer to a Request from Mr Pashouros, Sainsbury's abandoned the allegation that he was in breach of contract and confirmed that the contracting party was Condek and not Mr Pashouros.

25. Sainsbury's pleading of loss and damage in the Particulars of Claim is, on any view, very lightly sketched.[11] Rather than identifying what is said to constitute the loss and damage giving rise to a cause of action in tort, or the basis for the damages which it claims, it merely asserts that "the appropriate remedy is to demolish the existing system and to replace it with a properly designed [one]…". It then lists the costs of installing the replacement system in the sum of £3,246,000, asserts that it will lose £3,600,000 in lost sales while the replacement works are carried out and claims an additional £160,000 for temporary repairs and associated professional and legal costs plus any other ongoing costs for further temporary repairs as may be necessary.

26. By its Reply to Mr Pashouros' Defence, Sainsbury's alleges that Mr Pashouros in his personal capacity has been and is the owner of the design of the Condek car park system design and, as sole owner he is the only person who stood to benefit financially from putting his design into commercial use by having the car park built at North Cheam.[12] It also alleges that the communications with Sainsbury's about the car park were "with and through Mr Pashouros directly"[13]; that he signed the tender in his personal capacity[14]; and that Condek was a licensee used by Mr Pashouros at his direction as owner of the design to carry out the commercial implementation of his design so that he could personally financially benefit."[15] It then alleges that, in all the circumstances, "by reason of Mr Pashouros' ownership of the design of the Condek car park system, his direct involvement in promoting the use of the Condek car park system to [Sainsbury's] during his negotiations for the North Cheam contract, and his overall control of it during the course of its implementation, Mr Pashouros assumed a responsibility to [Sainsbury's] at common law for his design and its successful commercial construction at the North Cheam store."[16]

Further Factual Background

27. Sainsbury's takes the point that full disclosure has not yet been given. However, Sainsbury's would have copies of all documents crossing the line between the parties; and the core documents are before the Court. They include the following:

[11] Particulars of Claim [34]
[12] Reply [6]
[13] Reply [7]
[14] Reply [10]
[15] Reply [11]
[16] Reply [12]

i) On 27 July 2005 Mr Pashouros sent a letter to Mr Taylor of Sainsbury's. He signed the letter "for and on behalf of Rail Design Ltd" (which was Condek's previous name), informed Mr Taylor that Rail Design Ltd would be changing its name to Condek, and said that he could not provide any further information until Sainsbury's signed the attached Non-disclosure Agreement ["NDA"];

ii) On 3 August 2005 Mr Pashouros wrote to Mr Taylor again, this time signing the letter "for and on behalf of Condek". He attached specification notes for the Condek system and enclosing the NDA. The NDA was in terms between Condek as the disclosing party and Sainsbury's. It was signed by Mr Taylor "for and on behalf of" Sainsbury's on 10 August 2005 and by Mr Pashouros "for and on behalf of" Condek on 12 August 2005.

iii) On 5 September 2005, Mr Pashouros entered into an agreement with Condek by which he granted Condek an exclusive irrevocable licence for six years to exploit Mr Pashouros' inventions that would form the subject matter of future patents. The consideration payable by Condek was £2,000 plus a royalty payment of 1% of Condek's gross profit generated by the use of the invention, deferred for a period of 3 years to allow Condek to become established;

iv) The patent for the Condek system listed Condek as the proprietor and Mr Pashouros as the inventor;

v) The form of tender which was sent to Sainsbury's in March 2006 expressed all proposed contractual undertakings and obligations in terms that they would be performed by Condek (e.g. "Condek shall be responsible for the design of a suitable foundation and the provision of Structural Engineers calculations to support the design of such foundations."). The tender had the Condek banner logo on the front page. The first page stated "I, we the undersigned offer to carry out the fabrication and erection of [the car park] … for the sum of £1,640,676." The form then provided as follows "Signed ….. For ….. Dated ….." A signature appears after the word Signed, which is not obviously Mr Pashouros' signature. Before the word "For" is written "pp" and after it is written "A Pashouros". After the word "Dated" the date is written as 9 March 2006. Taken on its own, the manner in which the form is signed is unclear. Viewed overall, however, it appears clear that the Tender was submitted for and on behalf of Condek and that someone other than Mr Pashouros signed it on his behalf but, while stating the signature was per pro Mr Pashouros, did not state that it was also for Condek. Whether that was the intention of the signatory does not matter because Sainsbury's clearly took the tender as being from Condek and not as a personal tender by Mr Pashouros to carry out the works himself, as follows at (vii) below;

vi) Attached to the Tender was a Design Report by NRM Bobrowski "for Condek Demountable Car Park System." For present purposes the materiality of the report is that it was required by Sainsbury's because they wanted independent verification of the design calculations and were not prepared to rely upon Mr Pashouros' design on its own;

vii) The letter of intent dated 19 April 2006 was sent to Condek, signed by Mr Holloway for and on behalf of Sainsbury's and was signed by Mr Pashouros

for and on behalf of Condek. As originally drafted, the Schedule to the letter of intent said that "Sainsbury's Terms and Conditions include amendments to the standard form JCT'98 Standard Form of Building Contract with Contractors Design 1998 (edition May 2003)". This sentence was deleted and Mr Pashouros wrote alongside it "As agreed with Chris Mayo the JCT contract will be applied to this project";

viii) Sainsbury's required a New Supplier's Form to be filled in. It is apparent from the documentation that it was filled in for and on behalf of Condek. There is no evidence or suggestion that any formal documents were entered into in the name of Mr Pashouros or that he signed any such document other than for and on behalf of Condek.

28. In support of his applications, Mr Pashouros has submitted a witness statement which asserts that he only ever acted on behalf of Condek in his dealings with Sainsbury's; and he identifies the original letter of 27 July 2005, the subsequent letter of 3 August 2005, the NDA, the Tender, and the Letter of Intent in support of his assertions. In response, Sainsbury's has submitted a witness statement from Mr Tony Mars, who was employed as Sainsbury's Construction Interface Manager at the time. It is not clear why no statement has been provided by Mr Taylor, who appears to have conducted the early negotiations with Condek and Mr Pashouros, though it was suggested that he may no longer be with Sainsbury's. According to Mr Mars, Mr Pashouros told Mr Taylor that he had designed the Condek system and that he could deliver the system within a short frame of time and at a lower cost than competitors. He agreed to build a prototype and did so in Carlisle. Mr Pashouros pressed for the letter of intent to be agreed as soon as possible and told Sainsbury's that "he would be importing many of the materials from China." During his dealings "with Mr Pashouros and/or Mr Pashouros' companies" Mr Pashouros was the sole spokesman for the Condek System.

The Opposing Submissions at the Hearing

29. Mr Pashouros submits that all of his actions are consistent with him acting as a director of Condek in a routine way and that there is no feature that crossed the line that either suggests or demonstrates that he assumed personal responsibility.

30. In reply, it soon became apparent that Sainsbury's pleaded case does not reflect the case it really wishes to advance. Having previously confirmed that no claim is made against Mr Pashouros in contract, Sainsbury's also accepted that it did not allege that Mr Pashouros owed any duty to carry out the work himself: any case against him is advanced as designer and, possibly, supervisor. The contract terms that had been pleaded as setting out the scope of any duty of care accordingly would have to be amended as set out below:

> "(1) [Mr Pashouros] would exercise reasonable care and skill in the design, procurement, ~~construction~~ and installation of the modular car-park system at the North Cheam store.
>
> (2) The modular car-park system as designed ~~and constructed~~ would be appropriate for and external environment and traffic, would be safe, resistant to corrosion or other degradation, not

> give rise to excessive movement and noise, and would be of good and durable quality, durability being required for a minimum of 15 ad expected to last for 50 years as set out in the design parameters;
>
> (3) the materials *if* supplied *as designed by Mr Pashouros* would be of satisfactory quality, and reasonably fit for the purpose of a car-park in an external environment.
>
> (4) *Mr Pashouros would exercise reasonable skill and care to ensure that* [the] work *carried out by others* would be carried out in a good and workmanlike manner.
>
> (5) The work *if carried out in accordance with Mr Pashouros design* would be carried out in accordance with British Standards (in particular BS699 – Parts 1 and 2, BS5950 Part 1), Building Regulations, the Design Recommendations for Multi-Storey and Underground Carparks 3rd Edition published by the Institution of Structural Engineers June 2002 and good practice."

31. Even with these proffered amendments, the pleading requires explanation. Sainsbury's wishes to maintain the allegation in sub-paragraph 1 that Mr Pashouros owed a personal obligation to exercise reasonable care in the procurement and installation of the car park, despite not being contractually responsible for its construction. It wishes to maintain sub-paragraph 3, not on the basis that Mr Pashouros had any contractual responsibility for supplying materials but on the basis that he was under a duty of care to ensure that *if the supplied materials were in accordance with his design* then they would be of satisfactory quality and reasonably fit for the purpose of a car park in an external environment. Sub-paragraph 4 is maintained on the basis that Mr Pashouros as a designer who also attended on site during construction had an obligation to ensure that the work was carried out by others in a good and workmanlike manner (i.e. he assumed personal responsibility for supervising the construction despite being under no personal contractual obligation to do so). Sub-paragraph 5 is maintained on a similar basis to sub-paragraph 3, namely that the materials *as designed* were to be in accordance with the relevant British Standards, Building Regulations and Design Recommendations. This brief review shows that the pleading of duty is tortuous to a degree that is unacceptable as the basis for establishing liability in a substantial claim; and, even with the proffered amendments, the pleading does not make clear to Mr Pashouros the case he has to meet so as to enable him to prepare his case without unfair disadvantage.

32. Sainsbury's rightly accepts that the mere fact of designing a novel design does not impose an obligation upon the designer if he attends site in any capacity to check that the construction is in accordance with the design or to check the construction to see how it turns out. When pressed to identify any singular feature or anything that was not entirely routine that would justify imposing liability on Mr Pashouros on the basis of an assumption of responsibility, Sainsbury's was hard pressed to identify anything at all. Its submission in its final form was that an assumption of responsibility should be held to exist because he both promoted the use of the Condek system and would benefit financially from its commercial exploitation.

33. I reject Sainsbury's submissions. It is a commonplace that a trader who transfers his business to a limited company will do so in order to benefit financially from its commercial exploitation: that and the benefits of separate legal personality and limited liability are the three obvious reasons for incorporation. If it were the case that an inventor who wants to make money will be taken to have assumed personal responsibility despite trading through a limited company, the main benefits of incorporation would be lost: that is not the law. Second, it is routine for a director of a company that he has incorporated to be the spokesman who promotes the company's business and, as Sainsbury's accepts, to use language which is consistent with his personal involvement without suggesting that he has personal responsibility over and above that of his company. So, in this case, the fact that Mr Pashouros promoted the car park and extolled its virtues is no more indicative of an assumption of responsibility than would be a statement that "he" would be importing the materials for the car park from China. Even if, pursuant to internal arrangements between him and Condek, he had personally imported materials from China, that did not affect who was to build the car park for Sainsbury's. Once again, if it were the case that an inventor or designer who wished to exploit his invention or design through a limited company would assume personal responsibility if he promoted the invention or device on behalf of his company, the benefits of incorporation would be lost: that is also not the law. Third, all of the contractual documents show that Sainsbury's contracted with Condek and that Mr Pashouros acted for and on behalf of Condek in his dealings with Sainsbury's, from the initial introductory letter to the signing of the letter of intent. Fourth, although it is evident from the terms of the letter of intent that Sainsbury's was familiar with the JCT'98 Standard Forms of Contract and Sainsbury's must be very experienced in the negotiating of construction contracts, Sainsbury's took none of the steps that could and would routinely be taken by an employer who wished to have the added security of an enforceable duty of care owed by someone other than the person who has contracted to procure the design and construction of the structure. It could have required Mr Pashouros to be a party to the contract that was primarily intended to be with Condek; or to have provided a duty of care deed or some form of free standing warranty in respect of the design: but it did none of these things. Instead, it was content to contract with Condek, and Condek alone. There is nothing in the evidence of what crossed the line to suggest that Sainsbury's relied (let alone reasonably relied) upon Mr Pashouros in his personal capacity rather than upon Condek with which it chose to contract.

34. Sainsbury's submits that this is a case of a black hole which the law of tort should fill. I reject that submission. There is no legal black hole here as Sainsbury's has relevant legal remedies against Condek if the car park is defective. The fact that Condek is now in liquidation is a risk that Sainsbury's chose to take. It could have hedged its risk in a number of ways, including the obtaining of insurance or a bond that would answer in the event of defects in the car park. If it did not do so, that was a commercial choice by a major, knowledgeable and sophisticated commercial organisation which may now regret its choice – but it is not a legal black hole of the kind contemplated in *White v Jones* [1995] 2 AC 207 .

35. On the materials that are available to me, I am certain that Sainsbury's claim against Mr Pashouros will fail. There is no good reason to suspect that further information might emerge on disclosure that would subvert the very powerful inference to be drawn from the contractual documents and the present weakness of Sainsbury's

witness evidence. Nor are the legal principles relating to personal liability of employees a developing area of the law of the kind that may make a trial necessary or desirable to defer a decision until the actual facts are known. Taking them at their highest, the facts pleaded (even after the Reply, Further Information and proffered amendments at the hearing) do not disclose any reasonable grounds for bringing the claim against Mr Pashouros in his personal capacity. On all the information that is available, the Claimant has no real prospect of succeeding on its claim against Mr Pashouros, who acted in his capacity as a director of his companies at all material times.

36. For the reasons I have given, the facts pleaded by Sainsbury's against Mr Pashouros do not sustain an allegation that he was subject to a personal duty of care to protect Sainsbury's from economic loss. Had I thought that they did, I would still have struck out Sainsbury's pleading of the duty alleged to have been owed by Mr Pashouros: simply repeating the alleged terms of the contract with Condek without taking into account the real nature of the complaints to be made against him and the fundamental difference between the position of Condek (which had contracted with Sainsbury's) and Mr Pashouros (who had not) is inappropriate and would not be a fair basis on which to proceed. I would also have ruled that there is no adequate pleading of any allegations of breach of duty by Mr Pashouros. However, because the deficiencies in the pleading are fundamental in failing to identify facts that could give rise to any duty of care, the question of partial strikeout does not arise.

37. For these reasons I strike out the claim against Mr Pashouros pursuant to CPR 3.4(2) and grant him summary judgment in the action pursuant to CPR 24.

CSL's Application

38. CSL raises four substantial issues in relation to the claim against it:

    i) Did NRM (whose liability is said to have transferred to CSL) owe a duty of care in tort to Sainsbury's?

    ii) If NRM incurred liability to Sainsbury's, is that liability capable of being transferred to CSL?

    iii) On the proper interpretation of the agreements by which CSL became associated with NRM, did they cause any liability on the part of NRM to Sainsbury's to be transferred to CSL?

    iv) Limitation.

Sainsbury's Pleaded Case against CSL

39. Understanding Sainsbury's pleaded case against CSL is made difficult because it elides CSL and NRM, referring routinely to "Capita" when it should have referred to NRM and not discriminating between NRM and CSL. This may be because Sainsbury's did not appreciate the sequence of events by which CSL became connected to NRM in 2008. The difficulty would have been avoided if Sainsbury's had complied with the Pre-action Protocol before issuing proceedings as CSL would inevitably have furnished it with the information which makes the position plain.

That information is now contained in the witness statement of Mr Case, an in-house solicitor who was involved with the acquisition and transfer of NRM's shares, business and assets.

40. For the hearing, Sainsbury's produced a written summary of why it was owed a duty of care owed by NRM, which draws on the post-action letter of claim and its pleaded case as follows: Condek procured services from NRM to design or assist in the design of the works. NRM's design formed part of Condek's tender for the works which was provided by Condek to Sainsbury's. NRM was required to undertake structural inspections of the works during the course of the installation and undertook maintenance inspections for a period of 2 years after the completion of the works. Before Sainsbury's decided to procure the Condek system and enter into the contract with Condek, NRM attended various meetings with both Condek and Sainsbury's and provided design advice and assurances, which Sainsbury's relied upon when deciding to procure the Condek system: letter of claim 3.7-3.12[17]. NRM owed Sainsbury's a duty of care in tort to carry out the works, exercising the degree of skill and care expected of a reasonable competent designer. It was aware that Condek was going to use the Condek system at the North Cheam store. It was also aware that Sainsbury's relied upon NRM's advice and input at the various meetings both prior to entering into the Contract and during the Works. Sainsbury's was reliant upon NRM exercising reasonable skill and care in carrying out and reviewing the design of the Condek system. In particular it was incumbent upon NRM to ensure that its design for the works was such that when the works were constructed and installed the works were (a) appropriately designed for an external environment; (b) appropriately designed to cater for traffic; (c) safe for use by Sainsbury's and its customers' resistant to corrosion or other degradation; (d) did not give rise to excessive movement and noise; and (f) was of good and durable quality (durability being required for between 15 years to 50 years): letter of claim 4.1-4.3[18]. The car park was negligently designed and there were defects: Particulars of Claim [28]. As the structural engineer engaged by Condek or Mr Pashouros NRM should have checked and reviewed the design and taken steps to ensure that the car park was appropriately designed and installed in accordance with a reasonably competent design but failed to do so: Particulars of Claim [32].

41. By its Reply to CSL's Defence, Sainsbury's referred to alleged evidence of CSL's involvement contained in pages on the Capita website. It pleaded that Mr Pashouros wanted and needed NRM to be involved so that it could answer technical design questions that Sainsbury's had and give comfort to potential customers that the design had been carried out by engineering professionals: Reply [7]. NRM had close involvement including involvement specifically with the deck: Reply [8] and [9].[19] CSL acquired and became responsible for the liabilities of NRM after 4 April 2008 pursuant to the transactions by which it acquired NRM's business, assets and issued share capital; and CSL assumed responsibility to Sainsbury's for the liabilities of NRM: Reply [12]-[15], [17].

[17] Though some aspects of this formulation were in [8] and [9] of the original pleading, the Particulars of Claim said nothing in those paragraphs about reliance by Sainsbury's upon design advice and assurances from NRM or upon NRM's attendance at various meetings.
[18] Paraphrased from and to some extent a restatement of Particulars of Claim [19] and Reply [17]
[19] In fact the Reply referred to CSL and not to NRM in [7]-[9] but Sainsbury's would now wish the references to be taken as being to NRM.

42. By its skeleton argument for the hearing, Sainsbury's submits that the following features of the case distinguish the position of NRM and CSL from "a run of the mill construction contractual chain case", namely:

> " … this was a novel and untested design which had never been put into practice (Capita themselves describe it as 'revolutionary' and working in partnership with Condek). [Sainsbury's] was particularly concerned about, and was reliant upon the assurance that the car park was designed and backed by NRM. Without NRM's backing for that design [Sainsbury's] would not have proceeded with what was a novel and untested design. There is evidence that
>
> (1) NRM themselves were aware that a prototype and model was built with [Sainsbury's] in mind, they had put together a design specification which they were aware would have used to market the design to others – specifically they became aware it would be for [Sainsbury's] see paragraph 4.4 of Mr Cutlack's statement;
>
> (2) NRM rather than [Condek] were tasked with carrying out the design calculations – rather than [Condek]. On Mr Pashouros' case it was [Condek] that was actually doing the detail design for North Cheam;
>
> (3) NRM were involved in meeting with [Sainsbury's] and answering any queries they had;
>
> (4) and finally they were required to inspect the ongoing installation of the car park and, as Capita, did inspect it for defects and advised solutions in 2008."[20]

43. This formulation does not include any mention of reliance by Sainsbury's upon NRM, as opposed to reliance upon the assurance (from Condek by Mr Pashouros) that the car park was designed and backed by NRM. The witness statement of Mr Mars is also extremely light on that subject. Although he refers to Mr Pashouros saying that NRM/Capita would "underwrite" the design, there is little to indicate any relationship at all between NRM and Sainsbury's save that he says that "Capita contributed to a number of these discussion points and their comments were not only limited to discussing the structural steel supports. This provided [Sainsbury's] with a degree of comfort around the design of the whole Condek system." Sainsbury's submits that Mr Mars' reference to Capita should be taken as a reference to NRM, though that is evidently not what Mr Mars says.

[20] Note that by the time of the hearing, sub-paragraph (4) was abandoned as Sainsbury's does not rely upon anything done by CSL itself or anything done on or after 4 April 2008.

Did NRM (whose liability is said to have transferred to CSL) owe a duty of care in tort to Sainsbury's?

The Applicable Principles

44. In *Henderson v Merritt Syndicates* [1995] 2 A.C. 145, 195 Lord Goff addressed the general approach taken by the law where an employer under a building contract contracts directly with a contractor who then enters into sub-contracts with others.

> "Let me take the analogy of the common case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with standards and subject to terms established in the sub-contract. I put on one side cases in which the sub-contractor causes physical damage to property of the building owner, where the claim does not depend on an assumption of responsibility by the sub-contractor to the building owner; though the sub-contractor may be protected from liability by a contractual exemption clause authorised by the building owner. But if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the Hedley Byrne principle, claiming damages from him on the basis that he has been negligent in relation to the performance of his functions. For *there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility***.**" [Emphasis added]

45. Although it may be said that this passage is strictly obiter, it accurately reflects the present state of the law which, in this respect, has been settled for a considerable time. Nor is it necessary that the contractual framework be structured in any particular way or with any particular degree of complexity. That is because it is for the person asserting the existence of a duty of care to prove the existence of the special relationship that is a necessary prerequisite to it; and a contractual structure which does not show any unusual or particular features indicating a special relationship of proximity between the employer and the independent subcontractor will be taken as conforming to the norm, as explained by Lord Goff.

46. Lord Goff was referring expressly to the sub-contractor who provides work or materials in the construction of a building, and not to professionals such as NRM. However, once it is recognised that a claim in tort against a building professional who is not in a contractual relationship with the Claimant requires the existence of a special relationship of proximity as the foundation for the existence of a relevant duty of care, Lord Goff's statement of principle can be seen to be equally applicable to

sub-contracted design professionals as to sub-contracted suppliers of work and materials. The scope for an employer to identify facts which justify the conclusion that there has been an assumption of responsibility towards it by a design professional differs from that in respect of a building sub-contractor supplying work and materials: but the underlying principle remains the same.

47. I therefore respectfully agree with the decision of HH Judge Toulmin QC in *Architype Projects Ltd v Dewhurst MacFarlane & Partners* [2004] PNLR 38 on an application to strike out a claim by an employer against a supplier of civil engineering consultancy services who had been engaged as a sub-contractor by the employers' retained architect but who had not entered into any direct contract with the employer. The engineering subcontractor had attended at least one meeting with the employer and other members of the construction team (including the architect) and had responded to queries in letters from the employer that were passed on to it by the architect. The Judge struck out the claim despite concluding on the facts of that case that there was a relationship of proximity between the engineering sub-contractor and the employer. Adopting the three fold test as explained by Lords Bridge and Roskill in *Caparo v Dickman* [1990] 2 AC 604, 617, 628 he concluded that it was not fair just and reasonable to impose a duty of care on the engineering sub-contractor. In the light of the statement in *Henderson v Merrett* (at 181) that "once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss", I would prefer to express the conclusion as being that the employer had failed to identify facts giving rise to a special relationship of proximity so as to bring the extended *Hedley Byrne* principle into play. But, whichever analysis is correct, the result is the same.

48. Sainsbury's relied upon passages[21] from *Jackson & Powell on Professional Liability* (7th Edition) which, taken on their own, may suggest that the mere fact that a person possessed of special skill knows that his work may be relied on by others is sufficient to give rise to a duty of care. In the course of analysing Denning LJ's dissenting judgment in *Candler v Crane Christmas & Co* [1951] 2 KB 164, the editors write:

> **"To Whom Is the Duty Owed?** The duty is owed to the client and to those third parties with whom the professional person deals directly with a view to influencing their future conduct (*e.g.* by making an investment or loan). It also extends to third parties to whom the professional person knows his views will be conveyed by his client for the same purpose. This limits the class of those to whom the duty is owed. It recognises that there are limits to the extent to which it is reasonable to impose a duty of care on a professional person and so limits to the extent to which it is reasonable for a third party to rely on him."

49. In a later chapter[22], the editors give fuller consideration to the position of construction professionals:

[21] See 2-123, 2-124
[22] See 9-102, 9-103

> "Greater difficulties can be expected to occur in deciding when construction professionals owe duties to persons other than their clients to prevent economic loss on the grounds that such persons are entitled to rely upon the professionals or are in a sufficiently close relationship that a duty of care should be imposed, even although no misleading communication is made by a professional to the claimant. In *Junior Books Ltd v Veitchi Co Ltd*, nominated flooring subcontractors were found liable to a building owner for the costs of remedying a defective floor which they had laid. In *Murphy*, Lord Bridge stated:
>
> "There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss. The decision in *Junior Books Ltd v Veitchi Co Ltd* can, I believe, only be understood on this basis."
>
> As has been pointed out on many occasions, such an explanation for the decision in *Junior Books* is difficult to justify. The building owner in *Junior Books* chose to enter into a single contract with a main contractor, presumably relying on the competence and financial solvency of that contractor. The use of nominated sub-contractors is (or was) generally thought to give the owner some of the benefits of choice of sub-contractor without the burdens of a direct contract. It is difficult to see why the law should decide to provide further benefits to the owner.
>
> The increasing popularity of design and build contracts in the procurement of construction projects prompts the question whether a construction professional appointed by the design and build contractor owes a duty of care to avoid causing economic loss to the employer. Such a claim will rarely succeed. In *Henderson v Merrett Syndicates*, Lord Goff emphasised that the existence of a contractual chain which has been structured so as not to include a contract between claimant and defendant will commonly prove inconsistent with such a duty of care." [The passage from page 195 of *Henderson v Merrett* cited above is then set out.]

50. I respectfully agree with the thrust of this more extensive analysis.

Did NRM owe Sainsbury's a duty of care?

51. Reasonable reliance by Sainsbury's and knowledge on the part of NRM that Sainsbury's would rely upon its expertise and advice are necessary building blocks for the imposition of a duty of care owed to Sainsbury's by NRM. Furthermore, it is incumbent upon Sainsbury's, as the party alleging the existence of a duty of care, to

specify the scope of the relevant duty with precision so that it may be understood by others. That being so, there are two powerful points in support of CSL's application on this issue. The first is that Sainsbury's pleadings are presently inadequate in relation to reliance; the second is that the scope of the duty alleged is unjustifiably wide.

52. The first of these points is well made. The Particulars of Claim is silent on whether and to what extent NRM knew that Sainsbury's (as opposed to Condek) relied upon its work; and it fails to plead either direct interaction between NRM and Sainsbury's or any other facts from which an assumption of responsibility or the existence of a special relationship of proximity could reasonably be inferred. The most that is said is at [19] of the Particulars of Claim which alleges merely that Sainsbury's "was reliant on" Capita (meaning NRM) exercising its skill and care in reviewing the design of the car park and in providing its services *to Condek* in the course of installation of the car park. The Reply takes matters no further than a repetition of the bald assertion of reliance at [17]. On the pleadings as they presently stand, therefore, I would hold that they disclose no legally admissible basis for the imposition of a duty of care on NRM and I would strike out the pleading on that basis.

53. The second point is also well made. Even adopting the most generous view of the matters alleged by Sainsbury's in its Statements of Case, no coherent basis is pleaded to justify the broad scope of duty alleged at [19] of the Particulars of Claim or [17] of the Reply.

54. Sainsbury's has attempted to make good the deficiencies in its pleading by referring to the reformulation of its case as set out in the post-action letter of claim. In general, if a party wishes to reformulate its pleaded case, it should do so by amendment of its pleadings. No amendment has been put forward. It is also difficult to see how Mr Mars' evidence supports or justifies the reformulation that appears on the letter of claim.

55. To my mind, there are only two features of Sainsbury's current contentions that tend to support the possible existence of a duty of care owed by NRM to Sainsbury's. The first is that NRM's report was annexed to Condek's tender. If it were the case that (a) this was done with NRM's knowledge and (b) NRM knew the purpose of annexing it was to validate the design of the car park so that Sainsbury's would accept it, then that could be taken as evidence of an assumption of responsibility by NRM towards Sainsbury's, NRM's position being similar to that of the valuer in *Smith v Bush* who gave the valuation knowing that it was likely to be relied upon by the purchaser. The analogy is not exact because it is neither pleaded nor shown that NRM would have known that Sainsbury's would rely upon its report and that Sainsbury's would not rely upon alternative expertise – if indeed that was the case. But for the purposes of a strikeout application, the analogy is instructive.

56. The second feature of Sainsbury's current contentions that tends to support the existence of a duty of care is the allegation that NRM attended meetings and dealt with technical questions that were raised. At present this is inadequately pleaded or evidenced. In particular, no attention has been given to the scope of the questions that were asked of NRM, by whom the questions were asked, or the scope of NRM's advice in response. However, in principle, active involvement in meetings at which

the client was present could support the existence of an assumption of responsibility, though it will not necessarily do so, as the decision in *Architype* shows.

57. At this point I bear in mind that NRM is not formally a party to the present proceedings or application. It is therefore *possible* that if NRM were directly involved now and in the future, further information might emerge in support of the existence of a duty of care. Though possible, this seems unlikely since Sainsbury's has had every opportunity to formulate a coherent basis of claim in relation to NRM and has failed to do so.

58. I therefore resolve this issue by concluding that Sainsbury's pleadings do not at present disclose a legally admissible basis for a finding that NRM owed a duty of care to Sainsbury's and that the evidence that has been adduced does not remedy the deficiency. I would therefore strike out Sainsbury's pleading that NRM owed a duty of care to Sainsbury's and grant summary judgment on the issue. However, because I am conscious of the remote possibility that further evidence might emerge if NRM were directly involved, and also in case I am simply wrong in my conclusion on this issue, I turn to the remaining issues making the assumption that NRM did in fact owe a duty of care to Sainsbury's. The difficulties of defining the scope of any such duty remain, but I ignore those difficulties for the purposes of the following issues.

If NRM incurred liability to Sainsbury's, is that liability capable of being transferred to CSL?

59. Although Sainsbury's devoted considerable ingenuity to this issue, it can in my judgment be answered shortly. It is axiomatic that, in general, a personal liability in tort cannot be transferred so as to relieve the original tortfeasor of liability and to impose the original tortfeasor's liability upon another person instead. This is settled law and there appears to be no prospect of the law changing materially in the foreseeable future.

60. No case directly on point has been identified. Sainsbury's referred to *Martin v Lancashire County Council; Bernadone v Pall Mall Services Group* CA Unreported 16 May 2000. This case provides no support for Sainsbury's position. The Court of Appeal held that, where the Transfer of Undertakings (Protection of Employment) Regulations 1981 ["TUPE"] apply, a liability of a transferor to an employee in tort, which has accrued before the transfer, is transferred by TUPE to the transferee. The fact that Parliament has the power by statute or regulation to effect the transfer of a tortious liability does not mean or imply that tortious liabilities can be transferred where no statute or regulation so provides. Although Peter Gibson LJ referred to the existence of a provision in the Transfer Scheme and Business Agreement that the transferee should indemnify the transferor against all liabilities in respect of any act or omission on the part of the transferor before the transfer, he recorded that the Court had not heard argument about those clauses and expressly said nothing about them. Sainsbury's can derive no comfort from nothing being said on the point.

61. Sainsbury's also attempted to construct arguments based upon the law in relation to vicarious liability, partnership and subrogation. None of these doctrines provide support for the proposition that liabilities in tort may be transferred from the original tortfeasor to a third party:

i) Vicarious liability does not involve a transfer of liability: the person who commits the tort remains liable, with vicarious liability being a mechanism by which the law imposes liability additionally upon someone else (typically an employer) although he is himself free from blame: see *Lister v Hesley Hall* [2002] 1 AC 215;

ii) Shared responsibility for the acts of a partner is now the subject of ss. 9 and 10 of the Partnership Act 1890, which codified the law in relation to joint liability of partners for the debts and obligations of the partnership incurred while they are partners (S. 9) and liability of the firm for the wrongful acts or omissions of the partners (S. 10). Section 10 is derived from the common law of vicarious liability and does not involve a transfer of liability: see *Dubai Aluminium v Saleem* [2003] 2 AC 366 at [19]-[21], [39] per Lord Nicholls, [70] per Lord Hobhouse, and [95], [104] per Lord Millett;

iii) Subrogation is not concerned with the transfer of liabilities. It operates to enable a person (typically an insurer who has indemnified his insured or someone who has discharged another's debt) to exercise another person's rights to receive compensation from a third party and carries the right to bring a claim in the name of the person he has indemnified or whose debt he has discharged. It is not the same as assignment, as subrogation is dependant upon the operation of law rather than upon agreement which forms the basis of assignment, and has no relevance to the question of transferring liabilities.

62. Sainsbury's also referred to the doctrine of novation in contract. To my mind, this is more instructive but does not assist Sainsbury's. First, novation of a contract requires the agreement of all original contracting parties and the party to whom the contract is to be novated. There is no equivalent mechanism in tort. While it would be open to a tortfeasor, his victim and a third party to agree for consideration that, as a matter of contract, the victim will look to the third party (and not the tortfeasor) to discharge the tortious liabilities of the tortfeasor, no such agreement is alleged here. Sainsbury's rightly accepts that mere notice of a transfer of liabilities from the original tortfeasor to another would not be sufficient. There are sound policy reasons for this, which distinguish the suggested transferring of tortious liabilities from the transferring of rights of action or other assets. The nature and value of a cause of action will not change to the disadvantage of the obligor if it is transferred from the original obligor to another; conversely, the effective value of a tortious liability to the victim may change dramatically if it is transferred from A to B. This case illustrates the point. Sainsbury's wishes to establish that NRM's liabilities have been transferred from NRM (whose solvency is unknown) to CSL (which is thought to be solvent); but if transfer were possible in the circumstances alleged in the present case, it would be equally open to an unscrupulous but solvent tortfeasor to transfer his tortious liabilities to an insolvent third party, to the extreme disadvantage of the victim.

63. For these reasons I conclude that any liability to Sainsbury's which NRM may have incurred in tort was not capable of being transferred to CSL.

On the proper interpretation of the agreements by which CSL became associated with NRM, did they cause any liability on the part of NRM to Sainsbury's to be transferred to CSL?

64. For the reasons set out above, this question is academic. However, I reject Sainsbury's submission that the various agreements by which CSL became associated with NRM should be interpreted as meaning that any liability on the part of NRM to Sainsbury's was intended to be transferred to CSL.

65. Sainsbury's now accepts that the transfer of the issued share capital in NRM to CSL does not operate as a transfer of any liability that NRM had incurred to Sainsbury's. It bases its argument on the terms of the Asset Purchase Agreement by which CSL acquired the business and assets from NRM. The agreement is in conventional form and includes the following terms:

> "**WHEREAS**:
>
> (A) The Seller carries on the business of structural and civil engineering consultants (the "**Business**").
>
> (B) The Seller has agreed to sell and the Purchaser has agreed to purchase the Business as a going concern with effect from close of business on 4 April 2008 (the "**Effective Date**") upon the terms and for the consideration set out in this Agreement.
>
> **NOW IT IS HEREBY AGREED** as follows:
>
> **1. SALE OF BUSINESS**
>
> 1.1 Subject to the provisions of this Agreement, the Seller as beneficial owner shall sell and transfer or procure the sale and transfer (which expression shall where appropriate include an assignment) free from all liens, charges, encumbrances equities (except reservation of the title claims by the suppliers) and the Purchaser shall purchase the Business as a going concern and with effect from the Effective Date such right, title and interest as the Seller has in the Business and the following assets:
>
> 1.1.1 all tangible assets owed by the seller …
>
> 1.1.2 any industrial and intellectual property rights…
>
> 1.1.3 the benefit of any contracts of whatever nature…
>
> 1.1.4 the goodwill of the Business as at the Effective Date (the "**Goodwill**");
>
> 1.1.5 all trade debts and amounts owing to the Seller in respect of goods and services supplied by the Seller in the ordinary course of carrying on the Business on or before the Effective Date, and which are due at or become due after completion…

1.1.7 all other assets of the Seller of whatever nature (including without limitation any securities issued by any other body corporate)

(all together the ("**Assets**").

1.2 The Business and the Assets are sold together with all rights attached to them at the Effective Date or subsequently becoming attached to them.

2. CONSIDERATION

2.1 Subject to clause 2.2, as part of the consideration for the sale of the Business and the Assets (the "**Sale**") the Purchaser shall:

2.1.1 undertake, pay, satisfy, discharge and indemnify the Seller against all liabilities ad obligations of the Seller as at the Effective Date; and

2.1.2 adopt, perform, fulfil and indemnify the Seller against all liabilities and obligations relating to the Business and Assets after the Effective Date;

2.2 The residue of the consideration for the Sale (the "**Cash Consideration**") shall be the payment by the purchaser to the Seller, in accordance with clauses 2.3 and 2.4, of a sum equal to the aggregate of the amounts at which the Business and the Assets appear in the books of the Seller as at the Effective Date after deduction therefrom of the amounts at which the Liabilities appear in such books as at the Effective Date. …

…

9. THIRD PARTY RIGHTS

No term of this agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement. "

66. Clause 1 set out what NRM was to sell and transfer to CSL and it did not include liabilities that NRM had incurred in tort to third parties. Clause 2 identified the consideration payable by CSL. This included a commitment that was personal to CSL to indemnify NRM against all NRM's accrued liabilities and obligations; but it does not relieve NRM of those liabilities and make them CSL's by transfer or any other mechanism. The obligation on CSL to indemnify NRM is, in my judgment, incompatible with a transfer of the liabilities against which NRM is to be indemnified. Seen in this light, the agreement that CSL would "undertake, pay, satisfy [and] discharge" NRM's liabilities is an agreement to do so on NRM's behalf, not as the transferee of the liabilities.

67. The other evidence upon which Sainsbury's relies is the current content of the Capita website. The Pleading is inaccurate because it alleges that the website acknowledges *CSL's* involvement in the design of the car park. Once it is appreciated that the webpage was written after CSL had acquired NRM, it is apparent that it is written in language that would typically be adopted by a parent or group to refer to activities of a company that is now a group member but was not at the relevant time. I would therefore accept that the webpage is evidence that NRM had an involvement in the designing of the car park, but not that it is evidence of any involvement on the part of CSL.

68. I therefore conclude that the agreements by which CSL became associated with NRM did not purport to cause any liability on the part of NRM to Sainsbury's to be transferred to CSL.

Limitation

69. Sainsbury's pleading of loss and damage is inadequate. Having alleged various defects in the car park at [28] of the Particulars of Claim which are said to be "as a result of the negligent design and/or construction and installation" of the car park, its pleading as against CSL is:

> "[32] … Capita was in breach of its common law duty of care owed to the Claimant. The design of the Condek modular car park system at North Cheam was seriously flawed. As the structural engineer engaged by [Condek], Mr Pashouros or [the Second Defendant], Capita should have checked and reviewed the design and taken steps to ensure that the car park was appropriately designed and installed in accordance with a reasonably competent design but failed to do so. The Claimant relies on the matters set out in paragraphs 20-29 [i.e. the paragraphs listing the alleged defects in the car park as constructed] hereinabove.
>
> [33] By reason of the Claimant [sic] has suffered loss of damage. The said loss and damage is caused by the negligent acts or omissions of the Defendants or each of them in that the car park at North Cheam is seriously defective."

70. It may be deduced from this pleading that the negligence alleged against NRM is in relation to designing the car park and then carrying out inspections during construction. No separate case is articulated to suggest that further inspections after practical completion were causative of any loss. No information is provided about when the various defective elements were incorporated into the construction, which would at least arguably be when actionable damage flowed from the alleged original failures of design, save that it would have been before practical completion in November 2006. Similarly no case is articulated about what damage was caused by the alleged failure to review the design if (which is not at all clear) it is being alleged that there was a continuing obligation to review the design during construction and a negligent failure to do so. If such a case is being advanced, there is nothing to suggest that any cause of action would have become complete after practical completion, and it is readily conceivable that it may have become complete earlier than that.

71. Viewed overall, there are two things that can be said with confidence about this pleading. First, it is inadequate in failing to identify either the loss and damage that is alleged to have been suffered, when it was suffered or the causative nexus between any specified allegation of negligence on the part of NRM and the damage that is alleged to have flowed from it. Second, as a result, it would be quite impossible to reach a reliable conclusion about limitation on the information that is available.

72. Given the overall inadequacy of the pleading of breach, causation, loss and damage in the Particulars of Claim, [32] and [33] are liable to be struck out so far as they relate to CSL as disclosing no reasonable grounds for bringing the claim: it is incoherent and, as it stands, prejudicial to CSL because of the impossibility of identifying and joining issue with the case being advanced. If this were the only criticism to be made of the pleading, it might be reasonable to allow Sainsbury's one more chance to plead a coherent and properly particularised claim. However, for the reasons set out earlier, there are other serious deficiencies in the pleading which, in combination, militate against giving Sainsbury's relief on this part of the pleading alone. Weighing on the one side the overall deficiencies in the pleading and on the other the prospects (which seem remote) that Sainsbury's could plead a proper case identifying breach, causation and loss and damage with reasonable particularity, I would exercise my discretion to refuse permission to apply to amend (no application having in fact been made) and would strike out [32] and [33] of the Particulars of Claim so far as they relate to CSL.

73. Drawing all these strands together I grant summary judgment for CSL against Sainsbury's and strike out the claim against it as disclosing no reasonable grounds for bringing the claim. Even assuming that NRM owed a duty of care to Sainsbury's, neither the Statements of Case nor the evidence served on behalf of Sainsbury's raises an arguable case that any liabilities in tort of NRM were transferred to CSL. There is no reasonable prospect that further evidence at trial will lead to a different conclusion. An additional reason for striking out the pleading is the inadequacy of the pleading of breach, causation and loss and damage as against CSL.

Conclusion on the Applications

74. For these reasons, the applications brought by Mr Pashouros and CSL are granted.

Costs

75. It is inevitable that Sainsbury's must pay the costs of the applications brought by Mr Pashouros and CSL and of the actions it has brought against them. Each Defendant applies for its costs to be paid on the indemnity basis:

    i) Mr Pashouros points to the lack of particularity in the claim pleaded against him. On 11 November 2013 he served his Defence and a Request for Information. His defence set out in detail the relevant documents (as described above) and the fact that he had expressly acted for and on behalf of Condek when engaging in steps leading to the contract, which Sainsbury's acknowledged from the outset was a contract between it and Condek. Sainsbury's replied to the Request for Information on 16 December 2013, by which time it would have had the opportunity to reassess the claim against Mr Pashouros. In reply, Sainsbury's contends that the case is complicated and that Mr Pashouros failed to give proper information during the pre-action

correspondence. It also relies upon the fact that no notice of the claim was given to Condek's insurers so that, as a company that has now been put into liquidation, it is a Defendant of no substance;

ii) CSL points to Sainsbury's failure to follow the Pre-action Protocol before issuing the claim form and Particulars of Claim against it; and of the lack of particularity in allegations made against it. It also relies upon the fact that it appended the relevant documents showing the nature of CSL's connection with NRM to its Defence; and that, when it served an extensive Request for Further Information on 2 April 2014 that was designed to clarify the matters that were inadequately pleaded in the Particulars of Claim, Sainsbury's attempted to fob off the request by alleging that the claim was sufficiently pleaded and that the matters requested were matters of evidence. In reply, Sainsbury's reiterates that this is a difficult claim and that it was reasonable to join CSL as it did.

76. The claim by Mr Pashouros for indemnity costs before 16 December 2013 is not made out. There is substance in Sainsbury's complaint that Mr Pashouros (then acting for Condek or the Second Defendant) did not engage in the pre-action correspondence as constructively as he might have done and that he gave inaccurate information about the involvement of the Second Defendant. Although the information provided did not suggest that he had been acting in his personal capacity, I do not consider that joining him in the first place of itself merits an order for indemnity costs. However, on and from 16 December 2013 the position changed because Sainsbury's had Mr Pashouros' Defence, which made the position clear. I am not suggesting that a Claimant automatically has to accept that assertions in a Defence are well founded – far from it; but the terms of Mr Pashouros' Defence should have led Sainsbury's to reassess the position as against him. Had it done so, it should have concluded that the claim against Mr Pashouros in his personal capacity was hopeless to the extent that it was liable to be struck out or the subject of an adverse summary judgment. At the latest, this should have been appreciated by the time of the CMC on 9 May 2014. In these circumstances I award the costs of the action in favour of Mr Pashouros from 10 May 2014 including the costs of and occasioned by the strike out and summary judgment application on the indemnity basis.

77. Turning to CSL's application, no good reason has been shown for Sainsbury's failure to implement the terms of the Pre-action Protocol against CSL. It knew of NRM's involvement from the time of receipt of the Condek tender and could have requested any necessary information from 2008 at the latest, when the defects became apparent. Had it done so, and had it made relevant enquiries, it would have been told that NRM still existed as a separate legal entity. If it had pursued the possibility that CSL might now be the correct Defendant I am certain that it would have been provided with the information that would (or should) have disabused it of that notion. As it was, it had all relevant information when it was served with CSL's Defence on 11 November 2013. To my mind, the complete and unexplained failure to attempt any compliance with the Pre-action Protocol as against CSL and the failure to reassess the position when provided with the relevant documents on 11 November 2013 is sufficiently out of the ordinary to justify an order that CSL's costs of the action from 25 November 2013 including the costs of and occasioned by the present application should be paid by Sainsbury's on the indemnity basis.

Claim No. HT-12-360

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
THE HONOURABLE MR JUSTICE STUART-SMITH

BETWEEN

SAINSBURY'S SUPERMARKETS LTD

Claimant

– and –

(1) CONDEK HOLDINGS LIMITED (in liquidation)

(2) CONDEK MANUFACTURING LIMITED (in liquidation)

(3) ANDREAS PASHOUROS

(4) CAPITA SYMONDS LIMITED

Defendants

ORDER

UPON hearing Counsel for the Claimant, Third Defendant and Fourth Defendant at the hearing of the Third and Fourth Defendants' applications for strike out and/or summary judgment on 11 and 12 June 2014

AND UPON the First Defendant and Second Defendant not appearing and having indicated they do not participate in this action

IT IS ORDERED that

1. The Claimant's claim against the Third Defendant be dismissed.

2. The Claimant's claim against the Fourth Defendant be dismissed.

3. The Claimant do pay the Third Defendant's costs of and occasioned by the application on an indemnity basis, summarily assessed in the sum of £21,021.36, by 4pm on 26 June 2014.

4. The Claimant do pay the Fourth Defendant's costs of and occasioned by the application on an indemnity basis, summarily assessed in the sum of £38,616.00, by 4pm on 26 June 2014.

Order made on 12 June 2014

AND

5. The Claimant do pay the Third Defendant's costs of the action, including costs on an indemnity basis from 10 May 2014, to be subject to detailed assessment if not agreed.

6. The Claimant do pay the Fourth Defendant's costs of the action, including costs on an indemnity basis from 25 November 2013, to be subject to detailed assessment if not agreed.

Order made on 24 June 2014

Court of Appeal

Ineos Upstream Ltd and others *v* Persons Unknown and others (Friends of the Earth intervening)

[2019] EWCA Civ 515

2019 March 5, 6; April 3 Longmore, David Richards, Leggatt LJJ

Practice — Parties — Persons unknown — Injunction — Claimants seeking injunctions on quia timet basis to prevent anticipated unlawful "fracking" protests against various classes of unknown defendants — Whether injunctions properly granted — Guidance as to granting of injunction as against persons unknown

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". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants 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. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

Held, allowing the appeal in part, that, while there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort, the court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance; that, although it was not easy to formulate the broad principles on which an injunction against unknown persons could properly be granted, the following requirements might be thought necessary before such an order could be made, namely (i) there had to have been shown a sufficiently real and imminent risk of a tort being committed to justify a quia timet injunction, (ii) it had to have been impossible to name the persons who were likely to commit the tort unless restrained, (iii) it had to be possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they had not to do, and (vi) the injunction ought to have clear geographical and temporal limits; that, on the facts, the first three requirements presented no difficulty, but the remaining requirements were more problematic where the injunctions made against the third and fifth defendants had been drafted too widely and lacked the necessary degree of certainty; and that, accordingly, those injunctions would be discharged, and the claims against the third and fifth defendants dismissed; but that the injunctions against the first and second defendants would be maintained pending remission to the judge to reconsider (i) whether interim relief ought to be granted in the light of section 12(3) of the Human Rights Act 1998, and (ii) if the injunctions were to be continued against the first and second defendants, what would be the appropriate temporal limit (post, paras 29–34, 35, 39–42, 43, 47–51, 52, 53).

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471, SC(E) considered.

Decision of Morgan J [2017] EWHC 2945 (Ch) reversed in part.

APPEAL from Morgan J

The claimants, Ineos Upstream Ltd, Ineos 120 Exploration Ltd, Ineos Properties Ltd, Ineos Industries Ltd, John Barrie Palfreyman, Alan John Skepper, Janette Mary Skepper, Steven John Skepper, John Ambrose Hollingworth and Linda Katharina Hollingworth, were a group of companies and individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions to restrain potentially unlawful conduct against the first to fifth defendants, each described as a group of persons unknown engaging in various defined activities, the sixth defendant, Joseph Boyd, and the seventh defendant, Joseph Corré. By a decision dated 23 November 2017 Morgan J, sitting in the Chancery Division (Property, Trusts and Probate), granted injunctions against the first to third and the fifth defendants so identified [2017] EWHC 2945 (Ch). No order was made against the sixth and seventh defendants.

By an appellant's notice and with the permission of the Court of Appeal the sixth and seventh defendants appealed on the grounds: (1) whether the judge had been right to grant injunctions against persons unknown; (2) whether the judge had failed adequately or at all to apply section 12(3) of the Human Rights Act 1998, which required a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and (3) whether the judge had been right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Friends of the Earth were given permission to intervene by written submissions only.

The facts are stated in the judgment of Longmore LJ, post, para 1–11.

Heather Williams QC, Blinne Ní Ghrálaigh and *Jennifer Robinson* (instructed by *Leigh Day*) for the sixth defendant.

Stephanie Harrison QC and *Stephen Simblet* (instructed by *Bhatt Murphy Solicitors*) for the seventh defendant.

Alan Maclean QC and *Jason Pobjoy* (instructed by *Fieldfisher llp*) for the claimants.

Henry Blaxland QC and *Stephen Clark* (instructed by *Bhatt Murphy*) for the intervener, by written submissions only.

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

1 This is an appeal from Morgan J [2017] EWHC 2945 (Ch) who has granted injunctions to Ineos Upstream Ltd and various subsidiaries of the Ineos Group ("the Ineos companies") as well as certain individuals. The injunctions were granted against persons unknown who are thought to be likely to become protesters at sites selected by those companies for the purpose of exploration for shale gas by hydraulic fracturing of rock formations, a procedure more commonly known as "fracking".

2 Fracking, which is lawful in England but not in every country in the world, is a controversial process partly because it is said to give rise to (inter alia) seismic activity, water contamination and methane clouds, and to be liable to injure people and buildings, but also because shale gas, which is a fossil fuel considered by many to contribute to global warming and in due course unsustainable climate change. For these reasons (and no doubt others) people want to protest against any fracking activity both where it may be taking place and elsewhere. In the view of the Ineos companies these protests will often cross the boundary between legitimate and illegitimate activity as indeed they have in the past when other companies have sought to operate planning permissions which they have obtained for exploration for shale gas by fracking. The Ineos companies have therefore sought injunctions to restrain potentially unlawful acts of protest before they have occurred.

3 The judge's order extends to 8 relevant sites described in detail in paras 4–7 of his judgment [2017] EWHC 2945 (Ch); sites 1–4 and 7 consist of agricultural or other land where it is intended that fracking will take place; sites 5, 6 and 8 are office buildings from which the Ineos companies conduct their business.

The claimants

4 There are ten claimants. The first claimant is a subsidiary company of the Ineos corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The first claimant's commercial activities include shale gas exploration in the United Kingdom. It is the lessee of four of the sites which are the subject of the claimants' application (sites 1, 2, 3 and 7). The lessors in relation to these four sites include the fifth to tenth claimants. The second to fourth claimants are companies within the Ineos corporate group. They are the proprietors of sites 4, 5 and 6 respectively. The fourth claimant is the lessee of site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the first to fourth claimants as "Ineos" without distinguishing between them. The fifth to tenth claimants are all individuals. The fifth claimant is the freeholder of site 1. The sixth to eighth claimants are the freeholders of site 2. The ninth to tenth claimants are the freeholders of site 7.

The defendants

5 The first five defendants are described as groups of "Persons unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6 The second defendant is described as:

> "Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)."

7 The third defendant is described as:

> "Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form."

8 The fourth defendant is described as: "Persons unknown pursuing conduct amounting to harassment". The judge declined to make any order against this group which, accordingly, falls out of the picture.

9 The fifth defendant is described as: "Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order."

10 The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12 September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28 July 2017 against the first five defendants until a return date fixed for 12 September 2017. On that date a new return date with a three-day estimate was then fixed for 31 October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

11 As is to some extent evident from the descriptions of the respective defendants, the potentially unlawful activities which Ineos wishes to restrain are: (1) trespass to land; (2) private nuisance; (3) public nuisance; and (4) conspiracy to injure by unlawful means. This last group is included because protesters have in the past targeted companies which form part of the supply chain to the operators who carry on shale gas exploration. The protesters' aim has been to cause those companies to withdraw from supplying the operators with equipment or other items for the supply of which the operators have entered into contracts with such companies.

The judgment

12 The judge (to whose command of the voluminous documentation before him I would pay tribute) absorbed a considerable body of evidence contained in 28 lever arch files including at least 16 witness statements and their accompanying exhibits. He said of this evidence, at para 18 [2017] EWHC 2945 (Ch), which related largely to the experiences of fracking companies other than Ineos, which is a newcomer to the field:

> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

In the light of this comment and the limited grounds of appeal for which permission has been granted, we have been spared much of this voluminous documentation.

13 The judge then commented, at para 21:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

14 The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that: (1) the first defendants were restrained from trespassing at any of the sites; (2) the second defendants were restrained from interfering with access to sites 3 and 4, which were accessed by identified private access roads; (3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to sites 1–4 and 7–8, such interference being defined as (a) blocking the highway; (b) slow walking; (c) climbing onto vehicles; (d) unreasonably preventing access to or egress from the Sites; and (e) unreasonably obstructing the highway; (4) the fifth defendants were restrained from combining together to (a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992; (b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968; (c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and (d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment "in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous" all with the intention of damaging the claimants.

15 These separate orders related, therefore, to causes of action in trespass, private nuisance, public nuisance and causing loss by unlawful means.

16 It is a curiosity of the case that the judge made no order against either Mr Boyd or Mr Corré but they have each sought and obtained permission to appeal against the orders made in respect of the persons unknown and they have each instructed separate solicitors, junior counsel and leading counsel to challenge the orders. They profess to be concerned about the width of the orders and seek to be heard on behalf of the unknown persons who are the subject matters of the judge's order. Friends of the Earth are similarly concerned and have been permitted to intervene by way of written submissions. Any concern about the locus standi of Mr Boyd and Mr Corré to make submissions to the court has been dissipated by the assistance to the court which Ms Heather Williams QC and Ms Stephanie Harrison QC have been able to provide.

This appeal

17 Permission to appeal has been granted on three grounds:

(1) whether the judge was correct to grant injunctions against persons unknown;

(2) whether the judge failed adequately or at all to apply section 12(3) of the Human Rights Act 1998 ("HRA") which requires a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and

(3) whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Persons unknown: the law

18 Under the Rules of the Supreme Court ("RSC"), a writ had to name a defendant: see *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. Accordingly, Stamp J held in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204 that no proceedings could take place for recovery of possession of land occupied by squatters unless they were named as defendants. RSC Ord 113 was then introduced to ensure that such relief could be granted: see *McPhail v Persons, Names Unknown* [1973] Ch 447, 458 per Lord Denning MR. There are also statutory provisions enabling local authorities to take enforcement proceedings against persons such as squatters or travellers contained in section 187B of the Town and Country Planning Act 1990 ("the 1990 Act").

19 Since the advent of the Civil Procedure Rules, there has been no requirement to name a defendant in a claim form and orders have been made against "Persons Unknown" in appropriate cases. The first such case seems to have been *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 in which unknown persons had illicitly obtained copies of the yet to be published book "Harry Potter and the Order of the Phoenix" and were trying to sell them (or parts of them) to various newspapers. Sir Andrew Morritt V-C made an order against the person or persons who had offered the publishers of the Sun, the Daily Mail and the Daily Mirror copies of the book or any part thereof and the person or persons who had physical possession of a copy of the book. The theft and touting of the copies had, of course, already happened and the injunction was therefore aimed at persons who had already obtained copies of the book illicitly.

20 Sir Andrew Morritt V-C followed his own decision in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action Against Incinerators" on 14 July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

21 Both these authorities were referred to without disapproval in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, para 2.

22 In the present case, the judge held, at para 121, that since *Bloomsbury* there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the 1990 Act (section 187B, as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) or by the Civil Procedure Rules (eg CPR r 19.6 dealing with representative actions or CPR r 55.3(4), the successor to the RSC Ord 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

23 She pointed out that when the statutory powers of the 1990 Act were invoked that was precisely the position and she submitted that that could only be explained by the existence of the statute. This was most clearly apparent from the South Cambridgeshire litigation in which the Court of Appeal in September 2004 granted an injunction against persons unknown restraining them from (inter alia) causing or permitting the deposit of hardcore or other materials at Smithy Fen, Cottenham or causing or permitting the entry of caravans or mobile accommodation on that land for residential or other non-agricultural purposes, see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P LR 88. Brooke LJ cited both *Bloomsbury* and

Hampshire Waste as illustrations of the way in which the power to grant relief against persons unknown had been used under the CPR.

24 On 20 April 2005 Ms Gammell stationed her caravan on the site; the injunction was served on her and its effect was explained to her on 21 April 2005; she did not leave and the council applied to commit her for contempt. Judge Plumstead on 11 July 2005 joined her as a defendant to the action and held that she was in contempt, refusing to consider Ms Gammell's rights under article 8 of the ECHR at that stage and adjourned sentence pending an appeal. On 31 October 2005 the Court of Appeal dismissed her appeal and upheld the finding of contempt, holding that the authority of *South Buckinghamshire District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, which required the court to consider the personal circumstances of the defendant under article 8 before an injunction was granted, only applied when the defendants were in occupation of a site and were named as defendants in the original proceedings: see *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) held, at para 32, that Ms Gammell became a party to the proceedings when she did an act which brought her within the definition of the defendant in the particular case and, at para 33, that, by the time of the committal proceedings she was a defendant, was in breach of the injunction and, given her state of knowledge, was in contempt of court. He then summarised the legal position:

> "(1) The principles in the *South Buckinghamshire* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the principles in the *South Buckinghamshire* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Buckinghamshire* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Buckinghamshire* case and in the *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Buckinghamshire* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

25 Ms Harrison said that this was unacceptable unless sanctioned by statute or rules of court contained in the CPR, because the persons unknown had no opportunity, before the injunction was granted, to submit that no order should be made on the grounds of possible infringements of the right to freedom of expression and the right peaceably to assemble granted by articles 10 and 11 of the ECHR or, indeed, any other grounds.

26 Ms Harrison further relied on the recent case of *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that

unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed DPSC, Lord Carnwath, Lord Hodge and Lady Black JJSC agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding, at para 26, that a person, such as the driver of the Micra car in that case, "who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with".

27 In the course of his judgment he said, at para 12, that the CPR neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers; the critical question was what, as a matter of law, was the basis of the court's jurisdiction over parties and in what (if any) circumstances jurisdiction can be exercised on that basis against persons who cannot be named. He then said, at para 13, that it was necessary to distinguish two categories of cases to which different considerations applied: the first category being anonymous defendants who are identifiable but whose names are unknown; the second being anonymous defendants who cannot even be identified, such as most hit and run drivers.

> "The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not."

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard: para 17.

28 Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment 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. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

> "Where an interim injunction is granted and can 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 will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, 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. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell*, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold 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.

31 That is by no means to say that the injunctions granted by Morgan J should be upheld without more ado. A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance.

32 It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations, Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

33 Ms Williams for Mr Boyd, in addition to submitting that the judge had failed to apply properly or at all section 12(3) of the HRA, submitted that the injunction should not, in any event, have been granted against the fifth defendants (conspiring to cause damage to the claimants by unlawful means) because the term of the injunctions were neither framed to catch only those who were committing the tort nor clear and precise in their scope. There is, to my mind, considerable force in this submission and the principles behind that submission can usefully be built into the requirements necessary for the grant of the injunction against unknown persons, whether in the context of the common law or in the context of the ECHR.

34 I would tentatively frame those requirements 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.

Application of the law to this case

35 In the present case there is no difficulty about the first three requirements. The judge held that there was a real and imminent risk of the commission of the relevant torts and permission has not been granted to challenge that on appeal. He also found that there were persons likely to commit the torts who could not be named and was right to do so; there are clear provisions in the order about service of the injunctions and there is no reason to suppose that these provisions will not constitute effective notice of the injunction. The remaining requirements are more problematic.

Width and clarity of the injunctions granted by the judge

36 The right to freedom of peaceful assembly is guaranteed by both the common law and article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on private property. Professor Dicey in his *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at p 271:

> "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."

37 This neatly states the common law as it was in 195: see Oxford Edition (2013), p 154, I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said, at para 149, that it was not appropriate to do so since the concept of substantial interference was simple enough and well established. I agree.

38 The one possible drafting point that arises is that it was said by Ms Harrison that, as drafted, the injunctions would catch an innocent dog-walker exercising a public right of way over the claimants' land whose dog escaped onto the land and had to be recovered by its owner trespassing on that land. It was accepted that this was not a particularly likely scenario in the context of a fracking protest but it was said that the injunction might well have a chilling effect so as to prevent dog-walkers exercising their rights in the first place. I regard this as fanciful. I can see that an ordinary dog-walker exercising a public right of way might be chilled by the existence of an anti-fracking protest and thus be deterred from exercising his normal rights but, if he is not deterred by that, he is not going to be deterred instead by thoughts of possible proceedings for contempt for an inadvertent trespass while he is recovering his wandering animal. If this were really considered an important point, it could, no doubt, be cured by adding some such words as "in connection with the activities of the claimants" to the order but like the judge (in para 146) I do not consider it necessary to deal with this minor problem. Overall, this case raises much more important points than wandering dogs.

39 Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by ((c)(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or ((c)(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. 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 of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

41 Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order, which comprise public access ways to sites 1–4, 7 and 8 and public footpaths or bridleways over sites 2 and 7. The defendants are restrained from: (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of quia timet relief.

42 Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants 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.

Geographical and temporal limits

43 The injunctions granted by the judge against the first and second defendants have acceptable geographical limits but there is no temporal limit. That is unsatisfactory.

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

> "(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."

45 Ms Williams submitted that the judge had failed to apply section 12(3) because the claimants had failed to establish that they would be likely to establish at trial that publication should not be allowed. She relied in particular on the manner in which the judge had expressed himself [2017] EWHC 2945 (Ch), para 98:

> "I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm'). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants."

She submitted that it was not correct to ask what a trial judge would be likely to do "if the court accepted the evidence put forward by the claimants". The whole point of the subsection is that it was the duty of the court to test the claimants' evidence, not to assume that it would be accepted.

46 Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual evidence of the claimants was not contradicted by the defendants because he had added: "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

47 This submission has to be assessed on the basis (if my Lords agree) that the injunctions relating to public nuisance and the supply chain will be discharged. The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish that at trial publication of views by trespassers on the claimants' property should not be allowed.

48 Nevertheless, I consider that there is force in Ms Williams's submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought.

49 A number of other matters are identified in para 8 of Ms Williams's skeleton argument. We did not permit Ms Williams to advance any argument on the facts which contravened the judge's findings on the matters relevant to the grant of interim relief, apart from section 12(3) HRA considerations, and those findings will stand. Nevertheless, some of those matters may in addition be relevant to the likelihood of the trial court granting final relief. It is accepted that this court is in no position to apply the section 12(3) HRA test and that, if Ms Williams's submissions of principle are accepted, the matter will have to be remitted to the judge for him to re-consider, in the light of our judgments, whether the court at trial is likely to establish that publication should not be allowed.

Disposal

50 I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants pending remission to the judge to reconsider: (1) whether interim relief should be granted in the light of section 12(3) HRA; and (2) if the injunctions are to be continued against the first and second defendants what temporal limit is appropriate.

Conclusion

51 To the extent indicated above, I would allow this appeal.

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

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."

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).

(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

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

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

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.

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];

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."

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

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

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."

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 H took. In particular, and without derogating from the generality of this, the judge:

"Erred in concluding that the proper approach was to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protestor (whether or not that individual was formally joined as a party); and/or

"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

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

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

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

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

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 H publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at

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

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

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

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

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

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

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.

A **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.

B **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.

C *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

D **97** For all those reasons, we dismiss this appeal.

Appeal dismissed.
No order as to costs.

SUSAN DENNY, Barrister

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2020] EWHC 2717 (QB)

QB-2017-006080
QB-2020-003471

Royal Courts of Justice
The Strand
London, WC2A 2LL

Friday, 2 October 2020

Before:

MR JUSTICE NICKLIN
(By telephone hearing)

B E T W E E N :

LONDON BOROUGH OF ENFIELD — Claimant

- and -

PERSONS UNKNOWN — Defendant

- and -

LONDON GYPSIES & TRAVELLERS — Interested Party

MR S. WOOLF appeared on behalf of the Claimant

THE DEFENDANTS were not present and were not represented

MR O. GREENHALL (instructed by Chris Johnson of the Community Legal Partnership) appeared on behalf of the Interested Party.

J U D G M E N T

MR JUSTICE NICKLIN:

1. On 29 September 2020, I heard and application by the London Borough of Enfield for permission to amend the Part 8 Claim Form in an action that was originally issued on 21 July 2017, and an extension of an injunction (in modified terms) that was granted on 4 October 2017 ("the Final Order") for a period of three years. The Claimant had been granted an interim injunction on 21 July 2017 ("the Interim Order"). The Application Notice in respect of that application was issued on 22 September 2020. The Claim Form in that action had been issued against "Persons Unknown". In the original Claim Form, and indeed in the injunction orders, no description was given of the Persons Unknown in the title to the action.

2. The original Claim Form sought an interim and final injunction against the Persons Unknown pursuant to s.222 Local Government Act 1972 and/or s.187B Town and Country Planning Act 1990. The Local Authority brought the claim as the owner of around 130 public spaces within the London Borough of Enfield. The action was targeted at, "Unauthorised encampments throughout Enfield by Persons Unknown who are Travellers", as well as attempting to obtain restrictions to tackle the problems of fly tipping at various sites.

3. On Monday this week, Mr Woolf for the Claimant, and Chris Johnson, who is a member of the Community Legal Partnership representing, on that occasion, a group called the London Gypsies and Travellers ("LGT"), made representations to the Court. Mr Johnson and LGT do not represent any individual Defendant, the Persons Unknown; rather LGT, and therefore Mr Johnson on their behalf, is an Interested Party.

4. There were several obstacles to the applicant's application to amend the Claim Form, and the application to extend the duration of the injunction order.

    a. The Application Notice had not been served on any Defendant. Notices had not been posted at any of the sites in respect of which the Claimant was seeking to extend the injunction. By way of explanation for this failure, in the evidence provided to the court, the Claimant suggested that there had only been a "short time" available in order to carry out that notification procedure.

    b. I was doubtful that the Court had jurisdiction to grant permission to amend a Claim Form and/or to extend an injunction made by a final order. The order granted on 4 October 2017 did not contain any provision to extend the duration of the injunction. Although not required to determine this point, it does seem to me arguable that after a final order has been granted, which does not contain a liberty to apply to extend, the proceedings are at an end. The Court has made its determination. Subject to an appeal, the only jurisdiction to vary a final order would appear to be that contained under CPR 3.1(7). The limits of that jurisdiction were considered by the Court of Appeal in ***Tibbles -v- SIG Plc*** **[2012] 1 WLR 2591**. In summary, an application under CPR 3.1(7) usually requires a change of circumstances. The expiry of the period for which the injunction was granted does not appear to me to be a change of circumstances. Indeed, it is specifically foreseen at the date on which it was granted that the injunction would be time limited.

    c. Finally, and perhaps most seriously, it became clear that the Claimant had failed to serve a claim form on any of the Defendants in the original proceeding. CPR 6.3 sets out the methods of permissible service for a Claim Form. Without an order for

alternative service, the only method by which the Persons Unknown could be validly served was by personal service in accordance with CPR 6.5. The Claimant did not contend that the Claim Form had been personally served on any of these Defendants. No order had been made for service of the Claim Form by alternative means pursuant to CPR 6.15, and no order had been made dispensing with service of the Claim Form under CPR 6.16. The Claim Form had therefore not been validly served on anyone when the matter came before the court on Monday this week.

5. Recognising those difficulties, at the hearing, Mr Woolf, on behalf of the Claimant, formally withdrew the original Application for permission to amend the Claim Form and to extend the duration of the Final Order in the original proceeding. Nevertheless, he indicated that the Claimant would wish to make a further application under CPR 6.15(2) for an order for alternative service, to validate the steps the council had taken to bring the original Claim Form to the attention of the Persons Unknown Defendants.

6. I gave directions for the service of an Application Notice, and for evidence in support by the Claimant for a hearing that was listed to take place today. LGT was also given the opportunity to file any evidence upon which it wanted to rely. The Claimant duly filed an Application Notice dated 30 September 2020 for the CPR 6.15(2) Application, together with a witness statement in support from Antonia Makanjuola, the Assistant Principal Lawyer in the Council's Legal Department.

7. In addition, yesterday, 1 October 2020, the council also issued a fresh Part 8 Claim. In summary, this claim effectively seeks to extend the injunction granted on 4 October 2017, albeit by way of a fresh claim, and in respect of now some limited 96 sites, compared to the 128 sites that were the subject of the Final Order in the original proceeding. Under CPR Practice Direction 8A §20.8, 21 days' notice is required before the Part 8 Claim can be dealt with. The council, as part of its application today, has asked me to abridge the time for service of the Application for an interim injunction. The interim order sought today is limited to fly tipping, and does not seek to restrain the occupation of land by Gypsies, Travellers or others. The Claimant intends to seek an order against "Persons Unknown" in that latter category at the hearing of the Part 8 Claim, but it is not part of the relief they are seeking today.

8. As recognised by the Claimant in its evidence, and Mr Woolf in his submissions, the legal landscape that governs proceedings and injunctions against Persons Unknown has transformed since the Interim and Final Orders were granted in this case. In chronological order the key cases are:

- ***Cameron v Liverpool Victoria Insurance Co Ltd*** **[2019] 1WLR 1471.**
- ***Boyd v Ineos Upstream Limited*** **[2019] 4 WLR 100.**
- ***Bromley London Borough Council v Persons Unknown*** **[2020] PTSR 1043.**
- ***Cuadrilla Bowland Limited v Persons Unknown*** **[2020] 4 WLR 29.**
- ***Canada Goose UK Retail Limited v Persons Unknown*** **[2020] 1 WLR 2802.**

9. There are two issues immediately that I have to decide today:

   a. Whether to grant the Claimant's Application under CPR 6.15(2), the effect of which is an order retrospectively to validate, as good service, steps already taken to bring the Claim Form to the attention of the Defendants in the original proceedings.

b. Whether to grant an interim injunction in the Claimant's new Part 8 Claim against Persons Unknown to restrain fly tipping at the 96 sites that are subject of the application.

CPR 6.15(2): Alternative Service

10. CPR 6.15 provides:

> "(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.
>
> (3) An application for an order under this rule –
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice.
>
> (4) An order under this rule must specify –
>
> (a) the method or place of service;
>
> (b) the date on which the claim form is deemed served; and
>
> (c) the period for –
>
> (i) filing an acknowledgment of service;
>
> (ii) filing an admission; or
>
> (iii) filing a defence."

11. An application under 6.15(2) is concerned with giving retrospective validation of an event that has already happened: ***AstraZeneca UK Limited -v- Vincent & Others*** **[2014] EWHC 1637 (QB)**. There can be no question now of the Court permitting some future act of alternative service on the Defendants. The Claim Form in the original claim has long since expired.

12. The question is where there is a "good reason" to authorise service by an alternative method. Under CPR 6.15(2) this is essentially a factual enquiry into what steps have been taken, and whether they have or are likely to have brought the Claim Form to the attention of the Defendant: ***Abela -v- Baadarani*** **[2013] 1 WLR 2043**. The mere fact, if it can be demonstrated, that the Defendant did learn of the existence of the claim and the contents of the Claim Form cannot, without more, constitute a good reason to make an order under 6.15(2). However, the wording of the rule shows that this is a critical factor: ***Abela*** [36].

13. It has never been sufficient that the Defendant should be aware of the contents of the originating document, such as a Claim Form. Otherwise, any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process: ***Barton -v- Wright Hassall LLP*** **[2018] 1 WLR 1119** [16].

14. The question is whether there is a good reason for the court to validate the mode of service that has been used, not whether the Claimant had good reason to choose that mode: ***Barton*** [9(3)]. The CPR clearly stipulate the acceptable methods for serving the Claim Form. Absent some difficulty in using these methods, CPR 6.15(2) does not enable litigants to devise their own method to effect service. It is necessary in the interests of certainty that the court could permit a litigant to depart from the prescribed method of service only were a compelling case is made out to do so: ***Brown -v- Innovatorone*** **[2009] EWHC 1376 (Comm)** [44] *per* Andrew Smith J.

15. If a claimant would not have been able to demonstrate a "good reason" under CPR 6.15(1) prospectively to apply for an order for alternative service, he or she should not be in any materially better position if the Claim Form is not thereafter validly served, and he or she is forced to apply under CPR 6.15(2) to validate the method in fact used: ***Piepenbrock -v- Associated Newspapers Limited*** **[2020] EWHC 1708 (QB)** [65].

The evidence

16. There is no dispute that the Claim Form was only available on the Claimant's website, and copies of it available for inspection in the Claimant's libraries in the London Borough of Enfield. The Claim Form was not one of the documents that was attached to the physical posts at each of the 130 sites that were the subject of the original injunction. It is correct that the Claim Form was referred to in the injunction order granted on 4 October 2017, and indeed stated to be available on the Claimant's website. One person did, apparently make an inquiry with the Council's Legal Department about the claim.

17. In her witness statement, Miss Makanjuola has helpfully exhibited the documents which demonstrate the following:

    a. The web page which referred to the grant of the interim injunction on 21 July 2017, which included links to the Claim Form and the Claimant's evidence. The relevant page of the website has been viewed 2,168 times.

    b. Miss Makanjuola fairly acknowledges in her statement that members of the Gypsy and Traveller communities may not have immediate access to the internet. In light of that, hard copies of the Claim Form were placed, as I have said, in Enfield's libraries, and a notice publicising this was posted along with the interim injunction at all the relevant sites. No record has been kept of the number of people requesting to see a copy of the Claim Form at any of the libraries where it was available.

    c. A notice was placed in the *Enfield Gazette* and the *Enfield Independent* newspapers on 26 July 2017.

    d. Finally, although the materials made available at each site covered by the injunction did not include the Claim Form, the notice that was posted there was in the following terms:

> "The enclosed document, the order, and the map, together with the claim forms (sic) and evidence in support, have been posted on Enfield Council's website, and can be found at the following web address: www.enfield.gov.uk/injunction. Any person wishing to review hard copies of the order, map and claim form can do so at any of the council's public libraries. Hard copies in the libraries will be made available as reference copies only, and will be available until 4 October 2017."

After grant of the Final Order, copies of the notice were amended to show the date of 3 October 2020, rather than 4 October 2017.

18. LGT has provided a witness statement from Ilinca Diaconescu dated 30 September 2020. Ms Diaconescu is the policy and campaigns coordinator of LGT. I accept that she can speak with some authority, even if necessarily at a level of generality about the Gypsy and Traveller community given her role. She has expressed concern about the level of digital exclusion in the Gypsy and Traveller community. In that respect she has referred to research published in 2018 titled, "Digital inclusion in gypsy and traveller communities". This research suggests that:

- Two in five Gypsies and Travellers use the internet daily compared with four out of five of the general population.
- Further, only 38 per cent of Gypsies and Travellers had a household internet connection compared with 86 per cent of the general population.
- 32 per cent did not own any devices that could connect to the internet.

Submissions

19. Mr Woolf accepts that the Claimant cannot submit that making the Claim Form available on the council's website will have effectively brought the claim to all of those in the category of Persons Unknown. Nevertheless, he argues that this method of service, together with the other steps taken by the Council, would have been validated by the court had the Claimant applied in advance for an order for alternative service using these methods. He contends that the "Persons Unknown", who are most likely to be affected by the proceedings, for example the Gypsy and Traveller communities, would:

> "In all likelihood have been very aware of the nature of the proceedings from:
>
> 1. Discussions amongst their community.
> 2. From guidance from groups that support the Gypsy and Traveller communities such as LGT.
> 3. From similar orders and proceedings in relation to other locations."

20. Mr Greenhall, who today appears for LGT, submits:

a. There is no good reason for an order under 6.15(2). The Claimant failed to apply at the time of the original injunction for an order for alternative service. This mistake does not justify a retrospective validation of what was done by the Claimant.

b. The original order was made in 2017. Three years have passed without any attempt by the council to correct the lack of proper service, despite the well-known decisions at first instance and on appeal in ***Canada Goose***.

c. There is no evidence that any person falling within the category of Persons Unknown, as now defined in the new Claim Form, was aware of the proceeding or the contents of the Claim Form.

d. For the reasons explained in Ms Diaconescu's witness statement, the step of putting the Claim Form on the Claimant's website was, as a result of the level of digital exclusion in the Gypsy and Traveller community, not likely to bring the contents of the Claim Form to the attention of the Defendants. The Claim Form was not posted at each of the sites but could have been.

Decision

21. I refuse the Claimant's application for an order under CPR 6.15(2). I am not satisfied that the council has demonstrated a good reason to authorise service by the method of posting the Claim Form on the Claimant's website, and the other steps that were taken, for example, by placing it in libraries and adverting to the existence of the injunction in the newspaper articles.

    a. The Claimant has not demonstrated that this alternative method, in fact, brought the Claim Form to the attention of anyone in the category of Persons Unknown, who were the Defendants to the claim, save perhaps one person who made an enquiry in relation to the matter of the Claimant's Legal Department.

    b. Further, the Claimant has not demonstrated that this method of service was likely to bring it to the attention of the Persons Unknown Defendants. The level of digital exclusion in the gypsy and traveller community demonstrated in Ms Diaconescu's evidence means that, if anything, the likelihood was that, if effective at all, it would reach only a minority of the Persons Unknown.

22. I am satisfied that had the Claimant sought an order for alternative service back in 2017, the court, as a minimum, would have required service of the Claim Form by posting it at each of the sites covered by the injunction. Making the Claim Form available on the council's website, and advertising its availability there and in libraries, both in the notices that were posted and in the newspaper articles, would have been an important additional method of maximising the likelihood of the contents of the Claim Form coming to the attention of the Persons Unknown Defendants. But on their own, those are not sufficient.

23. I reject the argument that the Persons Unknown would, by a process of discussion in their communities and general experience, become aware of the proceedings and the contents of the Claim Form. General awareness of proceedings is not to be equated with proper service of the Claim Form on a Defendant:

    a. Service of the originating process, here by Part 8 Claim Form, is the very process by which a Defendant is subjected to the court's jurisdiction. In ***Canada Goose***, Coulson LJ stated [45]:

        > "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: ***Cameron*** [17] in the judgment of Lord Sumption. It is the service of the claim form that alerts a person to the fact that she or he is being made a defendant to the proceeding."

b. Further, in ***Birmingham City Council -v- Afsar & Others*** **[2020] EWHC 864 (QB)**, the Claim Form in that case simply identified Persons Unknown, like this case, without a description of them. Warby J noted the following [21(2)]:

> "The proceedings were, in this respect, defective at the outset; the description of 'persons unknown' failed to satisfy the essential requirement of identifiability, emphasised by the Chancellor in the ***Bloomsbury*** case and re-emphasised by the Court of Appeal in ***Canada Goose*** at [82(2)]. I do not consider that the Court, or a person given notice of the proceedings, can fairly be expected to work their way through the body of a lengthy statement of case to work out whether they are a target of the claim. In the case of an intended defendant, this may not be realistic, either. I regard the failure to describe the [Persons Unknown] with more precision as a breach of the requirement identified by the Court of Appeal in ***Canada Goose***, and a fundamental defect."

c. The important point from that decision, however, is the distinction between a person's general awareness of the proceedings, as a result of information they are provided, and the important step of being served with documents that makes the person aware that s/he is a party to the proceedings.

24. The consequence of the failure of the application under CPR 6.15(2) is pretty stark. The failure to serve the Defendants in this case means that the Interim and Final orders were made in this case without jurisdiction over any Defendant. The period of validity of the original Claim Form has long since expired: CPR 7.5. For the last three years, therefore, an injunction has been posted at up to 130 sites, directed at Persons Unknown, prohibiting certain conduct, on pain of committal for breach, when jurisdiction had not been established over any individual Defendant because of the failure validly to serve the Claim Form.

25. I consider that Mr Greenhall is substantially correct that the Council can be criticised not only for the original failure properly to effect valid service of the Claim Form, but also for the failure to detect this error at any point over the last three years before it was pointed out by the Court on Monday this week. The failure validly to serve the Claim Form on Persons Unknown was one of the principal failures in the ***Canada Goose*** case.

26. A point of some general importance therefore arises in this case. Following the Court of Appeal's decision in ***Canada Goose***, which was handed down on 5 March 2020, Mr Woolf accepts that there were at least grounds upon which the Persons Unknown, or people representing them, could have applied to vary or discharge the Final Order that was granted on 4 October 2017. The principal ground of challenge, although not the only one that could have been made, would have been that the final order purported to bind newcomers, in other words people who were not in the category of Persons Unknown when the final order was granted. Mr Woolf accepts that, whether under CPR 3.1(7) or otherwise, the Court would have retained a jurisdiction to consider whether a change in circumstances, including a change in the law, meant that the terms of the injunction in the Final Order ought to be reconsidered.

27. Before the hearing today, I asked the parties for their submissions on the following question:

> "Is a public authority that has obtained an injunction against Persons Unknown for a number of years under a duty to apply to the court for reconsideration of whether the terms of the injunction remain appropriate if there has, to the knowledge of the public authority, been a change in the law that casts doubt on whether the injunction ought to continue to apply in the terms in which it was originally granted?"

28. I am most grateful to the thoughtful and careful submissions from Mr Woolf and Mr Greenhall in response to this point. Mr Woolf has quite properly referred me to the decision of Eder J in ***Speedier Logistics & Othrs -v- Aardvark Digital & Anor*** **[2012] EWHC 2276 (Comm)**. That was a case dealing with a freezing injunction. The judge addressed the question of the duty of a claimant in circumstances where events occur after the date of the grant of the injunction which render information previously given to the court no longer relevant or accurate. The judge recited the familiar authorities on a party's duty, at the *ex parte* stage, to bring all relevant matters to the attention of the court that would have a bearing on the decision the court was making.

29. However, it had been submitted on behalf of the claimant in that case that this duty ended once there had been an *inter partes* hearing; and that after such an *inter partes* hearing there was no continuing duty upon a claimant to revert to the court upon a subsequent change in circumstances. The judge rejected that submission [25]:

> "I am unable to accept that submission. I cannot see any reason in principle in circumstances where the claimant becomes aware of information which renders what the claimant told the court originally incorrect, not being under a duty to go back before the court to inform the court that there has been a relevant change or, at the very least, to inform the defendant of those new circumstances. Counsel for the claimant submitted that even if there was such a duty in relation to what he described as a 'freezing injunction', there was no equivalent duty in relation to what I might be describe as an 'ordinary injunction'. I accept of course that there are important differences between a freezing injunction, which is often described as a 'nuclear weapon' to the extent that it may freeze assets generally, both within the jurisdiction and outside the jurisdiction, and other injunction. Of course, counsel for the claimant is right to say that there are differences between those injunction, however in relevant respects I do not accept that there is here any relevant distinction in terms of the continuing duty on a claimant to exhort the exercise of the court's discretion on a certain basis. If that basis changes, it seems to me important, as a matter of principle, that the claimant does revert to the court to inform the court of the position. The main reason for that is that the exercise of the court's discretion was originally on a particular basis and, if that basis changes, it seems to me that as a matter of principle, the court must be informed of that change in the ordinary circumstances."

30. The situation here, of course, is that never has been an *inter partes* hearing. There was the interim hearing on 21 July followed by a final hearing on 4 October 2017. At both hearings the only party present and represented, and the only party to make submissions, was the Claimant. It was not therefore an option for the Claimant to take the course of notifying the

Defendant of the change of law, as suggested as a possibility by Eder J, because it is not possible to notify those in the category of Persons Unknown.

31. Mr Woolf recognised in his submissions that a requirement to revert to the court to inform it of a material change of circumstances is more pressing where the Defendants are Persons Unknown. The safeguards usually present in *inter partes* adversarial litigation are typically absent where the defendants are Persons Unknown and whose interests are unlikely to be represented. Mr Woolf accepts, rightly in my view, that the court must retain jurisdiction to consider whether the terms of a subsisting injunction should continue in the terms in which it was originally granted.

32. In the light of these submissions and the decision in ***Speedier Logistics***, I consider that there is a duty on a party, such as the Claimant in this case who (i) has obtained an injunction against Persons Unknown *ex parte*, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration. Although there are many reasons why this duty should apply particularly to a public authority, it does not appear to me that the duty is limited to public authorities.

Interim Injunction in the new Part 8 Claim

33. As noted above, on 1 October 2020, the Claimant issued a new Part 8 Claim. Two categories of Persons Unknown are now identified as Defendants in new Claim Form as follows:

> "(1) Persons unknown who enter and/or occupy any of the locations listed in this order ("the locations") for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphanelia (sic)
>
> (2) Persons unknown who enter and/or occupy any of the locations listed in this order ("the locations") for the purposes of fly-tipping or discarding waste including entering with caravans, mobile homes, pick-up trucks, vans or lorries and any associated vehicles"

34. At this stage, Mr Woolf only seeks an interim injunction against the second category of Persons Unknown. To do so, he seeks an abridgment of the required period of notice. The Claimant intends to seek an interim injunction against the first category of Persons Unknown as a later point when proper notice has been given.

35. The issue that has caused me concern in relation to dealing with this application is the conundrum that is presented following the decision of the Court of Appeal in the ***Canada Goose*** case; the difference between the effectiveness of interim injunctions granted against Persons Unknown when measured against the effectiveness of a final injunction in substantially the same terms. Although an interim injunction against Persons Unknown *can* bind non-parties, an injunction made by final order made can only bind those who are parties to the proceedings in which it is made (see discussion in ***Canada Goose*** [66]-[72], [89]-[92]).

36. Where Persons Unknown are the defendants to proceedings, that means that, at the point at which the court grants the final order, it only binds those who can be identified as the Persons Unknown defendants at the date of that order. In some cases, it will be possible, as

in the ***Canada Goose*** case itself, to at least identify, if necessary by reference to video evidence, those upon whom there has been notice or service of the injunction and Claim Form.

37. In ***Canada Goose*** there were people – the protestors - who it was alleged had already carried out tortious acts. Subject to issues of service, they became defendants in the proceedings and would be bound by any final injunction. In the current case, the class of Persons Unknown is defined prospectively. There are currently no members of the class of persons unknown; the interim order anticipates, and seeks to prevent, persons acting in the prohibited way. In such a case, there can be no certainty about who has been served with the Claim Form and therefore become a defendant to the proceedings. The effect would be that, once converted into a final order, the injunction would be, for all practical purposes, impossible to enforce. It cannot be enforced against historic defendants because they cannot be identified. And as a matter of jurisdiction and principle, it cannot be enforced against those who are described as "newcomers" in the Court of Appeal's decision in ***Canada Goose***, because they were never parties to the original proceedings.

38. This effect, which is one of the submissions that was made forcefully to the Court of Appeal in ***Canada Goose***, but rejected, is that a party may end up obtaining more valuable protection by way of interim order than he would be able to achieve by way of final order. The Court of Appeal addressed the argument raised by the appellant about the apparent difference of enforceability of interim and final injunctions [92]:

> "In written submissions following the conclusion of the oral hearing of the appeal [the Appellant] 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."

39. In ***Canada Goose***, the Court of Appeal was satisfied that there existed wrongdoers in the category of Persons Unknown against whom meaningful final relief could be granted. That is not the position in this case. I accept the evidence, put forward on behalf of the Claimant in this case, that fly tipping is a serious problem for local authorities, including the London Borough of Enfield. The witness evidence of Ms Maguire that has been presented to the court contains graphic photographs of the consequences and the vast amount of waste that can be deposited on land by fly tippers operating on what appears to be an industrial scale. It is therefore understandable that the Claimant wishes to take all available steps to try and prevent this unlawful activity or at least to provide effective remedies against those who engage in it.

40. Mr Woolf has explained to me today why the Clamant believes remedies that are provided under the Environmental Protection Act are not as effective as civil injunctions against Persons Unknown. Largely, this appears to because, he suggests, civil proceedings offer a

speedier procedure to take action against those who occupy land by way of a commercial operation to dispose of large quantities of rubbish or refuse.

41. The difficulty is this: even if I were to grant an interim injunction in terms that were proportionate and targeted at the type of fly tipping that I have described, there would be no real prospect of serving the injunction order. No-one is presently occupying any of the land and carrying out fly-tipping on it. The Claimant seeks orders for alternative service of the Claim Form and any injunction. But, even assuming that such orders were made, the court would shortly thereafter move to consider what final relief should be granted. In a typical Persons Unknown claim like this, no Acknowledgement of Service is filed and there is no attendance by, or representation of, any defendant at the final hearing. In this case, for example, the Interim Order was granted on 21 July 2017 and the Final Order at a hearing on 4 October 2017, i.e. less than three months between initial and final hearings.

42. The point can be demonstrated in this way. Assume that the Court were to make a final order in the terms sought by the Claimant against Persons Unknown. It would not provide any real protection to the Claimant because, in all probability, the Claimant would not be able to demonstrate whether any individual person had become a defendant to the claim. If no one can be identified as a defendant, the final order binds no-one. ***Canada Goose*** establishes that final injunctions against "Persons Unknown" do not bind newcomers. The consequence is that a hypothetical fly tipper who turned up at any of the ninety-six sites in respect of which the Court had made the final order would not actually be restrained by the injunction: s/he is not bound as an original defendant to the claim and s/he is not bound as a newcomer.

43. The result would be most unsatisfactory: barring some unusual development in the case, any interim injunction the Court granted would be more effective and more extensive in its terms than any final order the court could grant. As there is unlikely to be much by way of development between the grant of the interim and final order in this case, this raises the question as to whether the court ought to grant any interim relief at all. This arises because, unlike ***Canada Goose***, at the date of grant of any interim injunction, no people exist in the category of Persons Unknown.

44. In terms of practical reality, the only way that the London Borough of Enfield could achieve what it seeks out to do, is to have a rolling programme of applications for interim orders. As soon as a final order was granted it would become worthless against "newcomers". To continue effective injunctive relief against "newcomers" the Council would have to commence fresh proceedings and seek a new interim order. That would be litigation without end. It presents a real challenge to the conventional understanding of adversarial civil litigation as it is conducted in this jurisdiction.

45. I am not satisfied therefore that I should grant an interim order today. Besides the points I have identified, there is no evidence of any current occupation of land by fly-tippers and no evidence of any threat by any particular individual to do so. Having considered the submissions of Mr Woolf, it seems to me that many of the concerns that he has identified, particularly the time it takes for the court to hear an application for an injunction as a response to people occupying land to conduct what are effectively commercial fly tipping operations, can be accommodated by other measures short of granting an interim order in the form he seeks.

46. It appears to me that this case raises issues of wider importance in relation to injunctions of this type. They require proper thought and consideration by the court. I will therefore

adjourn the Claimant's application for an interim injunction. The court is more likely to achieve a fair and just result, by allowing an opportunity for proper consideration of the points that arise, than dealing with the matter on the hoof, as it really is, as a result of the service of an application for an interim injunction in the fresh proceedings that were only issued yesterday. I propose that the court will invite the Attorney General to appoint an *amicus* to make submissions in the public interest on the wider implications of the ***Canada Goose*** judgment in the Court of Appeal, and its effect on interim and final orders made against Persons Unknown in cases like this. There is a real and recognised problem in cases like this that the arguments of only one side are advanced.

47. As I have said, I believe that the effects that the Claimant is concerned about can be mitigated, if not completely at least substantially, by the court making orders that enable applications to be made promptly to the court in the event that there are incidents of occupation of land by what can be described as commercial fly tippers.

48. But for the reasons I have explained, I am not satisfied that it is appropriate to grant, and, as an exercise of my discretion, I refuse to grant an interim injunction on this occasion. The application for such relief will be adjourned to be fixed on a later date.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Neutral Citation Number: [2021] EWHC 1045 (Comm)

Case No: CL-2020-000066

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

The Honourable Mrs Justice Cockerill DBE

- -

Between :

(1) ANTHONY DOUGLAS KING		**Claimants**
(2) JAMES PATRICK KING		
(3) SUSAN MAY KING		
- and -		
(1) BARRY STIEFEL		**Defendants**
(2) ROBIN FISHER		
(3) PETER SWAIN		
(4) PRIMEKINGS HOLDING LIMITED		
(5) CLARE VICTORIA TOOMER		
(6) RODERICK JOHN COWPER		
(7) PETER DAVID LEVINGER		
(8) TEACHER STERN LLP		
(9) PAUL DOWNES QC		
(10) JACOB ISAAC RABINOWICZ		

- -

- -

Christopher Newman (instructed by **Metis Law Limited**) for the **Claimants**
Catherine Addy QC and Joseph Sullivan (instructed by **Macfarlanes LLP**) for the **First to**
Fourth Defendants
Daniel Lightman QC and Charlotte Beynon (instructed by **Kennedys Law LLP**) for the **Fifth to Eighth and Tenth Defendants**
Charles Hollander QC (instructed by **DAC Beachcroft LLP**) for the **Ninth Defendant**

Hearing dates: 15, 16, 17, 18, 22 and 23 February 2021

Draft sent to Parties: 19 April 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE COCKERILL

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 AM 26 April 2021.**"

Mrs Justice Cockerill :

Introduction

1. On 28 April 2017 a claim in fraudulent misrepresentation brought by the Claimants ("the Kings") against the Second to Fourth Defendants to this claim commenced in the Chancery Division before Marcus Smith J. The claim is referred to below as "the Misrepresentation Claim". The misrepresentations alleged arose out of the negotiations for the sale of a company founded by Mr James King, Kings Solutions Group Limited ("KSGL") to the Fourth Defendant, Primekings. The trial was listed for 20 days.

2. It is fair to say that the case did not go as the Kings hoped. On Day 10 of that action the Kings discontinued that claim, apologised to those Defendants, and consented to pay the costs of the action on the indemnity basis. After short argument, Marcus Smith J ordered a payment on account of £1.7 million to be made in relation to that costs liability ("the Payment on Account Order").

3. From these basic facts has sprung a multiplicity of litigation which must inevitably put any observer with a taste for nineteenth century fiction in mind of the infamous Jarndyce case. The current claim is but one outcropping of that litigation.

4. In this action the Kings bring a claim in unlawful means conspiracy against the First to Fourth Defendants ("the Primekings Defendants"), and those Defendants' legal representatives in the Misrepresentation Claim: the Fifth to Eighth and Tenth Defendants, Teacher Stern LLP and certain partners, a former partner and an employee of that firm ("the Teacher Stern Defendants") as well as Primekings' leading counsel Mr Paul Downes QC. The conspiracy is dealt with further below, not least because it defies any powers of precis.

5. The Kings claim substantial damages on the basis that but for this conspiracy they would have won the Misrepresentation Claim, or that they would now be owners of a 40% stake in KSGL, or that they would not have had to pay costs arising out of the Misrepresentation Claim. They also claim damages for a variety of other more unusual heads of loss.

6. The three groups of Defendants each apply to strike out those claims.

7. The principal other proceedings to which reference will be made are:

    i) The Detailed Assessment Proceedings: the proceedings before the Senior Courts Costs Office wherein the costs ordered to be paid pursuant to the Payment on Account Order were assessed. Those proceedings closed late last year with a certificate being issued in the sum of £2,726,154.87, including £337,309.14 for interest as at 17 November 2020 and £168,664.00 for the costs of assessment.

    ii) The Professional Negligence Action: the proceedings in this court whereby the Kings seek damages against their own legal team in the Misrepresentation Claim

("the Misrepresentation Team" collectively and also "the Misrepresentation Solicitors" and "the Misrepresentation Counsel") for breaches of duties of care and fiduciary duties. That case remains live;

iii) The s. 994 Proceedings: the proceedings in the Companies Court in which it is alleged that Primekings and a number of other Respondents acted in a manner unfairly prejudicial to the interests of the Kings as shareholders in KSGL. Parts of the Kings' points of claim have now been struck out by Mr Tom Leech QC (sitting as a Deputy High Court Judge) in a judgment [2020] EWHC 2861 (Ch), but some aspects of the dispute remain live.

8. There is also one separate piece of litigation in the other direction. In a claim in the Chancery Division Kings Security Systems Limited ("KSSL") claimed against Mr Anthony King ("Mr King") for breach of fiduciary duty, the central allegation being that he took a bribe from KSSL's company car provider. In a judgment [2021] EWHC 325 (Ch) Mr Andrew Lenon QC (sitting as a Deputy High Court Judge) has found in favour of KSSL.

9. Regrettably this judgment can be neither short nor user friendly because there are a number of complications, principally:

i) Each set of Defendants seeks the strike out on a different basis, and each application itself contains a number of different components;

ii) The nature of the claim necessarily involves some consideration of the other proceedings; and

iii) That necessary overlap has been intensified by the fact that Mr Newman, acting for the Kings, has defended the claim very much by reference to what one might term the wider field of battle, rather than focussing only or mainly on the arguments advanced by the Defendants.

10. I have structured this judgment as follows:

i) Introduction

ii) The Law

a) The Legal Principles on Strike out and summary judgment

b) The relevance of the absence of a defence

c) Is there a need for an applicant for summary judgment to swear to the absence of real prospect of success?

iii) The Facts

a) The Misrepresentation Claim

b) Further Litigation

c) Enforcement of the Payment on Account Order

d) The s. 994 Proceedings

e) The Professional Negligence Action

f) The Detailed Assessment Proceedings

g) The current proceedings iv) The Particulars of Claim

v) Clarifying what is in issue

a) The Claim for the Value of the Misrepresentation Claim

i) Iteration 1: The Pleaded Threats

ii) Iteration 2: The Inferential/Unpleaded Threats

b) The Costs Claim

c) Analysis of the Claim: result

vi) The Costs Allegations: the Effect of the Final Costs Certificate

a) The law

b) The issue and submissions here

c) Discussion

vii) CPR 38.7 and abuse of process

viii) Discrete Issues

a) Immunity from Suit (Mr Downes only)

b) Mr Rabinowicz (Mr Rabinowicz only)

c) Without prejudice Privilege

d) The status of the unpleaded case

ix) The substance of the pleaded claims

a) Inferences of fraud and pleading fraud

b) The Pleaded Threats

c) The "Hidden Contingency Fee"

d) The Accounts Evidence

e) The £3 million costs figure

f) Shadow ledger

g) The Smith and Williamson evidence

h) The 577 hours issue

i) Conclusion

x) The Inferred Threats

a) The conflict of interest

b) The extraordinary events

c) Mr Downes' failure to exploit the B share error

d) The absence of Howard Smith

e) Conclusion

xi) Post-script: The conduct of the Kings' case

a) Specific allegations which lack basis

b) The leap from thinking the worst to accusation

c) Full and Frank disclosure

d) Routine accusations of impropriety

The Law

The Legal Principles on Strike out and summary judgment

11. The most often cited summary of the law in this area is in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) [15]. It has been applied by the Court of Appeal more than once, and on innumerable occasions at first instance. No-one overtly suggested that there was any fault to be found with it. I shall revert to it further below.

12. There is one aspect of the law on summary determination to which I should give particular attention, though in practical terms it has little impact on my decision. The Kings were emphatic that there is binding Court of Appeal authority stating that where a defence has not been filed, the facts pleaded in the Particulars of Claim have to be assumed to be true. This point was made by reference to *Thomas v News Group Newspapers* [2001] EWCA Civ 1233 and to what Mr Newman referred as "the Thomas Principle".

13. This so-called principle was derived from the passage at [3] where Lord Phillips M.R. said:

> "In this case the appellants had taken out their strike-out application before filing a defence. In such circumstances … The court proceeds on the assumption that the facts alleged by the claimants will be proved at the trial and considers whether, on that premise, the claim has any realistic prospect of success.

> If it does, it is permitted to proceed to trial; if it does not it is struck out unless there is some other compelling reason why the case should go to trial."

14. This authority is not one which has attracted much attention from the textbook writers, save in the context of the offence or tort of harassment. It does not, contrary to Mr Newman's submissions, set out any statement of principle as regards the approach to summary judgment. On closer examination it transpired that it was a case which was all about the definition of "harassment". There appears to be no reference to any evidence at all in the case. There was no question about whether the court had to assume all the facts alleged to be true. The reliance placed upon it was therefore thoroughly misplaced and evidences an apparent misunderstanding of the proper use of precedent, and what constitutes precedent, which recurs elsewhere in the submissions advanced for the Kings.

15. The leading cases on this area of jurisprudence are actually entirely different. They are mentioned in the *Easyair* summary:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91; ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "minitrial": *Swain v Hillman;*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a

> fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) …if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. …. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

16. It is worth making some further citation from the *ED&F Man* case. That was a case where the judge entered summary judgment based on an assessment of the facts. He was criticised for having wrongly conducted a mini-trial. That argument was rejected by the Court of Appeal, which considered at [53] that:

> "I would accept … in a case where, with knowledge of the material facts, clear admissions in writing are unambiguously made … a judge is in my view entitled to look at a case 'in the round', in the sense that, if satisfied of the genuineness of the admissions, issues of fact which might otherwise require to be resolved at trial may fall away. … In that respect, the judge was entitled to reject as devoid of substance or conviction such explanation as was advanced for the making of those admissions and in my view he was entitled to conclude that the first defendant lacked any real prospect of successfully defending the claim."

17. The Kings also placed reference on something which was referred to as the "the Silovsky Principle". This "principle" is understood to be a reference to *NHS Commissioning Board v Silovsky* [2015] EWHC 3141 (Comm) where at [3] Leggatt J said:

> "In particular, where there is any issue or potential issue of fact to which the answer might be affected by a full investigation, I shall assume for present purposes that the issue is to be answered in the claimant's favour. Where, however, the question is one of law or is otherwise one which I am as well placed to decide now as a judge would be at trial, it is

> appropriate that I should decide it now and not put the parties to further cost and delay."

18. As with the so-called "Thomas Principle" this is no such thing. Again it does not purport to be any formal statement of principle. It is best seen as an application of the principles set out above to the facts of the particular case.

19. Mr Newman for the Kings also relied on *S v Gloucestershire County Council* [2001] Fam 313, where May LJ stated at 342:

> "For a summary judgment application to succeed …, the court will first need to be satisfied that all substantial facts relevant to the allegations of negligence, which are reasonably capable of being before the court, are before the court; that these facts are undisputed or that there is no real prospect of successfully disputing them; and that there is no real prospect of oral evidence affecting the court's assessment of the facts. There may be cases where there are gaps in the evidence but where the court concludes, for instance from the passage of time, that there is no real prospect of the gaps being filled. …. Secondly, the court will need to be satisfied that, upon these facts, there is no real prospect of the claim in negligence succeeding and that there is no other reason why the case should be disposed of at a trial."

20. This authority takes matters no further. It is relevant to the approach to summary judgment on the facts on particular kinds of cases. The principles applicable to summary judgments are more authoritatively set out on the authorities to which I have referred.

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. Mr Lightman QC referred me to the recent cases of *Riley v Sivier* [2021] EWHC 79 (QB), at [14], and *Hunt v Times Newspapers* [2012] EWHC 110 (QB), at [28]-[29]. Both of those echo long-established authority both pre and post CPR such as the well known dictum of Megarry V-C in *Lady Anne Tennant v. Associated Newspapers Group Ltd* [1979] FSR 298. These are encapsulated in the Court of Appeal's decision in *ICI* which is itself summarised in *Easyair*.

23. I should deal specifically with the law on summary judgment and claims in fraud, not least because it was at least implicit in the submissions for the Kings that such serious allegations were not suitable for summary determination.

24. The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts. I have done so in a case heard very close in time to this application: *Foglia v The Family Officer and others* [2021] EWHC 650 (Comm), where at [14] I gave some examples of other cases in which this course was also followed. In other cases, such as *AAI Consulting Ltd v FCA* [2016] EWHC 2812 (Comm) and *Cunningham v Ellis* [2018] EWHC 3188 (Comm) fraud claims were struck out on the basis that the particulars of claim were inadequate in themselves to support the claims being made.

25. In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25] – [29], in the context of the approach to be taken when faced with an application to strike out a claim in fraud. In summary:

    i) The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.

    ii) Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.

    iii) However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings.

26. There is one potential distinction between the position in relation to an application for summary judgment under CPR r. 24.2 and an application to strike out under CPR r. 3.4(2)(a). As just noted, under CPR 24 evidence is admissible to show that the pleaded allegations are fanciful – albeit that the court will be very cautious about rejecting a claimant's factual case at the summary judgment stage.

27. When considering an application to strike out however the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible. This is noted in *Terry Allsop v Banner Jones Limited* [2021] EWCA Civ 7 by Marcus Smith J (giving the judgment of the Court of Appeal) at [7], citing the judgment of Arnold LJ in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, at [96]:

> "In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call "reasonable

> arguability". Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case."

The relevance of the absence of a defence

28. A recurring theme in the submissions advanced for the Kings was the fact that the Defendants have not served defences. It was argued that the rules do require a Defendant to file a defence, even if they have taken out a summary judgment application. Although on one level the point is not relevant, given the assumption which

    I make for the purposes of the strike out application, I deal with this point at some considerable length because it is absolutely plain from the submissions made to me that the Kings regard this absence as being highly significant to the point of pointing a powerful positive inference as to the merits.

29. That can be seen from the following passage of Mr Newman's submissions: "… when the rules are being breached and, in my submission, quite plainly breached, then the reason why there is potentially an inference there is because those Defendants are choosing to breach the rules and they have got very high quality legal advice and they must have been advised that there is at least an argument that the rules are being breached and so that raises the question why have they decided that their best interests lie in exposing themselves to potential criticism and the sorts of arguments that I am now able to make?

> The answer must be because the alternative is worse. The alternative being to file a defence which either has to admit the claim or has to admit large parts of the claim or, at best, would have to advance arguments on the facts so implausible that I would be sitting here today saying to your Ladyship "Have a look at this defence, my Lady, plainly it is weak." In those circumstances, the Defendants should not be permitted to benefit from their own breach of the rules in that regard."

30. The basis for this argument was outlined by Mr Newman on Day 4 of the hearing. It was submitted that is what the rule says. Reference was made to rule 15.2:

> "15.2 Filing a defence
>
> A defendant who wishes to defend all or part of a claim must file a defence."

31. It was contended that while at CPR 15.4.2(c) there is a carve out where a Claimant applies for summary judgment, there is no carve out for the "vice versa situation".

This was further said to be supported by CPR 24.4.2 which provides that if a Claimant applies for summary judgment the Defendant need not file a defence.

32. Reliance was placed as supporting this argument upon [19] of *Simmons & Simmons v Hickox* [2013] EWHC 2141 (QB). Coulson J, considering an application for indemnity costs and hence the question of whether the Defendant's conduct had been out of the norm, said as follows at [17-20]:

> "17. There are other reasons why I consider that the defendant's conduct was out of the norm: one is that the defendant never provided, and has yet to provide, any sort of defence to the remaining part of the claim, that is to say, to the £305,000-odd in relation to outstanding fees. True it is that that is only onesixth of the total claim but, nonetheless, that is a not insignificant sum, and it does seem to me to be most unfortunate that the summary judgment application has obscured the fact that no defence to that amount has ever been stated. …
>
> 19. There was an argument as to whether or not a defendant in the position of this defendant was required to serve a defence in any event, it being plain pursuant to CPR 12.3(3), that the issue of a summary judgment application meant that the claimant could not obtain a default judgment. Mr Salzedo said that that did not prevent the provision by the defendant of a defence, and as a matter of the rules that is plainly right, but as a matter of practicality it seems to me that a defence was required. That is not only because the summary judgment application did not deal with all of the aspects of the claim but also because in circumstances such as these a pleaded defence is very often the best possible way of setting out what the defence actually might be in advance of a hearing, such as today's would have been.
>
> 20. Mr Carpenter suggested that it might potentially have been a waste of costs to draft a defence if the summary judgment application had been successful, but that is not right for two reasons: one, because, as I have said, the summary judgment application did not deal with the whole claim, but secondly and more importantly, given that this was a point of law, the matter could have been very shortly stated and very easily conveyed by way of a pleaded defence."

33. I do not consider that this case does state, as Mr Newman contended, that it is a breach of the rules for a Defendant who applies for summary judgment not to file a defence. As can be seen from the fuller citation which I have given the judge was there considering whether conduct had been "outside the norm" for the purposes of indemnity costs. The reason the conduct was considered to be so was that no defence

was filed – but the key point being that there was no defence to a portion of the claim, and the summary judgment application went only to the other portion of the claim.

34. The question has to come back to the rules.

35. CPR 15.3 states:

> "15.3 Consequence of not filing a defence
>
> If a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it."

36. CPR Part 12 sets out *inter alia* conditions to be satisfied before an application for default judgment can be made. CPR 12.2(3) provides:

> "The claimant may not obtain a default judgment if –
>
> (a) the defendant has applied –
>
> (i) to have the claimant's statement of case struck out under rule 3.4; or
>
> (ii) for summary judgment under Part 24,…"

37. CPR 15.4 provides:

> "15.4— The period for filing a defence
>
> (1) The general rule is that the period for filing a defence is— (a)
>
> 14 days after service of the particulars of claim; or
>
> (b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim….
>
> (2) The general rule is subject to the following rules—
>
> (a) rule 6.35 (which specifies how the period for filing a defence is calculated where the claim form is served out of the jurisdiction under rule 6.32 or 6.33);
>
> (b) rule 11 (which provides that, where the defendant makes an application disputing the court's jurisdiction, the defendant need not file a defence before the hearing);
>
> (c) rule 24.4(2) (which provides that, if the claimant applies for summary judgment before the defendant has filed a defence, the defendant need not file a defence before the summary judgment hearing); ..."

38. It is also perhaps worthy of note that CPR 15.11 provides as follows:

> "15.11— Claim stayed if it is not defended or admitted
>
> (1) Where—
>
> (a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4;
>
> (b) no defendant has served or filed an admission or filed a defence or counterclaim; and
>
> (c) the claimant has not entered or applied for judgment under Part 12 (default judgment), or Part 24 (summary judgment), the claim shall be stayed.
>
> (2) Where a claim is stayed under this rule any party may apply for the stay to be lifted."

39. It is certainly right that these rules appear to have been drafted primarily with the orthodox situation of summary judgment applications by the Claimant, as opposed to reverse summary judgment applications by the Defendant, in mind.

40. However the absence of any automatic sanction for not filing a defence tends to indicate that not filing a defence is not a breach of a rule. That is strongly supported by the fact that the only "sanction" which does exist, default judgment, is explicitly not available where summary judgment has been applied for by a Defendant. Further it seems clear that the CPR views jurisdictional challenges and summary judgment as alternative means of the claim proceeding in the absence of a defence without being susceptible to default judgment.

41. A point which is notable about these provisions is the absence of any automatic sanction on the Defendant for failing to file a defence. If the Claimant does not act by applying for default or summary judgment, CPR 15.11 is the only automatically operative provision in Part 15. There is no penalty as such – there is simply a risk of default judgment being entered following the Claimant's application. If none is entered and no other steps are taken by the Claimant, the claim is (eventually) stayed.

42. That absence of automatic sanction at the time when a defence falls to be filed and the fact that the rules plainly contemplate jurisdictional challenges and summary judgment applications as being suspensory of the right to apply for default judgment, provide a powerful indication within the rules that there is no breach by failing to file a defence even when the application for summary judgment is launched by the Defendant and not by the Claimant, as is more usual.

43. It would in particular seem to be nonsensical for the CPR to specifically provide that no default judgment could be entered if an application for summary judgment had been made if the view were to be taken that the Defendant in question was in breach of the CPR by not filing a defence. I would add that this chimes with the other logical point – that there seems to be no good reason for why the rules would (as it is clear they do) suspend the obligation to file a defence where the summary judgment

application comes from the Claimant and not do so when the same application comes from the Defendant. This is the more so since a reverse summary judgment application is most likely to come where there is a clear defence in law. In such circumstances it would be both illogical and contrary to the overriding objective to require a Defendant to file a defence condescending to particulars where if he is right on the law, those facts are completely irrelevant.

44. To add to this, and to the same effect, there has been some consideration in the authorities of the question of whether CPR 15.11 is a sanction. If it were, it might tend to indicate that not filing a defence is a breach of the rules in and of itself, rather than simply giving the Claimant the initiative as regards applying for default judgment. Those authorities (in particular *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch), *Citicorp Trustee Co Ltd v Al-Sanea* [2017] EWHC 2845 (Comm), *John McLinden v Shiao Chen Lu* [2018] 4 WLUK 569 and *Bank of Beirut (UK) Limited v Sbayti* [2020] EWHC 557 (Comm)) tend to indicate that the discretion to lift the CPR 15.11 stay should not be approached as a relief from sanctions application and "*is not intended to place an especially heavy burden on the claimant to discharge before the court will agree to the stay being lifted*".

45. I accordingly conclude that the Defendants are not in breach of the CPR for not filing a defence. The absolute clarification of this point may however be a matter which commends itself to the attention of the Rules Committee.

Is there a need for an applicant for summary judgment to swear to the absence of real prospect of success?

46. This is a rather similar point – a formal point which makes no difference to the real issues for determination, but which assumes a significance because of the weight subjectively placed on it by the Kings.

47. The issue is simply stated: is an applicant for summary judgment required to serve a witness statement which states that the maker believes that the other party has no real prospect of success? The Kings say that it is so required and say that any such application (notably the Teacher Stern application) which does not do this does not comply with Practice Direction 24 paragraph 2(3)(b).

48. The importance placed on this point is again best seen in Mr Newman's submissions. In writing he said the following:

> "The Kings do not believe this is an oversight – it simply reflects the fact that the TS legal team, whilst asking for the case to be struck out, are not able to put the necessary statement before the court with a statement of truth to discharge the burden…
>
> In circumstances where the TS Ds have ample funds and the benefit of the highest quality legal advice, the inference must be that whilst their legal team are able to make lots of arguments about coherence and plausibility, they are (quite properly) not allowing their clients to place evidence before the Court denying the claim because doing so would put the

legal team in breach of their duty not to mislead. That, it is submitted, speaks volumes." 49. To similar effect in oral submissions:

> "What I would ask your Ladyship to note is that they are not saying anywhere in that application notice that the improper pressure side of the case has no real prospect of success on the facts…. there simply is no statement of belief from any relevant person before you, my Lady, stating that that part of the claim stands no real prospect of success at a trial and from that your Ladyship can infer that either it is believed to be possibly correct or believed to be certainly correct or at least believed to raise a very serious triable issue which is not suitable for summary determination."

50. This is another area where I have concluded that there has been a misunderstanding of the relevant law on the part of the Kings and their team.

51. Practice Direction 24, subparagraph (3) says:

> "The application notice or the evidence contained or referred to in it or served with it must (a) identify concisely any point of law or provision in a document on which the applicant relies and/or (b) state that it was made because the applicant believes that on the evidence the respondent has no real prospects of succeeding on the claim or issue (as the case may be) of successfully defending the claim or issue as to which the application relates."

52. This is a relatively simple point – what the Practice Direction requires is that where an application for summary judgment is made (in whole or in part) on the evidence, it is necessary to make a statement as to no real prospect of success. But where a point of law is relied upon as the sole basis for a summary judgment application, all that needs to happen is that it be identified. In the middle lies the situation where there is an application based on a point of law, and evidence; that will require both identification of the point of law and the attestation as to no real prospect of success.

53. Mr Newman in support of his submissions relied on the judgment of Chief Master Marsh in *Goldtrail Travel v Grumbridge* [2020] EWHC 1757 (Ch) where the Master cited in passing the passage at paragraph 24.2.5 of the White Book which says "*the essential ingredient is the applicant's belief that the respondent has no real prospect of success.*"

54. This provided another troubling example of what was at best an apparent misunderstanding of the nature of precedent. What was relied upon was the (unreported) case in which (in passing) the Master rehearsed a segment from the *White Book*. It was apparently relied upon (without attribution) because that partial quotation on its face supported the Kings' case, and without considering whether it formed part of the ratio of a case raising this point – which it plainly did not.

55. Further the *White Book* commentary, while often helpful, has no status as precedent. Yet further the full passage from the relevant portion of the *White Book* states this:

> "In *ED&F Man Liquid Products Ltd v Patel* … it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of the Practice Direction supplementing Pt 24; the applicant must (a) identify concisely any point of law or provision in a document on which they rely, and/or (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial."

56. That of course makes clear that (i) the passage relates to the *ED&F Man* case – which considered summary judgment on the facts and (ii) that even in that context the and/or distinction, apparent on the face of the PD was noted.

57. I conclude that it is clear on the face of the rules that to the extent that an application is made on the basis of a question of law, there is no requirement for the evidence to contain a statement as to the absence of a real prospect of success.

The Facts

58. This summary of the facts is intended to assist understanding of this judgment. It is not intended to be exhaustive; indeed, any exhaustive account would be so complex as to be confusing rather than helpful for present purposes.

59. As noted above, the Defendants in this claim are the lay clients (First through Fourth Defendants) and their sometime legal representatives (Sixth to Tenth Defendants), who were party to various legal proceedings against the King family and a related trust. All of these previous legal proceedings arise substantially out of a dispute concerning Primekings' investment in (and partial buyout of) KSGL, which was formerly in the sole control of the Kings.

60. KSGL is the parent company of KSSL. KSSL was incorporated by Mr James King in 1971. Initially, its business consisted of installing television aerials. Later it moved into the provision of security services and grew substantially. It now provides a wide range of security services to site operators across the UK, including major retailers and a number of police forces. Mr King joined KSSL as an apprentice after leaving school at the age of 17. He became a director of the company in 1999 aged 30 and

Chief Executive Officer in 2005. Mrs Susan King is the wife of Mr James King and the mother of Mr King.

61. Prior to the Primekings investment in December 2013, KSGL (and KSSL) was a family company. The shares in KSGL were owned as to 20% by each of Mr King's parents and Mr King and as to 40% by the JPK No. 1 Discretionary Settlement. This was a family trust for Mr King and his family (the "Trust").

The Misrepresentation Claim

62. In late 2013 KSGL and KSSL were in financial difficulties. In November 2013 Mr King and Mr James King were introduced to the Second Defendant, Mr Fisher, who had been connected by marriage to Mr Nathan Kirsh, a South African billionaire. They met Mr Fisher and Mr Stiefel, together with Mr Peter Swain, an associate of Mr Fisher, in London to discuss the possibility of Mr Fisher and Mr Swain investing in KSGL through Primekings Holdings Limited.

63. The Kings do not now accept that the Primekings investment was the only way for the KSGL group to avoid bankruptcy, but it does appear that the financial situation was dire. KSSL had gross tax liabilities of over £2.5 million, overdrawn directors' loans in excess of £550,000, and trade creditors exceeded £5.2 million. According to the information memorandum produced on behalf of KSGL, the Kings were seeking an initial £2 million to £2.5 million equity investment to replenish its balance sheet and fund future growth.

64. Negotiations took place in November and December 2013. It appears to be common ground that at a certain point in those negotiations the following proposals were discussed:

    i) Primekings would acquire 60% of the shares in KSGL, diluting the Kings' holdings to 40%;

    ii) £1 million of funding would be provided by Primekings through share subscription;

    iii) Mr James King and Mrs King were to receive £2 million initial consideration, and further consideration for their shares of £3 million payable at a rate of £1 million per annum if KSGL's EBITDA exceeded £3 million in each of those years;

    iv) A £3 million loan facility would be provided to KSGL.

65. The Kings considered these to have been the terms of a complete proposal (subject to contract) reached on 7 December 2013, which they call the "initial agreement". The proposals were said by Primekings to be only proposals envisaged to be in a final agreement, subject to due diligence. It was their case that no final agreement had been reached.

66. A key factor in Primekings' due diligence seems to have been KSGL's liability to GE Money, who had been the source of a major line of credit for KSGL. Mr Swain made

contact with GE personally. On 18 December 2013 he met representatives from GE, a Mr Cole and a Mr Weedall. The meeting was also attended by a turnaround consultant, Ms Lord. It was initially planned that KSGL's commercial director, a Mr Evans, would attend this meeting. However Mr Swain had passed word that Mr Evans' presence was not wanted. There was and is a dispute about whether this was said to be because GE did not want Mr Evans to attend.

67. Also on 18 December 2013, Mr King and Mr James King and the Misrepresentation Solicitors (including a partner at that firm, Mr Wilson), met Mr Fisher and Primekings' lawyers (from Teacher Stern, the Eighth Defendant). During that meeting, at around 3pm, Mr Fisher took a call from Mr Swain. He left the room, then re-entered and put Mr Swain on speakerphone for the Kings to hear.

68. It is accepted that Mr Swain at least purported to tell the Kings the outcome of his meeting with GE. However, the representations of Mr Swain as to GE's position would become central to the Misrepresentation Claim. The Kings (at least initially) stated that Mr Swain represented to them in the 18 October 2013 meeting that:

    i) All KSGL's accounts were frozen;

    ii) GE had lost complete faith in the management of KSGL (and on that basis had excluded Mr Evans from the meeting);

    iii) GE was no longer prepared to support KSGL and there would be no further funding.

69. Following this meeting, written agreements were signed on 20 December 2013, pursuant to which:

    i) Primekings (a) purchased all 402 ordinary shares previously held by the Second Claimant, Mr James King and the Third Claimant Mrs King for £750,000, with a further £1.25m to be paid by way of deferred consideration when KSGL had sufficient funds, with the intention of it being paid within 3 years and (b) subscribed for a further 1507 shares for £1m;

    ii) The Trust continued to hold 402 ordinary shares and Mr King 201 shares – such that Primekings held c.76%;

    iii) Primekings agreed it would reduce its holding to c.60% if, over the next 3 financial years, KSGL hit annual EBIDTA targets of £3m (and if KSGL did not meet such targets Primekings could acquire the Trust's shares for their nominal value);

    iv) Mr James King and Mrs King were allotted 6 B shares;

    v) Ki Finance SARL provided a loan of £3m working capital; and

    vi) Mr James King and Mrs King resigned as directors and Mr Stiefel, Mr Fisher and Mr Swain, were appointed as directors. Mr King continued in his role as a director and managing director of the trading subsidiary, KSSL.

70. The Kings refer to this as the "revised agreement". Primekings saw this as the only agreement. The point is that, if compared to the proposals described above, the agreed terms are clearly less advantageous to the Kings.

71. It appears from both the documentary evidence and the events as they have unfolded that the Kings had understandably mixed feelings about this deal. Their family business had received much-needed investment, but at the cost of losing control to the extent they would be unable to block even special resolutions. All members of the King family, apart from Mr King, had to resign their employment as part of the deal. It seems to have provoked in the Kings an amalgam of rancour and gratitude. As time has passed, the latter has entirely disappeared.

72. On 31 March 2015 the final instalment of the £1.25 million was paid to Mr James King and Mrs King. On the same day, the Kings sent pre-action letters to Mr Stiefel, Mr Fisher and Mr Swain. The letters alleged that the three representations made by Mr
Swain by telephone about GE's position at the 18 December 2013 were fraudulent, and had given the impression that KSGL was in a more financially precarious position than the actuality. This, it was (and continues to be) said, caused them shortly thereafter to enter the less advantageous "revised agreement".

73. Part of this disadvantage, which became of particular relevance at trial, was said to be the issuing of Mr James King and Mrs King with 6 "B" shares in the "revised agreement", as opposed to a prior proposal to receive their payment as cash from Primekings. Rescission and damages were sought. The letters went on to accuse Mr Stiefel, Mr Fisher and Mr Swain of committing criminal offences under sections 89 and

    90 of the Financial Services Act 2012 and reserved the right to report them to the Financial Conduct Authority and/or the Police without further notice.

74. The claim was issued on 16 July 2015: James Patrick King & Others v Primekings Holding Limited, Peter Swain and Robin Fisher HC-2015-0002953 (the "Misrepresentation Claim") against the present Second to Fourth Defendants (the "Misrepresentation Defendants"). Mr Stiefel, though sent a letter before action, was not a defendant. The Kings were the claimants in those proceedings. The claim was in fraudulent misrepresentation, with "back-up" claims in conspiracy and economic duress. There was no claim for innocent misrepresentation. The Kings were represented in the Misrepresentation Claim by the Misrepresentation Team.

75. The Misrepresentation Defendants instructed Teacher Stern. That firm and certain key individuals that made up the Misrepresentation Defendants' legal team are now Defendants in these proceedings. The Fifth and Sixth Defendants were solicitors at Teacher Stern: Mr Cowper was the partner leading the litigation team, and Ms Toomer was the lead associate. Mr Levinger acted as a consultant to the Teacher Stern litigation team. Teacher Stern instructed Mr Downes QC to act in the Misrepresentation Proceedings; he is the Ninth Defendant to these proceedings. Mr Rabinowicz is a solicitor and partner at Teacher Stern who became involved in early

2019 in the costs assessment process following the discontinuance of the Misrepresentation Claim.

76. By their defence dated 22 October 2015 the Misrepresentation Defendants admitted that Mr Swain had related to Mr Fisher what he had been told by GE as to its position at the meeting that he and Ms Lord attended with them. They also admitted the "gist" of the representations relied on by the Claimants, save that Mr Swain:

    i) Stated that GE had told him that KSGL's account was frozen and would remain frozen unless a deal was done;

    ii) Did not say that Mr Evans was excluded from participation in the meeting because GE had lost faith in the management of KSGL and the Kings. He further averred that he probably only said GE had lost faith in the Kings;

    iii) Stated that GE had told him that there would be no further funding support unless a deal was done.

77. In short, the Misrepresentation Defendants defended the statements on the ground that they were true in all material respects and/or were believed to be true. Further, the defence went, the Kings did not suffer loss by reason of the deal in any event: entry into the deal saved the business which would otherwise have entered a formal insolvency, with the Kings losing the value of their shareholdings. In all, they contended that there was no fraud, no misrepresentation, and no loss, that the claim was hopeless, and that the extremely serious allegations advanced by the Kings should never have been made.

78. The nature of the present claim brings to the fore a number of matters in the conduct of the Misrepresentation Claim, which are said in the present proceedings to variously constitute or indicate a conspiracy to unlawfully procure a discontinuance from the Kings and/or fraudulently inflate costs.

79. A total of six costs budgets were provided to the court and to the Claimants in the course of the litigation, on 7 March 2016, 3 June 2016, 21 September 2016, 20 February 2017, 10 March 2017 and 26 April 2017. Each were certified by Mr Cowper with a statement of truth. The first, 7 March 2016, projected the Misrepresentation Defendants' costs to trial at £2.7m.

80. At the first CMC on 15 March 2016, the Misrepresentation Defendants stated in their Precedent H that £76,558 had already been spent on witness statements prior to that CMC.

81. On 30 September 2016 Ms Toomer signed, filed and served a witness statement in respect of a CMC stating that another Teacher Stern associate had done £3,327.50 of work relating to Smith & Williamson's expert evidence prior to 7 March 2016, as shown in costs budgets dated 7 March 2016, 3 June 2016 and 21 September 2016. It also states that approximately 80% of the time anticipated for witness statements had already been incurred, and that the remainder would be for consideration of the Claimants' witness statements. It is alleged in the present proceedings that Mr Downes had a hand in drafting that witness statement.

82. The final budgeted costs of the Misrepresentation Defendants were £1,989,857.86.

83. On 3 January 2017 it is alleged in the present proceedings that Mr Stiefel (via Macfarlanes LLP) made an allegedly improper threat to report the Kings' solicitor, a Mr Blakey of the Misrepresentation Solicitors, to the SRA. The Kings refer to this in their Particulars of Claim as the "SRA Threat".

84. On 1 February 2017 Mr Downes drafted a mediation position statement relating to the Misrepresentation Proceedings. It contains wording characterised in the Claimant's Particulars of Claim as the "Allegations Threat". There is some dispute as to whether it may be referred to in these proceedings, or whether the position statement is protected by mediation privilege. I will deal with this as a discrete issue below.

85. On 17 March 2017, Mr King alleges that Mr Stiefel told him that he and his family would be "ruined and destroyed" by the Misrepresentation Proceedings, but if they dropped them Primekings would take the B shares (worth £2m) as payment to cover the Misrepresentation Defendants' legal costs. The Kings refer to this in their Particulars of Claim as the "Ruined and Destroyed Threat".

86. The trial of the Misrepresentation Proceedings was listed for 20 days before Marcus Smith J in May 2017. The trial began on 27 April 2017.

87. Mr King was the first witness called by the Claimants. He was cross-examined by Mr Downes for 5 full days and part of a sixth. The following events during that crossexamination were drawn to my attention in this application:

    i) On Day 2 of the trial Mr King confirmed in cross-examination by Mr Downes that the idea of the deal involving deferred consideration to Mr James King and Mrs King by redeemable B shares came from the Misrepresentation Solicitors. Immediately following this, Mr Downes asked Mr King whether he had complained about the Misrepresentation Solicitors or if Mr King had intimated

    a professional negligence claim against them. He did not pursue that in further cross examination at that point.

    ii) On Day 4, Mr Downes took Mr King to documents which demonstrated that, contrary to the Kings' pleaded case, the B-share mechanism was part of negotiations from 14 December 2013, i.e. 4 days before the alleged fraud took place.

    iii) On Day 6 – in the Monday morning session just after the weekend – Mr King delivered what has been termed the "long speech". In it, Mr King said he had reconsidered his evidence over the weekend and that the key words "*unless a deal was done*" were used. Mr King recalled that after Mr Swain initially informed the Kings there would be no support by GE, Mr Fisher left the room, and on return informed the Kings that Mr Swain had managed to talk GE around, and that they would continue support if a deal was done with Primekings.

iv) On Day 7, Mr Weedall and Mr Cole of GE gave evidence. There are two key features of their evidence. They confirmed in cross-examination that if there was no deal done by 20 December 2013 GE had no ability to provide an additional overpayment to meet KSGL's cash shortfall. Their evidence also seemed to suggest that Mr Swain could have reasonably believed that the relevant accounts were "frozen" from the conversation they had.

v) On Day 8 Mr Wilson of the Misrepresentation Solicitors was due to give evidence. Before doing so, he handed up to the judge a "list of corrections" to his witness statement. This included an amendment that removed the allegation that the B-share mechanism was added after the alleged fraud.

vi) Mr James King was cross-examined on Day 9, Thursday 11 May 2017. His position in cross-examination remained that the words "*unless a deal was done*" were not used either to him or Mr King. His evidence was therefore at odds with that of Mr King.

88. On 12 May 2017, a non-sitting day, the Kings met their legal advisors in conference. The Kings were advised that their case had collapsed in the course of their evidence, and it could not continue. A formal written advice was provided on Sunday 14 May 2017, which advised the Kings that there was no claim left that could be advanced, and that the Misrepresentation Counsel were professionally embarrassed and could no longer act.

89. This was said to be on the basis that, *inter alia*:

i) The evidence from GE was that Mr Swain could have had a reasonable belief in the statements he said over the phone;

ii) Mr King's "long speech" was contradictory of their pleaded case on "*unless a deal was done*", supportive of the Defendants' position, and also contradicted by Mr James King's evidence.

iii) As such, there was no credible case of fraud remaining. The Defendants' approximate version of events was variously (a) now supported by Mr King; (b) supported by GE witnesses. That was also fatal to the alternative cases in conspiracy and economic duress;

iv) Further, no amendment was possible to save the claim, because Mr King's evidence on the representations now contradicted Mr James King's;

v) The advice also highlighted that while the principal problem was the GE witnesses' evidence, Mr King's evidence was extremely disappointing, that he came across as evasive and that at least some of his evidence would not have been considered to be credible. He was said to be at risk of being found not to have given honest evidence;

vi) Finally it considered that the way in which the evidence had come out had further undermined any prospect of achieving rescission.

90. It was recommended that the Kings discontinue, with an apology, and agree to pay costs on the indemnity basis. On 15 May 2017, day 10 of the trial, this is what happened. The apology was read out in open court.

91. On the issue of costs, Mr Downes made an application for payment on account of £1,872,053.60, being the figure in the 26 April 2017 budget, minus £177,500 representing the final 10 days of the trial that now would not be needed, plus 3% for the budget process. Mr Downes also told Marcus Smith J that there would be more costs, and referred to applications for third party disclosure and costs of specific disclosure. The Misrepresentation Defendants were awarded a payment on account of costs of £1,700,000 by 4pm on 12 June 2017 (the Payment on Account Order).

92. One witness for the Kings was not called due to the discontinuance: a Mr Howard Smith of KPMG. The Kings suggest Mr Smith would have said there were other potential investors in November 2013 (i.e. other than Primekings), that KSGL seemed to have sufficient funds to pay salaries in December and trade through to January, and that KPMG would have a small number of staff on standby to re-commence marketing the business on a solvent basis.

93. The Kings failed to pay the sum specified in the Payment on Account Order by the date specified.

Further Litigation

94. Between 15 May 2017 and the present the Kings have been involved in four separate pieces of litigation besides the present:

    i) Primekings sought to enforce the unpaid Payment on Account Order by Part 8 proceedings (the "Part 8 Proceedings").

    ii) The Kings disputed the costs Primekings stated it incurred in the Misrepresentation and Part 8 Proceedings, leading ultimately to a detailed assessment hearing listed for 7 days before Master Whalan (the Detailed Assessment Proceedings").

    iii) An unfair prejudice petition in respect of KSGL (the 's. 994 Proceedings').

    iv) The professional negligence action against the Misrepresentation Team (the "Professional Negligence Action").

95. In addition, as already noted, KSSL issued proceedings in bribery against Mr King and Mr Evans relating to use of cars provided by a supplier of KSSL. Mr King counterclaimed against KSSL in the tort of abuse of process, on the basis that KSSL's predominant purpose in bringing the bribery claim was to obtain the Kings' minority shareholding in KSGL at an undervalue and/or damage Mr King reputationally.

96. By a judgment dated 18 February 2021 (the fourth day of hearing the present applications) Andrew Lenon QC (sitting as a Deputy High Court Judge) found Mr King liable to KSSL in the sum of £45,666.47, and dismissed the counterclaim (*Kings Security Systems Limited v Anthony Douglas King and Stephen John James Evans*

[2021] EWHC 325 (Ch)). Mr Lenon QC noted that he did not regard Mr King's evidence on the relevant matters as reliable or honest.

Enforcement of the Payment on Account Order

97. To return to the aftermath of the Misrepresentation Claim, on 13 June 2017 Teacher Stern drafted a without prejudice letter to the Claimants stating that their likely total costs liability to Primekings was £2.7m, and offered the Claimants the opportunity to agree this figure by way of a contract.

98. On 22 June 2017 an interim charging order was granted over shares and property owned by the Kings and the Trust to secure the Payment on Account Order.

99. On 29 June 2017 Teacher Stern wrote to solicitors for Mr James King stating that the costs order obtained on 15 May 2019 by Mr Downes did not include costs for third party disclosure, which exceeded £200,000.

100. The interim charging order was made final on 3 August 2017. On 24 August 2017 the court ordered the Claimants to attend for oral examination pursuant to CPR 71, as part of the enforcement of the Payment on Account Order. In the application relating to this process, the Misrepresentation Defendants stated that the total costs claim exceeded £3m.

101. On 11 and 12 October 2017 the Kings were questioned about their assets before Master Linwood. Primekings were again represented by Mr Downes QC. At that hearing, outside the court, the Kings allege Mr Downes made an offer to the Kings to settle the costs claim. There is dispute about whether this discussion was without prejudice or on an open basis. Mr Downes then drafted a letter to be sent to the Kings requesting further information about the Professional Negligence Action, including a clause that the Kings would not rely on the court-door discussion. The court adjourned the proceedings with liberty to restore, and ordered the Claimants to pay the costs of the CPR 71 application.

102. On 27 October 2017 Primekings, Mr Fisher and Mr Swain issued a Part 8 Claim Form seeking an order for sale of the Claimants' shares in KSGL, as an enforcement action on the Payment on Account Order. These are the Part 8 Proceedings. An order for the sale of the shares was made by Deputy Master Cousins on 23 March 2018.

103. On 23 May 2018 a judgment of Deputy Master Cousins confirmed the earlier decision in the Part 8 Proceedings, and directed the parties to attempt to agree directions for the valuation and process of sale of the Claimants' shares in KSGL. In a skeleton argument for this hearing the Misrepresentation Defendants informed Deputy Master Cousins that their total costs in the Misrepresentation Proceedings would be in the region of £2.2m.

104. On 10 July 2018 Ms Toomer of Teacher Stern stated to Mr King that the figure billed to Primekings for the Misrepresentation Proceedings was £3,213,026.99.

105. A further judgment of Deputy Master Cousins in the Part 8 Proceedings, dated 6 August 2018, re-confirmed the order for sale and refused to stay the Part 8 Proceedings pending the determination of the s. 994 Proceedings.

106. The Claimants paid the sum due by the Payment on Account Order on 10 October 2018. This was apparently funded by receipt of funds from the Misrepresentation Solicitors' insurer, following a determination by the Legal Ombudsman. The Kings have not disclosed the basis on which that payment was made, or the reasons given for that payment.

107. On 12 October 2018 Ms Toomer contacted the Kings to apologise and correct the figure provided on 10 July 2018 relating to the amount for which Teacher Stern had invoiced Primekings. She stated that the figure of £3,213,026.99 was inclusive of VAT, and incorrect: the correct figure was £2,855,501.94, again inclusive of VAT, due to a double-counted invoice.

108. A hearing took place before Deputy Master Cousins on 17 October 2018, intended to determine the form of the order for the sale of shares. As payment had been made on 10 October 2018, the Deputy Master instead heard submissions on costs.

109. On 27 December 2018 Deputy Master Cousins ordered the Claimants to pay the costs of the Part 8 Proceedings on an indemnity basis, to be determined by the court unless agreed.

The s. 994 Proceedings

110. On 19 March 2018 the Claimants issued the s.994 Proceedings in respect of KSGL against various respondents, including Mr Stiefel, Mr Fisher and Primekings.

111. The s. 994 Proceedings alleged prejudice on numerous grounds, including allegations that Primekings and its representatives on the KSGL board had deliberately sought to minimise KSGL's profit to minimise or avoid paying Mr James King and Mrs King for their B shares, and to attempt to acquire Mr King's shares at the lowest possible value. It also alleged that the Part 8 Proceedings was a further attempt to acquire the Kings' shares at an undervalue. The primary relief sought was purchase of the Kings' shares at market price without any discount.

112. As noted above, on 6 August 2018 Deputy Master Cousins refused to stay the Part 8 Proceedings pending the s. 994 Proceedings.

113. Detailed points of claim were served on 20 January 2019. These detailed points of claim rehearsed much of the long history of the relationship between the Kings and Primekings: the change between the "initial" to "revised" agreement, the alleged misrepresentations, alleged abuse of the Part 8 Proceedings to unfairly deprive the Kings of their shares, the trial and discontinuance of the Misrepresentation Proceedings, the charging orders obtained in June 2017, and the CPR Part 71 oral examination of the Kings.

114. On 20 December 2019 the First, Second and Fourth Defendants issued an application to strike out parts of the points of claim in the s. 994 Proceedings. This was heard on

7–8 October 2020. On 19 November 2020, following a full judgment handed down on 29 October 2020 Mr Tom Leech QC (sitting as a Deputy High Court Judge) struck out parts of the points of claim, including the allegations surrounding the alleged misrepresentations on 18 December 2013. By way of a further judgment dated 19 November 2020 he ordered that the Kings should pay £40,000 on account of costs. This payment was made on 16 December 2020.

The Professional Negligence Action

115. As indicated above, the Kings have also issued a professional negligence action arising out of the conduct of the Misrepresentation Proceedings, against the Misrepresentation Team.

116. This claim was issued on 6 December 2019, alleging breach of fiduciary duty and gross negligence: that "*the chance to win an overwhelmingly strong case was thrown away by the negligence and breach of duty of the Misrepresentation Solicitors*". Part of the claim, to which I will come in more detail later, is that the Misrepresentation team were intimidated by Primekings and Primekings legal team. The Kings in that claim seek damages to compensate them for loss of a (100%) chance that rescission would have been granted following success in the Misrepresentation Proceedings, the Misrepresentation Solicitors' legal fees (that would have been recoverable from the Misrepresentation Defendants on victory), and costs incurred by the Kings in subsequent proceedings flowing from the decision to discontinue the Misrepresentation Proceedings. Particulars of Claim were filed on 7 May 2020 (ie shortly after this claim was commenced).

117. On 29 July 2020 the Misrepresentation Solicitors filed a defence, denying the allegations in full. The Misrepresentation Counsel filed a defence on 30 July 2020, again denying the claims in full and, of particular relevance to the present claim, explicitly denying they were intimidated by the Misrepresentation Defendants' conduct of the case.

118. Recently Misrepresentation Counsel have served a draft Amended Defence. Following this hearing the Kings' solicitors wrote to me drawing to my attention the fact that the amendments were in the Kings' eyes significant, and indeed raised "red flags" in the context of this case. In particular it was said that the purport of some of the amendments was that Misrepresentation Counsel "*now wishes to emphasise that it is possible that Primekings intimated personal consequences for DWF if the case continued to a judgment, and that such matters may have been concealed from him, that tends to show that the Kings might be right*".

119. It was also said that "*The fact that eight substantive amendments are being made generally casts doubt on whether the Barristers' Defence when filed (and relied on at February hearing) was a proper and accurate representation of the barristers' position on the facts when alleging the King claim is a 'conspiracy theory'.*" *The Detailed Assessment Proceedings*

120. On 24 February 2019 Teacher Stern submitted an Amended Bill, in relation to the

Misrepresentation Claim, which was certified by Mr Rabinowicz. On 12 March 2019 Teacher Stern wrote stating that unless the Kings were able to make a reasonable offer on the bill of costs they would finalise and serve the bill and notice of commencement of assessment. On 2 April 2019 the bill was served, commencing detailed commencement proceedings. The signature of Mr Cowper, who left the firm on 31 March 2019, does not appear on the bill.

121. The served bill stated Primekings' incurred costs were £2,370,878.51 in the Misrepresentation Claim (not including the Part 8 Proceedings costs). There are a few features of this bill to which various courts' attentions have been drawn:

i) 577 hours was said to have been spent on witness statements after Ms Toomer's 30 September 2016 witness statement indicated that 80% of witness statement costs had already been incurred;

ii) It included a small sum said to be for work on an expert report with Smith & Williamson in 2016 (as shown on the March 2016, 3 June 2016 and 21 September 2016 budgets).

122. On 23 April 2019 the Kings applied to stay the detailed assessment of costs in the Misrepresentation Claim due to an overlap in issues with the s. 994 Proceedings. The same application was made by the Kings regarding the detailed assessment of costs in the Part 8 proceedings on 13 June 2019.

123. On 10 May 2019 a series of invoices, a schedule of invoices, a schedule of payments, and payment records were provided to the Kings by Ms Toomer and Mr Rabinowicz on behalf of Mr Fisher, Mr Swain and Primekings. It is on or around this point that Mr Rabinowicz is said to have joined the conspiracy presently alleged.

124. The stay applications were heard together on 8–9 August 2019, with further submissions made in writing. The Claimants served written reply submissions on 18 September 2019, and the Misrepresentation Defendants (via Mr Downes) served written submissions in answer on 27 September 2019. In that answer, the 577 hours spent on witness statements in the run-up to trial was defended as reasonable by Mr Downes, who also suggested certain ways in which such costs could have been incurred. The total length of the written submissions served was 106 pages, of which over 70 were served by the Kings.

125. The Kings argued that the overlap meant the detailed assessment proceedings should be stayed in favour of the s. 994 Proceedings otherwise the High Court Judge hearing the latter might be "embarrassed" or "put in a strait jacket" by findings arising from the detailed assessments.

126. Both stay applications were rejected on 19 December 2019 by Master Whalan. At [2829] of his judgment he said:

> "28. I state at this point my overall conclusion that it is not appropriate to stay the detailed assessment proceedings. My reasons are as follows:

(i) It is not sufficient for the Claimants to identify some purported commonality of issues between the proceedings. The alleged overlap must be of such relevance to justify the conclusion that this constitutes a 'rare or compelling case'. The allegations pleaded by the Claimants in the s.994 petition in respect of the Part 7 and 8 detailed assessments comprise a very small part of the varied and wide-ranging claims ….

(ii) The Senior Courts Costs Office has considerable experience and expertise in hearing and determining arguments in relation to misconduct per CPR 44.11. It regularly resolves issues concerning the alleged conduct of a party or that party's legal representative in respect of the substantive or detailed assessment proceedings….

(vi) The Defendants' entitlement to their costs was established in orders sealed on 22nd May 2017 and 27th December 2018 respectively. The payment on account of costs of £1.7m was due to be paid by the Claimants by 12th June 2017 but not actually discharged until 10th October 2018. Deputy Master Cousins, as noted, concluded that the Claimants were guilty of
'procrastination'…. Realistically, it is unlikely that the hearing of the assessments will be listed much before the end of 2020 … Nonetheless this is likely to be before any trial of the Unfair Prejudice Petition. Further delay (in addition to that already triggered by the Claimants) will constitute an unreasonable prejudice to the Defendants.

(vii) The issue of time and delay is given added emphasis when one considers again the nature and extent of the Claimants' allegations in the s.994 petition. The Claimants allege fraud - a material dishonesty in claiming for work that was not as a matter of fact undertaken - in the context of a widespread conspiracy hatched by the Defendants and their professional representatives. Very specific, damaging allegations are levied against the professional conduct of several senior practitioners at Teacher Stern, the Defendants' solicitors. A stay of these assessment proceedings will leave these allegations hanging over the Defendants' solicitors for an unreasonably protracted period of time. I agree that to leave such serious allegations of impropriety hanging over the heads of professionals constitutes a powerful pointer against ordering a stay(s). …

29. Ultimately, therefore, the Claimants have not demonstrated grounds for a stay of the detailed assessment proceedings. Identification of some pleaded or evidential issues which potentially overlap falls a long way short of demonstrating the

> rare and compelling circumstances required to order a stay of the assessments."

127. Master Whalan held that if the Kings wished to advance their argument that the bill had been fraudulently overstated, they should do so at the earliest opportunity, which was in the detailed assessment proceedings. There was no appeal against his refusal. But shortly thereafter the Kings issued this Claim.

128. There was a hearing for directions to detailed assessment on 20 February 2020. At that hearing the Kings were also ordered to pay the costs of the stay applications on the indemnity basis, despite the Kings submitting the costs of the stay applications should be reserved to the detailed assessment because of alleged *prima facie* evidence of costs fraud.

129. Following this hearing, there was some complexity about the Kings obtaining a transcript of the hearing in order to pursue an appeal. This appears to have arisen due to Teacher Stern apparently contacting two suppliers of court transcripts – Epiq and Ubiqus. This is a subject about which Ms Toomer later wrote about to Metis Law. It is said in the present claim that this was done deliberately to obstruct the Kings and disguise Mr Downes' misleading the court at that hearing.

130. On 25 February 2020 the Misrepresentation Defendants served an amended bill of costs. This amended bill totalled £2,452,657.51.

131. The Kings served points of dispute in the Detailed Assessment proceedings on 19 March 2020. This was the same day on which the Particulars of Claim in this action were served. These points of dispute raised allegations of costs fraud, relying on alleged inconsistencies in the various bills and budgets submitted by the Misrepresentation Defendants and alleging that the bills had been mis-certified, and allegations that the bill exceeded the sums invoiced, alongside taking issue generally and on a number of grounds with the reasonableness of the costs incurred.

132. The detailed assessment hearing was listed for 12–17 November 2020. On 9 November 2020 Mr King (acting in person) served a skeleton for the purpose of the Detailed Assessment hearing. On 11 November 2020, Mr King provided an amended points of dispute striking through the allegations of costs fraud and relying only on points concerning the reasonableness of the costs. That document indicated an intention to take the allegations of fraud in the High Court proceedings. Permission to drop these points was given by the Master at the hearing, which proceeded as listed, albeit requiring less court time than foreseen.

133. Final Costs Certificates were issued dated 18 November 2020. The Master assessed the costs of the Misrepresentation Proceedings at £2,220,181.73 (being approximately 90% of what was claimed) and the costs of the Part 8 Claim at £355,235.06 (being approximately 97% of what was claimed). The costs of the Detailed Assessment proceedings were themselves awarded on the indemnity basis. Including interest (as at 17 November 2020) and costs of the Detailed Assessment, the sums payable by the Kings were £2,726,154.87 in the Misrepresentation Proceedings and £411,541.84 in the Part 8 Claim.

The current proceedings

134. It is therefore against, and occasionally alongside, this background that the present claim was issued, and the present applications are made.

135. On 5 February 2020 the current proceedings were issued. The central claim is in conspiracy. The Claim Form alleges that:

> "The First to Ninth Defendants have unlawfully conspired to provide false and inflated cost information (including artificial costs budgets) to the Claimants and the Court with a view to causing damage to the Claimants by (a) improperly pressurising the Claimants and their legal team with improper threats of adverse costs (b) obtaining an improper payment on account of costs in favour of the Second to Fourth Defendants in the sum of £1.7m by misleading Marcus Smith J, which payment on account vastly exceeded the actual costs spent."

136. It also alleges that the First to Tenth Defendants covered up this conspiracy by:

i) Providing false information to a costs draftsman and attempting to launder that false information by submitting it to a Master; ii) Presenting a fraudulently inflated bill of costs to the Senior Courts Costs Office;

iii) Ensuring the Kings were not provided with any information about the costs fraud;

iv) "*Deploying a cynical and determined strategy of delay and obfuscation aimed at ensuring that the Claimants are bankrupted by interim costs orders before key evidence of fraud emerges from third parties, in order to stifle this claim*";

v) Intimidating the Kings and their lawyers to prevent this claim being brought or decided on its facts.

137. Particulars of Claim were served on 19 March 2020. As will be discussed further below they allege a "Common Design" with three goals:

i) To pressure the Kings' legal team to discontinue the claim by misleading the Kings into believing they would face adverse costs more than Primekings knew they would incur, and using threatening conduct (the so-called "Discontinuance Goal"); ii) To enrich Primekings by falsely inflating costs that would be incurred to obtain the Kings' shares in KSGL at an undervalue (the so-called "Enrichment Goal"); and iii) To cover up the above (the so-called "Cover-Up Goal").

138. The Teacher Stern Defendants served a lengthy Part 18 request on 20 April 2020. This was answered on 6 May 2020.

139. On 14 May 2020 the Ninth Defendant issued his present strike out application. The same day the First to Fourth Defendants issued their present summary judgment and strike out application.

140. Also on 14 May 2020, the Fifth to Eighth and Tenth Defendants issued a stay application. This was followed on 2 June 2020 with their present summary judgment and strike out application.

141. On 22 November 2020 I heard an *ex parte* application to preserve evidence in the present claim, issued by the Kings against the First to Eighth and Tenth Defendants. I dismissed that application and required its making to be notified to the Respondents to the Application.

142. On 11 January 2021 the First to Fourth Defendants applied for permission to rely on further evidence in support of their present application. The Ninth Defendant made a similar application on 20 January 2021.

The Particulars of Claim

143. At the heart of this application is the pleaded case. Since no defences have been served the critical document is the Particulars of Claim. It is a document of 25 pages in length (i.e. it is just within the page limit generally imposed in the Commercial Court). It is dated 19 March 2020 and is signed by Mr Newman. It is verified by statements of truth by all of the Kings.

144. It is, I regret to say, a document which is profoundly unsatisfactory in a number of respects.

145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:

> "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial."

146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "*(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases…*".

147. This is a point which feeds into the dictum of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm), at [18]-[21]:

> "The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies."

148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.

149. Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation.

150. This is a point which is not infrequently forgotten today. As Christopher Clarke LJ said (in a judgment with which Sharp LJ agreed) in *Hague Plant v Hague* [2014] EWCA
Civ 1609, [2015] CP Rep 15, at [76] and [78];

> "Particulars of Claim must include a concise statement of the facts on which the claimant relies: CPR 16.4. (1) (a) . But they need not, and should not, contain the evidence by which they are to be proved or the opposing party's pleadings or admissions. Whilst it may be appropriate in some circumstances to rely, as proof of dishonesty, on the fact that the defendant's account of his position requires explanation and that he has given several different accounts, all unacceptable, this can and should be done in a concise way, referring to documents (but not necessarily quoting in extenso) which makes clear what is the issue. The pleading cannot be used as the first draft of an opening or a delineation of points for cross examination….
>
> Pleadings are intended to help the Court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision, which are often destined never to be referred to at the trial, absent some dispute

> as to whether a claim or defence is open to a party, being overtaken by the opening submissions. It is time, in this field, to get back to basics."

151. The danger which attends pleadings which neglect to conform to this fairly minimalist approach can be illustrated from the same case, where Briggs LJ described the pleading in issue thus, at [23]:

> "So far from being a concise statement of the primary facts relied upon in support of the claim, it comes across as a rambling narrative …, serving no apparent purpose, and obscuring, rather than clarifying, the claimant's own case."

152. Not dissimilar criticisms could be made about the Particulars of Claim in this case, and it is certainly the case that there are points where I conclude that it positively obscures the Kings' case. I am persuaded also that the defects in the pleading have complicated the applications before me.

153. The starting point is perhaps the target at which the Particulars of Claim should be shooting – which is the cause of action in question. Here the claim is one in unlawful means conspiracy. The constituent parts of that clause of action have been summarised by the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] 2 All ER (Comm) 271, at [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

154. Those elements are not readily discernible in the Particulars of Claim. A flavour of the pleading can be gained from quoting the section entitled "The Common Design":

> "16. On a date or dates unknown but between April 2015 and 7 March 2016, Mr Stiefel, Mr Fisher, Mr Swain, Primekings, Ms Toomer, Mr Cowper, Mr Levinger, Teacher Stern, and Mr Downes ('the First Nine Defendants') reached an understanding that their case strategy would involve working together to achieve the following goals ('the Common Design'):
>
> 16.1. The Discontinuance Goal - Placing pressure on the Kings and their legal team to discontinue the case (thus avoiding a fair adjudication on the facts) by (i) misleading the Kings into believing that if they did not discontinue then they might ultimately become liable to Primekings for an amount of legal costs which in fact Primekings knew it would not incur (ii) using threatening conduct to intimidate the Kings and their lawyers for that purpose.

> 16.2. The Enrichment Goal - If a costs order was secured, enriching Primekings and Teacher Stern at the expense of the Kings by means of obtaining an order for a payment on account for a sum higher than the costs actually incurred and which could be used to improperly obtain the Kings' shares for less than their fair value.
>
> 16.3. The Cover Up Goal - At all times preventing the discovery of the Common Design.
>
> 17. The means by which such goals were to be achieved would necessarily include (and did in fact include) (i) presenting false information about legal costs incurred and likely to be incurred to the Kings, to the Kings' legal representatives and to the Court, which would involve deceit and contempt of court (ii) intimidating conduct intended to influence the Kings and their representatives, which is a contempt at common law.
>
> 18. The Common Design is ongoing and continues at the present time. It cynically seeks to exploit the fact that Courts are reluctant even to countenance the possibility that senior legal professionals might engage in such conduct."

155. The Common Design is then said to be capable of being inferred from a list of six so called facts, one of which is said to be the Cover Up itself. Only one of these facts – the alleged Contingency Fee Arrangement – predates 2017. This portion of the pleading runs to some 65 paragraphs.

156. The key allegations are:

i) An alleged "hidden contingency fee arrangement" whereby Primekings were only liable for disbursements if the case was "commercially successful". It is said to follow (though is not explicitly pleaded) that such an arrangement was unlawful, and so no fees were payable by Primekings to Teacher Stern or Mr Downes;

ii) Solicitors of Teacher Stern signing statements of truth on costs budgets they knew to be false;

iii) The "SRA Threat", the "Allegations Threat" and the "Ruined and Destroyed Threat" made in the course of the Misrepresentation Claim;

iv) Exerting (other) improper pressure on the Kings' legal team in the Misrepresentation Claim, and procuring the £1.7 million Payment on Account Order by fraud;

v) The "Discontinuance Goal" was said to have been achieved:

> "in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law), including, but not limited to, the SRA Threat, the Allegations
> Threat, and the Ruined and Destroyed Threat."

vi) As, on the Kings' case, costs in the Misrepresentation Proceedings were not recoverable or were fraudulently inflated, all the representations made about costs by the present Defendants – whether to a court or to the Kings – were false and all the Defendants knew them to be false when they were made. This includes witness statements, costs budgets anything said in court by Mr Downes and all offers to agree costs with the Kings. All matters concerning costs prediscontinuance are alleged to be part of the plan to force the Kings to discontinue, and post-discontinuance are part of the Cover Up.

vii) Further, Primekings seeking to recover those costs following discontinuance, and in particular by attempting to recover those costs by obtaining the Kings' shares in KSGL for less than their fair value, is to attempt to enrich itself at the Kings' expense.

157. Part way through this recital comes what transpires to be a key paragraph within the pleading. Under Heading 5 at [35] "Discontinuance and Payment on Account" this is pleaded:

> "On 15 May 2017, the tenth day of the trial, the Kings discontinued the Misrepresentation Proceedings. Such discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law), including, but not limited to, the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat. Pending disclosure, the Kings infer from those threats and the matters set out in the Schedule to these Particulars ('the
> Schedule') that other threats of a similar nature were made to the Misrepresentation Solicitors and the counsel team. That inference is strengthened by …"

158. The Schedule referred to is entitled "SCHEDULE OF COMMENTS MADE AND ACTIONS TAKEN PURSUANT TO THE COMMON DESIGN INTENDED TO MAKE THE KINGS AND THEIR LEGAL ADVISERS ANXIOUS ABOUT CHALLENGING COSTS AND SO INTENDED TO INFLUENCE THEIR CONDUCT IN LEGAL PROCEEDINGS".

159. It has one comment from the first day of trial; that Mr Downes QC stated during opening submissions: "*Unbelievably, there is an issue taken with the amount the*

lawyers on this side are charging." That is pleaded to be an attempt by Mr Downes, pursuant to the Common Design, to deter the Kings and their legal team from ever seeking to challenge the costs numbers which were being advanced by Primekings and which it is alleged he knew were false. The other comments date from 2019 and include Mr Downes accusing the Kings of lacking "bottle", and some statements made by individuals at Teacher Stern questioning the propriety of the allegations made.

160. There is then a section devoted to similar fact evidence - or, as it is entitled "*Similar Conduct Demonstrating Modus Operandi*". There is then a section entitled "*Particulars of Knowledge*" which deals with the allegation that the Defendants knew that the figures presented to Marcus Smith J in respect of the payment on account application were false.

161. That is followed by a section on Loss, Damage and Causation which sets out the claims which I have outlined above.

162. The pleading is unclear in the extreme, and combines tendentiousness with a combination of oversupply of evidence and undersupply of proper particulars.

163. As will be apparent, the conspiracy pleaded includes allegations that the Defendants deceived the court. There are no particulars given of deceit which enable the reader to ascertain on what basis these very serious allegations made against professionals are advanced. There is no clarity about the extent of the basis for the inference sought to be drawn. While much evidence is pleaded, the pleading leaves the inference to be drawn on the basis of "*inter alia*" these matters. It pleads a key agreement, the "*Hidden Contingency Agreement*" without any proper particulars or explanation for lack of particulars. And the allegation of improper pressure, to the extent that it is wider than the pleaded threats, is impossible to discern.

164. Those acting for the Teacher Stern Defendants raised the question of particularisation. They focussed on areas where they perceived a lack of proper particularisation and intimated that an RFI would be forthcoming, which it in due course was. I shall deal with the Response to the RFI in relation to the relevant parts of the case. In summary however it does not materially advance the reader's understanding of the case.

165. I entirely endorse the criticisms made by the Teacher Stern Defendants of the Particulars of Claim. The pleading failed in the following respects:

i) The pleading of fraud was inadequate; ii) There was insufficient particularity in the plea of knowledge; iii) The requirements for pleading a claim in aggravated damages were not met; iv) It was not as brief or concise as possible;

v) Many paragraphs contained more than one allegation;

vi) It manifestly did not set out only those factual allegations which are necessary to enable the other party to know what case it has to meet;

vii) The headings and definitions were contentious and could by no means have been adopted without issue by the other parties;

viii) The line between particulars and primary allegations is not at all clear.

166. This lack of clarity has persisted into the case advanced before me. For example, the Claim Form unequivocally put the conspiracy as one to do with costs:

> "The First to Ninth Defendants have unlawfully conspired to provide false and inflated cost information (including artificial costs budgets) to the Claimants and the Court with a view to causing damage to the Claimants by (a) improperly pressurising the Claimants and their legal team with improper threats of adverse costs (b) obtaining an improper payment on account of costs in favour of the Second to Fourth Defendants in the sum of £1.7m by misleading Marcus Smith J, which payment on account vastly exceeded the actual costs spent."

167. The pleaded conspiracy set out in the Particulars however faces two ways. It initially apparently focusses also on costs as the primary basis of the "Common Design", and indeed seems on its face to say that a main purpose of the conspiracy to inflate costs was to pressurise the Claimants into discontinuing. But then at [35] it places emphasis on discontinuance in conjunction with improper pressure in the context of the Misrepresentation Claim. That then links to the main loss plea at [101] which claims the Misrepresentation Claim would have succeeded.

168. Finally, at the hearing of these applications almost no emphasis was put on the costs allegations, with the primary focus being very much on the discontinuance and the Misrepresentation Claim.

Clarifying what is in issue

169. The starting point must therefore be to clarify what is properly in issue.

The Claim for the Value of the Misrepresentation Claim Iteration 1: The Pleaded Threats

170. Although as I have noted, the case in the Claim Form, and under the heading in the pleading which might be supposed to embrace the nature of the conspiracy, focuses on the costs aspect, this was not the centre of the submissions before me. Nor is it the financial centre of gravity of the claim.

171. At the core of the case inherent, though not properly expressed in the pleading, is a claim that there was a conspiracy to procure the discontinuance of the Misrepresentation Claim; and that that caused the loss of an otherwise copper bottomed claim.

172. This can be seen at:

i) [16.1(ii)] of the Particulars:

> "The Discontinuance Goal - Placing pressure on the Kings and their legal team to discontinue the case (thus avoiding a fair adjudication on the facts) by … using threatening conduct to intimidate the Kings and their lawyers for that purpose."

ii) [35] of the Particulars:

> "[The] discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law), including, …, the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat."

173. The factual nature of the three pleaded "threats" ("the Pleaded Threats") is as follows:

i) The SRA Threat: On 3 January 2017, an alleged threat by Mr Stiefel to report one of the Claimants' solicitors, Mr Jason Blakey (the lead litigation partner at the Misrepresentation Solicitors), who was handling the Misrepresentation Claim, to the SRA for a number of reasons including on the basis that a letter before action had been sent to Mr Stiefel but not followed by proceedings (the "SRA Threat").

ii) The Allegations Threat: On 1 February 2017, an alleged threat by Mr Downes in the mediation position statement, this time aimed at the Kings' legal team, by way of referring to "*allegations… which should never have been made in the first place*".

iii) The Ruined and Destroyed Threat: On 17 March 2017, an alleged comment by Mr Stiefel to Mr King that the Kings would be "*ruined and destroyed by the litigation*" but if the Kings dropped the proceedings, Primekings would take certain B shares belonging to the Kings in lieu of payment to cover their costs (the "Ruined and Destroyed Threat").

174. I deal with these threats first, because it was accepted by Mr Newman in argument that it was not the Kings' case that these threats were causative. On Day 5 of the strike out hearing I raised with Mr Newman the fact that his submissions had yet to touch on the pleaded case. His answer was that the evidence to which he had been taking me at some length showed that the conduct said to be evidenced by the Pleaded Threats did continue into the trial and caused the discontinuance.

175. Probing this further we had the following exchange:

> "MRS JUSTICE COCKERILL: So am I right that your case is not actually about the threats which you have pleaded. It is about the threats which you infer from the material that you

> have been taking me through?... Do you not rely on the pleaded threats, but just on the inferred threats?
>
> MR NEWMAN: No, it is the inferred threats during the trial which is what causes the actual loss because, of course, it is the last final threat which has the effect which causes the case to collapse…
>
> MRS JUSTICE COCKERILL: Do you say that if the inferred threat were not there, your pleaded threats would be causative?
>
> MR NEWMAN: … We say that it – we have never suggested or meant to suggest that the expressly pleaded threats, being the SRA threat, the allegations threat and the ruin and destroy threat, could have given rise to the events, no, that has never been suggested by us and we would not plead that as being the case." 176. So Mr Newman expressly disavowed any case that the Pleaded Threats caused the discontinuance.

177. That was a realistic concession, for a variety of reasons. In particular, given that all of these threats were made before the trial started, it would always have been entirely fanciful to suppose that they could have caused the discontinuance which happened on Day 10 of the trial, after a lot of water had flowed under the bridge.

Iteration 2: The Inferential/Unpleaded Threats

178. That then leaves the inferential/unpleaded case. In the light of that concession [35] of the Particulars of Claim needs to be read as follows:

> "On 15 May 2017, … the Kings discontinued the Misrepresentation Proceedings. Such discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law),… . Pending disclosure, the Kings infer from [the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat]… and the matters set out in the Schedule to these Particulars ('the Schedule') that other threats of a similar nature were made to [the Misrepresentation Solicitors and Counsel]. That inference is strengthened by [PoC [35] then lists various matters from which it is said other similar threats can be inferred]."

179. That pleading has now been supplemented by the late evidence of Mr King in his Seventh and Eighth witness statements, a "Note Summarising the King Claim relevant to all the Applications" ("the Note") and the oral submissions of Mr Newman.

180. The essence of that case is that in the Misrepresentation Claim the Defendants "*[intimidated] the claimants and/or their legal team, … to make them so frightened at the possible consequences of proceeding with the case, that they would withdraw their powerful claim and apologise.*" In essence, it is said that the Defendants identified mistakes made by the Misrepresentation Team, and threatened to "*expose the full extent of the legal team's negligence to the Kings and the Court if the legal team did not cause the Kings to discontinue the case on terms specified by Primekings*". This unpleaded threat is at the heart of the Kings' case: The Threat. It is worth pausing here to note that although [35] says that the Kings will rely on threats of a "similar" nature to the Pleaded Threats, the Threat is nothing like those threats.

181. Given that the case which was being advanced was not one set out in the Particulars of Claim, nor even consistent with the pleaded case as to "similar" threats, it was regrettable that no amendment had been made or draft amendment proffered. It was the more so in circumstances where the only reason for not advancing this case at an earlier stage appears to have been a deliberate decision on the part of the Kings not to waive privilege; and indeed where one response to a request for further particulars of the claim in this respect was to reject the inquiry as an attempt "*to fish for materials covered by legal advice and litigation privilege*".

182. This is a point made very recently by Lord Hamblen in the *Opkabi* case [2021] UKSC 3 (in the context of a jurisdiction challenge, but the point is equally valid here):

> "105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. We were told that this is because they wanted to avoid producing various iterations of the pleading, but if they wanted to advance a case which was not reflected by their existing pleading then they should have amended it. In that way the proper focus of the inquiry can be maintained."

183. The position as to absence of a pleading is still less satisfactory when one considers that a case on precisely the same issues has been pleaded in the Professional Negligence claim. It is therefore very hard indeed to understand why by the time this application was heard there was not even a draft Amended Particulars of Claim setting out the case which the Kings actually do desire to run.

184. The position which faces me is that there are therefore two aspects to the claim which may be being made – the actual case (unpleaded – the Threat) and the inferential case (alluded to in the pleading but not particularised or argued before me). Strictly speaking it would probably be right to proceed only on the basis of the pleaded case. However I will deal here and later in this judgment with the case advanced *de bene esse*; not least because it is quite apparent to me that the Kings have a passionate belief in the merits of this claim and because Mr Newman chose to spend the majority of his time in oral submissions on this aspect.

185. The substance of the unpleaded case however logically comes after the issues as to whether that case would be capable of being pleaded so as to contain the requisite

elements to amount to a viable cause of action. This has two elements: causation and knowledge.

186. The argument here derives from the relation of the plea in this action to the case advanced in the professional negligence action. In that case (also in Particulars of Claim signed by Mr Newman, and under Statements of Truth signed by all the Kings) it is pleaded that:

i) The Misrepresentation Team were (at best) negligent in settling the Misrepresentation Particulars of Claim without checking the underlying documentation and spotting the B share consideration issue [23-25];

ii) The Misrepresentation Team breached their duties in not bringing this negligence to the attention of the Kings [46, 49];

iii) The King's primary case pleaded at [51] of the Particulars is then that the Misrepresentation Team reached an understanding with Primekings that the Misrepresentation Team would not be accused of improper conduct if they caused the case against Primekings to be withdrawn. That is in effect a plea of a dishonest conspiracy between the Primekings Defendants, and the Misrepresentation Team to bring about the discontinuance and thereby hide their own negligence;

iv) The secondary case is that if no such understanding was reached, then the Misrepresentation Team were made to feel so professionally exposed by what had been communicated to them by Primekings that they collectively came to the view that a discontinuance on whatever terms Primekings insisted on was the only way to avoid significant personal consequences for them;

v) The tertiary case is that the Misrepresentation Team felt so professionally exposed by their own negligence (all of them being aware of the threatening conduct which the Primekings Defendants had engaged in) that their judgment was clouded, giving rise to grossly negligent conduct;

vi) The Misrepresentation Claim was then withdrawn because the Misrepresentation Counsel advised that "*there was no claim left that could be advanced any further and [Counsel] told the Kings that they would have to represent themselves if they wanted to continue with the case. That advice was wrong and the legal team knew it was wrong (and so acted in breach of fiduciary duty)*" [99] (see also [110.1]; vii) "*Anthony King indicated that he accepted the advice*" [101].

Knowledge

187. All three of the primary/secondary/tertiary professional negligence claims can only work if: (i) the Misrepresentation Team had been negligent and had not advised their clients of that negligence and (ii) the Defendants knew both of the negligence and the lack of its disclosure. Without knowledge there could be no threat. Without knowledge of absence of disclosure there could be no threat (because if the Kings

knew, the threat would have no teeth). That is also the underpinning of the Inferred threats.

188. Knowledge is a matter which has to be pleaded pursuant to CPR PD 8.2(5). Obviously since the Inferred Threats have not been pleaded there is no formal pleading on this. But as the Inferred Threats case has emerged the issue was raised. The Teacher Stern Defendants' skeleton says:

i) At [71]: *"The Claim contains no allegation that any of the Defendants knew of either the alleged gross negligence of the Kings' legal team or the nondisclosure of that negligence. In those circumstances, it is not possible to see how they could be liable for* "*exploiting*" *that negligence.*"

ii) At [103] "*The attempt to allege that the Defendants* "*exploited*" *those conditions is (i) entirely unclear and (ii) not sustainable in circumstances where it is not alleged anywhere in the PoC or RFI Response that any of the Defendants knew of the alleged gross negligence of the Kings' legal team or the non-disclosure of that gross negligence*".

189. Mr Newman did not grapple with this difficulty at all in his submissions. The matter was put in the skeleton argument thus:

> "Since the Kings expressly plead that their legal team had been negligent (and Primekings revealed it during cross-examination) and the Defendants exploited the undisclosed conflict of interest arising from that, it is obvious that the Kings are alleging that the Defendants knew about the negligence and its non-disclosure to the Kings. Clearly, Primekings cannot have exploited something they did not know about. And they cannot have 'revealed during cross-examination' something they did not know about."

190. Reliance was also placed both in the skeleton and the Note on the response to RFI 40 which stated as follows:

> "The Fifth to Eighth Defendants are well aware of what happened at the trial and so are in a position to plead back to paragraph 109 in accordance with CPR16.5……..40.2. The other factors were (i) the gross negligence of the Kings' legal team in pleading a case which was inconsistent with the documents in the trial bundle, as revealed during crossexamination by Primekings after lunch on Day 4 (ii) the fact that such negligence was never disclosed to the Kings in breach of IB(1.12) of the SRA Handbook and gC51 of the BSB Handbook. That meant that there was an undisclosed conflict of interest which Primekings exploited through its threatening conduct further to the Discontinuance Goal of the Common Design."

191. Based on this, in the Note Mr Newman contends that: "*So all of these Defendants have known for nine months that the Kings are alleging that the Defendants knew about the negligence of the Kings' legal team and exploited the fact that was not ever disclosed to the Kings.*"

192. However this is plainly no pleading of knowledge; nor does it set out what would be required to be pleaded were such a pleading to be made. The reasoning is plainly circular. If it is the Kings' case that threats were used to induce the Misrepresentation Team to procure a discontinuance there must be a clear case, at least as a matter of allegation, of how that threat had teeth. It is not enough to say you threatened, therefore you knew, because the presence or absence of knowledge is central to the very existence of the threat. What may be a threat if the Teacher Stern Defendants knew about the breach of duty and absence of disclosure becomes no more than ordinary litigation tactics – an attempt to distract or rattle the other side - if there is no knowledge of breach of duty, just (for example) knowledge that the other side's case was going rather badly for them. Examples of the latter might be an observation that a witness had not come up to proof or that a pleading was not consistent with underlying documents.

193. Ultimately the Kings' case on this point (i.e. the basis for any plea of knowledge) was said to lie in the Professional Negligence Particulars of Claim and in Mr King's Eighth statement. In his Note Mr Newman referred to [50-53] of the former and [73], [74], [77], [78], [80], [83], [90] of the latter. There is nothing in the pleading which amounts to a case on knowledge. It merely sets out the Kings case against the Misrepresentation Team.

194. As for Mr King's statement, this is similarly deficient. To be clear:

i) [73] sets out the negligence on which reliance in placed – the error of Mr Wilson (see paragraph 87 above). [74] then says the he believes it had been spotted as an error because Mr Downes asked if any claim had been made against DWF;

ii) [77] says that he believes that the Primekings Defendants agreed not to expose to the Kings the conduct of Mr Wilson and the fact the remainder of the Misrepresentation Team had not checked the underlying documents, so long they caused the Kings to discontinue on specified terms. [78] sets out the obverse side of the threat and deals with discontinuance;

iii) [80] states that Mr King believes that the Misrepresentation Team thereafter became passive, to facilitate the discontinuance;

iv) [83] says that Mr Downes was quick to threaten to allege professional misconduct against the Misrepresentation Team and that Mr King believes he would have used the knowledge of the error in the pleading and the witness statement to the advantage of his client;

v) [90] says: "*I believe that Primekings intimated to my legal team the possible personal consequences for them if the case continued to a judgment, and that led to an informal understanding with Primekings that our legal team would*

> *not be accused of improper conduct by Primekings if [leading counsel] caused the case to be withdrawn following the close of our evidence.*"

195. Having done the very best I can and considered the argument very carefully I see nothing which amounts to material which could support a proper plea of knowledge.

196. It follows from this that the claim based on the Inferred Threats in relation to the Misrepresentation Claim and the discontinuance is fundamentally flawed and cannot succeed.

197. As I have explained above, this has nothing to do with any evidence which might be called. In a sense this makes the causation argument academic, but I deal with it for completeness

Causation

198. Causation of loss is an essential part of all claims in tort. Where an unlawful means conspiracy is alleged the loss complained of must have been caused by the unlawful acts complained of. This is plain from *Kuwait Oil Tanker*, at [108-9] and perhaps most powerfully from the judgment of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 188.

> "Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement."

199. This has been more recently reiterated by the Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727 at [9]:

> " a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort."

200. It is therefore no good identifying arguable unlawful acts - or even clearly unlawful acts, together with loss which was caused by a lawful act, or by an unlawful act performed by someone else. The act complained of and the loss must link up.

201. The Kings' case on causation here is that one necessary condition for and the major cause of the discontinuance was the gross negligence of the Misrepresentation Team and the ensuing conflict of interest which arose. However it is said that that situation

was then "*exploited*" by the Defendants by means of the Inferred Threats, with the result that those threats are the legal cause of the Discontinuance.

202. The pleaded case on causation here is not that the Inferred Threats caused the discontinuance of the Misrepresentation Claim, but that "*discontinuance resulted in significant part*" from it [35] or "*were a substantial factor in causing the Kings to discontinue … as the approach of the Kings' legal team was heavily influenced by the threatening conduct*." [109]. These are not orthodox pleadings of causation, but for present purposes I assume them to be adequate.

203. How this case has to be said to work is that the Inferred Threats themselves were causative of the key breach of duty alleged in the Professional Negligence Action – that of advising discontinuance. The way that it was put in argument was "*it is the inferred threats during the trial which is what causes the actual loss because, of course, it is the last final threat which has the effect which causes the case to collapse…*"

204. Before going on to consider this point in more detail I should deal with the Kings' main arguments in relation to the point. Mr Newman contended that causation of loss is always an issue of fact to be decided by the trial judge in light of all of the evidence. He made this submission by reference to the case of *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch); [2004] 2 B.C.L.C. 191, where Jonathan Crow QC (sitting as a Deputy High Court Judge) said, at [89.1]: "*The first is that causation is a question of fact. As such, it is plainly unsuitable for summary determination.*" That was itself a statement by reference to the dictum of Lord Steyn in *Three Rivers (No. 3)* [2003] 2 AC 1, at 194: "*Causation is an essential element of the plaintiffs cause of action. It is a question of fact. The majority in the Court of Appeal and Auld LJ held that it is unsuitable for summary determination. That is plainly correct*". Neither of those were however purporting to be determinations of a point of principle. They were simply statements as to the suitability of the causation issue in those cases for summary determination.

205. Of course causation is an issue of fact; and equally of course it will very often be unsuitable for summary determination. However it cannot be said that this will always

be so. The question is whether in this case the Defendants can satisfy me - to the necessary standard for summary judgment – that the Kings' case on causation is defective.

206. The issue here is that exactly the same relief is claimed here on the basis that it was caused by the conspiracy as is claimed against the Misrepresentation Team in separate proceedings on the basis that their advice was the legal cause of the discontinuance, and pursuant to a primary case that the advice was caused by an agreement between the Misrepresentation Team and Primekings.

207. Dealing first with factual causation, as to the facts which give rise to that claim of causation there can be no real dispute. One result of the waiver of privilege by the Kings is that I have seen Misrepresentation Counsel's written advice. It plainly does give (in effect) the clear advice that there was no claim left. Equally plainly one can

see from the fact of the discontinuance (and indeed from the contemporaneous notes of the discussions which led up to the discontinuance) that that advice caused the discontinuance. Mr Newman was (and remains) emphatic that the Misrepresentation Team said that the case could not go on unless the Kings wished to represent themselves. Whether that is what was said is to some extent in issue in the Professional

Negligence Action, but that is immaterial here where it is the Kings' case against these Defendants which is in focus.

208. The Defendants say that the Professional Negligence Claim, deliberately run by the Kings, causes a very serious problem for the Kings' claim in this action. That is because if the Kings are correct and they had a good claim and the Misrepresentation Counsel knew this, that advice to discontinue was (as the Kings positively aver in the Professional Negligence Action) at least grossly negligent and in breach of fiduciary duty. In those circumstances what caused the discontinuance is not any threats by the Defendants, but that breach of duty by the Misrepresentation Team.

209. I have given this line of argument very careful thought and have concluded that I can go part of the way with the Defendants on this argument, but no further.

210. I am with the Defendants only as to the primary case in the Professional Negligence Action. Logically, and as a matter of the pleaded case in that action, that (different) conspiracy, leading to the breach of duty in advising discontinuance, is what causes the loss in question. The key point is that the two conspiracies appear on the pleading to be mutually incompatible. I accept the submission that to that extent it should not have been possible for the Kings and their team to put forward both Particulars of Claim in this action and the Particulars of Claim in the Professional Negligence action as documents of truth.

211. I then turn to the secondary and tertiary cases in the Professional Negligence Actions and the case on causation in this action. Here I do accept that - assuming the pleaded facts to be true - the two cases can be compatible, and the conspiracy pleaded in this action could continue to cause the loss. This is because on this approach it was the intent of the Defendants to procure a discontinuance, they acted so as to bring about that result, and their threats were efficacious – albeit that there is another cause, because the result could not be brought about absent the breach of duty which forms the secondary and/or tertiary cases in the Professional Negligence Action.

212. While the Defendants urged me to say that the breach of duty would be a *novus actus interveniens*, breaking the chain of causation, I do not regard that as a realistic argument, certainly at the summary judgment stage. If the Defendants had held the Misrepresentation Team's loved ones hostage, threatening them with violence unless the Misrepresentation Team advised discontinuance I cannot see that the breach of duty would constitute a *novus actus*; if there really were intended threats which so overcame the Misrepresentation Team as to lead to the same result it must be arguable that the analysis would be the same.

The Costs Claim

213. Before proceeding to analyse the costs claim I pause here to note that the costs claim is one which is difficult to follow. This is because it is hard to see how the conspiracy works; and because of the jumbled nature of the pleading the answer to this question certainly does not emerge from that document.

214. However stepping back there appears to be an anomaly with the claim even before one proceeds to break it down into its component parts. The pleaded claim is that the Defendants placed pressure on the Kings and their legal team to discontinue the case by misleading the Kings into believing that if they did not discontinue then they might ultimately be liable for an amount of legal costs which Primekings knew it would not incur. Even assuming the basis for this (the hypothesis that Primekings had no properly recoverable costs because they had failed to take the necessary steps regarding a contingency fee arrangement – the Hidden Contingency Fee allegation[1]) how does the discontinuance factor into this? If the Kings discontinued they would have to pay costs; if they pursued the case to judgment and lost they would have to pay (more) costs. But if they discontinued they would still have to pay costs. Discontinuance reduces the liability – if the case is not good. Only if they pursued the case successfully (i.e. did not discontinue) would they not have to pay costs.

215. The reality appears to be that the costs conspiracy, to the extent it exists, would have to be entirely independent of the pleaded discontinuance goal and be rather different to what is pleaded. There could for example be a claim that there was a conspiracy to mislead the Kings so that they did not know at any relevant time about the Hidden Contingency Fee, such that they could not take that point before any costs liability was determined. That however is not the pleaded case – and on the facts it could not be the case since the Kings raised points about the Hidden Contingency Fee before the costs liability was determined.

216. But putting that to one side, and assuming that the costs conspiracy does not have the logical difficulties I have just identified, I turn to consider how the pleaded claim works.

217. It is trite law that loss is an essential component of a cause of action in tort. Thus an unlawful means conspiracy, such as that alleged in this case, must have caused loss to the claimant, or else the cause of action will be incomplete - as noted in *Ablyazov*, at [9]. Or as Lord Diplock put it in the passage from *Lonrho v Shell* which I have already quoted: "*the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to the agreement*".

218. When one turns to the costs aspect of the claim one faces a rather different facet of the causation problem which could be seen in relation to the Threats. There the issue is

[1] I will deal with this further below, but it either means a contingency fee arrangement which could never result in any recoverable costs, because it was not properly documented or (ii) a contingency fee arrangement which resulted in lower costs being incurred than were being listed in the Costs Budgets

that there is a factual nexus between the main loss claimed and the Threats, but the chain of causation between the two may be said to be either non-existent or (arguably) broken. In the context of the costs allegations however the first issue is to find any link between the losses pleaded and the unlawful acts complained of.

219. The main loss complained of at [110] is the claim lost in the Misrepresentation Proceedings. This can only have relation to the Threats. It does not result from the costs conspiracy.

220. The secondary case relates to a claim for 40% stake in KSGL and is put thus at [111]:

> "The Kings' fallback case is that absent the Common Design, the Share Campaign would not have happened, and they would now be owners of a 40% stake in KSGL worth circa £29,000,000 and would not have been damaged by the Share Campaign, including by non-payment of their B-shares. The early stages of the Share Campaign used pressure created by the false costs numbers to try to deceive the Kings into giving up their shares. When that did not work, the later stages of the Share Campaign relied on the Payment on Account Order as a basis for enforcement proceedings against the Kings. Absent the Common Design, the Payment on Account Order would not have been obtained."

221. This claim too is thus premised on the Payment on Account Order which was part of the discontinuance; absent discontinuance the payment on account order would not have been made. This claim therefore also stands or falls with the Threats element of the conspiracy.

222. The third element of the claim is "*damages in respect of the £1,882,305 paid to Primekings in October 2018*" [112]. That sum is the amount of the payment made by the Kings in respect of costs. It therefore flows (again) from the order on discontinuance, and hence from the discontinuance.

223. I note by way of parenthesis that as to £1.7 million of it directly referable to that order (as being the amount of the payment on account), it would appear that the insurers of the Misrepresentation Solicitors have made a payment in that amount. This appears from the Note lodged by Mr Newman as an adjunct to his skeleton arguments. It is described by him at paragraph 34.2 of that document as "*Having honoured the informal recommendation of the Legal Ombudsman to pay the £1.7m payment on account*." It would follow that there is a very live question as to whether that sum could ever be recoverable, as on the face of it the Kings have been made whole for that portion of the loss and the result if the Defendants were liable would be double recovery.

224. The remaining claim is for injury to feelings:

> "caused by the extreme distress the Kings have been subjected to as a result of the Common Design; any costs to the Kings of obtaining access to justice; damage done to Anthony King's

> career; legal costs paid to the Misrepresentation Solicitors; damage to the Kings' reputation; aggravated damages; and exemplary damages on the basis that the Common Design involved abuse of their positions by officers of the Court and/or on the basis that the Common Design was calculated to generate a profit for Primekings which Primekings cynically calculated to exceed any likely liability in damages."

225. None of this has any relation to the costs allegations.

226. All of this is only reinforced when one considers the Particulars of Claim, while holding these losses in mind. It will be recalled that the "Common Design" comprised three elements: (i) Discontinuance Goal, (ii) Enrichment Goal (shares) and (iii) Cover Up Goal.

227. The Discontinuance Goal has one element which on its face relates to costs. As already noted, it is alleged that pressure was placed on the Kings and their legal team to discontinue by "*misleading the Kings into believing that if they did not discontinue then they might ultimately become liable to Primekings for an amount of legal costs which in fact Primekings knew it would not incur*".

228. This relates to allegations that (i) there was a Hidden Contingency Fee Arrangement and (ii) that the information provided through the Costs Budgets was deliberately falsified and (iii) the Pleaded Threats.

229. However, there seems to be no way to tie such a costs representation to the decision to discontinue in this case. There are a variety of facets to this. One important one is the timing aspect which itself has two aspects: (i) by the time the discontinuance happened costs had been largely incurred – the difference between discontinuing mid-trial and after trial was marginal; (ii) if these representations were made, they were made well before trial and the idea of a causative link becomes very difficult. If the cause of the discontinuance is the Threats (plus the breach of duty by the Misrepresentation Team – or more properly the breach of duty by the Misrepresentation Team itself caused by the Threats) how can the discontinuance be caused at all by the costs representations?

230. Further, as already noted, it is no longer suggested that the Pleaded Threats were causative of the discontinuance; as such it would also seem illogical for the costs representations to be relied on in this context. Finally and fundamentally the costs aspects (even insofar as they precede the discontinuance) have no effect on the merits of the Misrepresentation Claim. There is therefore absolutely no discernible link which could provide causation in relation to the costs allegations. That deals with the case insofar as it leads to the discontinuance, or relates to damage suffered by reason of discontinuance.

231. The remainder of the Particulars of Claim deals with matters after the discontinuance – what is referred to as "the Cover Up". There are said to have been repeated and dishonest statements as to the costs incurred. All of this goes to what is said to be attempts to ensure that the Kings agreed costs (see [72] of the Particulars).

232. However none of these representations gives rise to any loss. So far as the costs liability is concerned it was incurred in the Misrepresentation Claim, which was over in 2017. Further either that was determined finally by the detailed assessment, or it was not. The representations on any analysis did not increase that liability. They did not give rise to any other loss. It follows that there is no separate loss which arises out of these representations, so there is no complete cause of action to be made out based on these representations.

233. It follows that the portion of the Particulars of Claim which relates to those allegations also falls to be struck out.

Analysis of the claim: result

234. The result – reached very simply and by a straightforward route of analysis of the pleaded claim, entirely divorced from any controversial facts – is that the entirety of the Kings' claim fails. To be clear, the claim fails because no complete cause of action is currently pleaded or could be pleaded:

    i) As regards the main element of the claim (threats causing discontinuance and other losses) the Pleaded Threats are no longer relied on as causative of any loss. The case based on the Pleaded Threats therefore falls to be struck out. Alternatively there is no real prospect of success on it and it would be appropriate to grant summary judgment;

    ii) The same would necessarily follow as regards any further "similar" threats – currently suggested but not particularised in the pleading;

    iii) As regards the unpleaded claim on the Inferred Threats (assuming it can be properly pursued) the case falls to be struck out/there is no real prospect of success because the case must fail on knowledge in circumstances where the Kings cannot plead any case that the Defendants knew (i) of the Misrepresentation Team's (assumed) negligence; and/or (ii) of the Misrepresentation Team's failure to disclose that (assumed) negligence to the Kings.

    iv) As regards the subsidiary part of the claim (costs representations) there the case falls to be struck out/there is no real prospect of success because there is no separate loss which arises out of these representations, so there is no complete cause of action to be made out based on these representations. Further there is no real prospect of success of these being held to have caused the discontinuance.

235. However it is nonetheless important that I deal with the remaining aspects of the argument, in part to ascertain whether there are other reasons why parts of the claim would in any event fail.

236. The remainder of this judgment is thus addressed to the position which would pertain if I were wrong about this first basis for decision.

The Costs Allegations: the Effect of the Final Costs Certificate

237. It is sensible to take the other main issue on the Costs Allegations here, as this largely permits the rest of the judgment to deal with the centre of gravity of the argument which is advanced by the Kings – the threats upon which they rely.

238. Leaving aside the question of the lack of loss relevant to the Costs Allegations, the main issue which arose was the effect of the recent Final Costs Certificate. As already noted, the Kings' case is that there was either never a costs liability because there was no effective contingency fee arrangement or the costs which were incurred were much less than those which were represented to the court on various occasions.

239. The answer which was posed to that line of argument on behalf of all the Defendants was: it is not open to the Kings to say this, because that costs liability has now been conclusively determined in the detailed assessment.

240. The relevant facts concerning this issue are set out at paragraphs 122-133 above.

The law

241. There are two aspects to the relevant law here.

242. The first is the law relating to detailed assessments, which is uncontentious. An order for costs cannot be more than an indemnity i.e. the paying party cannot be ordered to pay the receiving party more than the amount that party is liable to pay to its solicitors: *Gundry v Sainsbury* [1910] 1 KB 645, at 649, 650 and 653. Indeed, the Kings assert this at [22] of the Particulars: "*an informal contingency arrangement would not give rise to any recoverable costs against the Kings*".

243. The second aspect is issue estoppel. Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been determined in earlier proceedings, one party seeks to reopen that issue in subsequent proceedings and the parties in both are the same or their privies.

244. The principles governing issue estoppel were summarised in *Price v Nunn* [2013] EWCA Civ 1002 in light of the Supreme Court's decision in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2014] AC 160. At [68], Sir Terence Etherton stated:

> "Issue estoppel is a form of estoppel precluding a party disputing the decision on an issue reached in earlier proceedings even though the cause of action in the subsequent proceedings is different. It may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties or their privies to which the same issue is relevant one of the parties seeks to re-open that issue. In such a situation, and except in special circumstances where this would cause injustice, issue estoppel bars the re-opening of the same issue in subsequent proceedings. The estoppel also applies to

> points which were not raised if they could with reasonable diligence and should in all the circumstances have been raised, but again subject to special circumstances where injustice would otherwise be caused." 245. Lord Sumption explained the effect of an issue estoppel in *Virgin Atlantic* at [22]:
>
> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

246. This latter facet of the test may be referred to as the "*could and should*" aspect.

247. I should also deal here with the concept of abuse of process. This is important in this case because the parties to this action are different to the parties to the Misrepresentation Claim.

248. Abuse of process is a distinct concept, although it shares an underlying common purpose of limiting abusive and duplicative litigation. Issue estoppel forms part of the substantive law of *res judicata* whilst abuse of process forms part of the court's procedural powers (per Lord Sumption in *Virgin Atlantic* at [25]).

249. The core principles applicable to abuse of process are set out *in extenso* in *Johnson v Gore Wood & Co (A firm)* [2002] 2 AC 1. Although the circumstances in which abuse of process can arise are not limited, Lord Bingham (at [31]) cited examples where it may be established, including a collateral attack on a previous decision or where a party brings a claim or raises a defence in later proceedings which should have been brought or raised in earlier proceedings ("*Henderson v Henderson abuse*"). As Simon LJ noted in *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 at [48], the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest in not having issues repeatedly litigated.

250. The key point for current purposes is that a claim may comprise an abuse of process as amounting to an attempt to relitigate a point which was or should have been raised in earlier proceedings even if the parties to the second set of proceedings are not the same as those in the first set of proceedings. That will occur if it would be manifestly unfair to the parties in the second set of proceedings that the same issues should be relitigated or if to permit such relitigation would bring the administration of justice into disrepute. This is set out clearly in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 per Sir Andrew Morritt V-C at [38]:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. … (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the

> parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

251. Moreover, it is irrelevant that the tribunal in the first set of proceedings may be different from the tribunal in the second set of proceedings. This can be seen in the decision of the Court of Appeal in *Taylor Walton v Laing* [2007] EWCA Civ 1146, [2008] B.L.R. 65 (a previous judicial finding) and in *Arts & Antiques Ltd v Richards* [2013] EWHC
3361 (Comm) [2014] 1 Lloyd's Rep IR 219 per Hamblen J at [45]-[47] (a case of a previous arbitral award). If the disappointed party wishes to challenge the decision of the first tribunal, the correct route is by way of appeal.

The issue and submissions here

252. The submission of the Defendants is that the question of whether there was an enforceable liability for costs was or should have been taken in the Detailed Assessment proceedings, and that the Kings are now barred, whether by way of issue estoppel or abuse of process, from taking the point in this litigation.

253. The answers posited by the Kings are essentially threefold:

    i) The issues were not taken and there is therefore no identity of issue;

    ii) There is no identity of parties such that issue estoppel could arise;

    iii) As for "should" an abuse of process cannot bite either because (a) the Detailed Assessment proceedings were unsuitable to the taking of such issues, because of their format or (b) Mr King was a litigant in person operating in difficult circumstances because of the Covid-19 pandemic.

Discussion

254. I shall leave issue estoppel to one side, because it was tacitly accepted by the Defendants that there were some difficulties with this approach. But one might perhaps start with the proposition that but for (i) the slightly different line-up and (ii) the circumstances of the costs assessment there would be only one issue which could realistically prevent this being a straightforward issue estoppel case. That is the question of whether the nature of the proceedings was unsuited to the determination of these issues.

255. On this issue the very clear answer at which I arrive is that there is nothing in the nature of a costs assessment which is unsuited to those determinations. On one level one can see this from the fact that certain of the costs issues which raise questions of

fraud were originally taken by the Kings in their Points of Dispute for the detailed assessment – which it will be recalled were served on the same day as the Particulars of Claim in this action. On another level it is a plain matter of logic – the costs assessment process is there to determine what is the enforceable costs liability; it would be bizarre if it were to be said to be unsuited to determining issues which go to the heart of whether there is any costs liability at all, or which have a major impact on the amount owing.

256. What Mr Newman for the Kings says to this is that the Kings relied on the guidance in the case of *Drukker & Co v Pridie Brewster & Co* [2006] 3 Costs LR 439, which they say was endorsed by Tom Leech QC dealing with the s. 994 Proceedings.

257. Taking *Drukker* first, the headnote of that case states this:

> "When considering whether there is jurisdiction under s 70 Solicitors Act 1974 for costs judges to hear allegations of negligence each case should be approached on its own facts. In this case there were wholesale allegations of professional negligence and wide ranging criticism of the solicitors' conduct which affected not only individual items in the bill but which went to the heart of the retainer. In these circumstances the costs judge did not have jurisdiction to hear such matters."

258. That is reflected in the following passages from the judgment of Openshaw J:

> "28. … it is, in my judgment, in the highest degree questionable whether a costs judge has the jurisdiction to hear claims of professional negligence of this wide ranging nature and extent….
>
> 31. Assessments are of course now heard by a costs judge. They are experts in costs. They do not try any other type of case. Of course, they do sometimes hear witnesses; they do sometimes hear and determine allegations of misconduct, but always within the context of the assessment of costs. The issues usually concern some discrete part of the bill. In our judgment – for I sit with assessors – the type of trial which would be required to resolve the issues in this case is entirely unsuitable by reason of its factual complexity and subject matter for trial by a costs judge.
>
> 33. … the issues are factually complex; witnesses must be called and cross-examined as to disputed facts; experts will be called; the allegations impute professional negligence; the papers are voluminous. Each of us is clearly of the opinion that these issues are not suitable for trial by costs judges. Such matters should be tried in the High Court.
>
> 37. Each case should be approached on its own facts: in my judgment, in these circumstances, the Master did not have

> jurisdiction under s 70 of the Solicitors Act (or otherwise) to hear such wholesale allegations of professional negligence and such wide ranging criticisms of the solicitors' conduct, which affected not just individual items in the bill of costs but which went to the heart of the retainer.
>
> 38. Even if he had jurisdiction, he was correct not to have exercised it, since it would be an abuse of the process of the court to allow the defendants to raise by way of the Points of Dispute to the Bill of Costs before the Master precisely the same allegations which they made in the pre-action protocol procedure, thereby putting the claimants to the very considerable costs of contesting the same, and which they did not pursue in a High Court action after the protocol had run its course.
>
> 39. The factual complexity of these matters made them entirely unsuitable for trial before a costs judge. The matter should be litigated, if at all, in the High Court."

259. Does this case provide any authority for the proposition that "*issues requiring witness evidence and cross-examination are for the High Court*" (what Mr Newman referred to as "the Drukker Principle")? In my judgment it manifestly does not. One need only look at [31] of the judgment to see that.

260. One can also see that the Court is by no means purporting to lay down any principle at all. The case is authority for no wider proposition than that there may be some complex cases which are unsuited for trial before a costs judge, and that the question of whether that is the case or not will turn on the facts of the particular case.

261. That particular case was one where (as Openshaw J notes) what was in issue was an assessment of the party's own costs as between him and his solicitor, in circumstances where he claimed that he should not have to pay 70% of the bill because the solicitors had been professionally negligent. Those allegations were effectively a free standing cross claim (which had been "trailed" by way of pre-action protocol letter somewhat earlier, but not pursued) and would effectively involve (i) unpicking the original retainer and (ii) trying the professional negligence allegations.

262. It is also worthy of note that *Drukker* was not itself decided on the basis of this line of argument. In *Drukker* what was decided was that "*It was an abuse of the process of the court to seek to raise before the costs judge on an assessment of costs matters which could – and should – have been litigated before the court after the exchange of the pleadings in the pre- action protocol.*"

263. I turn then to the argument that Tom Leech QC in his 29 October 2020 decision in *King v KSGL* [2020] EWHC 2861 (Ch) endorsed the so-called Drukker Principle. The relevant part of the judgment reads thus:

> "137. Mr Newman also submitted that the detailed assessments of the costs of the Misrepresentation Claim and the Part 8

> Claim would not determine the issues in the Petition. He drew my attention to *Nicholas Drukker & Co v Pridie Brewster & Co* [2006] 3 Costs LR 439 where Openshaw J held that the costs judge did not have jurisdiction to decide allegations of professional negligence and criticisms of the solicitors' conduct which affected not just individual items in the bill but which went to "the heart of the retainer": see [34].
>
> 138. …I am not prepared to strike out extracts (7) to (14) for the following reasons:
>
> i) I accept Mr Newman's submission that there is no general "proper forum principle". I also accept his submission that the costs judge is highly unlikely to make findings which will assist the judge hearing the Petition to determine whether the detailed assessments formed part of the Campaign."

264. This is absolutely not a case of Tom Leech QC endorsing "guidance" from *Drukker*. It is hard to understand how that submission can sensibly be made. In particular:

    i) There is no guidance in *Drukker*;

    ii) Tom Leech QC does not "endorse" that decision. He does not purport to do more than summarise the outcome of the case;

    iii) His decision at [138(i)] is about an entirely separate point. It is a factual conclusion that the costs judge would (on any analysis) not be dealing with the question of whether the detailed assessments formed part of the Campaign.

265. I therefore conclude that there is nothing in either of these authorities which assists the Kings on this point. Nor, given that the point is entirely clear, can the Kings pray any misunderstanding in aid when it comes to the question of "*could and should*". If the Kings formed the view that *Drukker* encapsulates the principle contended for, or that Tom Leech QC "endorsed" it, there was no sensible reason for them to do so.

266. This then brings me to the question of "*could and should*". It follows from what I have found already that there was no reason why the Kings "could" not have raised the issues of whether there was any liability and various of the other points on the costs amounts in the detailed assessment. What is said in response to this is in effect twofold.

267. The first point is that "*Complex cases such as this have to be considered cumulatively and never on a piecemeal basis. The SCCO would never have been able to take into account most of the matters set out in the POC in this case.*" The first part of this was effectively the argument run before and rejected by Master Whalan. It is plainly wrong that the question of what costs were properly recoverable would have to be decided in these proceedings – that is what detailed costs assessments are there for.

268. Of course it is right that a number of aspects of the argument set out in the Particulars of Claim in this case would have been ones which the SCCO would not have taken

into account. But that is not because it could not, but rather because they were not germane to the issues of recoverable costs. It is hard to tell whether this elision by the Kings is deliberate or not. It either evidences the lack of structured thinking which affects the Particulars of Claim or a determination on the part of the Kings to pursue matters the way in which they would prefer to do so.

269. Coming back to basics:

i) There is no reason why such issues as the 577 hours and the expert evidence could not and should not have been determined in the Costs Assessment. Indeed, plainly the Kings originally intended them to be so determined. Similarly as regards such questions as mis-certification.

ii) There is no reason why the amount of fees actually incurred – by reference to either such issues as the accounts or the "shadow ledger" (as to which see further below) could not have been determined.

iii) There is no reason why the existence of any contingency fee arrangement and its enforceability should not equally be determined in the Costs Assessment. While disclosure and witness evidence might well have been needed, there is no reason why that could not have been done.

270. The second point raised by the Kings is the endorsement which they say that they received from Master Whalan for this approach. The skeleton says:

> "It is difficult to see how the Kings can have abused the Court process by following the guidance in Drukker, endorsed by Tom Leech, by doing their best to simplify the assessment under COVID conditions, in a way which was expressly endorsed by
> Master Whalan [fn. See Master Whalan comment: "quite rightly……"]"

271. Again this argument seems to be completely misconceived. In the first place whether or not Master Whalan endorsed the approach is neither here nor there for present purposes; the Kings took this decision themselves, and Master Whalan's comment came on Day 3 of the assessment – well after they had done so. It therefore cannot justify the rightness of the decision.

272. Secondly, in the context of the debate which had gone before, Master Whalan's passing comment of "quite rightly" appears to have been related to the limiting of matters on which he needed to hear evidence. It seems very possible that (despite the skeleton argument served by Mr King, where if one is interested and with the benefit of hindsight one can certainly discern what was intended) Master Whalan did not have a full appreciation of the fact that these points were still to be attempted to be revived later. This is because at the outset of the hearing, when urged by Mr Mallalieu for Primekings to disallow the amendment, and to formally dismiss those points of dispute he said this:

> "I am clear as to my function, which is to assess the bills. The effect of the variation is to remove what would otherwise be

> articulated objections to the defendant's recovery … those obstacles to the defendants' recovery disappear."

273. But in any event, I do not consider that Master Whalan's throwaway remark of "quite rightly" can assist the Kings.

274. If there is nothing to be gained for the Kings by reliance on *Drukker* or indeed their view on what *Drukker* imported, or the supposed approval of it by Master Whalan the answer to the "should" element of the analysis becomes quite clear: these points should have been raised in the costs assessment.

275. All that remains is the question of "*special circumstances which would cause injustice*". This was not specifically relied upon by Mr Newman, but Ms Addy QC for Primekings very properly drew this point to my attention in paragraph 47 of her skeleton. It is a point to which I have given considerable thought.

276. There seem to me to be two arguments which might have been enunciated on behalf of the Kings in this regard. The first is that I should regard there as being special circumstances because Mr King was not legally represented at the detailed assessment hearing and he had to attend by phone. It was said in Mr Newman's skeleton as noted above that the Kings were "*doing their best to simplify the assessment under COVID conditions*".

277. However Mr King's skeleton for the assessment seems to undercut both these points. At paragraph 1 of his skeleton he notes that he has received some *pro bono* legal assistance in preparing the skeleton. That appears to be borne out by the liberal citation of authority within the skeleton. It is further supported by Metis Law's letter of 4 November 2020 which makes it clear that they were advising Mr King in relation to the Detailed Assessment proceedings.

278. Secondly he nowhere says that he is abandoning points to simplify the assessment under
COVID conditions. Rather he says "*Just as it would be my right to decide now not to contest the Bills at all I can also choose to only take certain points if I wish to see Mr Dyson LJ in Al-Medenni v Mars UK…*". I also note that it does not appear to have been the case that the Kings were without legal advice other than *pro bono* advice generally. As will be appreciated, by this stage in the timeline the Kings were represented in these proceedings.

279. The second aspect which might be said to comprise "special circumstances" is whether the nature of the allegations are themselves so grave that an exception should be made. The authorities are not particularly forthcoming on the subject of what constitutes special circumstances. One might perhaps trace an analogy with the cases dealing with attempts to set aside or resist enforcement of a judgment or an award obtained by fraud or illegality, where the abuse of process arguments are also deployed.

280. Both of these impose a high hurdle and do not suggest that any allegation of fraud can suffice. In the former context there is a need to show conscious and deliberate

dishonesty and that the evidence which was suppressed was material in the sense that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did (see *Takhar v Gracefield* [2019] UKSC 13).

281. In the latter the court will generally not refuse enforcement unless:

i) There is a strong prima facie case (at least of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing); ii) The evidence was not previously available or reasonably obtainable.

(see *Alexander Bros v Alstom* [2020] EWHC 1584 (Comm) [2021] 1 Lloyd's Rep. 79 at [74]).

282. Thus in the latter case I concluded that allegations of illegality even if endorsed by a foreign court would not count as special circumstances precluding enforcement unless (possibly) the merits were particularly compelling: see [165-70].

283. It follows that the nature of the allegations would not in my judgment *per se* constitute special circumstances. It may be that if there was a strong prima facie case on the merits in relation to such serious allegations the special circumstances exception would apply. For reasons which are already evident (and for further reasons to which I will in due course come) this is not a case which could pray that particular line of argument in aid.

284. It follows then that were this a case where there was identity of parties I would conclude that there was a clear case of issue estoppel as regards the costs allegations, insofar as they put the amount of the costs liability in the Misrepresentation Claim in issue.

285. The question is whether a different outcome results because of lack of identity of parties. On this I conclude without any difficulty at all, that the same outcome must result. The attempt to run these points now is a blatant attempt to go behind both the decision on the detailed assessment and the decision of Master Whalan not to stay that detailed assessment; a decision which was taken expressly so that Primekings had finality on the indemnity costs order which it had obtained (by consent) in the Misrepresentation Claim.

286. It cannot be said that anything has changed between the time when those decisions were made and now: the costs issues are no different now to what they were then. This is particularly tellingly illustrated by the fact that the Points of Dispute were served on the same day as the Particulars of Claim in this action.

287. Having had the decision of Master Whalan not to stay the assessment, the Kings took what was plainly a deliberate decision to remove those points from the Detailed Assessment; it appears that they did so in full knowledge that there was an argument that an estoppel would arise if they argued the points, and given that the point was raised squarely in the Reply to the Points of Dispute they were also alive to the abuse

arguments which would arise if they did not. They chose to take that decision based on a desire to run the points in this litigation – the same desire which formed the basis of their arguments (rejected) before Master Whalan. Their reliance on *Drukker* was manifestly erroneous. Nor can there be any reliance on the supposed reservation of rights in this context. It was made quite clear to the Kings that this was not accepted.

288. There was time to decide the issues – 7 days had been set aside when the issues were live. The late abandonment of the issues will have led to a waste of court resources *vis a vis* other litigants. There was, as I have noted, nothing in the issues which was unsuitable for determination in the Detailed Assessment.

289. It follows that those aspects of the claim which put in issue the recoverability of Primekings' costs of the Misrepresentation Claim, or which take issue with their amount, are abusive and fall to be struck out.

290. On this basis the part of the conspiracy claim which is based on the costs allegations must fail in its entirety, because it is predicated on allegations at paragraph 16 that representations were made about legal costs which "*Primekings knew it would not incur*" that the order for payment on account was "*for a sum higher than the costs actually incurred*".

291. The costs aspect of the claim therefore fails for a second reason.

CPR 38.7 and abuse of process

292. I turn next to the second argument which also raises questions of abuse of process. This is one however which arises in the context of the main claim.

293. CPR 38.7 provides:

> "A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –
>
> (a) he discontinued the claim after the defendant filed a defence; and
>
> (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

294. The issue here arises out of the discontinuance of the Misrepresentation Claim, and the fact that it is alleged in this claim that but for the threats the Kings "*would have won*" the Misrepresentation Claim (as it is squarely put at paragraph 110 of the Particulars of Claim). All the Defendants say that CPR 38.7 is squarely engaged and that it would be abusive for the Kings to bring this claim without permission under CPR 38.7 – which would not be forthcoming. Further they say that to the extent that CPR 38.7 is not technically engaged (for example as regards Defendants who were not parties to the Misrepresentation Claim) permitting relitigation of those proceedings would be an abuse of process.

295. One issue which arises is whether arguments on abuse of process are engaged where there has been a discontinuance. Ironically this is an issue which has been recently

considered between (substantially) the same parties. The question arises because there is a first instance decision of HHJ Matthews, *Ward v Hutt* [2018] 1 WLR 1789, in which the judge refused to strike out a claim for abuse of process where the previous claim had been discontinued.

296. In that case a liquidator discontinued a misfeasance claim against two directors for payments made in breach of fiduciary duty but then commenced a second claim against them in their capacity as partners of the recipient firm on the basis that the payments were a preference. The judge held that the second claim arose out of substantially the same facts and that CPR Part 38.7 was engaged but declined to strike out on the basis of *Henderson v Henderson* abuse.

297. In *King & Ors v Kings Solutions Group Limited & Ors* [2020] EWHC 2861 (Ch), Mr Tom Leech QC (sitting as a Deputy High Court Judge) held (acceding to Ms Addy QC's submissions) that *Ward v Hutt* was wrong because the judge wrongly interpreted *Virgin Airways* as re-drawing the boundary between *res judicata* and abuse of process and treating the principle in *Henderson v Henderson* as part of the law of *res judicata* applying such authorities. He concluded that "*it remains open to a party to rely upon Henderson v Henderson abuse of process where the first claim has been discontinued as well as resulting in a judgment or compromise*". He therefore found that it would be unjust and an abuse of process for such allegations to be made against Mr Steifel (as well as striking them out against Primekings and Mr Fisher for failure to comply with CPR 38.7). The Kings have not sought permission to appeal that decision.

298. The Kings submitted that Mr Leech QC's decision (i) will not assist the Court as that involved different facts and (ii) it was not correct. They contend that he overlooked the fact that the paragraphs he struck out were not a "claim", but rather a few introductory paragraphs to a s. 994 petition, apparently accepted by Primekings who largely admitted them in their Points of Defence.

299. I am obviously not bound by Mr Leech QC's decision on different facts; though it is not really open to the Kings to impugn its correctness when they have not sought to appeal it.

300. Approaching the question here on the facts of this case, the starting point is whether *Ward v Hutt* does present a roadblock. I conclude that it does not. Indeed Mr Newman did not really seek to challenge Ms Addy QC's detailed submissions on the law.

301. The Kings' arguments on this issue essentially addressed the extent to which there was identity of issue. The first argument is that it is a false point because the issue goes to quantum only. That is because the relevant plea is at paragraph 110, in the context of loss and damage.

302. Anyone who has followed the judgment thus far will be unsurprised to find that I reject that argument instantly. The specific plea is only at paragraph 110, in the context of loss, but it is (now) clear that intent to cause and causation of that discontinuance is at the heart of the claim brought. Indeed Mr Newman was very

emphatic about that , when I suggested at the outset of the hearing that his pleaded case seemed to be confined to the Costs Allegations:

> "MR NEWMAN: So, the discontinuance goal contains, obviously, the overall goal of achieving a discontinuance, because we say they had no answer to the case on the facts, and therefore to win the case they needed to get the Kings to withdraw.
>
> MRS JUSTICE COCKERILL: But that is not pleaded.
>
> MR NEWMAN: It is pleaded later on, my Lady, at paragraph 110.
>
> MRS JUSTICE COCKERILL: Well, it is pleaded as part of your quantum case, Mr Newman. What you have pleaded relates only to discontinuance in relation to what you say is a costs fraud.
>
> MR NEWMAN: No, that is not right, my Lady. It says: "*Discontinuance – placed pressure on the kings: (i) by misleading them about the level of costs liability; (ii) using threatening conduct to intimidate the Kings and their lawyers for that purpose, and the purpose is to procure a discontinuance*."" 303. That argument can therefore be dismissed.

304. The second argument is that CPR 38.7 is about preventing claimants from reinstituting claims which they have discontinued (or very similar claims based on the same facts). What is said is that the present claim was not discontinued but that a completely different claim - a claim seeking rescission based on misrepresentations made and relied upon in December 2013 – was discontinued. Logically that claim could only ever be based on facts prior to the date it was issued on, namely 7 July 2015.

305. By contrast, it is said, this claim relates to how the Misrepresentation Claim was conducted after it had been issued, and the facts it is based upon obviously postdate the issue date. Thus the common design is alleged to have begun on "*On a date or dates unknown but between April 2015 and 7 March 2016*". The first costs budget alleged to have been misleading was on 7 March 2016.

306. It is also said that the language of CPR 38.7 makes clear it concerns claims, not "averrals", still less particulars of loss and that there is therefore no factual overlap at all, so that this claim is not based on the same or similar facts as required by CPR 38.7.

307. This is effectively the same argument by another route, and can be dismissed with equal ease. This claim may relate to how the Misrepresentation Claim was conducted, but it is based on a positive case that the Kings "*would have won*" that claim and is for the value of that claim. It is therefore very fundamentally about the merits of that claim, and is based on the same facts. To win at trial the Kings will plainly need to prove that they were right in the Misrepresentation Claim. And indeed it is telling that Mr Newman spent rather more time in his oral submissions addressing the merits of

the Misrepresentation Claim than he did in addressing the issues raised by the Defendants in this strike out/summary judgment application.

308. Mr Newman then submitted that there is a distinction because Primekings would not need to tender evidence about what happened on 18 December 2013, since this is a "*loss of a chance to win litigation*" claim where it is well established that the Court looks at the evidence in the case said to have been thrown away and does not seek to try the original claim. Reference was made to *Phillips & Co v Whatley* [2007] PNLR 27 at [2]: the court does "*not to seek to try the original claim, but to measure its prospects of success and assess damages on a broad percentage*" with the benefit of any doubt usually going to the innocent party.

309. I note first that the analogy between the cases is not a strong one – that was a case of a professional negligence claim where a writ had not been issued in time, rather than a root and branch re-averral of the merits of a complex fraud claim.

310. But in any event it may be true that Primekings would not need to tender evidence about what happened on 18 December 2013 – after all, the parties have the benefit of the transcripts from the trial. But that does not mean that the same issues confronting Marcus Smith J would not be considered, such that the same issues were live. Further, given the circumstances of the discontinuance, it would be surprising if the Kings did not positively want to hear from the Primekings parties.

311. I conclude without difficulty therefore that CPR 38.7 is engaged. But that is not the end of the story because (i) not all of the parties to this action were parties to the Misrepresentation Claim and (ii) I need to take a view about whether permission would be given under CPR 38.7. The answer to both of these questions, say the Defendants, lies in arguments about abuse of process.

312. That is essentially because in *Westbrook Dolphin Square Limited v Friends Provident Life and Pensions Limited* [2011] EWHC 2302 (Ch) Arnold J held at [45] (a passage unaffected by the decision on appeal at [2012] EWCA Civ 666]):

> "Counsel for Friends Provident submitted, and I accept, that the principles identified by the maxims *nemo debet bis vexari pro una et eadem causa* (no-one should be vexed twice in respect of one and the same cause) and *interest reipublicae ut sit finis litium* (it is in the public interest that there be an end to litigation) should inform the court's approach to CPR 38.7. In my judgment it follows that there is an analogy between the principles to be applied to an application under r. 38.7 and those applied by the courts under CPR r. 3.4(2)(b) with respect to *Henderson v Henderson* abuse of process. The main difference I perceive is that under r. 38.7 the onus lies upon the applicant to show that it should be given permission to bring the new claim, whereas under r.3.4(2)(b) the onus lies upon the defendant to show that the new claim is an abuse of process."

313. As for granting permission under the rule, in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609, [2015] CP Rep 15 at [60] – [61] Briggs LJ said:

> "… it seems to me that the rule leaves it to the court to decide whether to grant or refuse permission having regard, as I have said, to the public interest in finality.
>
> It is true that the Notes to the current edition of the White Book use the phrase "exceptional circumstances" as characteristic of the sort of explanation likely to be required in an application for permission under Pt 38.7, but it is dangerous in my view to erect that as a test imposed by the rules, not least because of its inherent uncertainty. To that limited extent the judge may have mis-described the ambit of the court's discretion to give such permission. The real question for the judge was whether, having abandoned the de facto directorship claim in the light of Jean Angela's Defence (in which the other defendants precisely concurred) a sufficient explanation was offered for its reintroduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon".

314. The question is then whether on the facts of this case there would be an abuse of process if the Kings were to pursue the line of argument which involves contending that the Misrepresentation Claim would have succeeded. Essentially for the same reasons given above in relation to CPR 38.7 I conclude that it would be an abuse of process. The claim in this action which gives rise to effectively the whole quantum of the claim is entirely dependent upon proving that the Misrepresentation Claim would have succeeded. That

means that the Kings would have to prove the merits of that claim – by one means or another – and to effectively seek to go behind the discontinuance.

315. I should note that very much as a fallback position, the Kings contend that permission should be given/there is no abuse of process "*where the claimant was misled or tricked by the Defendant, where important new evidence has come to light…*" They submit that there is compelling evidence in this case that the Kings were tricked by their own lawyers who were under pressure from Primekings. As noted in relation to the costs conspiracy abuse of process arguments, I agree that consistently with the broad merits based approach a court might well refuse to strike out in circumstances where it was apparent that there was such compelling evidence. For the reasons to which I will come I do not consider that this case falls into this category.

316. It follows that, even had the case not fallen to be struck out on the causation point, it would fall to be struck out pursuant to CPR 38.7 and/or as an abuse of process.

317. The main conspiracy claim therefore fails for a second reason.

Discrete Issues

318. It follows that the remainder of the arguments are academic. I do however propose to deal with them for completeness. I turn first to a number of issues which apply only as regards some of the Defendants, then to two "housekeeping" issues.

Immunity from Suit (Mr Downes only)

319. Mr Downes contends that insofar as the claim brought against him relates to actions in court, he is protected by the principle of immunity for things done in the ordinary course of proceedings. This argument is regarded as significant because both as to the Pleaded and the Inferred Threats once actions in court are removed it is said that what remains could not credibly found the claim brought.

320. The Kings contend that the advocate's immunity from suit has been substantially done away with following *Hall v Simons* [2002] 1 AC 615, remaining only arguably in place as regards defamation or conspiracy to defame; and this argument cannot therefore avail Mr Downes.

321. The best way to deal with this point is to trace through the authorities in chronological order, placing *Hall v Simons* in its context.

322. The starting point then is the case of *Marrinan v Vibart* [1963] QB 234. This was, like the present, a conspiracy case; it was alleged that there was a conspiracy to make a false report to the DPP about Mr Marrinan (a disbarred barrister). It makes clear that prior to *Hall v Simons* the immunity was not one limited to defamation but extended to any form of proceedings. Salmon J stated at 238:

> "The immunity that witnesses enjoy in respect of evidence given in a court of justice extends to statements made in preparing a proof for trial and, in my view, also to statements made in a report to the Director of Public Prosecutions … and to evidence given in any judicial proceedings recognised by the law… It is true that in nearly all the reported cases in which the principles to which I have alluded were laid down, the form of action was for damages for libel or slander, but in my judgment these principles in no way depend upon the form of action. … the immunity to which I have referred is not only an immunity to be sued for damages in libel or slander. The immunity, in my judgment, is an immunity from any form of civil action."

323. The next case is the decision of the House of Lords in *Darker v Chief Constable for West Midlands* [2001] 1 AC 435. This expressly applied the rule in *Marrinan* to advocates. *Darker* concerned allegations again of conspiracy – this time to defraud and fabricate evidence by the police (conspiracy to injure and misfeasance in public office). Lord Hope summarised the "core" principle of immunity as follows at 445H:

> "This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to [a police witness] as a matter of public policy, is shared by all witnesses in regard to the evidence which

they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause" 324. Lord Cooke held, at 453H, that:

> "to prevent the evasion of this immunity it is necessary to rule out also allegations of conspiracy to give false evidence, as was held in *Marrinan v Vibart*."

325. Then comes *Hall v Simons* itself. This is the case in which the House of Lords decided that advocates are no longer immune from suit in respect of negligence in the conduct of court proceedings. One can see from the judgments of Lord Steyn and Lord Hoffmann that the panel was not thinking about removing the broader immunity but was focussing on negligence. Thus Lord Steyn stated, at 678-679:

> "… the "cab rank" rule cannot justify depriving all clients of a remedy for negligence causing them grievous financial loss. It is "*a very high price to pay for protection from what must, in practice, be the very small risk of being subjected to vexations litigation (which is, anyway, unlikely to get very far)*": Cane, Tort Law and Economic Interests, p 236. Secondly, there is the analogy of the immunities enjoyed by those who participate in court proceedings: compare however Cane's observation about the strength of the case for removing the immunity from paid expert witnesses: at p 237. Those immunities are founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case. For these reasons they prevent legal actions based on what is said in court. As Pannick has pointed out this has little, if anything, to do with the alleged legal policy which requires immunity from actions for negligent acts…." 326. And Lord Hoffmann at 697:
>
> "This argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court. So is the judge, counsel and the parties. They cannot be sued for libel, malicious falsehood or conspiring to give false evidence: *Marrinan v Vibart* [1963] 1 QB 528. The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say ..."

327. Perhaps most clearly Lord Hobhouse at 740 stated:

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their

> participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity..."

328. There is then *Jones v Kaney* [2011] 2 AC 398 in which, building on the hints dropped in *Hall v Simons,* the House of Lords abolished the expert witness's immunity for negligence.

329. It follows that neither *Hall v Simons* not *Jones v Kaney* affected the immunity beyond actions for negligence.

330. That such an immunity remains appears clear based on more recent authorities. In *JSC BTA Bank v Ablyazov (No 14)* [2018] 2 WLR 1125, Lord Sumption observed at [23] that:

> "[a] witness… is absolutely immune from civil liability for things said in evidence or in circumstances directly preparatory to giving evidence. An action against him for negligence or defamation would fail. If it were framed in conspiracy, it would still fail."

331. Likewise Martin Spencer J in *A and B v The Chief Constable of Hampshire* [2012] EWHC 1517 (QB) at [20]-[25-27] rejected a submission that the law had been changed by *Jones v Kaney*. It was argued in that case that in the light of *Jones v Kaney* it could not be said with confidence that the core immunity relied upon still survives, and that it would be wrong to strike out a claim where the relevant principles of law are still evolving. Martin Spencer J rejected the argument in round terms:

> "The Supreme Court in *Jones v Kaney* cannot be taken to have intended to abolish the core immunity under examination in the present case, which has been enjoyed by witnesses, parties and their advocates for centuries. As Mr Beer points out, *Jones v Kaney* is concerned with the liability of a "friendly" expert to the party who instructed him. *Arthur JS Hall v Simons* was concerned with the liability of an advocate to his own client….In *Arthur JS Hall v Simons*, in considering the justification for a barrister's immunity from suit by his client, Lord Steyn referred
> (at page 679) to the "analogy of the immunities enjoyed by those who participate in court proceedings", thereby recognising the continued existence and importance of the "core immunity"."

332. So too in *Baxendale-Walker v Middleton* [2011] EWHC 998 (QB) the arguments were fully rehearsed by a distinguished cast of counsel at [66-95] and Supperstone J concluded at [94]:

> "… the decision in *Jones v Kaney* does not touch on the immunity of a witness (whether they be a witness of fact or expert opinion) or a party to proceedings in respect of things said or done in the ordinary course of proceedings in respect of claims brought against him by an opposing party; nor does the decision affect the law on judicial immunity…"

333. There was nothing in the arguments put forward by Mr Newman for the Kings which really engaged with this line of authority – and he did not deal at all with these recent authorities. While the cases do deal specifically with different situations (witness immunity, judicial immunity and so on) the fundamental point being made is that aside from the specific carve outs made by *Hall v Simons* and *Jones v Kaney* the immunity remains.

334. The reliance placed by Mr Newman on *Clerk & Lindsell* (23rd ed.) at 9-137, *Charlesworth & Percy* at 2-308 and *Jackson & Powell* at 12-009 was misplaced. The passages cited all dealt with immunity in relation to negligence, and therefore not with this point. But when one looks further on in *Jackson & Powell* at 12-112 the point is dealt with in terms which clearly supports the case advanced for Mr Downes: "*Advocates should continue to enjoy the same immunity as others from any action brought against them on the ground that things said or done in proceedings were done or said maliciously or falsely: Taylor v DPP*."

335. It follows that I accept the submission that in any event all the allegations relating to Mr Downes' conduct in court would fall to be struck out.

Mr Rabinowicz (Mr Rabinowicz only)

336. The point in relation to Mr Rabinowicz can be taken swiftly. Mr Rabinowicz, is specifically alleged only to have joined the conspiracy on 10 May 2019, some two years after the Discontinuance had taken place. This means he cannot be liable for the losses relating to the discontinuance.

337. While it is not necessary for all parties to a conspiracy to have joined the conspiracy at the same time in order for them to be liable, it is well established that a defendant will have no liability for specific losses incurred or caused before he became a party to the conspiracy.

338. The argument which was advanced for the Kings did not take issue with this line of authority. It was rather said that "*since the POC was filed, the Kings have been ordered to pay over £1.1m. Since such losses occurred after it is alleged that Mr Rabinowicz joined the common design*".

339. That of course does not match up with the way that damage is pleaded. But in any event it is not enough as a matter of law for damage to occur after the relevant party has joined the conspiracy, if that damage flows from acts committed before he joined. This can be seen in *Kuwait Oil Tanker Co SAK v Al Bader* (17 December 1998) cited by *Mumford & Grant* at paragraph 2-127. That authority is endorsed by Flaux J in *Erste Group v SC* "*VMZ Red October*"*, Red October Steel Works* [2013] EWHC 2926

(Comm), [2014] B.P.I.R. 81 at [103] (a conclusion left untouched by the Court of Appeal):

> "*Kuwait Oil Tanker* … establishes that a late joiner to a conspiracy cannot be liable for loss which has already been caused before he joins the conspiracy."

340. In that case Flaux J preferred to leave to the trial judge the question of what acts caused what loss. However here there is no similar question about the causation of this loss – the loss alleged is caused by the discontinuance, which happened long before Mr Rabinowicz is alleged to have joined the Common Design. In the premises, there are no reasonable grounds for bringing the Claim against Mr Rabinowicz and it falls to be struck out as against him, even absent the conclusions which I have reached already.

341. The case which was really run here was not one which originated in the pleaded conspiracy. Rather it was a claim which depended on establishing that there was no liability for the costs in the amount assessed. That of course falls with the conclusion which I have reached on abuse of process as regards the costs assessment.

Without Prejudice Privilege

342. Although the relevance of the Pleaded Threats appears now to be vestigial there is an issue which arises as to without prejudice privilege in relation to one of the Pleaded Threats. Mr Lightman QC pointed out that technically this issue should be decided first, because to the extent that the Pleaded Threats have to be considered, the removal of one affects the evidence base. That is logically right, though I have preferred to deal with the structural issues first.

343. As for the argument on this point it can be quickly summarised. One of the Pleaded Threats concerns the contents of a mediation statement. It is common ground that in general such statements are subject to without prejudice privilege unless one of a number of specific exceptions (set out in *Unilever Plc v Proctor & Gamble* [2000] 1 W.L.R. 2436, at 2444-2445) apply. The one which is prayed in aid in this case by the Kings is "unambiguous impropriety".

344. The Kings' submission is that this hurdle is cleared. The skeleton stated:

> "the Kings have pleaded that the statements were made with the intention of applying improper pressure in contempt of court by (i) threatening (ii) exaggerating possible costs exposure. That is an allegation of fact. No defence has been filed denying it. Nor has Mr Downes in his two witness statements denied those factual allegations. This strike out application has to be assessed on the assumed basis that it is true."

345. The submission of the respondents in summary was in essence that the material relied on was a country mile from anything which could be considered "unambiguously improper".

Discussion

346. I will start with the law. The reasoning behind this exception is that where the hurdle is met it would be an abuse for the privilege to be invoked (because it is operating as a "cloak" for the impropriety): *Savings and Investment Bank v Fincken* [2004] 1 W.L.R. 667 (CA), at [57], per Rix LJ.

347. The test is not lightly found to have been met. The privilege is regarded as an important one, fulfilling an important function. As Hoffmann LJ pointed out in *Forster v Friedland* (CA, unrep, 10 November 1992), "*the value of the without prejudice rule would be seriously impaired if its protection could be removed [for] anything less than unambiguous impropriety*".

348. Thus the *Unilever* case concerned a claim brought on the basis of threats to bring infringement proceedings (regarding a patent for washing machine tablets) said to have been made during a without prejudice meeting. The Court of Appeal held that it would be an abuse of process for Unilever to be allowed to plead anything that had been said at that without prejudice meeting. In so doing Robert Walker LJ at 2449 noted the:

> "….underlying objective of giving protection to the parties, …: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders….
>
> The expansion of exceptions should not be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation."

349. It is therefore unsurprising that the cases in which the hurdle has been met have been very extreme. In *Hawick Jersey Ltd v Caplan* (26th February 1988), statements made amounted to plain admissions that the proceedings were brought dishonestly and that in those circumstances they amounted to threats to further a dishonest purpose which were not protected by the without prejudice rule. In *Forster v Frieldand* Hoffmann LJ was unwilling to find unambiguous impropriety in a case where something said in a without prejudice meeting was sought to be used to demonstrate that a case was being advanced dishonestly. Similarly in *Fazil-Alizadeh v Nikbin* (25th February 1993, unreported) the Court of Appeal held the test was not met where it was not clear that an admission was being made that a settlement agreement was forged.

350. The courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule.

351. The rigour with which the courts approach this can also be seen in *Berry Trade Ltd v Moussavi (No. 3)* [2003] EWCA Civ 715, at [48] where the judge applied the test of whether there is a serious and substantial risk of perjury. The Court of Appeal rejected this approach decisively:

> "…we can see nothing in the authorities to support it. On the contrary, it seems to us to weaken significantly the requirement of unambiguous impropriety and of the need for a very clear case of abuse of a privileged occasion."

352. This can also be seen in the very recent case of *Motorola v Hytera Communications Corp Ltd* [2021] EWCA Civ 11 [2021] 2 WLR 679.

353. In that case the Court of Appeal considered the question what standard of proof the court should apply when considering the potential application of the unambiguous impropriety exception. Males LJ, with whom Rose and Lewison LJJ agreed, held, at [57]:

> "I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional."

354. He also held at [64] that there is no test of a "good arguable case" of unambiguous impropriety when that issue arises at an interim stage of litigation; rather, the test "*remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it…*"

355. The facts against which this argument arises is that the mediation statement relied on stated (with the Kings' emphasis):

> "There is no real prospect of the claim succeeding, and so the Claimants are left facing two alternatives. They can pursue the case to trial, after which they will almost certainly be ordered to pay the Defendants' costs on the indemnity basis in light of the nature of the **allegations** made against the Defendants (**which should never have been made in the first place**) and the weakness of the Claimants' case. **The Defendants' total budgeted costs are £1,823,997.86 and, of course, when indemnity costs are ordered, the court is not bound by the budget.**
>
> Alternatively, they can discontinue their claim now, and seek to come to an agreement with the Defendants by which the

> Defendants might be persuaded to agree to accept payment of their costs on the standard rather than indemnity basis. Whilst the Defendants accept that this course of action is unlikely to appear especially attractive to the Claimants, it is by far the better of the two alternatives now available to them.
>
> There are references in the papers to the hugely distressing impact that the events of 18th December 2013 had upon the Kings. This is not doubted but **the Claimants should be in no doubt that if the Defendants have accurately assessed the merits of this claim: the trauma of the trial and its aftermath will be far far worse.**"

356. Pausing here, this would seem to fall squarely within the ambit of the cases where the court has said that the hurdle of unambiguous impropriety has not been met. In terms of content this mediation statement is certainly frank – but that is exactly what one expects a mediation statement to be.

357. It is also notable that all but one of the passages emphasised are quite plainly not untrue. So:

i) The budgeted costs were this figure – and the contrary is not suggested by the Kings;

ii) It is trite law that if indemnity costs are ordered the Court is not bound by the costs budget;

iii) This claim, the Professional Negligence Claim, the other litigation - and the upset which I have seen clearly evidenced in Mr King's witness statements in this action - demonstrate the accuracy of the warning that the trauma of the trial and its aftermath have been far, far worse than a settlement ahead of trial would have been.

358. There remain therefore two aspects. The first is the phrase "*allegations which should never have been made*". The second is the assumption as to intention upon which the Kings rely. What is said as to the first is that this imported a threat to the Misrepresentation Team, because allegations which should never have been made can result in complaints to professional regulators (and of course may result in allegations of professional negligence, for example if a client's funds are effectively wasted chasing the chimera of a baseless claim).

359. I assume in the Kings favour that it might be said that, though directed to the Kings themselves, this statement might be seen as importing something directed to the Misrepresentation Team. This is a point which would of course be contentious, but I

would tend to the view that such a reading was possible. However I would by no means regard this phrase as one which (even in the case of it being used to try to settle a good claim) was "unambiguously improper". It is a phrase which is not uncommonly found bandied about in hard fought commercial litigation, particularly where allegations of fraud are in play. It may be used rather more often than it should

be in an ideal world; it tends to reflect an absence of best practice, and of compliance with the constructive approach which this Court urges upon those who practice before it.

360. But it is not unambiguously improper – indeed the fact that it is not infrequently used also reflects the difficulties in assessing which side of the propriety line a case falls. When allegations of fraud are in play there may well be a spectrum in terms of having material before the pleader/legal team which they judged to be reasonably credible and which appeared to justify the allegation of fraud – that being the test set out in *Medcalf v Mardell*. This is a point to which I shall return later in this judgment.

361. Further its (regrettable) prevalence in cases of this sort has reduced it to a state where it would tend to be regarded (particularly in the context of mediation statements, whose contents are not governed by any rules, are protected by privilege and are not known for their restraint) as "mere puffery". I do not consider that any experienced litigator would regard them as more than aggressive timewasting and as not being in the best of taste. There is for example a qualitative difference between this and the unambiguous threat in *Unilever*. And yet that unambiguous threat was not regarded as sufficient to displace the without prejudice privilege of the occasion.

362. The assumption which lies at the heart of the Kings' case on this point does not cut across this point. So (despite the reservations which I have expressed about the blanket making of such an assumption) I do proceed out of an abundance of caution on the basis that that assumption should be made. But even if it were the case (which is the essence of the assumption) that Primekings/their legal team knew that the Kings had a good case and that they were intending to and trying by various means to pressure the Misrepresentation Team to persuade the Kings to discontinue, that does not transform the statement in question into unambiguous impropriety. That statement has to have that quality in and of itself. That seems to be clearly indicated by the authorities – for example *Fincken* at [57] where Rix LJ focussed on the importance of the privilege itself being abused.

363. I also note that were this not the case there would be a rather odd result, namely that the relevant statement would not be privileged for the purposes of a summary judgment application (because the assumption of the underlying facts would bring that about), but the statement would be privileged at trial, because the Kings would not be able to pray that unambiguous impropriety in aid without assuming the facts pleaded to be true.

364. I therefore conclude that (to the limited extent that the Pleaded Threats remain relevant) the so-called Allegations Threat is not unambiguously improper and hence is protected by without prejudice privilege and cannot be considered.

The status of the unpleaded case

365. One point which was raised was the status of the unpleaded threats. It was submitted that I should decide this case only on the basis of the Pleaded Threats. As I have indicated above I have been minded not to follow this course in looking at the structural

issues, essentially to ensure the Kings understand that the case they advance has been considered. I have therefore *de bene esse* looked at how those allegations (if they had been pleaded) would fit in and whether, if pleaded, they could produce an arguable case.

366. However the point is certainly one which should be considered. If it is right nearly all of the argument addressed to me on behalf of the Kings was irrelevant to the case which could properly be run, and the case would fail even more emphatically than I have already found it does.

367. I have noted above that particulars of knowledge, fraud and breaches of trust require to be pleaded. In order to plead a proper case on the Inferred Threats case such particulars would be required. At present a case on inference is pleaded as to the existence of the Common Design by reference to "inter alia" certain facts – almost none of which refer to the key time period. There is no pleading as to knowledge or (to the extent a case in deceit is maintained) as to fraud. At points the matters which are relied on are given in the form "Pending disclosure" (for example at [21] and [35]).

368. Where particulars are required it is not permissible to avoid the need for giving particulars by saying that particulars will be given at a later stage. Warby J in *Duchess of Sussex v Associated Newspapers* [2020] EWHC 1058 (Ch), [2020] EMLR 21 stated, at [59]:

> "The suggestion, …. that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure (see, for instance, *Zierenberg v Labouchere* [1893] 2 Q.B. 183, 188 (Lord Esher MR)). It is also bad on the facts. The complaint has two aspects. The first is an allegation of improper conduct towards the claimant's father. Such allegations should not be made, if the claimant cannot give details of what was done and when."

369. The Court may at the stage of summary judgment or strike out permit a little latitude where a party has recently discovered facts which it would wish to plead. But this is not the case here. As I have already noted, the facts which underpin the Inferred Threats case have been known to the Kings for some time, and they have taken an entirely conscious decision not to waive privilege until now. Having done so they have apparently deliberately chosen not to (as they should have done) come to this hearing with a formulated draft pleading, so that the Court can assess the case properly – and indeed see whether (i) counsel is prepared to plead and clients to give statements of truth on such serious allegations and (ii) whether the pleading meets the strike out test. It is perhaps telling that a document was instead put forward in the form of the Note which did not have to comply with any of these requirements.

370. It follows that the argument on the unpleaded Inferred Threats should properly be excluded.

The substance of the pleaded claims

371. The substance of the claims are therefore not relevant to this determination. I do however propose to consider at least some aspects of them in some detail – first by reference to the pleaded case and then by reference to the unpleaded case on the Inferred Threats. This is for a variety of reasons. The first is that (as I have indicated above) were the prima facie substance of the claims that there were threats or other dishonesty compelling it is possible that this would come into the equation either in relation to abuse of process (see paragraph 283 above) or via "*some other compelling reason for trial*".

372. Here I note that Mr Newman did not explicitly suggest that I should refuse summary judgment on the basis that even if there was no real prospect of success, there was some other compelling reason why the matter should nonetheless proceed to trial. However the subtext of quite a lot of what was said, in particular as regards the status of the Defendants, was imbued with the suggestion that it was very important that the matter proceeded to trial, regardless of the merits. So too, as I have noted above, were the arguments in relation to abuse of process essentially focussed on the underlying facts, if not strictly on the merits of the claims.

373. The second reason is that it is clear to me (as I have already noted) that the Kings are deeply personally involved in this litigation and that they strongly desire to have the details of the claims ventilated and considered. While I have reached the very firm conclusion that the claim is fundamentally flawed and must be struck out I consider it right that they have the benefit of the consideration which I have given to the details of the case, not least when other related litigation remains ongoing.

374. The third reason is that a certain amount has been said about whether the evidential basis of those allegations justified them being pleaded in the first place and I have been left at the close of the case with some considerable concerns about the way in which aspects of the case have been pursued. It would seem wrong – in particular when it may have an impact on costs and against the background where similar allegations are being pursued in other litigation - not to record those concerns.

375. I will deal first with some relevant points of law and then with certain aspects of the pleaded claim, which largely relates to the costs allegations. I will then deal with some of the submissions made relating to the Inferred Threats which includes some consideration of the conduct of the Misrepresentation Claim.

Inferences of fraud and pleading fraud

376. I have made a number of points above about what the requirements of a compliant pleading are and why. As I have noted a fairly minimalist approach is generally acceptable - and to be commended. There are however exceptions. One of these is pleading fraud.

377. Allegations of this nature do require to be pleaded. CPR Part 16, PD paragraph 8.2 makes this clear: "*The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim: (1) any allegation of fraud…*" Similarly, paragraph C.1.3(c) of the Commercial Court Guide

provides that "*(i) full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality; and (ii) where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out*".

378. In *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), at [7], Birss J adopted the principles that apply to a plea of fraud/dishonesty as set out in *Three Rivers DC v Bank of England* [2003] 2 A.C. 1 and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [12]-[23], as follows:

> "(i) The use of the word "fraud" or "dishonesty" is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.
>
> (ii) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.
>
> (iii) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable prima facie case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justified the inference is a matter for the trial judge.
>
> (iv) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty."

379. This links to the limitations which there are upon counsel in putting forward allegations of fraud. In *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120 Lord Bingham said this, at [22]:

> " … [the Bar Code of Conduct] lays down an important and salutary principle. The parties to contested actions are often at daggers drawn, and the litigious process serves to exacerbate the hostility between them. Such clients are only too ready to make allegations of the most damaging kind against each other. While counsel should never lend his name to such allegations unless instructed to do so, the receipt of instructions is not of itself enough. Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make

> such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation…. at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it."

380. As Lord Steyn noted in the same case, deciding whether this requirement is met can pose very difficult problems for the pleader. There will often be a spectrum of views as to which side of the line an allegation falls: "*What the decision should be may be a difficult matter of judgment on which reasonable minds may differ.*"

The Pleaded Threats

381. As I have noted already reliance was not placed on these as being themselves causative. They take place instead as part of the pleaded basis for inferring that threats were made. I ignore the Allegations Threat for the reasons already given.

382. The Pleaded Threats relate to the discontinuance. So far as that aspect of the case is concerned, the background which one has to have in mind is what is being alleged as the actual substance of what was done. I deal with this further below in the context of the Inferred Threats, but in essence what is being said is that it is to be inferred that threats were made which were of sufficient potency to persuade the King's then legal team to (primary case) dishonestly/ (secondary case) grossly negligently advise the Kings that their very good claim was so hopeless that it must be abandoned. Either the threats must be capable of making the legal team behave in knowing and flagrant breach of their core professional obligations or they must be capable of making them completely panic and mess up the case to a startling degree.

383. The starting point therefore is that the threats which are sought to be inferred are substantial threats; it is fanciful to suppose that less would cause an entire suite of professionals to behave in so shocking a way.

384. There is a problem for the Kings here. Not only is it clear that the Pleaded Threats did not cause the discontinuance, it is apparent from the timeline that if they are properly to be called threats at all, they are certainly not very potent matters. This is because the Pleaded Threats are matters which took place some months before the trial commenced; and yet despite them the trial started (with, on the Kings' case, their lawyers still giving bullish advice about their prospects of success) and proceeded for 10 days before being abandoned with the greatest reluctance by the Kings. It is therefore fanciful to suggest that the Pleaded Threats were causatively potent; and as I have noted it is no longer contended that they were.

385. But this also has an impact on the substance of these threats as a basis for the inference of other more substantial threats. I entirely see that if there is evidence that A has previously threatened an opponent B with death or injury for some reason, that might form part of the evidence which provides the basis for a case that he has separately threatened another opponent C (or indeed B) with something very

unpleasant if C or B does not withdraw a claim. But I struggle to see how A intimating an intention to pinch B's book if B will not give it to him would provide very much of a basis for inferring that A had separately threatened B to burn down B's house if B did not withdraw a claim.

386. Yet this is analogous to the nature of the Pleaded Threats. I have already noted the flimsiness of the Allegations Threat. The other threats are of a similar order. So the

SRA threat is said to be "*to report the King's solicitor Jason Blakey to the SRA on the basis that an LBA had been sent to Mr Stiefel but not followed by proceedings.*".

387. I note by way of parenthesis that this pleading plainly mischaracterises what was said. What was said was not that the basis of the complaint would be that a letter before action had been sent but had not been followed by proceedings. What was said was this:

> "Your firm has (1) made wrongful allegations that Mr Stiefel is guilty of a criminal offence without any evidence whatsoever to support such complaint; (2) commenced civil proceedings against KIF in breach of warranty of authority; and (3) published defamatory statements against Mr Stiefel to a third party."

388. The point about not following up with proceedings refers to (1), and what was said was this:

> "Having made these allegations against Mr Stiefel, the Court Proceedings were subsequently issued without naming Mr Stiefel as a Defendant. It is abundantly clear that the allegations were wholly without merit and should never have been made.
>
> It is not unreasonable in the circumstances to infer that the allegations were made as an attempt to exert pressure on Mr Stiefel in order to try to settle a civil claim for damages. You will be aware how serious such conduct is, and that it in itself can amount to the criminal offence of blackmail.
>
> No form of apology has ever been received … for these baseless and yet extremely serious allegations of criminal liability. Nor have the allegations ever been withdrawn, or any explanation offered as to why they were made. You have the opportunity to do so now."

389. What was therefore being said was not that the Kings' solicitor had misbehaved by making an allegation and not pursuing proceedings, but that he had misbehaved by making allegations for which there was no proper basis and then not withdrawing them.

390. Again whether the approach taken was best practice or expressed optimally may be open to debate. There are (for example) two views about whether such a letter is a

professional courtesy or whether allegations of professional misconduct should simply be made without such "*shots across the bows*". It might well be said that logically if there has been professional misconduct it should be reported regardless of whether it is later withdrawn and apologised for. Certainly this litigation has shown clearly how such correspondence can be subjectively perceived as a litigation tactic or a threat.

391. But leaving aside that point, the reality is that (particularly in cases where fraud is alleged) such correspondence is by no means uncommon; it is an unattractive part of the give and take of hard fought modern commercial litigation, particularly against the background of the penumbra cast by *Medcalf v Mardell*. So even if the correspondence were a bald indication of an intent to report, I would consider it of very minor significance in the context of allegations of threats sufficiently substantial to give rise

to such flagrant and serious breaches of duty as are alleged. But the correspondence is not even such an indication. As the first quote above makes clear, it is an invitation to provide a response to the concerns expressed. It provides no basis for making the inference that the Inferred Threats were made.

392. As for the "Ruined and Destroyed Threat", it may be recalled that this is pleaded as being that Mr Stiefel told Mr King that his family would be "*ruined and destroyed*" by the litigation unless they dropped the case. As a threat one can see that this might have more substance – in two situations. The first is if (i) this were contended to be causatively potent (ii) it was pleaded as being made to the lawyers and (iii) there was some discernible link to discontinuance. But none of these is the case. (I do note however that there is a question mark over (ii): in the Professional Negligence Action it is pleaded at [38] that it was shared by Mr King with his lawyers, but that their response was that the Kings had a very strong case.)

393. The second situation in which this "threat" might be said to be of some relevance is if it were said that the Inferred Threats were made by Primekings, in particular Mr Stiefel for Primekings. But that does not appear to be the case. It therefore seems to me that the Pleaded Threats provide nothing to indicate that the claim that there were Inferred Threats is strong. On the contrary had it been necessary to deal with this case on the merits based on the Pleaded Threats, I would have concluded without much hesitation (and bearing well in mind the caution applicable to deciding fraud cases on the facts at the summary judgment stage) that the pleaded case lacked even fanciful prospects of success.

The "*Hidden Contingency Fee*"

394. The Kings' original case in this action related to costs. The Claim Form, as already noted, places the conspiracy squarely as one to provide "*false and inflated costs information*". In the Particulars of Claim the primary case as to costs is that the actual costs arrangement that was in place involved a contingency, and it was "hidden" i.e. not written down. If that is the case, as a matter of costs law, there would not have been any recoverable costs against the counterparty – pursuant to section 58 of the Courts and Legal Services Act.

395. The basis for this allegation seems very difficult to ascertain. A request for further information was made in relation to it. The response which came back did not progress matters. As to a request for details of the agreement the answer said:

> "The Claimant was not a party to the Hidden Contingency Agreement, hence why it is referred to as "hidden" …Requests for details of a hidden contingency arrangement entered into as part of the covert conspiracy (part of which was a deliberate cover up) demonstrate that this Part 18 request has been made by the Teacher Stern defendants for the improper purposes of (i) delaying this case and (ii) seeking to find out what evidence the claimants had."

396. A further request posited on the basis that an inference was being drawn as to the existence of the agreement referred the Defendants back to multiple paragraphs of the Particulars of Claim (including the paragraph of which particulars were being sought). None of these appear to me to provide any basis for an inference of a hidden contingency fee arrangement, though they provide material which might provide an inference that costs budgets were inaccurate.

397. Perhaps the high point of the pleaded case is that "*Teacher Stern have refused ... to provide the Kings with native format emails showing scrutiny by their own clients of the costs being incurred. That is because Teacher Stern knows that doing so would show that a normal hourly rate retainer was not being operated.*" It is not at all clear how such a request to provide material pre-disclosure which was not relevant to the claim set out in the Claim Form could provide any legitimate basis for such an inference.

398. What is also troubling is how this allegation appears to remain live and to be pursued in circumstances where it now appears to be common ground that there were at least some invoices provided by Teacher Stern which were paid by Primekings in relation to this matter; the "shadow ledger" allegation to which I will come shortly is predicated on the Kings saying that some only of the invoices were false.

The Accounts Evidence

399. The Kings rely heavily on the Primekings accounts, which they say show that Primekings spent zero on legal expenses in 2015 and 2016 and only around £1.2 million in 2017. This is relied upon in part to sustain the case as to Hidden Contingency fee/false costs budgets but also as an indicator of fraud, not least because it is said that dishonest explanations were given for the accounts by Mr Downes and Ms Toomer.

400. On this point I conclude that the accounts are obscure and certainly do not provide clear evidence of anything. I can understand why they may have caused concern in the minds of the Kings, but I certainly do not regard them as giving rise to even a good case that the incurred costs were only £1.2 million – particularly in the light of some detailed evidence from Mr Popperwell which goes through the invoices and payments

made, and which supports the larger figure which was found by the Costs Judge on the Detailed Assessment.

401. As to how the £1.2 million figure derives, this is a rather complex point and certainly does not emerge clearly from the evidence even now. The basis upon which it was said to be dishonest vis a vis Mr Downes was that "*it can't be a mistake that a defendant who is very familiar with accounts and has accountancy training, used to lecture in accounts, accidentally came to this conclusion because it is just not plausible*".

402. Whether this is a permissible inference must, it seems to me, depend upon the materials which were available to Mr Downes at the time and the material available to the pleader. There was not time to go into this level of detail at the hearing. However I note that Mr Downes' evidence on this is that at the time he had a very limited amount of material as to how the figure had been arrived at, that he made an inference from the accounts, but accepts now that his inference was wrong. On its face this would appear a perfectly credible explanation.

The £3 million costs figure

403. The allegation made at [60] of the Particulars of Claim is that

> "On 10 July 2018 Ms Toomer (acting on the instructions of Mr Fisher, Mr Stiefel and Mr Swain) stated to Anthony King that the figure billed to Primekings was £3,213,026.99 (a figure Ms Toomer, Mr Fisher, Mr Stiefel and Mr Swain intended the Kings to interpret as being exclusive of VAT). That was false and Ms Toomer, Mr Fisher, Mr Stiefel and Mr Swain all knew it was false. In fact, less than £1.256m had been billed to Primekings." 404. Mr Newman explains the gravamen of the allegation thus:
>
> > "when Teacher Stern wrote that down in that context, they did not have any honest belief that that was the true value of the costs claim and that they were willing to ramp it up in that regard because they wanted to put as much pressure as they could on the Kings to hand over all of their shares."

405. This is made against a background where it is said that as part of the "Cover Up" the Defendants were very unwilling to provide the Kings with a costs figure because they were "*all aware that the true costs were less than £1.256 million*"

406. There had already been one statement that the costs incurred were over £3 million. This came in the context of an application to question Mr King as to his assets which was made on 24 September 2017.

407. The Kings are made suspicious about this figure because (i) on 13 June 2017 Teacher Stern had indicated that the likely total liability excluding VAT was £2.7 million (ii) on 22 May 2018 Primekings had informed the Court via a skeleton argument in the enforcement proceedings that costs likely to be due to Primekings (including interest) would be in the region of £2.2 million – a figure which was reiterated by Teacher Stern in correspondence in early June 2018 and (iii) just after the £1.7 million had

finally been paid in respect of the Payment on Account Order on 12 October 2018 Ms Toomer indicated that the £3,213,026 figure was wrong and the amount actually owing as at the date of discontinuance was £2,855,501.94 inclusive of VAT (the reason given being the double counting of an invoice).

408. Suspicion is also said to be raised by the fact that in the s. 994 Proceedings an amendment was made to the pleading as regards the £3 million figure, moving away from saying that Ms Toomer's letter "confirmed" the amount currently billed to "stating that" this was the amount billed – and adding "including VAT". Mr Newman's explanation of the inference raised by this was:

> "This particular case is a very good example where …. they are removing any statement to the court that that was correct, and we say that is significant because, firstly that means the original plea was false, and it must have been known to be false to Primekings because Primekings must have known how much it had paid."

409. The Kings advance a primary case that there was never an authentic invoice that could have been double counted, and as a backup that if there was such an invoice Ms Toomer did not in fact genuinely double count it in error.

410. These are allegations of fraudulent and probably criminal behaviour. The primary case is that the Defendants deliberately concocted an invoice which they added to the sum owing. The second is that Ms Toomer did not double count in error; which equates to an allegation that she deliberately double counted it.

411. Once again I am left unclear as to the basis upon which the primary case or the secondary case is advanced. Interpreting the case pleaded as best I can in the light of Mr Newman's submissions it appears that there are two limbs to this. One is that it is to be inferred from the changes in the figure that there was a dishonest inflation of the figure, and later a dishonest reduction of the figure. The second is that the amendment to the pleading itself raises an inference of fraud because Primekings knew what it had paid. As to the latter I regard this as utterly hopeless. For one thing the figure given was not one which related to what had been paid. For the second, there is no reason to suppose that Primekings, Mr Fisher and/or Mr Swain would be *au fait* with the minutiae of correspondence on costs such that they would even have seen this letter.

412. As to the first (and primary) argument, I do not regard it as one which appears to have much, if any strength. I quite understand that the picture which emerged as to the costs was not as clear as it might have been. It is plainly the case that there were inconsistencies. There is something of an oddity that in early June 2018 Teacher Stern said that the costs of the underlying action plus interest (but not including the costs of the enforcement proceedings) were £2.2 million, whereas in early July it gave the £3 million figure (though the amount given as the relevant figure for the purposes of what the Kings had to pay was given as £2.7 million). But the explanation Ms Toomer has given accounts for it perfectly.

413. It is true also that Ms Toomer's witness statement did not make clear that the figure in the 13 June letter did not include VAT; but that did not make it a representation that the figure did include VAT. Nor does the fact that Teacher Stern included VAT when Primekings is VAT registered provide a basis for inferring nefarious intent. Again there seems to be no basis for inferring that the Primekings Defendants read every letter before it was sent by their solicitors (which would be highly unusual in my experience); and the applicability or non-applicability of VAT to costs bills is the source of frequent confusion even with experienced solicitors.

414. Overall, I reiterate that this allegation, on which much weight was placed, did not strike me as a strong one. Indeed it seemed to me, based on the material I saw unclear (unless one starts from a presumption of dishonesty) why there would seem to be a basis for rejecting the explanations given and building upon them an edifice of such serious allegations.

Shadow ledger

415. The next point I deal with because (i) it was the most detailed iteration of the costs fraud argument, (ii) on a previous hearing I expressed some tentative views that it might have some merit and (iii) Mr Newman contended there was no answer to it in the evidence. It is, regrettably, a point which is somewhat difficult to set out clearly in a judgment.

416. The starting point is the same base allegation – namely that Primekings and the Teacher
Stern Defendants falsified the costs figures. As part of the evidence in this application Mr Popperwell swore a statement with the purpose of verifying the figures charged and paid. He did that by setting out the invoices sent to Primekings and how they were paid.

417. The Kings did not accept this evidence. They contended that one could deduce from the evidence the existence of a "shadow ledger" which suggests that "*evidence has been created by Teacher Stern and Mr Popperwell's clients by merging together work from one case, which is this case, and another case or other cases which are nothing to do with the order made by Mr Justice Marcus Smith.*" The contention is that this was done deliberately in order to justify what is said to be inflated costs figures being sought from the Kings.

418. What appeared to be the case when I was taken through the evidence by Mr Newman at the *ex parte* disclosure hearing was that close focus was to be had on the matter number for the Misrepresentation Claim (PRI075/3). It was common ground, for example, that PRI075-1 was a different matter, and should not appear on the bill for the Misrepresentation Claim. The Kings submitted that one could see bills for this matter being "repurposed" into the bill for the Misrepresentation Claim; for example a printed copy of a transaction report showing payment for "BILL NO 8401" being made into Teacher Stern's client account originally had the /1 number, but had been manually changed to /3.

419. My attention was also drawn to the fact that as a ledger the account looks odd, in that payments never balance, and there were "commercially improbable" overpayments. In his evidence Mr King set out the invoices in ledger format which he said showed implausible patterns. He then produced a second table in ledger format stripping out the invoices which he regarded as dubious. The result (which I described as "*rather beautiful*") was a smaller, much tidier table which on its face balanced nicely.

420. I however also expressed in the *ex parte* hearing a number of doubts about the arguments which underpinned this editing process. For example if, as the Kings contended, there had been deliberate alterations, they were of the most inept variety (with alterations manifest on the face of the documents). On their face they presented more credibly as examples of an original wrong accounting entry being corrected than as a forgery with nefarious intent. But at that stage I would certainly have regarded the point as within the bounds of arguability.

421. However Ms Addy's pellucid treatment of this point in argument made its hopelessness quite clear; and also raised a question about how it could have been pursued by anyone who had read the underlying documents thoroughly or said to have been unanswered in the evidence. Taking a few examples from her demolition of it:

    i) A payment of £50,000 was excluded simply because it had the reference PRI75.3 rather than PRI075/3;

    ii) A payment of £120,000 was ignored, although the SWIFT transaction report explicitly stated that it was paid with reference to a bill which Mr King accepts was referable to the correct proceedings;

    iii) Mr King's analysis excludes a payment which pays an invoice which carries the notation "Claim by the Kings Family" – which could only have been the Misrepresentation Claim. That invoice also on its face includes reference to Mr Downes QC's counsel fees for a hearing before Master Matthews.

422. The result is that the so-called shadow ledger is demonstrably unsound. All of the material which demonstrates its unsoundness was in the appendix to Mr Popperwell's original statement. Ms Addy's submission that the way in which the shadow ledger was compiled by Mr King was disingenuous appears to have some real force.

The Smith and Williamson evidence

423. The point in relation to Smith and Williamson is that the detail of the bill in due course provided included entries for dealing with an expert report from Smith and Williamson, when Mr King has ascertained from a partner at Smith and Williamson that they were not formally instructed until a later date.

424. On this I quite see that this gives rise to material which calls the veracity of certain entries on the bill into question. However it seems to me that the explanation given for the Defendants - that the billing covered a pre-meeting and was simply misdescribed in the bill - appears perfectly credible. Certainly the evidence supports the contention that there were preliminary contacts and discussions at this time. Those are contacts and discussions which would properly be billable to the client. There are no relevant

entries covering exactly that work, so the entries and the work match, apart from the fact that the description attached is wrong.

425. Accordingly I do not consider that this point provides any strong support for the Kings' costs fraud case. That was tacitly accepted by Mr Newman who described it as a "*prima facie case, enough to survive a summary judgment application when taken … in combination with other points.*"

The 577 hours issue

426. This is one of the issues which is pleaded as part of the Cover Up. The core of the complaint is that a witness statement of Ms Toomer dated 30 September 2016 asserted that witness statements were substantially complete; but that was not put before Master Whalan at the hearing in August 2019, when 577 more hours than this were sought.

427. It is said that:

i) The witness statement shows that either it was itself knowingly false, or that the extra 577 hours in the bill were fraudulent. Mr Newman described it as "*powerful evidence of fraud*". This was a point originally taken but ultimately not pursued in the Detailed Assessment;

ii) The failure by Ms Toomer to provide it before the hearing (it was requested in June 2019) was done deliberately "*so as to ensure that the Kings could not make oral submissions about it*" [86.2] and that this was done on advice from Mr Downes;

iii) The approval by Teacher Stern and Primekings of a skeleton of Mr Roger Mallalieu which stated that the 577 hours in the bill on witness statements after 30 September 2016 was explicable on the basis of a "*further … round of evidence*" was done knowing it to be false. (A similar point is made as regards Mr Downes' skeleton for an earlier hearing).

428. I do not conclude that the evidence on this is strong; indeed I am troubled as to the basis on which the full extent of these allegations are made.

429. As to the first point it remains unclear to me how this proposition follows from the evidence. Certainly the pleaded case does not set out the basis for the inference. 577 hours is certainly a large number to be added after such a statement is made. But there are a number of explanations which do not involve fraud. One is that Ms Toomer's original statement contained the wrong figures, owing to some reporting error. Another is that the 577 hours was itself a mistake. A third is that both were right, but that in the event this time was spent over three months, whether by overzealousness to get the statements perfect, or by inefficiency, or overmanning the job. The latter seems perfectly credible in circumstances where 316 hours were spent reviewing the Kings' evidence, and that figure was not questioned as unreasonable by the Kings. That coheres with the Master's own view – he ultimately disallowed 114 of the 577 hours.

430. As to the second point, the delay in provision of the witness statement is a point which loses quite a lot of its sting in circumstances where the document was provided shortly after the hearing, and the position was corrected before the Master gave judgment. But even if it had not been provided it is not at all clear how the inference arises either as to Ms Toomer acting deliberately, or as to Mr Downes advising her so to do.

431. As to the skeleton argument point, certainly Teacher Stern had accepted that the explanation given was not correct and that it did indeed relate solely to the Primekings witness statements in the Misrepresentation Claim, but I cannot see that it follows that Teacher Stern knew this point to be wrong or should be taken to have allowed this line in the skeleton argument to go forward "*in an attempt to deceive the court*" as is alleged. Further the transcript indicates that the error in the skeleton did not infect the actual argument – which proceeded on the basis that the hours related solely to the original statements.

Conclusion

432. I therefore conclude that there is nothing in the originally pleaded case which indicates that the substance of the allegations is very strong, such that it would give pause in the context of either the abuse of process arguments or in granting summary judgment.

433. I have already noted that as regards the pleaded basis for the Threats aspect of the claim I would have concluded that the pleaded case was insufficient to withstand summary judgment on the merits. As regards the Costs aspect of the claim had this claim not already failed (i.e. if there had been a pleaded loss, and had the central contention not been barred by abuse of process) I would regard the claim as weak, but I would probably have granted a conditional order, on the basis that (i) the factual basis was sufficiently complex (ii) there was sufficient evidence of error which might provide a slim basis for such allegations and (iii) those serious allegations would be best and most clearly dealt with at trial.

434. However I would have done so on the basis that the entire case required to be repleaded; and I would have indicated that certain allegations appeared not to be capable of being pursued.

The Inferred Threats

435. I will now consider briefly the substance of the unpleaded case on the Inferred Threats – which it is plain is the real case being run.

436. This creates some difficulties because of the cross over with the Professional Negligence Action, which is an entirely separate action. In the passage which follows I am making no determinations and expressing no views as to that action. All that I am doing is (i) ascertaining whether (if a case had been pleaded and had set out all the requisite components of a cause of action) it might have had sufficient prospects of success to survive summary judgment or the CPR 38.7/abuse of process arguments, and (ii) reflecting on certain aspects of the putative case which cause concern.

437. For these purposes I proceed on the basis that I should assume (in the Kings' favour) that (i) the Misrepresentation Claim was a good one, and (ii) the case being made by the Kings involves the lower hurdle of establishing that the Inferred Threats caused the Misrepresentation Team to offer grossly negligent advice (as opposed to conspiring with Primekings and/or "deliberately scuttling" the Misrepresentation Claim).

438. As a result of the latter I will not consider the allegations made in Mr Newman's note which go only to the "scuttling"/sabotage primary case save insofar as they can also be said to support a case that there were threats which led the Misrepresentation Team to negligently advise that the Misrepresentation Claim was hopeless.

The conflict of interest

439. One matter on which much emphasis was placed was that the Misrepresentation Team had a conflict of interest arising out of the fact that they had not spotted that the underlying documents were not consistent with the pleaded case – in particular as to the pleading on quantum arising out of the B Shares. It could have been actionable if it had caused loss. I will assume for present purposes that this was a possibility.

440. This fact came to the surface on Day 4 of the trial. It is not suggested that the Misrepresentation Team knew of this fact before this point. Therefore the conflict of interest could only arise and be exploited at or after this point. However the problem which I have already noted earlier in the judgment remains – it could only be exploited if Primekings knew not just of the possible negligence, but also that that had not been disclosed to the Kings. There is no suggestion that Primekings did know this. The putative conflict of interest therefore cannot assist the Kings causatively – or consequently as a "merits" point.

The extraordinary events

441. The Note at paragraph 21 sets out what are said to be a number of "extraordinary events" which happened between Day 4 and discontinuance which it is said form part of a web of facts which together put a sinister complexion on the case (by reference to *Compania Naviera Santi SA v Indemnity Mar Ins Co (The Tropaioforos*) [1960] 2 Lloyd's Rep. 469).

442. I will deal with the Howard Smith evidence, on which most emphasis was placed, separately. However I do not see these points as raising any basis for such an inference. In particular:

i) The fact that a substantial written advice (running to 35 pages) may have been commenced well before it was handed over raises no basis for an inference of nefarious activity or that it was produced by threats. Any such advice is a very serious matter, which would require careful thought and reflection. I would be very surprised if it could conceivably be written overnight or even in a couple of days. Any barrister giving such advice would want to reflect on it and indeed very probably sleep on it after completion;

ii) There is an allegation that a purdah order was breached. However this allegation appears to proceed on a misconception – witnesses were excluded from watching the evidence of other witnesses, but were only formally in purdah when giving their own evidence;

iii) Negative comments made to the Court/non notification of helpful evidence. These were not particularised in the Note and were not pursued in any depth;

iv) There is an allegation [Note 21.5] that Mr Blakey "*doctored his own notebook to create a false evidence trail*" and that the pages showing this were suppressed. As to this:

a) While it may be the case that the King's legal team have some material which justifies this extremely serious allegation, from the material deployed before me I was unable to discern what it was.

b) The point about "doctoring" the notebook appeared to depend upon imputing some nefarious motive to the addition of annotations reflecting unfortunate bits in Mr King's cross-examination (failure to answer the question and so forth) next to the note of his evidence in chief. If it is indeed suggested that this provides the basis for inferring that the notes were deliberately doctored I would regard that as an absurd contention and one lacking proper basis.

c) Even if it were the case, such behaviour (which is certainly consistent with a lawyer taking "protective" notes as a case goes badly wrong) seems to have no link which would make it a basis for an inference of threats being made by/for Primekings.

d) Similar points could be made in respect of an argument that because certain of the Misrepresentation Team's notes, including a "to Do List" of 10 May 2017 were not provided as part of pre-action disclosure, when the page before and the page after were, there is an inference that this material was deliberately suppressed.

v) Exception is taken to liaison between Mr Downes and Misrepresentation Counsel during the course of trial. Again this was not particularised in the Note (reliance being placed on a note which dates from the time of the discussions which finalised the terms of the discontinuance) and not really pursued orally. Liaison between opposing counsel is of course both commonplace and expected by the Court in furtherance of the overriding objective during trial. It may be that the King's legal team have some material which justifies the extremely serious allegation that such liaison went beyond what was proper, but from the material deployed before me I was unable to discern what it was. Again such behaviour seems to have no link which would make it a basis for an inference of threats being made by/for Primekings;

vi) Reliance is placed on the poor performance in the witness box of the partner from the Misrepresentation Solicitors. There seems to be a good basis for

saying that this witness's performance was poor. Again I fail to see how this provides any basis for inferring that there had been threats, particularly when the witness in question had obvious very good reasons of his own for trying to distance himself from what had gone wrong;

vii) Suppression of disclosure. It is said that important disclosure which came from Primekings on 8 May 2017 was hidden from the Kings by their own legal team, and that this was a concealment which continued in a pre-action letter and even in pleadings recently filed in the Commercial Court. This point was not pursued at any length before me and does not emerge clearly from the Note.

Mr Downes' failure to exploit the B share error

443. One matter which was said to be very significant in the inference that threats had been made was the fact that Mr Downes did not exploit with any witness the fact that the pleadings and witness statements signed with Statements of Truth were all wrong as a result of the B Share Problem. This was said to be evidence of Primekings keeping to their side of the nefarious understanding and to justify the inference.

444. This is a point which I would entirely understand being made by a litigant in person, because it completely fails to understand the techniques of cross-examination. It is however rather strange to find it pursued with any enthusiasm by counsel. It is often thought by non-lawyers that good cross-examination consist of confronting the witness repeatedly and "*rubbing his nose*" in every discrepancy. A good cross examiner will however usually aim to get the good answer she wants for the purposes of closing submissions and move swiftly on before the witness can start to dig himself out of the hole.

445. As Keith Evans says in "*The Golden Rules of Advocacy*" p. 102:

> "STOP WHEN YOU GET WHAT YOU WANT ….Don't indulge yourself. If you do, things may start to go horribly wrong"

446. Or, to quote Sir David Napley in his classic work "The Technique of Persuasion" p. 113:

> "If .. you have elicited from the witness – or a different witness – an admission which assists your case, do not, in your understandable enthusiasm, put the same or similar question again; you may well get a different answer which nullifies the good which your earlier answer achieved."

447. What one sees Mr Downes doing on the transcript is simply him following this golden rule. I therefore fail to see how this could provide any basis at all for an inference of impropriety.

The absence of Howard Smith

448. One point from which the inference that something untoward was going on was the situation with Howard Smith – and a spreadsheet produced by KPMG.

449. It is the Kings' case that Howard Smith, a KPMG witness, was to be a star witness for the Kings, as he was well-placed to comment on the cash flow of the business and that nefarious intent could be inferred from his centrality to the claim, and from the fact that his evidence was repeatedly moved back, with him ultimately not being called.

450. The main point here was the centrality of his evidence. It was said that he would have established that Primekings' claim that KSGL would be insolvent if investment was not found immediately was untrue. Mr Newman said:

> "Howard Smith was going to give evidence which was completely supportive of the claim and he was going to say that they could pay the wages and the business wouldn't go into administration and the business would be re-marketed, which is completely contrary to the case which is being put to all the witnesses throughout that week by Primekings"

451. This assertion was based on what Mr Newman (more than once) called the witness statement of Mr Smith. This was a document bearing Mr Smith's name, which certainly did set out a statement to this effect.

452. However there was a very significant problem with this submission. That problem was that the so-called witness statement of Mr Smith was no such thing. It was an unsigned witness summary. I have no evidence that Mr Smith would have given evidence to the same effect as the witness summary. I in fact have no evidence that he had ever seen it. The basis for this argument is therefore manifestly flawed.

453. Further Mr Newman referred me to a document which he said would have formed the basis of Mr Smith's favourable evidence – a spreadsheet which was said to show that KSGL could have afforded to carry on; however that document was one which was predicated on a cash injection which was only going to happen if the deal went ahead. The factual underpinning of the evidence which it was said that Mr Smith could give was therefore also demonstrated to be flawed.

Conclusion

454. It follows that even assuming that the case as referenced in the Note had been pleaded or sought to be pleaded (which it was not) that case provides no basis for an inference of threats which would have more than fanciful prospects of success, and does not come close to the kind of compelling material which might conceivably assist in the context of the abuse of process arguments.

455. In striking out the claim and/or granting summary judgment I am not therefore by any means stifling a claim which should be heard. What I am doing is bringing a proper conclusion to a claim which is structurally fatally flawed, abusive and lacking in pleadable substance.

Post Script: The conduct of the Kings' case

456. As will by now be apparent, in considering the applications I have repeatedly been troubled by aspects of the way in which the Kings' case was put forward. After careful reflection I have considered that I should say something about this aspect specifically for the benefit of those involved in this and the wider litigation; as well as because some of these issues are ones which should be marked with disapproval by the Court.

Specific allegations which lack basis

457. I have indicated above a number of allegations which were not formally pleaded in this action but which were pursued with what appeared to be an insufficient basis. There were also allegations in this action which were pleaded but which appeared to lack basis.

458. One is the allegation that Mr Rabinowicz certified the Amended Bill in the knowledge that it was false (Particulars at [81]). Another is the allegation that Mr Downes knew the Bill to be false. I entirely understand the basis whereby it is said that Teacher Stern and Ms Toomer knew the Bill to be false, though as I have indicated I regard the basis for the falsity argument as slight, even if it could be properly run (which I have concluded earlier it cannot, in the light of the fact that the bill has now been formally assessed at 90% of the sum claimed). I can also (just about) understand that it may be said that Primekings as clients (with a pleaded very keen interest in costs and an incentive to keep a track of what was billed) would know if a bill was false. But when it comes to Mr Rabinowicz, no basis for knowledge as at 24 February 2019 appears to be pleaded – on the contrary the Kings' own pleaded case is that he joined the Common Design on around 10 May 2019. The 24 February Bill was not relied on before me, is not otherwise mentioned in the Particulars of Claim and is not apparently in the voluminous bundles which were placed before me. It is also hard to understand how, even at the later stage, Mr Rabinowicz, with no underlying knowledge of the case, should have ascertained that the bill was false. This is not explained.

459. As regards Mr Downes also the basis for knowledge of falsity appears on the face of the pleading to be inadequate. What is pleaded as a basis is that he used to work in banking and is highly financially literate. As I have noted above in relation to some other matters, it may be that the Kings' legal team have other material to add to this which they consider forms a proper basis for making such an allegation of dishonesty. However looking at the material which I have been given I am cannot currently discern one.

460. I therefore do have concerns about the basis on which some of the allegations in this case were advanced. I note that this approach appears not to be confined to this part of the litigation; I see from [240] of Mr Andrew Lenon QC's judgment in the KSSL case that he highlighted a number of serious allegations being made in that case without any proper foundation.

The leap from thinking the worst to accusation

461. One hallmark of the submissions which were made, which submissions I am sure are a reflection of the Kings' own views, is that the very least point in whatever context becomes "powerful evidence" in favour of the underlying allegations.

462. Very many examples of this could be given. I take just a few. The first is the approach taken to the non-service of defences, and the fact that the Defendants have not engaged on the facts in relation to most of the allegations. This approach – perfectly logical (and indeed proper) in the context of an application of this nature - has been transmuted in the Kings' eyes to acknowledgements of guilt.

463. Thus Mr Newman's Note had an Appendix "FAILURE TO DENY ALLEGATION OF IMPROPER PRESSURE DURING THE TRIAL", and the following were a selection of ways in which the point was made over the course of his submissions:

i) "*this case cannot be defended realistically, and the reason why it is not being defended through a defence, my Lady, is because there's been so many explanations given and so many accounts given of what should be a single number but it is impossible to plead back to without admitting some serious unlawful conduct at some point.*"

ii) "*why is it that no defences have been put before your Ladyship today or draft defences. It is because, in my submission, there just isn't a defence to this claim that could ever be advanced that wouldn't result in the Kings getting the justice that they deserve, that they have been waiting for so long*"

iii) "*These defendants must know that they are taking a huge risk of at least adverse inferences enough to defeat their applications be drawn from their silence on these points… we say there is a very powerful inference there that they don't have answers which they can provide, and aren't providing them because they don't exist.*"

464. Another example is that at the hearing of the s. 994 Proceedings strike out, in the course of Ms Addy explaining the background to the application, the Deputy Judge asked Ms Addy about the allegation that the £1.7 million Payment on Account figure, and whether he was right that the allegation was that Marcus Smith J ordered it on a false basis. Ms Addy responded "*Yes, the petitioners do take issue with the content of the submissions that were made by Mr. Downes, QC, ... but those submissions were made by Mr. Downes and the judge made the order he did.*" That is said by the Kings to found a powerful inference because: "*Where a party fails to deny a serious allegation, there is normally a powerful inference that that is because they know it is correct.*". It is hard to understand how this argument comes to be made on any sensible reading of this passage of the transcript. There was no allegation; the Deputy Judge was plainly merely

trying to orient himself in the (morass of) issues and Ms Addy was providing an answer indicating that from her perspective the point did not go anywhere.

465. Perhaps the most telling example is the so-called Transcript Fraud. When the Teacher Stern Defendants made a request for Further Information of paragraph 19 of the Particulars ("*The existence of the Common Design is to be inferred (inter alia) from…*") the Reply (signed by Mr Newman) asserted that "*since the case was pleaded further facts evidencing the conspiracy have emerged*".

466. The facts relied on were that Ms Toomer had told Metis Law that the audio file for a hearing (of the Kings' unsuccessful application to stay the Detailed Assessment) had not been received by the transcription-provider, Epiq. It was stated in terms that she had "*misled Metis knowing that such evidence would support the case of the Kings*". This situation was also later relied upon in support of an inference that the Inferred Threats were made.

467. I note that no explanation of this situation had been sought prior to this allegation being made.

468. A response was given on behalf of Teacher Stern/Ms Toomer five days later. The explanation was that Epiq had failed to produce the transcript urgently, as requested because their systems were down and they had not received or could not locate the instruction. The request via them had been cancelled and another provider (Ubiqus) asked to produce the transcript – and had then been chased when Ubiqus reported they had not yet received the audio file. When asked, Ms Toomer had mis-summarised this saga and had referred to the wrong transcript provider. The letter attached all the relevant emails and invited the Kings to withdraw the allegations.

469. Those very serious allegations have not been withdrawn. They have been maintained with full vigour up to and during the hearing before me. In his skeleton Mr Newman stated that the explanation is "*most implausible*" and that the inference that Ms Toomer "*lied to the Kings because she wished to deny the Kings documentary evidence is not in the context of this case as a whole … unrealistic.*"

470. In oral submissions – despite the emails which on their face show the problems which Teacher Stern encountered with Epiq - he described the cancellation of the Epiq order as "*a cynical ploy to really slow everything down and make it impossible for Mr King to get the transcript*" and the absence of emails with Ubiqus as supporting the Kings' case that "*this was a bit of a ploy, a bit of sharp practice, one might see it as, to try and stop the Kings getting a transcript*".

471. The reason the inference is said to arise, and why the Court would at trial be asked to disbelieve the explanation given by Ms Toomer is that "*Ms Toomer had a real motive to ensure the Kings couldn't get this transcript which provides, we say, categorical evidence that her and her clients were misleading a judge about the accounts evidence*".

472. There are two points to make here. The first is that even if there was a basis to make these very serious allegations in the RFI (which seems dubious based on the material I have seen) I cannot understand how, in the light of the explanation and the provision of the emails with the transcribers, this allegation could properly be pursued before me (and – as it has been – in the other litigation between the parties).

473. The second goes back to my first sub-heading. It is that this episode highlights beautifully the approach taken by the Kings and their legal team to this case. Anything unhelpful to the Kings is immediately seen as suspect on the basis of previous suspicions – hence the "inference" that a mislaid transcript was the product of some attempt to keep vital evidence from the Kings. In the Kings' eyes there are no mistakes, only conspiracies.

474. Another example of this tendency is the correspondence arising out of the recent amendment to Misrepresentation Counsel's defence in the Professional Negligence Action, to which the Kings' legal team were very keen to draw my attention. The amendments in question are minor in the extreme. One makes clear that the Misrepresentation Counsel can only plead to their own lack of contact with Mr Wilson. That is said to "*emphasise the acceptance of a legitimate possibility that a member of the legal team … did contact Mr Wilson to bring to his attention what transpired on Day 4*" and to be a "*serious red flag*". Another clarifies the Misrepresentation Counsel's absence of knowledge of what was said to other members of the team. Similarly it is said to be "*implicit in the proposed amendment that the barristers are accepting that there is a real possibility that a highly relevant development on the case may have been concealed by DWF from both the counsel team and the Kings*". It takes a determined and thoroughly skewed reading of those amendments to take from them the points which were made by Metis Law in their letter to me.

475. This feeds into an approach to the legal argument (said to be in reliance on *Blockchain Optimization v LFE Market Ltd*. [2020] EWHC 2027 (Comm) at [53]) that because facts in support of an allegation of fraud have to be viewed cumulatively it is possible to justify an allegation of fraud by pulling together the widest possible variety of complaints and saying "*cumulatively these permit us to infer fraud*".

476. This is not, in my judgment, an appropriate approach to inferring fraud. What *Blockchain Optimisation* says is that:

> "I agree … that it is not enough merely to plead a representation and to assert that it was made fraudulently - the primary facts from which the court is invited to infer that the statement was made fraudulently must be pleaded. But the pleading as a whole has to be taken into account, and statements which are asserted to be factually untrue, when taken cumulatively, can go to support an allegation that they were all made fraudulently, even if individually they would be equally consistent with innocence."

477. That does not mean that an inference of fraud can be justified by lumping together a number of disparate allegations which bear no relation to the conspiracy, fraud or deceit which is said to sound in damages. One cannot ask the court to infer fraud against A in relation to a particular transaction because (for example) he once stole a sweet from a shop, or because he lied to get out of an unwanted dinner engagement.

478. Reliance was also placed for the Kings on *Compania Naviera Santi SA v Indemnity Mar Ins Co (The Tropaioforos)* [1960] 2 Lloyd's Rep. 469; but that case illustrates the point nicely. That was a scuttling case. The "apparently trivial" circumstances relied on were that the master found time to shave, and the crew packed their suitcases before abandoning ship, but the logbooks were left on board. The relevance to the fraud alleged is immediately apparent.

479. What the cases do not say is that one can jumble together a vast array of different, apparently trivial or marginally suspicious facts relating to different matters and turn them into a valid pleading of fraud.

480. That the claim is dependent on this approach is manifest from the response to Teacher Stern's RFI where it is said "*All of the facts pleaded in the Particulars of Claim support the inference of a conspiracy, especially the attempts to cover it up set out at paragraphs 44-100*". Thus the main pleaded basis for a conspiracy in 2015/2016 relating to the Misrepresentation Claim, and which was causatively over by 15 May 2017 are a collection (which might not inaccurately be referred to as a "ragbag") of allegations which relate only to the assessment of the costs of the action. This is also clear from:

i) The pleading at section IV of the Particulars of "*Similar Conduct Demonstrating Modus Operandi*", which brings into the picture matters in relation to the Part 8
Claim and the Kings' legal expenses insurance. It was referred to in the Note as "*powerful similar fact evidence …[which] tends to show that exaggerating legal costs and seeking to interfere with opponents' legal representation are viewed as a legitimate way of doing business by Primekings, Teacher Stern and Mr Downes*".

ii) The reliance on the fact that Teacher Stern had aggressively chased Master Cousins for a sealed order, including intimating a likelihood that they would report him to the Judicial Conduct Office.

481. There is also a huge amount of circular reasoning involved in this approach. The socalled Transcript Fraud is used to infer fraud because there is said to be dishonesty, but the inference that it itself evidenced dishonesty depends on an assumption that there is a conspiracy.

482. Thus the desire to allege fraud/dishonesty/conspiracy becomes a kind of philosopher's stone which transforms innocent errors into dishonest conspiracies - from which in turn the main conspiracy can itself be inferred.

Full and frank disclosure

483. Another aspect of the way in which the case has been run is that I have doubts as to the way the shadow ledger material was presented to me at the *ex parte* hearing. As the matter was *ex parte* there was an obligation of full and frank disclosure on the applicant. Having now been taken through the material by Ms Addy it certainly seems to me that whether consciously or not, the obligation was not discharged. The problem

may in part have arisen from the fact that the argument was put together by Mr King, who may not fully have understood the obligation on him, and who (not being a lawyer, and given the emotional toll of this litigation) I suspect may genuinely struggle to comprehend the points which might and should be made against his case. It may be the case that the legal team did not fully get on top of the materials so as to be able to make good that deficiency. But the net result was that points which could and should have been made about this line of argument were not drawn to my attention.

Routine accusations of impropriety

484. Another concern which I have is that the correspondence from the Kings' legal team has been characterised by a hair trigger approach to accusing their correspondents of impropriety. So, when Teacher Stern asked for further particulars of what I have indicated was a manifestly unsatisfactory pleading and intimated that an RFI would otherwise be served, that letter attracted a robust response in correspondence, describing the proposed RFI as "*a transparent ruse*". This is just one of a number of occasions when those instructed for the Kings appear to have responded to correspondence in a manner which steps well beyond mere abrasiveness into allegations of misconduct for which no justifiable basis can be discerned.

485. In other correspondence addressed to Teacher Stern it was said that they and Primekings "*are seeking to use the product of their wrongdoing (such being but not limited to, an improperly obtained payment on account and an artificial and false bill of costs filed in Court wrongfully endorsed with a statement of truth) to stifle this claim.*"

486. Further, in the course of this litigation in correspondence addressed to those representing the Teacher Stern Defendants allegations were made that they were *"using*
... threatening techniques in response to this claim". This was said to *"powerfully support[] the claimants' case that such techniques were used in May 2017"*. This is not the only occasion when the allegations made against these defendants have been extended, apparently reflexively and without any apparent basis, from those Defendants to those who now represent them in this dispute.

487. Similarly in the response to that RFI it was pleaded (by Mr Newman) that the RFI demonstrated that "*this Part 18 request has been made by the Teacher Stern Defendants for the improper purposes of (i) delaying this case and (ii) seeking to find out what evidence the Claimants have*". The basis for this response (which itself implicitly accused Teacher Stern's legal team of improper conduct) was not clear. While Metis Law Limited and Mr Newman have repeatedly stated in correspondence and in argument that they do not accuse the current legal team of any of the Defendants of impropriety there are a number of occasions where the logic of the accusation being made (that something wrong is being done through the legal team) necessarily extends to those members of the legal team.

488. Such matters are not strictly a matter for a judgment, but having noted them with considerable concern in the course of the submissions, it has seemed to me right that I should highlight the point. As I have indicated many of these accusations appeared to lack basis; even on those occasions where the point might be arguable it would

certainly have been preferable if all of these accusations, which seemed to serve little legitimate purpose, had been avoided.

489. Certainly, too, the correspondence seems to have been conducted with no regard at all for paragraph A1.10 of the Commercial Court Guide which states: "*The Court expects a high level of co-operation and realism from the legal representatives of the parties. This applies to dealings (including correspondence) between legal representatives as well as to dealings with the Court.*". I would hope that this point is noted and acted upon.

A Court of Appeal

Barking and Dagenham London Borough Council and others *v* Persons Unknown and others

[2022] EWCA Civ 13

B 2021 Nov 30; Dec 1, 2;
2022 Jan 13

Sir Geoffrey Vos MR, Lewison, Elisabeth Laing LJJ

Injunction — Final — Persons unknown — Local authorities obtaining final injunctions against persons unknown to restrain unauthorised encampments on land — Judge calling in injunctions for reconsideration in light of subsequent C *legal developments — Whether court having power to grant final injunctions against persons unknown — Whether procedure adopted by judge appropriate — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37[1] — Town and Country Planning Act 1990 (c 8), s 187B[2]*

In claims brought under CPR Pt 8, a number of local authorities obtained a series D of injunctions which were aimed at the gypsy and traveller community and targeted unauthorised encampment on land. All of the injunctions were against "persons unknown" although most also included varying numbers of named defendants. In some cases only interim injunctions were granted and in others final injunctions were also made. A judge took the view that a series of subsequent decisions of the Supreme Court and Court of Appeal had changed the law relating to injunctions against persons unknown, with the consequence that many of the injunctions might need to E be discharged. Accordingly, with the concurrence of the President of the Queen's Bench Division and the judge in charge of the Queen's Bench Civil List, he made an order effectively calling in the final injunctions for reconsideration. Following a hearing the judge discharged some of the injunctions, holding that the court could not grant final injunctions that prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land, because final injunctions could only be made against parties who had been identified and had F had an opportunity to contest the final injunction sought.

On appeal by some of the local authorities—

Held, allowing the appeals, that section 37 of the Senior Courts Act 1981, which was a broad provision, gave the court power to grant a final injunction that bound individuals who were not parties to the proceedings at the date when the injunction was granted; that, in particular, there was no difference in jurisdictional terms between an interim and a final injunction, particularly in the context of those granted G against persons unknown; that, rather, where an injunction was granted, whether on an interim or a final basis, the court retained the right to supervise and enforce that injunction, including bringing before the court parties violating the injunction who thereby made themselves parties to the proceedings, which were not at an end until the injunction had been discharged; that, therefore, the court had power under section 37 of the 1981 Act to grant a final injunction that prevented persons who were unknown and unidentified at the date of the injunction from occupying and trespassing on local H authority land; that it followed that the judge had been wrong to hold that the court could not grant a local authority's application for a final injunction against unauthorised encampment that prevented newcomers from occupying and trespassing

[1] Senior Courts Act 1981, s 37: see post, para 72.
[2] Town and Country Planning Act 1990, s 187B: see post, para 114.

on the land; and that, accordingly, the judge's orders discharging the final injunctions obtained by the local authorities would be set aside (post, paras 7, 71–77, 81–82, 86, 89, 91–93, 98–99, 101, 125, 126).

Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA, *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, CA and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, CA applied.

Canada Goose UK Retail Ltd v Persons Unknown [2020] 1 WLR 2802, CA not applied.

Cameron v Hussain [2019] 1 WLR 1471, SC(E) and *Venables v News Group Newspapers Ltd* [2001] Fam 430 considered.

Per curiam. (i) The procedure adopted by the judge was unorthodox and highly unusual in so far as it sought to call in final orders of the court for revision in the light of subsequent legal developments. The circumstances which will justify varying or revoking a final order under CPR r 3.1(7) will be very rare given the importance of finality. However no harm has been done in that the parties did not object to the judge's procedure at the time and it has enabled a comprehensive review of the law applicable in an important field. In any event, most of the orders provided for review or gave permission to apply (post, paras 7, 110–112, 125, 126).

Terry v BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, CA applied.

(ii) Section 37 of the 1981 Act and section 187B of the Town and Country Planning Act 1990 impose the same procedural limitations on applications for injunctions against persons unknown. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. CPR PD 8A, para 20 seems to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases (post, paras 7, 117, 125, 126).

(iii) The court cannot and should not limit in advance the types of injunction that might in future cases be held appropriate to be made against the world under section 37 of the 1981 Act. It is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37, which might tie the hands of a future court in types of case that cannot now be predicted. Injunctions against the world have been granted to restrain the publication of information which would put a person at risk of serious injury or death, to prevent unauthorised encampment and to prohibit the tortious actions of protesters. No further limitations are appropriate since although such cases are exceptional, other categories may in future be shown to be proportionate and justified (post, paras 7, 72, 119–121, 125, 126).

(iv) Each member of the gypsy and traveller community has a right under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms to pursue a traditional nomadic lifestyle. Accordingly, when a member of that community makes themselves party to an unauthorised encampment injunction they have the opportunity to apply to the court to set aside the injunction praying in aid that right. Then the court can test whether the injunction interferes with that person's article 8 rights, the extent of that interference and whether the injunction is proportionate, balancing their article 8 rights against the public interest. It is incorrect to say that the gypsy and traveller community has article 8 rights, since Convention rights are individual. Nonetheless, local authorities should engage in a process of dialogue and communication with travelling communities and should respect their culture, traditions and practices. Persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review (post, paras 105–107, 125, 126).

(v) This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. Plain language should be used in place of Latin (post, paras 8, 125, 126).

Decision of Nicklin J [2021] EWHC 1201 (QB) reversed.

The following cases are referred to in the judgment of Sir Geoffrey Vos MR:

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Attorney General v Times Newspapers Ltd [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)

Birmingham City Council v Afsar [2019] EWHC 3217 (QB); [2020] 4 WLR 168; [2020] 3 All ER 756

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

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

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

Canary Wharf Investments Ltd v Brewer [2018] EWHC 1760 (QB)

Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)

Chelsea FC plc v Brewer [2018] EWHC 1424 (Ch)

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

Davis v Tonbridge and Malling Borough Council [2004] EWCA Civ 194; The Times, 5 March 2004, CA

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

Enfield London Borough Council v Persons Unknown [2020] EWHC 2717 (QB)

Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9

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 [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

Jacobson v Frachon (1927) 138 LT 386, CA

Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)

Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA

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)

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

Speedier Logistics Co Ltd v Aardvark Digital Ltd [2012] EWHC 2776 (Comm)

Starmark Enterprises Ltd v CPL Distribution Ltd [2001] EWCA Civ 1252; [2002] Ch 306; [2002] 2 WLR 1009; [2002] 4 All ER 264, CA

Terry v BCS Corporate Acceptances Ltd [2018] EWCA Civ 2422, 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
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA

The following additional cases were cited in argument:

Attorney General v Harris [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira (Practice Note) [2011] EWCA Civ 241; [2011] 1 WLR 2391; [2011] 3 All ER 392, CA
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176, CA
Bromsgrove District Council v Carthy (1975) 30 P & CR 34, DC
Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA
Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd [2021] EWCA Civ 1173, CA
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
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Iveson v Harris (1802) 7 Ves 251
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406
Newbury District Council v Secretary of State for the Environment [1978] 1 WLR 1241; [1979] 1 All ER 243, CA
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358, HL(E)
R (Youngsam) v Parole Board [2019] EWCA Civ 229; [2020] QB 387; [2019] 3 WLR 33; [2019] 3 All ER 954, CA
Rickards v Rickards [1990] Fam 194; [1989] 3 WLR 748; [1989] 3 All ER 193, CA
Roult v North West Strategic Health Authority [2009] EWCA Civ 444; [2010] 1 WLR 487, CA
Serious Organised Crime Agency v O'Docherty [2013] EWCA Civ 518; [2013] CP Rep 35, CA
Test Valley Investments Ltd v Tanner (1963) 15 P & CR 279, DC
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160; [2013] 3 WLR 299; [2013] 4 All ER 715, SC(E)
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37

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

Akerman v Richmond upon Thames London Borough Council [2017] EWHC 84 (Admin); [2017] PTSR 351, DC
Ashford Borough Council v Cork [2021] EWHC 476 (QB)
Attorney General v Premier Line Ltd [1932] 1 Ch 303
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)

Basingstoke and Deane Borough Council v Eastwood [2018] EWHC 179 (QB)
Basingstoke and Deane Borough Council v Thompson [2018] EWHC 11 (QB)
Bensaid v United Kingdom (Application No 44599/98) (2001) 33 EHRR 10, ECtHR
Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA
British Broadcasting Corpn, In re [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Cadder v HM Advocate [2010] UKSC 43; [2010] 1 WLR 2601, SC(Sc)
Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)
City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA
City of London Corpn v Persons Unknown [2021] EWHC 1378 (QB)
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E)
Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423
Hatton v United Kingdom (Application No 36022/97) (2003) 37 EHRR 28, ECtHR (GC)
Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2004] UKPC 26; [2005] 1 AC 190; [2004] 3 WLR 611; [2005] 1 All ER 499, PC
Lambeth Overseers v London County Council [1897] AC 625, HL(E)
Local Authority, A v W [2005] EWHC 1564 (Fam); [2006] 1 FLR 1
López Ostra v Spain (Application No 16798/90) (1994) 20 EHRR 277, ECtHR
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All ER (Comm) 1099, CA
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Mileva v Bulgaria (Application Nos 43449/02 and 21475/04) (2010) 61 EHRR 41, ECtHR
Moreno Gómez v Spain (Application No 4143/02) (2004) 41 EHRR 40, ECtHR
R v Hatton [2005] EWCA Crim 2951; [2006] 1 Cr App R 16, CA
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
Scott v Scott [1913] AC 417, HL(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)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] Ch 1; [1983] 3 WLR 78; [1983] 2 All ER 787, CA
Tewkesbury Borough Council v Smith [2016] EWHC 1883 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
Von Hannover v Germany (Application No 59320/00) (2004) 40 EHRR 1, ECtHR
Wellesley v Duke of Beaufort (1827) 2 Russ 1
Wokingham Borough Council v Scott [2017] EWHC 294 (QB)
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X and Y v The Netherlands (Application No 8978/80) (1985) 8 EHRR 235, ECtHR

APPEALS from Nicklin J

Using the modified CPR Pt 8 procedure provided by CPR r 65.43 Walsall Metropolitan Borough Council applied for a traveller injunction against Brenda Bridges and 17 other named defendants and persons unknown. An interim injunction without notice was granted on 23 September 2016. A final injunction was granted on 21 October 2016 until further order of the court.

By a claim form issued on 10 March 2017 Barking and Dagenham London Borough Council applied for a borough-wide injunction against Tommy Stokes and 63 other named defendants and persons unknown, being members of the traveller community who had unlawfully encamped within the borough of Barking and Dagenham. On 29 March 2017 an interim injunction was granted prohibiting trespass on land by named defendants and persons unknown ("a traveller injunction"). On 30 October 2017 a final injunction was granted until further order against 23 named defendants and persons unknown, containing permission to apply to the defendants or "anyone notified of this order" to vary or discharge the order on 72 hours' written notice.

By a claim form issued on 21 December 2017 Rochdale Metropolitan Borough Council applied for a traveller injunction against Shane Heron and 88 other named defendants and persons unknown, being members of the travelling community who had unlawfully encamped within the borough of Rochdale. An interim injunction was granted on 9 February 2018 with a power of arrest.

By a claim form issued on 26 April 2018 Redbridge London Borough Council applied for an injunction against Martin Stokes and 99 other named defendants and persons unknown forming or intending to form unauthorised encampments in the London Borough of Redbridge. On 4 June 2018 an interim injunction was granted against 70 named defendants and persons unknown with a power of arrest. A final injunction was granted on 12 November 2018 until 21 November 2021 against 69 named defendants and persons unknown. The final injunction contained a permission to apply to the defendants "and anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 28 June 2018 Wolverhampton City Council applied for a traveller injunction against persons unknown. An injunction contra mundum with a power of arrest was granted on 2 October 2018. The order provided for a review hearing to take place on the first available date after 1 October 2019. A further injunction order was granted on 5 December 2019, contra mundum and with a power of arrest. The order provided for a further review hearing to take place on 20 July 2020, following which an order was made dated 29 July 2020 continuing the injunction.

By a claim form issued on 2 July 2018 Basingstoke and Deane Borough Council and Hampshire County Council applied for a traveller injunction against Henry Loveridge and 114 other named defendants and persons unknown, the owner and/or occupiers of land at various addresses set out in a schedule attached to the claim form. On 30 July 2018 an interim injunction was granted with a power of arrest. A final injunction was granted on 26 April 2019 until 3 April 2024 or further order against 115 named defendants and persons unknown with a power of arrest. The final

injunction contained a permission to apply to the defendants or "anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 22 February 2019 Nuneaton and Bedworth Borough Council and Warwickshire County Council applied for a traveller injunction against Thomas Corcoran and 52 other named defendants and persons unknown forming unauthorised encampments within the borough of Nuneaton and Bedworth. On 19 March 2019 an interim injunction was granted with a power of arrest.

By a claim form issued on 6 March 2019 Richmond upon Thames London Borough Council applied for a traveller injunction against persons unknown possessing or occupying land and persons unknown depositing waste or flytipping on land. By an order of 10 May 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. An interim injunction without notice was granted on 14 August 2018 and continued on 24 August 2018. Both contained powers of arrest.

By a claim form issued on 29 March 2019 Hillingdon London Borough Council applied for an injunction against persons unknown occupying land and persons unknown depositing waste or flytipping on land. On 12 June 2019 an interim traveller injunction without notice was granted with a power of arrest. By an order of 17 June 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in the case of *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043.

By a claim form issued on 31 July 2019 Havering London Borough Council applied for a traveller injunction against William Stokes and 104 other named defendants and persons unknown. On 11 September 2019 an interim traveller injunction was granted pending the final injunction hearing with a power of arrest.

By a claim form issued on 31 July 2019 Thurrock Council applied for a traveller injunction against Martin Stokes and 106 other named defendants and persons unknown. An interim injunction was granted on 3 September 2019 with a power of arrest.

By a claim form issued on 18 June 2020 Test Valley Borough Council applied for a traveller injunction against Albert Bowers and 88 other named defendants and persons unknown forming unauthorised encampments within the borough of Test Valley. An interim injunction was granted on 28 July 2020 with a power of arrest.

On 16 October 2020 Nicklin J made an order of his own motion, but with the concurrence of Dame Victoria Sharp P and Stewart J (the judge in charge of the Queen's Bench Civil List), ordering each claimant in 38 sets of proceedings, including those detailed above, to complete a questionnaire in the form set out in a schedule to the order with a view to identifying those local authorities with existing "traveller injunctions" who wished to maintain such injunctions (possibly with modification), and those who wished to discontinue their claims and/or discharge the current traveller injunction granted in their favour. On 27 and 28 January 2021, as a consequence of local authorities having completed the questionnaire, Nicklin J conducted a hearing in which he considered the injunctions granted in those proceedings. By a judgment handed down on 12 May 2021 Nicklin J [2021] EWHC 1201 (QB) 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. By an order dated 24 May 2021 Nicklin J discharged certain of the injunctions that the local authorities had obtained.

By appellants' notices filed on or about 7 June 2021 and with permission of the judge the local authorities detailed above appealed on the following grounds. (1) The judge had erred in law in finding that the court had jurisdiction to vary and/or discharge final injunction orders where no application had been made by a person affected by those final orders to vary or discharge them. (2) The judge had been wrong to hold that the injunction order bound only the parties to the proceedings at the date of the order and did not bind "newcomers" where the injunction was granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided a statutory power to grant an injunction against persons unknown at the interim and final stages. The judge had failed to take into account the court's entitlement to grant an injunction that bound newcomers pursuant to section 222 of the Local Government Act 1972, in particular where the local authorities' enforcement powers pursuant to sections 77 and 78 of the Criminal Justice and Public Order Act 1994 had proved to be ineffective. (3) The judge had been wrong to hold that final injunction orders sought and obtained pursuant to section 222 of the 1972 Act could not, in principle, bind newcomers who were not party to the litigation. Such injunctions could be granted on a contra mundum basis where there was evidence of widespread impact on the article 8 rights of the inhabitants of the local authority area. One of the claimants in the court below, Basildon Borough Council, did not appeal but was given permission to intervene by written submissions only. The following bodies were granted permission to intervene: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd; and Basildon Borough Council.

The facts are stated in the judgment of Sir Geoffrey Vos MR, post, paras 9–17.

Nigel Giffin QC and *Simon Birks* (instructed by *Walsall Metropolitan Borough Council Legal Services*) for Walsall.

There are no unavoidable conceptual objections to the grant of final injunctions against newcomers, that is, persons who have not been identified as defendants prior to the date on which the final order is made, whether identification is by name or by some sufficient other description. The key principle is procedural fairness. If ways can be found of granting a final injunction while complying with procedural fairness there is no principled objection to doing so. The final injunction must provide a means by which a newcomer may ask the court to vary or discharge the injunction to comply with procedural fairness. In the present case Nicklin J accepted that interim injunctions can be granted against persons unknown, including newcomers who become parties after the order has been made by doing an act which breaches the injunction and by being served with the injunction or by a form of alternative service. If a person can become a party to the proceedings after the order has been made at the interim stage, that should apply equally

A at the final stage. A final injunction is final only in the sense that it is not a staging post on the way to a later trial. It is *not* final in the sense of being set in stone. A person who breaches the injunction and as a consequence becomes a party to it is entitled to apply for the injunction to be varied or discharged.

A rigid distinction between interim and final injunctions would be
B false and lead to undesirable consequences: see the flytipping case of *Enfield London Borough Council v Persons Unknown* [2020] EWHC 2717 (QB) at [41]–[44], per Nicklin J. In the case of a rolling occupation, where one group of persons move on to land for a time and are immediately replaced by another group, which makes it difficult to identify those involved, a rigid approach to identifying defendants does not address the practical problems faced by local authorities. Nicklin J's approach is unworkable
C and impractical with wide ramifications. That approach has considerably truncated the use of interim as well as final injunctions, which is inconsistent with authority: cf *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780. It is consistent with interim injunction cases
D where by the time of the application for a final injunction the defendants have all been identified (see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658), but in the case of the present injunctions it is not possible to identify all the defendants. Similar problems can arise in different areas of the law including protest cases, copyright infringement and nuisance, for example, car cruising and illegal raves. Section 37 of the Senior
E Courts Act 1981, which confers jurisdiction to grant a final injunction binding non-parties, is flexible and adapts to new circumstances: see *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and *Fourie v Le Roux* [2007] 1 WLR 320. Apart from exceptional cases against the world, the use of section 37 should not be excluded on an a priori basis and regardless of the particular facts unless a reason of principle compels such a conclusion.

F What is important is not the difference between interim and final injunctions but between injunctions and other remedies such as damages. The latter are backward-looking, compensating for past wrongs, and are by their nature once and for all and binary. It inevitably follows that the person sought to be held liable must already be a party at the time of trial. Any opportunity to be heard must be extended to that party by trial at the latest:
G see *Cameron v Hussain* [2019] 1 WLR 1471. *Cameron* is distinguishable from the present cases on the basis that it concerned the remedy of damages, not an injunction. The fundamental principle that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard was applicable to the issues considered in that case, but the issues arising in the present cases, including rolling occupation and newcomers, were not before the Supreme Court in
H *Cameron*. It follows that it was not part of the ratio of *Cameron* that a final injunction could not be granted against persons unknown.

Where a form of relief by its nature operates only for the future, there is no reason of principle why it should not operate against newcomers who come to the proceedings in the future. By contrast with monetary remedies,

injunctions are forward-looking, and even if final rather than interim they can be varied for the future. It is not the case that proof of historic wrongdoing by person A is intrinsically incapable of justifying a quia timet (precautionary) injunction against person B. The material upon which the court is invited to act when granting an injunction will necessarily relate to what has been said and done in the past. But inferences can be drawn from such material about what is likely to happen in the future in the absence of an injunction. That is the whole basis of precautionary claims, although naturally a court will be cautious in drawing such inferences and the relief to be granted on the basis of them: see *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29. The fact that evidence relates to the past behaviour of A does not mean that it is incapable of founding an inference about the likely future behaviour of B, but rather goes to the weight to be placed on the evidence in that respect. The past conduct of a substantial number of persons, significant numbers of whom it has not been possible to identify, is in appropriate circumstances capable of founding inferences as to the likely future behaviour of persons who have not yet been identified.

A final injunction should be formulated so as to catch only behaviour which is unlawful and ought to be restrained. There are obvious problems, other than on a purely temporary basis, when seeking to control an activity not intrinsically unlawful, such as protest on the public highway, the lawfulness of which will depend critically on what a given protester actually does, and which very directly engages rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, particularly articles 10 and 11: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. Those problems are compounded, and probably insuperable, if the injunction is directed to an unlimited class of potential future newcomers. That is one reason why the attempt to obtain a final injunction in *Canada Goose* failed. The ratio in *Canada Goose* does not lay down a universal principle of general application but applies only to protester injunctions: see para 89. If that were not the case, *Ineos* and *Canada Goose*, both Court of Appeal decisions, would be inconsistent. Any apparently broader statements made by the Court of Appeal in *Canada Goose* cannot be considered to be part of the binding ratio: see *R (Youngsam) v Parole Board* [2020] QB 387, para 48, per Leggatt LJ. [Reference was made to *Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira (Practice Note)* [2011] 1 WLR 2391.]

In considering whether to grant an injunction against the unauthorised occupation and use of land, Convention rights are relevant, but the starting point has to be whether the activity being restrained would have an impact upon the Convention rights of the persons living or working in the relevant part of the claimant local authority's area, particularly article 8 rights. Whether the unauthorised occupation and use of land would in fact violate Convention rights, and whether a contra mundum (against the world) injunction would represent a proportionate means of protecting those rights, would of course depend entirely upon the particular facts. But that possibility cannot be ruled out as a matter of principle.

A *Mark Anderson QC* and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services* for Wolverhampton.

The injunction granted to the local authority in this case is a precautionary injunction against persons unknown in order to prevent future encampments following frequent disruptive incursions on local authority land. There being no named defendants, the injunction defines defendants as persons who, in the future, would set up encampments. Defendants would come into being only if and when they committed the prohibited acts. It is therefore a precautionary injunction and provisional because it will only take effect against an individual who acts inconsistently with it, is identified and brought before the court. There being no return date or expression that it will only last until trial, it is not interim but neither is it a final order which can only be challenged on appeal. Since it is not a final order in the usual sense, it is not inconsistent with the fundamental principle 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 *Cameron v Hussain* [2019] 1 WLR 1471, para 17, *Iveson v Harris* (1802) 7 Ves 251, 256–257, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406 and *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191, 224A–B per Lord Oliver of Aylmerton. The injunction includes provision for an application to discharge the order. That is consistent with a proportionate approach permitting a person who becomes a defendant by breaching the injunction of which he or she has knowledge to apply for the injunction to be varied or discharged: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658. A full assessment of all the circumstances, as in *South Bucks District Council v Porter* [2003] 2 AC 558, is not required: see *Gammell*, para 27. None of the courts in *Iveson*, *Marengo* or *Spycatcher* defined the circumstances in which a court can grant a precautionary injunction or explored the limits of such orders.

There is no fundamental distinction between interim and final injunctions. An injunction is always against the world to the extent that it binds newcomers as defined in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, para 82(1). Thus, the distinction between "persons unknown" and "against the world" injunctions, when analysing their effectiveness against newcomers, is conceptually unimportant. A problem arises if it is possible to obtain injunctive relief against the whole world provided the claimant can name one defendant, but not possible to obtain any relief at all if there is no named defendant to a claim. That is close to the distinction which can lead to the anomalous position identified in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, para 11, per Sir Andrew Morritt V-C, and approved in *Cameron v Hussain* [2019] 1 WLR 1471, para 10. An injunction will not be granted against a defendant who cannot be served unless an alternative method of service is available. An alternative method is provided in the injunction granted to the local authority in the present case. All the injunctions in this appeal should have been reviewed by the court which granted them in accordance with the guidance in the test case of *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 106.

The injunction considered by the Court of Appeal in *Canada Goose* [2020] 1 WLR 2802 (a protester case) was a very different type of injunction in very

different circumstances from those of the present case, where there is a binary distinction between whether individuals are trespassing on land and whether they are not. Trespass is always unlawful. *Canada Goose* is distinguishable from the present circumstances. The injunction sought in *Canada Goose* was not precautionary. It was not intended to preserve the status quo, but to put a final end to an existing activity. It was an application for summary judgment, so had nothing provisional about it. The claimant was a private entity seeking to use remedies in private litigation to prevent what it perceived as public disorder to protect its own commercial interests. The Court of Appeal found that in a protester case the fundamental principle necessitates that a final injunction must only prohibit a person from activity in which that person has already participated. The circumstances are very different in the case of unauthorised encampments on local authority land. The guidance in *Bromley* [2020] PTSR 1043 should stand and be applied. There was no need for Nicklin J to revisit it in these cases.

Ranjit Bhose QC and *Steven Woolf* (instructed by *South London Legal Partnership*) for Hillingdon and Richmond upon Thames.

The difficulty of obtaining an injunction against traveller encampments with a floating population of travellers has long been recognised: see *Test Valley Investments Ltd v Tanner* (1963) 15 P & CR 279, 280, per Lord Parker CJ and *Bromsgrove District Council v Carthy* (1975) 30 P & CR 34, per Lord Widgery CJ. Some local authorities have had a long-standing problem with deliberate breaches of planning law. There has long been a strong perception that the planning system is being systematically abused and needed strengthening: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 45, per Lord Steyn. This is the context in which section 187B of the Town and Country Planning Act 1990 was enacted and the mischief at which it was directed.

Section 187B of the 1990 Act envisages that a final injunction may be granted against newcomers. Being expressed in wide terms, section 187B confers locus on a local planning authority to apply to the court for injunctive relief (including quia timet relief) where it is "necessary or expedient" within subsection (1), but it also confers power on the court itself to grant such relief by subsection (2). It differs, in this respect, from cases in which an authority brings proceedings under section 222 of the Local Government Act 1972, where the court's power to grant injunctive relief comes from section 37 of the Senior Courts Act 1981. This does not, however, warrant a different approach by the courts. The language of section 187B does not differ from the criteria in section 37 of the 1981 Act. The grant of the injunction must be just and convenient. If this test is not satisfied it is not appropriate to grant an injunction: see *South Bucks District Council*, para 98, per Lord Scott of Foscote. The focus of planning and planning control is what is done to the land. By whom it is done is secondary.

Section 187B enables the local authority to apply to the court for an injunction to prohibit an express breach or to prevent an apprehended breach. Alone in this area of law section 187B is prospective. It can be invoked as a stand alone provision where a breach is threatened, whether or not the local authority is proposing to exercise other powers. Section 187B itself confers power on the court to grant relief against a person whose identity is unknown, this being implicit in the terms of subsection (3), which

A contemplate that rules of court may make provision for an injunction to be issued against such a person. The power to grant relief comes from subsection (2) and this power cannot be widened or narrowed by rules of court that happen to be made (or not made) or the terms of those rules: see *Cameron v Hussain* [2019] 1 WLR 1471, para 12, per Lord Sumption, who stated that Practice Directions are no more than guidance on matters of
B practice, they have no statutory force and they cannot alter the general law. Section 187B is broad and open-textured. It contains nothing to exclude final relief against newcomers. [Reference was made to *In re Persons formerly known as Winch* [2021] EMLR 20.]

The dispute in these cases is not between individuals but between the public and a small part of the public not complying with the law. The law
C should protect the public. To counter this contemporary problem an injunction is only effective if it can be enforced against newcomers. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 did not establish a principle of universal application to civil litigation that a final injunction against "persons unknown" binds only those who are parties to the proceedings at the date the final order is granted. It is distinguishable on a number of bases. First, it was a protest case and applies to applications for
D injunctive relief in protester cases: see paras 11, 82, 89, and 93. Second, like *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, a private entity was seeking to protect its commercial interests against interference with its private law rights. The claimants, by contrast, are public authorities: their claims do not concern interference with their private law rights (save in
E relation to trespass), but with their public law rights. Third, nothing in *Canada Goose* calls into question or qualifies the Court of Appeal's judgment handed down the previous month in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, which was an appeal by a local authority against a refusal to grant final injunctions relating to residential encampment. In *Bromley* the only judgment was given by
F Coulson LJ, who was then part of the constitution which delivered the judgment of the court in *Canada Goose*. Fourth, para 44 of *Birmingham City Council v Sharif* [2021] 1 WLR 685 suggests that the Court of Appeal does not regard *Canada Goose* as necessarily applying to injunctions under section 222 of the Local Government Act 1972, since there the court referred to the possibility of further consideration in any future case about injunctions to restrain anti-social behaviour by persons unknown.

G The claimant local authorities are seeking to enforce public rights for the benefit of the public in their areas. Three public wrongs are of particular concern: (i) breaches of planning law; (ii) public nuisance, for example, fly-tipping; and (iii) trespass. Local authorities as owners of land for public use such as parks and the green belt, can enforce planning law in the public interest. Where local authorities are seeking to enforce public rights on
H behalf of all members of the public, as in the case of the Attorney General, the court should seek to assist them: see *Attorney General v Harris* [1961] 1 QB 74 and paras 42 and 44 of *Sharif*, a case of street cruising in the local authority's area which the Court of Appeal concluded could only effectively be restrained by an injunction. The prospect of obtaining effective relief in

the instant cases is vanishingly small if no final injunction can be granted against persons unknown.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for Barking and Dagenham, Havering, Redbridge, Basingstoke and Deane, Hampshire, Nuneaton and Bedworth, Warwickshire, Rochdale, Test Valley and Thurrock.

The general principle that applies to final orders is that once judgment has been given on a claim, the cause of action is extinguished and the sole right is on the judgment: see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 17, per Lord Sumption JSC. Nicklin J in the present case wrongly found that the court could disturb the final orders granted to the local authorities of its own initiative and/or pursuant to CPR r 3.1(7) and was wrong to find that, where a final order binds persons unknown (as these final orders do), a change in the law could justify the disturbing of an order where no application has been made by a non-party to vary or discharge the order. There having been, in the cases of these local authorities, no application by a non-party to vary or set aside the final orders, nor any application under the liberty to apply provisions, the court was wrong to re-open, case manage and ultimately discharge the final orders in so far as they relate to persons unknown.

In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 the court held that final injunctions bind only parties to the proceedings. But that case is distinguishable because it concerned private law rights and common law causes of action in nuisance and trespass, whereas the present cases concern public law rights and statutory rights, including section 187B of the Town and Country Planning Act 1990 and section 222 of the Local Government Act 1972. Nicklin J was wrong to say that *Canada Goose* was of universal application. *Canada Goose* concerned a claim against protesters, where no statutory power had been provided to grant an injunction against persons unknown, by contrast with the present cases in which section 187B of the 1990 Act provides a statutory power to grant an injunction against persons unknown at the interim and final stages. The 1990 Act, like its predecessors, provides that matters of planning control and judgment are exclusively for local planning authorities and the Secretary of State: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 30, per Lord Bingham of Cornhill and *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 141, per Lord Scarman. Private law is not to be applied to planning law unless it is necessary for interpretation: see *Newbury District Council v Secretary of State for the Environment* [1978] 1 WLR 1241, 1248–1249. The court has power under section 187B to grant a final injunction against persons unknown: see *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88, para 8 and *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 2. A final order is binding on persons unknown who were not defendants at the time the order was made but became defendants when they knowingly acted in breach of it: see *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460, paras 23–28.

Canada Goose applied *Cameron v Hussain* [2019] 1 WLR 1471, para 9, in which the Supreme Court confirmed the general rule that proceedings may

not be commenced against unnamed parties but referred to statutory exceptions to the principle, in particular, the specific power in section 187B of the 1990 Act to restrain actual or apprehended breaches of planning control, with the provision of rules of court for injunctions against persons unknown pursuant to section 187B(3). Thus, the principle in *Canada Goose* is subject to statutory exceptions, in particular section 187B of the 1990 Act.

Bromley London Borough Council v Persons Unknown [2020] PTSR 1043 concerned a final injunction to restrain unauthorised occupation of land owned or managed by the local authority and/or the disposal of waste or fly-tipping on the land, which was refused by the judge on proportionality grounds. Whereas *Bromley* was a case on public law rights, it is distinguishable from *Canada Goose* which was concerned with private law rights. There is no suggestion in the text of section 187B, or CPR PD 8A, paras 20.1–20.10, that orders against persons unknown are intended to be limited to the interim injunction stage in proceedings. The appropriate approach is to ask whether a case is sufficiently serious to justify granting a final injunction. Service on persons unknown under this type of order is alternative service: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658. It is important for orders made against persons unknown to include a liberty to apply clause, so that when a person becomes a defendant by knowingly breaching the injunction, that defendant can apply to vary or discharge the order. A non-party who is affected by an order may also apply to set it aside under CPR r 40.9.

A court has no power to case manage a final injunction without a specific provision for review in the liberty to apply clause. Nicklin J had no power in the present case to call in final orders, review them and discharge them. He was wrong to take the view that *Bromley* and *Canada Goose* obliged him to call in the final orders that he did: see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. That approach offends against the principle of finality and runs contrary to the case law on final orders. [Reference was made to *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant* [2021] 1 WLR 3834.]

Although CPR r 3.1(7) provides a wide power for a court making an order to vary or revoke the order, there are limitations on that power. First, rule 3.1(7) cannot constitute a power in a judge to hear an appeal from himself in respect of a final order. Second, whilst the powers at rule 3.1(7) may be invoked in respect of procedural or interlocutory orders where either (i) the order was made on the basis of erroneous information or (ii) a subsequent event destroys the basis on which the order was made, it does not follow that where either (i) or (ii) are established a party may return to a trial judge and ask him to re-open a final order disposing of the case, whether in whole or in part. Third, to extend the power at rule 3.1(7) would undermine the principle of finality: see *Roult v North West Strategic Health Authority* [2010] 1 WLR 487. This limitation on the power at rule 3.1(7) is well established, and recognised in subsequent Court of Appeal authority: see *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [75]. Neither of the first two limitations are present in the cases before the court. The retrospective effect of a judicial decision is excluded from cases already finally determined: see *Serious Organised Crime Agency v O'Docherty* [2013] CP Rep 35, para 20.

Richard Kimblin QC (instructed by *Eversheds Sutherland (International) LLP*) for High Speed Two (HS2) Ltd, intervening.

The approach of Nicklin J in the present case has produced an unworkable outcome which makes it impossible to obtain relief other than on a short-term basis on an interim application, and after trial relief is available only against named defendants which is of no use against a fluctuating body of unknown persons. HS2 has experienced significant disruption from protesters against the national high-speed rail link it is building, and has obtained interim injunctions against persons unknown at three different places. Each injunction is temporally and geographically limited. Following the judgment below the protection they give is short-lived and after trial, non-existent against persons unknown.

HS2 has two central concerns: (i) whether the temporal limits on interim injunctions are short (see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, paras 92–93); and (ii) whether a newcomer, that is, a person who was not a party to the litigation at the date on which the final order was granted, is bound by it. On *Canada Goose* the submissions of Mr Giffin and Mr Anderson are adopted.

First, assessing a claim for relief against persons unknown is a highly fact-specific exercise. Second, classification of injunctions by reference to the type of claimant or defendant is unhelpful because the range of rights to be balanced is not consistent from case to case. Third, it is properly open to a court to grant interim relief which will last for a long time. Fourth, an injunction against persons unknown, made by final order, may bind newcomers if one or more representative persons have been served with the claim form or the order is plainly contra mundum. Such an order is appropriate where the extent of its effects are necessarily limited and do not, in reality, affect everybody. *Canada Goose* was not intended to have the wide and restrictive effect which Nicklin J understood it to have; alternatively, paras 89–90 of *Canada Goose* should not be followed in that limited respect.

There is a wide range of factual circumstances in which claimants seek relief by injunction or order for possession: cf *Canada Goose*, *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191, *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. In all of these cases, the following differ greatly: (i) the number of people who might reasonably be thought to be affected; (ii) the type and gravity of the anticipated harm; (iii) the length of time during which there was an issue to be addressed; (iv) the legal right to be protected, or the illegality to be prevented; and (v) the legal rights of potential defendants. HS2's circumstances illustrate why the fact-specific nature of the jurisdiction is so central to the legal issues which have to be solved in any particular case. HS2 seeks to keep possession of its land in much the same way as local authorities do in respect of, for example, their amenity land. But the defendants would say that they are protesters, not trespassers, so the set of legal issues is quite different to those arising from local authority concerns which are prompted by traveller incursions. For that reason, it may be unhelpful to classify cases.

A The first and obvious solution to the problem of providing relief where the case calls for it but the defendants fluctuate, is to leave it to the judgment of the first instance judge to decide what interim relief is appropriate. As the circumstances and legal issues are so very variable, an overburden of principles and classifications is a hindrance to finding a just solution in a particular case. No claim should be allowed to go to sleep. Active B case management assists all parties and the court. But what constitutes appropriate case management will be highly variable and not susceptible to prescriptive guidance in cases which are looking to future events. Nicklin J overstated both the restriction on contra mundum orders and the effect of *Canada Goose* [2020] 1 WLR 2802, which is inconsistent with *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100. *Ineos* is to be preferred. In that case it was held that there is no conceptual or legal C prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort. It is accepted that any prohibitory order in respect of specified land should be conditional, which is the case in each of the three injunctions made in HS2's favour. The appropriate conditions will relate to the circumstances of the case and not to generalised prescription. What constitutes a just order is fact D specific. It is an assessment which is closely allied to any necessary consideration of proportionality, in that the court will take a view about the extent of land to be affected which will in turn affect who, in reality, is likely to be subject to the terms of the order. The quality of service is important. It is perfectly possible to effect alternative service which provides a fair opportunity to challenge an application for an order against persons unknown. In the light of *Burris v Azadani* [1995] 1 WLR 1372, 1380 the E Court of Appeal in *Canada Goose* held that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. The court was adjusting its approach by reference to the outcome which it needed to achieve, that is, protecting rights. That position was anticipated in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 39–40, and is appropriate.

F *Tristan Jones* (instructed by *Attorney General*) as advocate to the court.

These appeals concern the conflict between, on the one hand, the desirability of the court aiding the prevention of persistent and harmful wrongdoing, and on the other hand, the principled and practical limits to the court's ability to criminalise conduct ex ante and ex parte. Those important issues have already been the subject of very extensive judicial consideration, G including by the Court of Appeal on several occasions over recent years. Once the authorities are properly understood and the rules of precedent properly applied, the answers to most of the claimants' arguments are clear.

There are two issues on the appeal. Issue 1, on which Barking and Dagenham and others in the same group seek permission to appeal, is whether the court has power, either generally under CPR r 3.1(7) or specifically on the terms of the order below, to case manage the proceedings H and/or to vary or discharge injunctions that have previously been granted by final order. Issue 2, on which all the claimants appeal, is whether the court has jurisdiction, and/or whether it is correct in principle, generally or in any relevant category of claim, to grant a claimant local authority final injunctive relief either against "persons unknown" who are not, by the

date of the hearing of the application for a final injunction, parties to the proceedings, and/or on a contra mundum basis. A

In relation to the procedural limb of the claimants' argument on issue 1, the court's power to vary or revoke final orders is recognised in several CPR provisions, including the general provision in CPR r 3.1(7), and the liberty to apply provisions in the injunctions themselves. The answer to the claimants' procedural point is CPR r 3.3(1), which provides that, except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. The substantive question concerns the circumstances in which the court's power is properly to be exercised. The claimants rely on *Roult v North West Strategic Health Authority* [2010] 1 WLR 487, but that was inter partes litigation of limited interest in the present appeals. The better analogy would be with cases where a party failed to attend the final hearing and then applied to set aside judgment under CPR r 39.3(3), in which case the judgment may be set aside provided the requirements of rule 39.3(5) are met. A further analogy is with cases where a non-party makes an application under rule 40.9, on which the authorities establish that the court will take a flexible approach but in an appropriate case will reconsider the issues on the merits. The underlying principle is natural justice. How that applies to a particular case will depend on the circumstances. In general, a newcomer or prospective newcomer should be able to challenge an injunction on any grounds, including on the merits, without bringing the case within a category ordinarily applicable on the application of a party present at the original hearing. If the court makes an order ex parte with lasting effects against newcomers, then it has necessarily taken on a role with wider public consequences than ordinarily arise in private litigation. If the jurisdiction is exercised then it is right that the court should retain a flexible power to oversee and review its orders on an ongoing basis. There is, accordingly, no need to bring this case within one of the categories of cases recognised to apply in inter partes litigation: see *Roult*. In the present case Nicklin J found that the court had jurisdiction because the terms of the final injunctions expressly provided for the court's continuing jurisdiction, and in any event applied to newcomers who were not parties to the relevant proceedings when the order was granted. He was essentially right for the reasons he gave. B C D E F

The question of res judicata, raised by Wolverhampton, has some relevance to both issues 1 and 2. The claimant argues that an injunction against newcomers is necessarily an injunction contra mundum; that it follows that in such a case there is no res judicata; and that that is why such injunctions can be re-opened. Nicklin J adopted that argument at para 141 of his judgment in relation to issue 1, but the argument is wrong. The claimant is right to argue that an injunction against newcomers would in effect be (and could in principle only be) an injunction contra mundum. Essentially such an injunction would be in rem. But the claimant is wrong to suggest that orders in rem do not create a res judicata. Further, the claimant is wrong to assume that final decisions creating a res judicata cannot be set aside. The reason the court can set aside the injunctions in this case is not because they are a special kind of final relief which creates no res judicata, it is instead the result of the application of the normal procedural and substantive rules, namely CPR rr 39.3 (an application by a party), 40.9 (an application by a non-party) or 3.3(1) (the court's power to make an order of its own initiative). G H

A The parties agree that issue 2 contains two separate issues: (i) how Nicklin J understood the issue; and (ii) how he addressed it. That is the correct approach because there is a clear difference between making an unknown person a party to an injunction on a "persons unknown" basis, and, by contrast, obtaining an injunction against the entire world under the exceptional contra mundum jurisdiction. Nicklin J was right on the persons unknown issue in holding that
B the court could not grant final injunctions that prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land, for the reasons he gave. As regards the contra mundum injunctions issue, Nicklin J's conclusion will be correct in the very large majority of cases but it is possible that there could in future be a case in which the court might be compelled to grant a contra mundum injunction to safeguard local residents' article 8 rights.

C The difference between a persons unknown injunction and a contra mundum injunction starts from the principle that an injunction normally only operates in personam, which is to say in relation to persons over whom the court has jurisdiction because they have properly been made parties to the claim: see *Iveson v Harris* (1802) 7 Ves 251. Exceptions have been recognised where an injunction may operate contra mundum and bind
D non-parties, but only in exceptional and tightly defined circumstances, which may include (of particular significance) final injunctions where required by the Human Rights Act 1998. A separate question arises as to the circumstances in which a person whose identity is not known can be made a party to a claim. The answer, in broad terms, is that an unknown person can be made a party to a claim if they can be suitably described and given adequate notice to enable them to participate fairly in the action: see
E *Cameron v Hussain* [2019] 1 WLR 1471. It is helpful to distinguish between three categories of unknown persons: (a) existing identifiable unknown persons can be made parties to the claim and may thus be the subject of an injunction on normal principles; (b) existing unidentifiable unknown persons can be made subject to an interim injunction, the breach of which would make them an identifiable party to the claim within (a) above, but otherwise
F cannot be made a party to the claim; and (c) newcomers are subject to the same principles as existing unidentifiable unknown persons. In practical terms the claim form will list, as parties, "persons unknown", and a suitable description will need to be given for them to be adequately identified. In contrast, in a claim contra mundum it has been suggested that as there are no parties the claim form should simply leave the "defendant" box blank: see
G Nicklin J in *Persons formerly known as Winch* [2021] EMLR 20, para 31. One potential source of confusion is that the expression "persons unknown" is somewhat ambiguous: it is sometimes used to refer compendiously to persons unknown injunctions and contra mundum injunctions. The drafting of an injunction may also be unclear: it might be expressed as being against "persons unknown" even though it is in reality contra mundum.

H The four main categories of the claimants' argument with the answers to them are in summary as follows. (1) Some claimants argue that the persons unknown case law permits the making of final injunctions against newcomers. That is contrary to authority. A final persons unknown injunction cannot be made against newcomers. A court could only make a final injunction against newcomers if permitted under the contra mundum

jurisdiction, but that would be subject to the limits of that case law: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, paras 89, 91 and 92. What is not permissible is to bypass that case law by relying on a new form of "final persons unknown injunction against newcomers" jurisdiction. (2) Some claimants argue that final injunctions against newcomers are specifically permitted under section 187B of the Town and Country Planning Act 1990. If that were possible at all, it would require there to be relevant rules of court, which there are not. (3) Some claimants base arguments on section 222 of the Local Government Act 1972, which gives the claimants standing to seek certain kinds of injunction but does not create any new kind of injunction. (4) Some claimants argue that a contra mundum injunction may be made to protect the article 8 rights of local residents. Nicklin J rejected that argument, holding that such an injunction could never be justified. This question requires a cautious approach. Nicklin J identified a range of compelling factors which tend to show that such injunctions would always be highly problematic, but those factors do not arise in the case law regarding confidentiality injunctions which is the foundation of the claimants' human rights arguments. Contrary to what the claimants say, one cannot simply transpose the approach adopted in the confidentiality context to this context. On the other hand, the Strasbourg authorities do establish that, as in the confidentiality context, there could in principle be a positive duty on a court to take action within its jurisdiction to protect a local resident's article 8 rights against unlawful action by third parties. Therefore the possibility that a contra mundum injunction might be required in a particular case cannot be ruled out if there were an exceptional and compelling need to prevent a significant interference with the article 8 rights of local residents.

The principal authorities on contra mundum injunctions are distilled with an overview of all the authorities in a High Court case, *OPQ v BJM* [2011] EMLR 23. The so-called *Spycatcher* principle provides that anyone who reveals confidential information the subject of an interim injunction to restrain publication by the defendants, with knowledge of that injunction, is liable for criminal contempt of court: see *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191. Once a permanent injunction has been obtained the *Spycatcher* doctrine no longer applies because the court's purpose, in holding the ring until trial, has been overtaken by events. That remains the position. *Spycatcher* also recognised limited exceptions such as the wardship jurisdiction, which have been expanded in the new era of the Human Rights Act 1998: see *Venables v News Group Newspapers Ltd* [2001] Fam 430, para 100, per Dame Elizabeth Butler-Sloss P. The Convention for the Protection of Human Rights and Fundamental Freedoms places a duty on the court to protect individuals from the criminal acts of others where exceptionally it is necessary and proportionate to protect them by granting an injunction against the world. That jurisdiction having been established, a court could expand it where it was necessary and proportionate on the facts to do so, on grounds not limited to human rights. In the cases before the court no injunctions were sought on human rights grounds.

The case law on persons unknown was reviewed in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633

A by Sir Andrew Morritt V-C, who concluded at paras 20–22 that, under the CPR provisions, an unknown person may be a party provided that the description used was sufficiently certain to identify "both those who are included and those who are not", a test which was satisfied in that case. It should be noted that the interim injunctions in the *Bloomsbury* case were against existing persons unknown, not newcomers. In *South Cambridgeshire*
B *District Council v Gammell* [2006] 1 WLR 658 interim injunctions were granted restraining the stationing of caravans on identified land. The appellants were newcomers who became defendants when they stationed their caravans on the land: see para 32 per Sir Anthony Clarke MR.

Later authorities have explained that the ratio in *Gammell* is confined to interim injunctions and therefore does not establish a novel principle. In
C *Cameron v Hussain* [2019] 1 WLR 1471 the Supreme Court considered the basis and extent of the persons unknown jurisdiction in a damages case. The question was widely framed by Lord Sumption and considered two classes of persons unknown: those who could be identified but not named, such as squatters identifiable by their location, and those who could not be named or identified, for example, hit and run drivers. The first category, which included people who can be given notice of the proceedings because they become
D identifiable if and when they commit conduct in breach of an interim order, can be parties to proceedings. The second category of anonymous defendant, who is not identifiable and cannot be served, cannot be a party, subject to any statutory provision to the contrary: see para 21. The ratio of *Cameron* was not confined to actions for damages because of the broad question posed, but extends to injunctions and other forms of relief. Although *Cameron* does not
E expressly consider newcomers, they are a fortiori in the second category of unidentifiable defendants. Any person affected by an order can apply under the CPR to become a party and participate in the final trial because they have been identified. That is consistent with *Cameron*.

The issues raised have been considered since *Cameron* in several recent Court of Appeal authorities. *Ineos Upstream Ltd v Persons Unknown*
F [2019] 4 WLR 100, an interim injunction case, held that newcomers can be sued as persons unknown, and parts of the judgment can be read (wrongly) as extending that proposition to final injunctions: see para 34. In *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, as it was not in issue that the court could make an order against persons unknown in a final injunction case, the court's consideration of that issue was obiter. The
G correct position is that such final injunctions cannot be made save for potentially under an exceptional contra mundum jurisdiction. That issue was not considered in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, paras 57, 65–72 the discussion of *Ineos* is confined to interim injunctions only. Final injunctions against newcomers are only permitted if
H they can be brought within established exceptions for against the world injunctions: see paras 89, 91, 92. That is a principle of general application, derived from *Cameron* [2019] 1 WLR 1471. Both *Cameron* and *Canada Goose* apply to the present cases. The claimants' submissions that *Canada Goose* is per incuriam are not correct. However, setting out different

scenarios, the first being if *Cameron* does not apply to injunction cases, if the court concludes that either *Gammell* [2006] 1 WLR 658 or *Ineos* decide as part of their binding reasoning that it is permissible generally to grant a final injunction against newcomers, then *Canada Goose* would be inconsistent with that principle. The court would not be bound by *Canada Goose* if its ratio only applies to protesters. If *Canada Goose* cannot be distinguished and its ratio includes the reasoning that no final injunction can be made against newcomers there would be a conflict of authority. The answer may be to apply the principle that, where the ratio of an earlier decision of the Court of Appeal is directly applicable to the circumstances of a case before the Court of Appeal but that decision has been wrongly distinguished in a later Court of Appeal decision, it is open to the Court of Appeal to apply the ratio of the earlier decision and to decline to follow the later decision: see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306, paras 65, 67, 97, and cf *Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd* [2021] EWCA Civ 1173.

A second scenario is if the principle that no final injunction can be made against newcomers is not part of the binding reasoning in *Gammell* or *Ineos*, and *Canada Goose* is distinguishable, then there is no binding authority either way. If it is not possible to distinguish *Canada Goose*, but the court considers that it is based on a misunderstanding of *Cameron*, the court can apply the principle in *Rickards v Rickards* [1990] Fam 194, 204, 206, 210. Where the Court of Appeal is satisfied that an earlier Court of Appeal decision was erroneous, there is no likelihood of the matter being reviewed by the Supreme Court and the issue concerns the jurisdiction of the Court of Appeal, the court is justified in treating the earlier decision as within an exceptional category of case in which it is entitled to regard the decision as given per incuriam and to decline to follow it. Even if the court were to follow *Canada Goose* and uphold the judgment as a general proposition, the court could still find that Nicklin J below went too far in ruling out ever obtaining an injunction against persons unknown in cases of trespass on and occupation of local authority land. Such an injunction could be granted to protect the article 8 rights of local residents. Although none of the claimants have put forward arguments on article 8 grounds, it should be put before the court. If such an injunction were considered by the court, there would then be a balancing exercise between the article 8 rights of the travellers and those of the local residents.

HS2's core argument is that each case raises its own range of issues and that the court should not be overburdened with principles and classifications, such as contra mundum, persons unknown, and interim as against final injunctions. That is a recipe for uncertainty, and in any event that approach is not open to this court on the authorities. The court should instead be flexible to give effective remedies in meritorious cases. The submissions of the advocate to the court are consistent with those on behalf of the London Gypsies and Travellers. The one point of difference is that those interveners do not contemplate the possibility of making a contra mundum order in certain exceptional cases raising local residents' article 8 issues. However, they may have focused somewhat more on the lack of evidence for creating such an exceptional jurisdiction in these particular

A cases, as opposed to the wider question of principle of whether it could ever be appropriate. If the court agrees with the interveners regarding the evidence in these cases then the appropriate result may be to dismiss the appeals even if the court agrees that it is possible that, in another case, a contra mundum injunction might be necessary.

On the question of the procedure adopted by Nicklin J in bringing these
B cases before the court for review, in consultation with the President of the Queen's Bench Division, that course was taken because of a change in the law and widespread problems which had arisen. Fairness requires a review of cases against newcomers. Some injunctions contain ongoing review provisions but others do not. Nicklin J exercised a power the court had to review these cases though there does not appear to be any previous example of such a course having been adopted.

C

Marc Willers QC, Tessa Buchanan and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for London Gypsies and Travellers; Friends, Families and Travellers; and Derbyshire Gypsy Liaison Group, intervening.

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
D proceedings as will enable him to be heard: see *Cameron v Hussain* [2019] 1 WLR 1471, para 17, per Lord Sumption. Two categories of unknown defendant were identified by Lord Sumption: anonymous defendants who are identifiable but whose names are unknown and anonymous defendants who cannot be identified. An interim injunction may be made whereby a person only becomes party to proceedings when they commit the act
E prohibited under the order: see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. Applying the principles in *Cameron*, the Court of Appeal has ruled that 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 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: see *Canada*
F *Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, para 89. The progenitor of that jurisdiction is a possession case brought by a university against students occupying parts of the university and threatening to move on to other parts, in which a wide injunction was granted extending to the whole of the university premises against named defendants "or any person who might be in adverse possession": see *University of Essex v*
G *Djemal* [1980] 1 WLR 1301, 1305. The principle in that case is where there is a right, there should be a remedy to fit the right (see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 25); but an order must be made against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order (see *Meier* at
H para 40). *Canada Goose* is the key case. In the orders before the court a number of individuals have been named and efforts have been made to identify others so the final injunctions granted will not offend against the principle in *Canada Goose*.

The increasing popularity of wide injunctions granted to local authorities against persons unknown prohibiting unauthorised occupation or use of

land is identified in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 10. There is a shortage of sites available for travellers, which means that those travelling for an economic purpose such as seeking work will be caught by borough-wide injunctions since there has been no improvement in the availability of sites in recent years. Given that there may well be nowhere to park a caravan when travellers are moving for work, it is right to restrict the width of the ambit of injunctions granted. The centrality of the nomadic lifestyle to the gypsy and traveller identity has been recognised by the European Court of Human Rights: see *Chapman v United Kingdom* (2001) 33 EHRR 18, para 73. [Reference was made to a government policy document, *Planning Policy for Traveller Sites*, updated 31 August 2015.]

In para 124 of his judgment in the present case Nicklin J found that the traveller injunctions granted to the claimant local authorities were subject to the principle that a final injunction operated only between the parties to the proceedings and did not fall into the exceptional category of civil injunction that could be granted contra mundum. On this issue the grounds of appeal fall into three broad categories: (i) traveller injunctions do or should fall into the exceptional category of contra mundum cases; (ii) the court has the power to grant a final injunction against newcomers under the *Gammell* principle and there is no principled reason why it should not be exercised in traveller injunction cases; and/or (iii) there are specific statutory powers to grant final injunctions against newcomers in traveller injunction cases.

In general, first, injunctions against persons unknown can still be made in respect of a defendant who is identifiable but whose name is unknown. There is an obvious tension between the argument frequently advanced by the local authorities that, on the one hand, a wide injunction is needed because otherwise the occupants of one encampment will simply move onto the next site, and, on the other hand, the claimed inability to identity any defendants. If a local authority knows that there is a "rolling cast" moving from site to site, then it must know enough to identify at least some of the alleged wrongdoers. A local authority therefore could obtain an injunction against named defendants (for example there were 105 named defendants in Havering's case), and limit the application to those individuals. Second, it is not Nicklin J's judgment which is radical, but the cases advanced by the local authorities. It is not radical to say that a claimant cannot sue a defendant who does not exist. What would be truly radical would be to hold that the court has the power, absent the exceptional category of contra mundum cases, to grant wide-ranging relief against persons who have never been before the court or had notice of the claim. Third, one-sided justice results if a claimant is allowed to bring proceedings in an adversarial system without having to name, and therefore give notice to, any defendant.

On the contra mundum issue, Nicklin J correctly excluded borough-wide injunctions from traveller injunctions. The court's power to grant an injunction under section 37 of the Senior Courts Act 1981 "in all cases in which it appears to the court to be just and convenient to do so" is subject to the fundamental principle 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 *Iveson v Harris* (1802) 7 Ves 251, 256–257 and *Cameron v Hussain* [2019] 1 WLR 1471, para 17. The only exception

A to the principle that the court cannot grant an injunction which binds a non-party is where it is necessary for the court to grant a contra mundum injunction in order to avoid a breach of section 6 of the Human Rights Act 1998. The local authorities cannot bring themselves within the existing exception.

The truly exceptional nature of the circumstances warranting such
B injunctions can be seen from an examination of the facts of those cases: see *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X (formerly Bell) v O'Brien* [2003] EMLR 37 and *OPQ v BJM* [2011] EMLR 23. There are no cases cited by the local authorities where a contra mundum final order has been granted which has not concerned exceptional circumstances including a risk to life (*Venables*), a risk to physical health (*X v O'Brien*) or
C serious risk to mental health (*X v O'Brien* and *OPQ v BJM*). Two principles can be derived from those authorities. First, a contra mundum injunction can only be made to prevent a breach of an individual's human rights. That is fundamentally inconsistent with an application made at a general, or borough-wide, level, such as those made by the local authorities. Second, a contra mundum injunction can only be granted where to do otherwise would defeat the purpose of the injunction, such as in publicity cases like
D *Venables*. The same cannot be said to apply to the case of unauthorised encampments, which will vary immeasurably in terms of their size, nature, and effect.

The court cannot create another exception to the principle that a final injunction binds only the parties to a claim. The importance of the fundamental principle identified by Lord Sumption is such that any other
E exception must be created by legislation. In any event, it would be wrong in principle to create another exception. The flexibility of section 37 of the 1981 Act is not without limit and the case law continually refers to the need for a party to be before the court as a restriction on the grant of injunctive relief. Where an extension of an existing jurisdiction is sought, the onus is on those who seek to increase jurisdiction to justify the extension. There are
F further specific reasons for concern in relation to borough-wide traveller injunctions identified by Nicklin J at para 234 on the basis that it is impossible to carry out the required parallel analysis of, and intense focus upon, the engaged rights. Further, in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 101 the Court of Appeal expressed concern that closing down unlawful encampments on land and moving on
G gypsies and travellers must be regarded as a last resort. Prospectively making a contra mundum injunction prohibiting all encampments is arguably worse. Nicklin J was therefore correct to refuse to extend contra mundum cases to traveller injunctions.

Contrary to the submissions for the local authorities, *Canada Goose* [2020] 1 WLR 417, para 89 precludes all final injunctions against newcomers. Lord Sumption referred in *Cameron v Hussain* [2019] 1 WLR
H 1471, para 15 to the cases of *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 and *Gammell* [2006] 1 WLR 658 as examples of interim injunctions concerning anonymous but identifiable defendants. There is scope for making persons unknown subject to a final injunction provided the persons unknown are confined to those

anonymous defendants who are identifiable 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: see *Canada Goose*, para 91. It is wrong to differentiate between the injunction against protesters in *Canada Goose* and those injunctions against travellers granted to local authorities in these cases. The causes of action, for example, in nuisance and trespass, are similar. All that is required for an injunction against persons unknown is their identification.

It is wrong to seek to extend the *Gammell* principle to final injunctions on the basis that relief is sought on a quia timet or precautionary basis. The limitations on suing persons unknown are not based on whether the harm sought to be prevented has occurred or not, they are based on the need properly to identify defendants even where they cannot be named. The procedural protections in a final order proposed by the local authorities do not overcome the jurisdictional issues that arise in cases where unidentifiable defendants are subject to final orders. The purpose of the *Gammell* principle is to enable a claimant to identify defendants and bring them before the court so that the claim may be determined.

The adequacy of procedural protection cannot, and should not, be assessed in a vacuum. A realistic assessment of the position of those affected by the order must be made, and the resources available to gypsies and travellers and their pattern of life are relevant factors for the court to consider: see *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, paras 104–105. These injunctions are aimed at temporary encampments formed by nomadic people, many of whom will be of limited means with poor literacy. The injunction will inevitably do what it was designed to do: it will have a chilling effect and scare away those likely to be affected by it without enabling them to have a reasonable opportunity to challenge the order. There is no inconsistency between *Canada Goose* [2020] 1 WLR 417 and earlier Court of Appeal decisions in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 and *Gammell*. *Canada Goose*, in which the court concluded that in protester cases there is no justification for injunctions against the world, is binding on the present court. The court in *Canada Goose* did not misunderstand the fundamental principle in *Cameron* that persons unknown should be identified to enable them to participate in proceedings for a final injunction on the basis of fairness.

Section 187B of the Town and Country Planning Act 1990, one of the specific exceptions to the general rule that proceedings may not be brought against unnamed persons, does not, in and of itself, allow for injunctions to be made against persons unknown, but allows for rules of court to be made to that effect. The scope of the jurisdiction is in CPR PD 8A, paras 20.1–20.10, from which it is apparent that there must still be an identifiable (if anonymous) defendant to whom the normal rules requiring service still apply. Since neither section 222 of the Local Government Act 1972 nor sections 77 to 79 of the Criminal Justice and Public Order Act 1994 provide any power on which to grant injunctive relief, their combination cannot achieve a different result. There are no other statutory powers which provide a basis for the local authorities to obtain the injunctive relief sought.

A Permission to appeal on the first proposed ground of appeal should be refused on the grounds set out by Nicklin J: see paras 146–147.

Giffin QC replied.

Anderson QC replied.

Bhose QC replied.

B *Bolton* replied.

Wayne Beglan (instructed by *Basildon Borough Council Legal Services*) for Basildon Borough Council, intervening by written submissions only.

The court took time for consideration.

C 13 January 2022. The following judgments were handed down.

SIR GEOFFREY VOS MR

Introduction

1 This case arises in the context of a number of cases in which local D authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gypsies, Irish Travellers and New Travellers.

E **2** The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land. The judge, Nicklin J, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 F ("*Canada Goose*") and the Supreme Court's decision in *Cameron v Hussain* [2019] 1 WLR 1471 ("*Cameron*"). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3 The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong[1*], and that, even if that is what the Court G of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v Gammell* H [2006] 1 WLR 658 ("*Gammell*"), *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ("*Ineos*"), and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043 ("*Bromley*").

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the judgment of Sir Geoffrey Vos MR, on p 350.

4 The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5 In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 ("section 187B") to restrain an actual or apprehended breach of planning control validates the orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6 I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

7 I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 ("section 37") and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

8 This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

The essential factual and procedural background

9 There were five groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council ("Walsall"), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council ("Wolverhampton"), represented by Mr Mark Anderson QC. The third group was led by Hillingdon London Borough Council ("Hillingdon"), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by Barking and Dagenham London Borough Council ("Barking") and Havering London Borough Council ("Havering"), represented by Ms Caroline Bolton.

A The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

10 The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the
B court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

11 It is important to note at the outset that these claims were all started under the procedure laid down by CPR Pt 8, 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)(a)). Whilst CPR r 8.2A(1)
C contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such practice direction has been made (see *Cameron* at para 9). Moreover, CPR r 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step
D before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR r 8.1(5)). Nonetheless, CPR r 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12 These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *Enfield London Borough Council v Persons Unknown* [2020] EWHC 2717 (QB) ("*Enfield*"),
E and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the "PQBD") about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the court for reconsideration". He reported that the PQBD's
F current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against persons unknown [had] transformed since the interim and final orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 ("*Cuadrilla*"), and *Canada Goose*.

G **13** Nicklin J concluded at para 32 in *Enfield* that, in the light of the decision in *Speedier Logistics Co Ltd v Aardvark Digital Ltd* [2012] EWHC 2776 (Comm) ("*Speedier*"), there was "a duty on a party, such as the claimant in this case who (i) has obtained an injunction against persons unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real
H prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14 At paras 42–44, Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the court granted would be more effective and more

extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15 On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order ("the 16 October order") recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing traveller injunctions who [wished] to maintain such injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current traveller injunction granted in their favour".

16 Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that had been made in favour of Wolverhampton by three other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 ("*Bloomsbury*") and *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 ("*South Cambridgeshire*"), that it was appropriate for the application to be made against persons unknown.

17 The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

18 Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

(i) Claims against persons unknown should be subject to stated safeguards.

(ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and imminent risk of a tort being committed by the respondents.

(iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

(iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to amend the claim form to add named defendants.

(v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within category 1 persons unknown[2], to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR r 38.2(2)(a), (b) otherwise, as against the category 1 persons unknown defendants, to apply for (i) default judgment[3]; or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance, that the claim be struck out and the interim injunction against persons unknown discharged.

(vi) Final orders must not be drafted in terms that would capture newcomers.

19 I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton.

The main authorities preceding the judge's decision

20 It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only $4\frac{1}{2}$ years ago.

Bloomsbury: judgment 23 May 2003

21 The persons unknown in *Bloomsbury* [2003] 1 WLR 1633 had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt V-C continued orders against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case (para 4) described the defendants' conduct and was held to be sufficient to identify them (paras 16–21). Sir Andrew was assisted by an advocate to the court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "The overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance": para 19. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2004] Env LR 9 ("Hampshire Waste"): judgment 8 July 2003

22 *Hampshire Waste* was a protester case, in which Sir Andrew Morritt V-C granted a without notice injunction against unidentified "Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites . . . in connection with the 'Global Day of Action Against Incinerators' ". Sir Andrew accepted at paras 6–10 that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23 In *South Cambridgeshire* [2004] 4 PLR 88 the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

24 At paras 8–11, Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

Gammell: judgment 31 October 2005

25 In *Gammell* [2006] 1 WLR 658, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire District Council v Gammell*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v Maughan*) ("*Maughan*") was an order made until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26 Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v Porter* [2003] 2 AC 558 ("*Porter*") applied to cases where injunctions were granted against newcomers (para 6). He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act 1998 ("the 1998 Act") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

27 Sir Anthony noted at para 10 that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham of Cornhill at para 20) approved paras 38–42 of Simon Brown LJ's judgment, which suggested that injunctive

A relief was always discretionary and ought to be proportionate. That meant that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gypsy's private life and home and the retention of his ethnic identity—are at stake." He cited what
B Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v Tonbridge and Malling Borough Council* [2004] EWCA Civ 194 ("*Davis*") at para 34 to the additional effect that it was "questionable whether article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at para 37 in *Davis* had explained
C that *Porter* recognised two stages: first, to look at the planning merits of the matter, according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell* [2006] 1 WLR 658 at para 12, was whether those principles applied to the cases in
D question.

28 At paras 28–29, Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at paras 30–31 that the court would have regard to statements in *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460
E ("*Brown*") (Lord Phillips of Worth Matravers MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at para 32 in *Gammell*, namely:

F

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a
G 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."

29 In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at para 33 including the following: (i) *Porter* applied when the court was considering granting an injunction
H against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, ex hypothesi, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be

concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30 These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31 There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 ("Meier"): judgment 1 December 2009

32 In *Meier*, the Forestry Commission sought an injunction against travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger of Earlsferry JSC made some general comments at paras 1–2 which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt V-C had overcome the procedural problems in *Bloomsbury* [2003] 1 WLR 1633 and *Hampshire Waste* [2004] Env LR 9. Referring to *South Cambridgeshire* [2004] 4 PLR 88, he cited with approval Brooke LJ's statement that "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule"[4].

Cameron: Judgment 20 February 2019

33 In *Cameron* [2019] 1 WLR 1471, an injured motorist applied to amend her claim to join "The person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

34 Lord Sumption said at para 1 that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at para 11 that, since *Bloomsbury*, the jurisdiction had been

A regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of
B the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

35 After commenting at para 12 that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that
C actions against unnamed parties were permissible only against trespassers (see CPR r 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at para 13 between two kinds of case in which the defendant cannot be named: (i) anonymous defendants who are identifiable but whose names are unknown (e g squatters), and (ii) defendants, such as most hit and run drivers, who are not only
D anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

36 At para 14, Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be
E tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 at para 8. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme
F Court): *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] QB 502, 523 per Bingham LJ. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR r 6.15, which was why proceedings against anonymous trespassers under CPR r 55.3(4) had to be effected in accordance with CPR r 55.6 by placing them in a prominent place on the land. In *Bloomsbury*
G [2003] 1 WLR 1633, for example, 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. Lord Sumption then referred to *Gammell* [2006] 1 WLR 658 as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified
H acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "in the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37 Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38 Lord Sumption proceeded to explain at para 16 that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at para 17 was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard[5].

39 Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see para 32 in *Gammell*).

40 At para 19, Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR rr 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at para 21 that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At para 25, Lord Sumption commented that the power in CPR r 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or

A were likely to be brought. He concluded at para 26 that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

B **41** *Ineos* [2019] 4 WLR 100 was argued just two weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right C to grant the injunctions against persons unknown (including, of course, newcomers).

42 Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the D appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at para 13 in E *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43 Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she F submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at paras 29–30, holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to para 11 in *Cameron*). Lord Sumption had, according to G Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "he appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a 'hit and run' driver" was not infringed (see my analysis above). H Lord Sumption's para 15 in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44 Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45 In *Bromley* [2020] PTSR 1043, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At para 29, however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at para 34 in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46 At paras 31–34, Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gypsy and traveller community". Relying on article 6 of the Convention, *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Jacobson v Frachon* (1927) 138 LT 386, Coulson LJ said that "The principle that the court should hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47 Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter* [2003] 2 AC 558, before referring at para 44 to *Chapman v United Kingdom* (2001) 33 EHRR 18 ("*Chapman*") at para 73, where the European Court of Human Rights ("ECtHR") had said that the occupation of a caravan by a member of the gypsy and traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also because it affected her ability to maintain her identity as a gypsy. Other cases decided by the ECtHR were also mentioned.

48 After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at para 100 by saying that he thought there was an inescapable tension between the "article 8 rights of the gypsy and traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49 At paras 102–108, Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were thought to be the only way forward, then engagement was still of the utmost importance: "Welfare assessments should be carried out, particularly in

relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide sufficient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the *Wolverhampton* case (now before this court), and (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise."

50 It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

Cuadrilla: judgment 23 January 2020

51 In *Cuadrilla* [2020] 4 WLR 29 the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking. The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed (para 48). After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at para 50 that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52 The first paragraph of the judgment of the court in *Canada Goose* [2020] 1 WLR 2802 (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and 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 under CPR r 6.16(1). The first defendants were named as persons unknown who were protesters against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53 The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at paras 37–55. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54 The court in *Canada Goose* set out at para 60 Lord Sumption's two categories from para 13 of *Cameron*, before saying at para 61 that that distinction was critical to the possibility of service: "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": para 14. This citation may have sown the seeds of what was said at paras 89–92, to which I will come in a moment.

55 At paras 62–88 in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron*, *Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372. At para 82, the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at paras 83–88 applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56 It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at para 82 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'.

A "(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
B 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.

C "(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
D 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
E 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."

57 The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of
F the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the
G proceedings and for the further reasons . . . set out below".

58 It is the further reasons "set out below" at paras 89–92 that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

"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
H 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 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."

The reasons given by the judge

59 The judge began his judgment at paras 2–5 by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley* [2020] PTSR 1043. At para 6, the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* [2020] 1 WLR 2802 held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether an assumed general principle derived from *Attorney General v Times Newspapers Ltd* ("*Spycatcher*") [1992] 1 AC 191 or *Cameron* [2019] 1 WLR 1471 applied to final injunctions against persons unknown (which if

A it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

60 At paras 10–25, the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

B **61** At paras 26–113, the judge dealt in detail with what he called the cohort claims under 9 headings: assembling the cohort claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR r 8.2A, the (mainly statutory) basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the C grant of an interim injunction, particular cohort claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

62 On the first issue before him (what I have described at para 4 above as the secondary question before us), the judge stated his conclusion at para 120 to the effect that the court retained jurisdiction to consider the terms of the D final injunctions. At para 136, he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR r 40.9, which provided that "A person who is not a party but who is directly affected E by a judgment or order may apply to have the judgment or order set aside or varied".

63 On the second and main issue (the primary issue before us), the judge stated his conclusion at para 124 that the injunctions granted in the cohort claims were subject to the *Spycatcher* principle (derived from p 224 of the speech of Lord Oliver of Aylmerton) and applied in *Canada Goose* that a F final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at paras 161–189.

64 On the third issue before him (but part of the main issue before us), the judge concluded at para 125 that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final G order was granted, then that order bound nobody.

65 The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*")). The correct starting point was to recognise the fundamental difference between interim and final H injunctions. It was well established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell* [2006]

1 WLR 658, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At para 173, the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66 At para 174, the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "It is fundamental to our process of civil litigation that the court cannot grant a final order against someone who is not party to the claim." Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on para 92 in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67 At paras 175–176, the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At para 180 the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68 The judge then rejected at para 186 the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69 The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants

A before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i e those who were anonymous and could not be identified.

70 Between paras 190–241, Nicklin J considered whether final
B injunctions could ever be granted against the world in these types of case. He decided they could not, and discharged those that had been granted against persons unknown. At paras 244–246, the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see para 17 above).

The main issue: Was the judge right to hold that the court cannot grant final
C *injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land?*

Introduction to the main issue

71 The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to
D grant an injunction that bound non-parties to proceedings. He referred to *Venables* [2001] Fam 430 as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts
E should seek to close the categories of case in which a final injunction against all the world might be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72 Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction . . .
F in all cases in which it appears to the court to be just and convenient to do so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73 The judge in this case seems to me to have built upon paras 89–92 of *Canada Goose* to elevate some of what was said into general principles that
G go beyond what it was necessary to decide either in *Canada Goose* or this case.

74 First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75 Secondly, the judge said at para 174 that it was "fundamental to our
H process of civil litigation that the court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to

refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as 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, but that was said without disapproving the mechanism explained by Sir Anthony Clarke MR in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76 Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77 Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78 With that introduction, I turn to consider whether the statements made in paras 89–92 of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at para 88 as being further reasons for it.

Para 89 of Canada Goose

79 The first sentence of para 89 said that "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". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80 *Canada Goose* then referred at para 89 to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be appropriate in such cases.

A 81 *Canada Goose* then said at para 89, as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at para 17. That passage was, in my judgment, a misunderstanding of para 17 of *Cameron*. As explained above, para 17 of *Cameron* did not affect the validity of the orders against newcomers made in
B *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them (see para 32 in *Gammell*). Moreover at para 63 in *Canada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people who will or are highly likely in the future to commit an unlawful civil wrong
C (i e newcomers), and (ii) Lord Sumption had referred at para 15 with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a final order and one made on an interim basis.

D 82 There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason why the court cannot devise procedures, when making longer
E term persons unknown injunctions, to deal with the situation in which persons violate the injunction and make themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were
F held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

Para 90 of Canada Goose

83 In my judgment both the judge at para 90 and the Court of Appeal in
G *Canada Goose* at para 90 were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 ("*Vastint*") was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal raves). At paras 19–25, Marcus Smith J explained his reasoning relying on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945
H (Ch)). At para 24, he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "Until an act infringing the order is committed, no one is party to the proceedings. It is the act of infringing the order that makes the infringer a party." Any person affected by

the order could apply to set it aside under CPR r 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

Para 91 of Canada Goose

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*.

86 In the third sentence of para 91, the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87 The court in *Canada Goose* then approved Nicklin J at para 159 in his judgment in *Canada Goose*, where he said this:

> "158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the 'final order' permitting any newcomers to apply to vary or discharge the 'final order'.
>
> "159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55–60 above. Unknown individuals, without notice of the proceedings, would have judgment and a 'final injunction' granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the 'final order' at future protests, the court could be faced with an unknown number of applications by individuals seeking to 'vary' this 'final order' and possible multiple trials. This is the antithesis of finality to litigation."

88 This passage too ignores the essential decision in *Gammell*.

89 As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons

A unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. 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. A person who is not a party but who is directly affected by an order may apply under CPR r 40.9. In addition, in the case of a third party costs order, CPR r 46.2 requires the non-party to be made party to the B proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose*, the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR r 70.4 says that an order C made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR r 83.8A. Where a judgment is to be enforced by charging order CPR r 73.10 allows "any person" to object D and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90 The decision of Warby J in *Birmingham City Council v Afsar* [2020] 4 WLR 168 at para 132 provides no further substantive reasoning beyond E para 159 of Nicklin J.

Para 92 of Canada Goose

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 F 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 G 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 H normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92 It was illogical for the court at para 92 in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are

identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93 In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at paras 31 and 44 above. It would have been wrong to do so.

94 The judge, as it seems to me, went too far when he said at para 174 that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at para 92 as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95 I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e g *Canary Wharf Investments Ltd v Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC plc v Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96 As I have explained, in my judgment, the judge ought not to have applied paras 89–92 of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos*. *Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97 We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and paras 89–92 of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

A **98** In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 ("*Young*"), three exceptions to the rule that the Court of Appeal is bound by its previous decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of
B Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99 In my judgment, it is clear that *Gammell* [2006] 1 WLR 658 decided, and *Ineos* [2019] 4 WLR 100 accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron* [2019] 1 WLR 1471, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make
C an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, paras 89–92 of *Canada Goose* [2020] 1 WLR 2802 were inconsistent with *Ineos* and *Gammell*. Moreover, those
D paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at para 89 above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at paras 89–92 of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

E **100** This analysis is applicable even if paras 89–92 of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that paras 89–92 of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306 at paras 65–67 and 97).

F

Conclusion on the main issue

101 For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

G

The guidance given in Bromley and Canada Goose and in this case by Nicklin J

102 We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at para 82 of *Canada Goose* (see para 56 above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment
H cases at paras 99–109 in *Bromley* [2020] PTSR 1043 (see para 49 above). It would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103 First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final

injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104 Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the gypsy and traveller community and the common law of trespass, and (ii) the cases made plain that the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105 On the first point, it is not right to say that either "the gypsy and traveller community" or any other community has article 8 rights. Article 8 provides that "everyone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* [2003] 2 AC 558 (and unlike in *Manchester City Council v Pinnock* [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* 33 EHRR 18 decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the Human Rights Act 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 to the First Protocol to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106 Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the gypsy and traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

A 107 Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that persons unknown
B injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108 It will already be clear that the guidance given by the judge in this case at para 248 (see para 18 above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and
C final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at paras 104–106 above), and those mentioned below at para 117. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption
D at para 13 in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.
E

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109 In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and
F final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110 In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the
G basis that the law had changed. We heard considerable argument based on the court's power under CPR r 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v BCS Corporate Acceptances Ltd* [2018] EWCA Civ 2422 at [75]).

H 111 As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such provisions, the orders in question would, as I have already explained,

be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112 In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113 The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114 Section 187B provides that:

"(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

"(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

"(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

"(4) In this section 'the court' means the High Court or the county court."

115 CPR PD 8A provides at paras 20.1–20.6 in part as follows:

"20.1 This paragraph relates to applications under— (1) [section 187B]; . . .

"20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant . . .

"20.4 In the claim form, the applicant must describe the defendant by reference to— (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence.

"20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place.)

"20.6 The application must be accompanied by a witness statement. The witness statement must state— (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide."

116 In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties

A sought to draw between section 37 and section 187B applications are of far less significance to this case.

117 In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that
B description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment case under section 187B as they are to one sought in such a case to restrain apprehended trespass or
C nuisance. Indeed, CPR PD 8A, para 20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118 There is, therefore, no need for me to say any more about section 187B.

D *Can the court in any circumstances like those in the present case make final orders against all the world?*

119 As I have said, Nicklin J decided at paras 190–241 that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

E **120** I have already explained the circumstances in which such injunctions can be granted at paras 102–108. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate
F in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

G **121** I conclude that the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122 The parties agreed four issues for determination in terms that
H I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with.

123 I have concluded, as I indicated at para 7 above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was

unorthodox and unusual in that he called in final orders for revision, no harm has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124 I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Notes

1. There were 38 local authorities before the judge.

2. This was a reference to the two categories set out by Lord Sumption at para 13 in *Cameron*, as to which see para 35.

3. As I have noted above, default judgment is not available in Part 8 cases.

4. Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605.

5. See *Jacobson v Frachon* (1927) 138 LT 386, 392 per Atkin LJ.

LEWISON LJ

125 I agree.

ELISABETH LAING LJ

126 I also agree.

Appeals allowed.
Judge's order set aside.
Injunctions obtained by Havering, Nuneaton and Bedworth, Rochdale, Test Valley and Wolverhampton restored subject to review hearing.
Interim injunctions obtained by Hillingdon and Richmond upon Thames restored subject to applications for review on terms.
Permission to appeal refused.

25 October 2022. The Supreme Court (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC)) allowed an application by London Gypsies and Travellers for permission to appeal.

SUSAN DENNY, Barrister

Queen's Bench Division

Director of Public Prosecutions *v* Cuciurean

[2022] EWHC 736 (Admin)

2022 March 23; 30 Lord Burnett of Maldon CJ, Holgate J

Human rights — Freedom of expression and assembly — Interference with — Defendant trespassing on land with intention of obstructing or disrupting construction of railway — Defendant charged with aggravated trespass — Whether court required to be satisfied that defendant's conviction proportionate interference with his Convention rights — Criminal Justice and Public Order Act 1994 (c 33), s 68 — Human Rights Act 1998 (c 42), ss 3, 6, Sch 1, Pt I, arts 10, 11, Pt II, art 1

The defendant was charged with aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994[1], the prosecution case being that he had trespassed on land and dug and occupied a tunnel there with the intention of obstructing or disrupting a lawful activity, namely the construction of the HS2 high speed railway. The deputy district judge acquitted the defendant, finding that the prosecution had failed to prove to the requisite standard that a conviction was a proportionate interference with the defendant's rights to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The prosecution appealed by way of case stated on the ground that, if the defendant's prosecution did engage his rights under articles 10 and 11, a conviction for the offence of aggravated trespass was intrinsically a justified and proportionate interference with those rights, without the need for a separate consideration of proportionality in the defendant's individual case.

On the appeal—

Held, allowing the appeal, that there was no general principle in criminal law, nor did section 6 of the Human Rights Act 1998 require, that where a defendant was being tried for a non-violent offence which engaged his or her rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms the court would always have to be satisfied that a conviction for that offence would be a proportionate interference with those rights; that, rather, the court would only have to be so satisfied where proportionality was an ingredient of the offence, which would depend on the proper interpretation of the offence in question; that if the offence were one where proportionality was satisfied by proof of the very ingredients of that offence, there would be no need for the court to consider the proportionality of a conviction in an individual case; that proportionality was not an ingredient of the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, which was compatible with articles 10 and 11 of the Convention without having to read in a proportionality ingredient pursuant to section 3 of the 1998 Act; that, in particular, (i) section 68 of the 1994 Act had the legitimate aim of protecting property rights in accordance with article 1 of the First Protocol to the Convention and, moreover, protected the use of land by a landowner or occupier for lawful activities and helped to preserve public order and prevent breaches of the peace, (ii) a protest which was carried out for the purposes of

[1] Criminal Justice and Public Order Act 1994, s 68: see post, para 10.
[2] Human Rights Act 1998, s 3: see post, para 29.
S 6: see post, para 30.
Sch 1, Pt I, art 10: see post, para 26.
Art 11: see post, para 27.
Pt II, art 1: see post, para 28.

A obstructing or disrupting a lawful activity, contrary to section 68, would not lie at the core of articles 10 and 11, even if carried out on publicly accessible land and (iii) articles 10 and 11 did not bestow any "freedom of forum" to justify trespass on land; that, therefore, proof of the ingredients of the offence of aggravated trespass set out in section 68 of the 1994 Act ensured that a conviction was proportionate to any article 10 and 11 rights which might be engaged; that it followed that it had not been open to the deputy district judge to acquit the defendant on the basis that the B prosecution had not satisfied her that the defendant's conviction of an offence of aggravated trespass contrary to section 68 was a proportionate interference with the defendant's rights under articles 10 and 11; and that, accordingly, the defendant's case would be remitted to the magistrates' court with a direction to convict (post, paras 57–58, 65–69, 73–81, 89–90).

Bauer v Director of Public Prosecutions [2013] 1 WLR 3617, DC, dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3, SC(E) and *James v Director of Public Prosecutions* [2016] 1 WLR 2118, DC applied. C

Appleby v United Kingdom (2003) 37 EHRR 38, ECtHR considered.

Director of Public Prosecutions v Ziegler [2022] AC 408, SC(E) distinguished.

Per curiam. It is highly arguable that articles 10 and 11 of the Convention are not engaged at all on the facts of the present case. There is no basis in the jurisprudence of the European Court of Human Rights to support the proposition that articles 10 and 11 include a right to protest on privately owned land or on publicly owned land from which the public are generally excluded. The furthest that that court has been D 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, it would not exclude the possibility of a state being obliged to protect those rights by regulating property rights. 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 rights protected by articles 10 and 11 would be destroyed. Legitimate protest can take E many other forms (post, paras 45–46, 50).

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

Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21; [2013] EMLR 28, ECtHR (GC)

Annenkov v Russia (Application No 31475/10) (unreported) 25 July 2017, ECtHR

Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR F

Barraco v France (Application No 31684/05) (unreported) 5 March 2009, ECtHR

Bauer v Director of Public Prosecutions [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC

Blumberga v Latvia (Application No 70930/01) (unreported) 14 October 2008, ECtHR

Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

G *City of London Corpn v Samede* [2012] EWHC 34 (QB); [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin); 169 JP 581

Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)

Ezelin v France (Application No 11800/85) (1991) 14 EHRR 362, ECtHR

H *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), DC

Gifford v HM Advocate [2011] HCJAC 101; 2011 SCCR 751

Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC

Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)

James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lambeth London Borough Council v Grant [2021] EWHC 1962 (QB)
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA
R v E [2018] EWCA Crim 2426; [2019] Crim LR 151, CA
R v R (Practice Note) [2015] EWCA Crim 1941; [2016] 1 WLR 1872; [2016] 1 Cr App R 20, CA
R (AB) v Secretary of State for Justice [2021] UKSC 28; [2022] AC 487; [2021] 3 WLR 494; [2021] 4 All ER 777, SC(E)
R (Leigh) v Comr of Police of the Metropolis [2022] EWHC 527 (Admin); [2022] 1 WLR 3141, DC
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Richardson v Director of Public Prosecutions [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20; [2014] 1 Cr App R 29, SC(E)
Taranenko v Russia (Application No 19554/05) (2014) 37 BHRC 285, ECtHR

The following additional cases were cited in argument:

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Director of Public Prosecutions v Barnard [2000] Crim LR 371, DC
Lashmankin v Russia (Application Nos 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12 and 37038/13) (2017) 68 EHRR 1, ECtHR
Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch)
National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)
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)
RMC LH Co Ltd v Persons Unknown [2015] EWHC 4274 (Ch)
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Whitehead v Haines [1965] 1 QB 200; [1964] 3 WLR 197; [1964] 2 All ER 530, DC

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

Connolly v Director of Public Prosecutions [2007] EWHC 237 (Admin); [2008] 1 WLR 276; [2007] 2 All ER 1012; [2007] 2 Cr App R 5, DC
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)
Manchester City Council v Pinnock (Nos 1 and 2) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
UK Oil & Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

CASE STATED by Deputy District Judge Evans sitting at City of London Magistrates' Court

On 21 September 2021, after a trial before Deputy District Judge Evans in the City of London Magistrates' Court, the defendant, Elliott Cuciurean, was acquitted of the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. The prosecution

A appealed by way of case stated. The questions for the opinion of the High Court are set out in the judgment of the court, post, para 3.

The facts are stated in the judgment of the court, post, paras 2–9.

Tom Little QC and *James Boyd* (instructed by *Crown Prosecution Service*) for the prosecutor.

B The prosecutor's appeal concerns the question whether, in light of the Supreme Court's judgment in *Director of Public Prosecutions v Ziegler* [2022] AC 408, a fact-specific assessment of the proportionality of a conviction's interference with an individual's rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms is required in any prosecution for offences of trespass committed during a public protest. The C appeal should be allowed on three mutually alternative grounds: (i) the defendant's Convention rights under articles 10 and 11 were not engaged; (ii) alternatively, if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is, inherently and without the need for a separate consideration of proportionality, a justified and proportionate interference with those rights, and so the deputy district judge erred in treating the decision in *Ziegler* as compelling her to undertake an D additional assessment of proportionality; and (iii), alternatively, if a fact-sensitive assessment of proportionality were required, the deputy district judge reached a decision on that assessment which was so unreasonable that no reasonable tribunal would have taken it.

On the preliminary procedural issue as to the jurisdiction of the court to determine grounds (i) and (ii), although, contrary to Crim PR r 35.2(2)(c), E the prosecutor failed to include ground (i) in its application to the magistrates' court for a case to be stated, and accepted before the deputy district judge that the defendant's Convention rights under articles 10 and 11 were engaged, it would nevertheless not be right for the court to decline to determine a pure point of law open on the facts found in the case stated: *Whitehead v Haines* [1965] 1 QB 200. There is uncertainty as to the correct approach to the assessment of proportionality following the decision in F *Ziegler* which is affecting a large number of cases at first instance and which calls for exploration by the higher courts (see dicta of Lord Burnett of Maldon CJ in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, para 29). On account of that uncertainty, the points being advanced now were not obvious to the prosecutor below, and they were not argued, expressly considered or conceded and then discarded on appeal. However, the G substance of the prosecutor's argument remains the same: that conviction was proportionate and it was not open to the deputy district judge to conclude otherwise. Accordingly, despite the breach of the rules, there are compelling and exceptional reasons for a higher court to determine the issue and it is in the interests of justice for the court to so do.

As in ground (i), the issue before the court on ground (ii) is a pure point of law which it would not be right for the court to decline to determine (see H *Whitehead v Haines*) and the same compelling and exceptional reasons for a higher court to determine the issue apply. However, in relation to ground (ii), the prosecution case has always been that it was not open to the deputy district judge to conclude that a conviction for aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994

represented a disproportionate interference with the defendant's Convention rights.

[*Lord Burnett of Maldon CJ*. The court will hear argument on grounds (i) and (ii) de bene esse.]

On ground (i), the Convention rights to freedom of expression contained in article 10 and to peaceful assembly and freedom of association contained in article 11 cover a broad range of opinions and expressions thereof. Opinions such as the one held by the defendant concerning the development of the HS2 high speed railway would be protected by article 10 and he would be entitled to express his opinions in a number of ways, including by participating in public protest, which right is protected by article 11. The jurisprudence of the European Court of Human Rights demonstrates that such expressions may extend to protests impeding activities of which the protestor disapproves: *Steel v United Kingdom* (1998) 28 EHRR 603.

However, both article 10 and article 11 rights are qualified and not without limit. Some individual conduct, by its nature and degree, would mean it could fall outside the scope of protection under article 11. Article 11 of the Convention only protects the right to "peaceful assembly". Therefore, where a protestor is personally involved with violence or intends to commit or incite violent acts, or by some other conduct "rejects the foundations of a democratic society", that conduct would not attract the protection of the Convention; whereas conduct which is intended to be disruptive, such as obstructing traffic on a highway, while not an activity lying at the core of the protected freedom, might not be such as to remove participation in the protest from the scope of protection in article 11: *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 92, 97–98.

Thus, the jurisprudence recognises that there may be conduct which falls outside that protected by a Convention right and conduct which, although protected by the right, does not lie at its core. In respect of the offences of aggravated trespass and criminal damage, there is no relevant jurisprudence to support the proposition that article 10 and 11 rights are engaged. Neither do articles 10 and 11 confer a right of entry to private property (or publicly owned property with no right of access) unless a bar to entry would effectively extinguish the essence of those rights, which will not be the case where alternative options for effective protest exist: *Appleby v United Kingdom* (2003) 37 EHRR 38, para 47. Where deliberate acts of obstruction and inconvenience do not lie at the core of the right but close to the limit of the conduct in scope of the protection of article 11 (as in *Kudrevičius*), trespassing on private land (or publicly owned land over which there is no right of access as in the present case), damaging it by building a tunnel with the intent of preventing the landowner from doing what it is lawfully entitled to do are also likely to be a considerable distance from the core of the right, thus falling outside the scope of Convention protection.

The European court held that the rights in articles 10 and 11 were engaged in *Taranenko v Russia* (2014) 37 BHRC 285 for a protestor who participated in the occupation of an office in the President's administration building, the group having forced their way through security, locked themselves in the office, called for the President's resignation, distributed leaflets from the window, destroyed furniture and equipment and damaged the walls and ceiling. However, that should not be understood as

A establishing that the protestor had any right protected by articles 10 and 11 to trespass and cause damage. The court held that the domestic courts had concluded the protestor's political beliefs were fundamental to the prosecution and had not established that the individual had personally participated in causing any damage. Accordingly, it could be inferred both that the court accepted that, as in *Kudrevičius*, the acts of one protestor could not necessarily be used to justify restricting the rights of another and B that those who actually cause damage or commit violent or otherwise reprehensible acts in the course of a protest can be prosecuted for doing so without engaging Convention rights. That principle should apply in the current case, since trespassing on land and intentionally damaging it is an unacceptable way in which to engage in political debate in a democratic society. The rights under articles 10 and 11 cannot be used to support the C proposition that the defendant was entitled unlawfully to enter private land and purposely to damage it by building a tunnel when there were numerous alternative and effective ways available to him to protest and express his objection to the HS2 high speed railway.

With regard to ground (ii), even if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is inherently, and without need for a separate consideration of proportionality, a justified D and proportionate interference with those rights. In a prosecution, it is not necessary to read words into a criminal offence in order to give effect to the rights of the defendant under articles 10 and 11: *James v Director of Public Prosecutions* [2016] 1 WLR 2118, paras 32–35. In determining how the court should address the interaction of those rights with criminal offences, there are two distinct categories of case. First, where there is available a E statutory defence that the defendant's conduct was "reasonable", article 10 and 11 rights and the qualifications to them and thus the proportionality of any conviction may be expressly considered in an assessment of the facts as part of the defence. Secondly, where, once the specific ingredients have been proved, the defendant's conduct has gone beyond what could be described as reasonable conduct in the exercise of Convention rights, Parliament can be taken to have defined the parameters of lawful conduct as a matter of public F policy and within its margin of appreciation. Thus, a fact-sensitive assessment of the proportionality of any prosecution and conviction would only be relevant where the reasonableness defence is provided for in the statute: *R v Brown (James Hugh)* [2022] 1 Cr App R 18.

Similarly, in *Animal Defenders International v United Kingdom* [2013] EMLR 28, the Grand Chamber of the European court held that the state can, G consistently with the Convention, adopt general rules which apply to pre-defined situations notwithstanding that it might result in some hard cases, provided that the prohibition is necessary in a democratic society and thus proportionate. That principle applies in the present case. Section 68 of the 1994 Act is a general measure which is intrinsically compliant with the Convention, being one which is narrowly drawn and balances the rights of landowners and the rights of protestors, allowing the exculpation of those H who trespass but who can show a justification defence. However, the state is entitled to prevent aggravated trespass as defined in section 68(1) for the prevention of disorder and for the protection of property rights. Article 1 of the First Protocol to the Convention ("A1P1") provides that the landowner has the right to peaceful enjoyment of his property. Although also a

qualified right, the state is under a positive obligation to protect the A1P1 rights of the landowner by law against interference. Where the interference is criminal in nature the authorities are obliged to conduct such criminal investigation and prosecution as appropriate. Section 68(1) strikes a fair and proper balance with the need to protect acts and freedoms of those on private land acting lawfully under A1P1: *Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008. Interference with the article 10 and 11 rights of a protestor who had trespassed with the intention to disrupt the lawful activity of the landowner would not therefore be disproportionate.

Articles 10 and 11 do not provide a defence as a matter of criminal law or confer a right to trespass. Trespass is by definition unlawful and a conviction for the offence of aggravated trespass provides a lawful limitation on the exercise of rights of free expression which Parliament deemed to be a justified sanction: see dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3. Once the elements of the offence of aggravated trespass are made out, there can be no question of a breach of articles 10 or 11: *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617. Accordingly, no fact-sensitive proportionality assessment is required from the court. In that context, any distinction between articles 10 and 11 is of no consequence: see *James* [2016] 1 WLR 2118.

It follows that a conviction for the offence of aggravated trespass under section 68(1) of the 1994 Act inherently constitutes a justified and proportionate interference with the defendant's article 10 and 11 rights without the need for any separate consideration of proportionality, and the decision in *Ziegler* [2022] AC 408 did not create an extra ingredient to the offence of aggravated trespass that the prosecutor had to prove with a need for the judge to undertake a *Ziegler*-style factual analysis.

As to ground (iii), if an assessment of proportionality was required, the deputy district judge reached a decision on that basis at which no reasonable tribunal properly directing itself on all the material considerations could have arrived.

In failing to analyse the nature and degree of the conduct involved in the offence and to recognise that, even if it could fall within the scope of rights protected by articles 10 and 11, it would not lie at the core but rather at the outside edges of those rights, the deputy district judge neglected to consider a material consideration which was highly relevant to the determination of the proportionality of any interference with those rights. Furthermore, the Convention rights of the landowner, specifically protected under A1P1 and therefore a highly relevant consideration, were not acknowledged and thus not appropriately balanced against the defendant's article 10 and 11 rights. In contrast to the situation in *Ziegler*, the land trespassed upon in this case was not land over which the public had a right to assemble. That ought to have been properly weighed in the balance by the deputy district judge since different considerations applied: *Appleby v United Kingdom* 37 EHRR 38.

The deputy district judge's reasoning was further flawed, being based as it was on an irrelevant finding of fact that the land concerned was merely a small part of the HS2 high speed railway project, projected to take up to 20 years to complete at a cost of billions of pounds. Those factors were not relevant in determining whether a conviction for obstructing and disrupting those activities was a proportionate interference with Convention

A rights. Accordingly, the deputy district judge reached a decision which no reasonable tribunal, properly directing itself as to the relevant considerations, could have reached and she was wrong to have acquitted the defendant.

Tim Moloney QC, *Adam Wagner* and *Blinne Ní Ghrálaigh* (instructed by *Robert Lizar Solicitors, Manchester*) for the defendant.

B The appeal should not be allowed for four reasons: (1) the court should not permit grounds (i) and (ii) to proceed since they are procedurally barred; (2) articles 10 and 11 of the Convention are engaged; (3) in a case involving the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of the rights under articles 10 and 11, which will require a fact-sensitive C enquiry; and (4) the deputy district judge's decision to acquit the defendant was reasonable.

On the procedural issue, ground (i) of the prosecutor's appeal was not raised at first instance as required by Crim PR r 35.2(2)(c); moreover, in the original application for permission to appeal, the prosecutor expressly disavowed that ground and expressly stated that articles 10 and 11 were D engaged. For reasons of the interests of justice and to discourage attempts to circumvent the strict time limit in rule 35.2, he should not now be permitted to advance an appeal entirely different from that for which permission was sought in an earlier application or which would be a second bite of the cherry: see *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [31].

Only in very exceptional circumstances should a party be permitted to E renounce its agreement to an approach in which it acquiesced before the judge at first instance and advance a different approach on appeal. Parties are expected to get it right first time: *R v E* [2018] EWCA Crim 2426 at [19]. That will especially be the case where the party is sophisticated and fully represented, as is the prosecutor in the present case: *Food Standards Agency*, para 26. None of the reasons advanced by the prosecutor are exceptional.

F Unlike the situation in *Whitehead v Haines* [1965] 1 QB 200, this is not a case where the prosecutor genuinely was not aware of a new point of law which if taken could prevent conviction for the defendant. The defendant's advocate submitted a skeleton argument before the trial, supported by authority which was served on the court. Therefore the issues in the case were clear. By contrast, according to the case stated, the prosecutor neither submitted a skeleton argument nor made submissions to the effect that the G defendant's article 10 or 11 rights could not be engaged in relation to the offence of aggravated trespass or that the principles in *Director of Public Prosecutions v Ziegler* [2022] AC 408 did not apply. It was therefore accepted by the prosecutor that the defendant's article 10 and 11 rights were engaged and not disputed that the prosecution was required to prove that interference with those rights was proportionate.

H Insofar as the decision in *Ziegler* has caused uncertainty as to the legal position, there is nothing exceptional in a legally significant decision of the higher courts causing some uncertainty in the lower courts. It would undermine the principle in *Food Standards Agency* that parties should get it right first time if an argument that resolution of an important point of law, in existence and obvious during the proceedings at first instance, be permitted

to amount to a sufficiently exceptional reason as to allow it to be raised on appeal when not raised at first instance. Accordingly, none of the reasons advanced by the prosecutor are exceptional and the court should not permit grounds (i) and (ii) to proceed.

Wagner following.

In any event, the prosecution did engage the defendant's article 10 and 11 Convention rights. The right to freedom of assembly in article 11 is a fundamental right in a democratic society and, like the right to freedom of expression in article 10, one of the foundations of such a society: *Kudrevičius v Lithuania* (2015) 62 EHRR 34. It is an established principle in the jurisprudence of the European Court of Human Rights that the scope of those rights should not be interpreted restrictively. That principle was recently reaffirmed by the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408, paras 69–70, 89.

All forms of peaceful, i e non-violent, assembly engage article 11, unless they otherwise reject the foundations of a democratic society when the actions of protestors may take them outside of the protection of Convention rights so that the question of proportionality does not arise: *Ziegler*, para 69. The only three categories of case in which direct action protest would fall outside of the scope of articles 10 and 11 are as set out in *Kudrevičius*: where organisers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society. The guarantees of article 11 therefore apply to all other gatherings: *Ziegler*. The jurisprudence of the European court shows that even protests which are intentionally disruptive are capable of falling within the scope of article 10: see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241. Article 11 has been found to remain engaged even in relation to demonstrations where protests have involved aspects of violence, showing that the actions of one protestor cannot necessarily be used to restrict the rights of another: *Kudrevičius*.

There is no authority to support the proposition that committing trespass or digging a tunnel as part of a protest render it not peaceful and therefore falling outwith the protection of article 11. Whilst it is right that articles 10 and 11 do not provide a right to trespass, the jurisprudence of the European court demonstrates that the court should ask first whether the right is engaged and then consider proportionality. Creation of a bright line rule that articles 10 and 11 are not engaged where an otherwise peaceful protestor has trespassed on private property would run counter to the established jurisprudence where any exclusionary category has been construed very narrowly. Individuals from the Occupy Movement who had been trespassing for three months on public land by setting up a protest camp were held to have engaged rights to articles 10 and 11: *City of London Corpn v Samede* [2012] PTSR 1624, para 49. Similarly, in *Appleby v United Kingdom* (2003) 37 EHRR 38 the court considered that the article 10 and 11 rights of protestors who were prevented from setting up a stand and distributing leaflets concerning their opposition to the development plans of the local authority were engaged, albeit no violation of those rights was found to have occurred. The removal and subsequent conviction of protestors in *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017 were held to constitute an unjustified interference with the article 11 rights of the protestors, notwithstanding their conduct in taking

A possession of privately held land, impeding access to the land by its lawful owners and committing acts of violence against private security guards.

By analogy, in cases involving civil injunctions and contempt, the article 10 and 11 rights of individuals accused of trespass and nuisance and conduct causing considerable economic damage were found to be relevant: see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), B where a *Ziegler*-style analysis was undertaken. Similarly, the article 10 and 11 rights of individuals who had trespassed were found to be engaged in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29; and considered to be factors to be weighed in the balance in *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) and *RMC LH Co Ltd v Persons Unknown* [2015] EWHC 4274 (Ch).

C In the present case, the deputy district judge made no finding of damage or intentional damage caused to the land by the defendant. It is therefore not open to the prosecutor to now invite the court to reach a finding of fact in that regard. Accordingly, the prosecution's argument that the defendant trespassed and intentionally damaged land and that that therefore puts him outside the scope of protection which would be afforded to his Convention D rights under articles 10 and 11 has no basis in fact and is wrong. Moreover, the jurisprudence of the European court also provides that protests involving damage still fall within the scope of article 10: see e g *Taranenko v Russia* (2014) 37 BHRR 285, para 10. Were trespass and damage to property to be interpreted as violence or reprehensible acts, it would be an overly restrictive interpretation.

Conduct which might not be considered to be at the core of the rights under E articles 10 and 11 still requires careful evaluation and is not determinative of proportionality: *Ziegler* [2022] AC 408, para 67. Any reprehensible behaviour would be considered in the proportionality assessment but not as a barrier to engagement of the rights. The focus would be on the conduct of the individual concerned. In the present case, the conduct of the defendant was targeted at disrupting the activity of the HS2 high speed railway, i e those at F whom the protest was targeted. Accordingly, it ought to be closer to the core of the rights protected under article 11 than the conduct of protestors in *Ziegler*, whose protest seriously disrupted the everyday activities of others. The protest organiser should retain autonomy in deciding where, when and how the protest should take place and it is recognised that the purpose of an assembly is often linked to a certain location: *Lashmankin v Russia* (2017) G 68 EHRR 1, para 405 and *Ziegler*, para 72. Although the jurisdictions differ, it would be illogical if trespassing protestors disrupting the activities of people not connected to the protest object retained the protection of article 11 when, as in the present case, a trespassing individual protesting at the precise location of the environmental damage being caused by the high speed railway but only disrupting the activity of the protest object was not so protected.

H The section 68 offence requires, in addition to trespass, an additional act of intimidation, obstruction or disruption: *Director of Public Prosecutions v Barnard* [2000] Crim LR 371. It is to that additional act that the question of whether articles 10 or 11 are engaged applies, rather than whether or not the protestor is trespassing.

In a case involving the offence of aggravated trespass contrary to section 68 of the 1994 Act, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of rights under articles 10 and 11, which will require a fact-sensitive enquiry. Although the Supreme Court judgment in *Ziegler* [2022] AC 408 was concerned with obstruction of the highway, the principles apply in any potential conviction which would be a restriction on article 10 and 11 rights. The jurisprudence of the European Court of Human Rights clearly shows that a conviction is a restriction which represents a distinct interference with article 10 and 11 rights: see e g *Kudrevičius* 62 EHRR 34, para 101. That distinct interference requires justification separately from any which might be required due to any interference caused to those rights by arrest or disposal of a protest because different considerations may apply: *Ziegler*, paras 57, 60. In order to determine the proportionality of an interference with Convention rights, a fact-sensitive enquiry will be required to evaluate the circumstances in the individual case. Any restriction on the exercise of article 10 and 11 rights, including a criminal conviction, must be (1) prescribed by law, (2) in pursuit of a legitimate aim and (3) necessary in a democratic society.

Accordingly, section 68 of the 1994 Act cannot predetermine what is inherently a fact-sensitive consideration of proportionality. The issue is not whether section is 68 is a proportionate restriction generally but whether what happens to an individual when section 68 is applied is proportionate having regard to all the circumstances. The interference with an accused's rights under articles 10 and 11 would be different at the stages of arrest, prosecution decision and conviction and, thus, the proportionality assessments would require separate fact-specific enquiries: *Ziegler*. In addition, in making those decisions, each public authority has its own duty under section 6 of the Human Rights Act 1998 not to act in way which is incompatible with Convention rights. The wide impact of articles 10 and 11 on public order offences was emphasised by Lady Arden JSC at para 92 of *Ziegler*, citing Lord Bingham of Cornhill's observation in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 34 that giving effect to those rights under the 1998 Act represented a "constitutional shift".

The court, when considering an offence of aggravated trespass or other public order offence, is obliged by section 3 of the Human Rights Act 1998 to read and, so far as it is possible to do so, give effect to the relevant statutory provisions in a way which is compatible with the Convention rights. Where it is not possible to do so, the court may make a declaration of incompatibility under section 4 of the 1998 Act. Accordingly, as in the present case, where a statutory provision is likely to interfere with article 10 and 11 rights but on its face contains no element which would make it compatible with those Convention rights, the court is required to read in that proportionality element to give effect to them. Thus, no bright line distinction exists or is required between convictions for an offence which includes a lawful excuse defence and those which do not.

Section 68 of the 1994 Act was enacted before the 1998 Act came into force. That distinguishes the situation in the present case from that in *Animal Defenders International v United Kingdom* [2013] EMLR 28 on which the prosecutor relies as authority for the principle that the state can

A adopt general measures which apply to predefined situations regardless of the individual facts of each case. In *Animal Defenders*, the legislative provision concerned had been debated in Parliament with full reference to Convention rights, whereas section 68 of the 1994 Act was not. Therefore, the intentions of Parliament in enacting it are of little relevance in the current case. In any event, the case does not provide authority for the proposition that in the context of a protest the proportionality of a restriction on
B Convention rights, in this case a conviction, can be predetermined through a statutory provision without the need for a fact-specific assessment in each case.

Section 68 of the 1994 Act is listed as a public order offence aimed at disruptive protests which involve trespass. The gravamen of the offence requires an element of intimidation, obstruction or disruption in addition to
C trespass. Thus, the Convention rights of the landowner under article 1 of the First Protocol to the Convention ("A1P1") become less relevant to the exercise of assessing the proportionality of any interference with the article 10 and 11 rights of the defendant. Indeed, any interference with the A1P1 rights of the landowner are also subject to a proportionality assessment to balance any competing rights and freedoms of other people. If the prosecutor's argument that priority should be given in advance to the
D A1P1 rights of the landowner were successful, engagement of the rights under articles 10 and 11 would effectively be excluded altogether. In so far as the rights under A1P1 are capable of outweighing those under articles 10 and 11, it remains the case that a fact-sensitive balancing exercise is required to determine the issue.

Moloney QC

E The deputy district judge's decision to acquit was plainly reasonable in that it was open to her to make. Although another judge might have reasonably reached another conclusion on the facts, there is no flaw of reasoning which undermines the cogency of the conclusion reached. The judge applied the non-exhaustive list of factors set out in *Ziegler* [2022] AC 408, finding that the protest was peaceful, there was no disorder and the
F defendant had committed no other criminal offences, his actions were carefully targeted to impact on the particular part of the development to which he objected, the protest related to a matter of general concern and was one which the defendant had a long-standing commitment to opposing, the delay to the project was relatively short and it was unclear whether there was a complaint about his conduct. In the circumstances, it was plainly open for the deputy district judge to acquit.

G Although it is correct that the deputy district judge made no direct reference to the A1P1 rights of the landowner, it can reasonably be inferred that those rights were in her mind when finding "no inconvenience to the general public or interference with the rights of anyone other than HS2". Furthermore, whereas in civil injunction cases the A1P1 rights of a claimant landowner are directly balanced against the article 10 and 11 rights of those
H who wish to protest on or around the land, in a criminal case the parties are the Crown and the defendant, which makes it unclear whether or to what extent the A1P1 rights of the landowner need to be balanced.

Moreover, the deputy district judge was entitled to take into account the relative impact of the cost and disruption of a protest to a development project. In doing so, it was necessary to make reference to the total

estimated time and cost of the project and reasonable to conclude that, overall, the relative impact of the protest was minor. In the context of a fact-sensitive proportionality exercise it was an entirely appropriate consideration.

The appeal should therefore be dismissed.

The court took time for consideration.

30 March 2022. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2 The defendant was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The deputy district judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the defendant that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11". In short, the judge accepted that there was a new ingredient of the offence to that effect.

3 Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the defendant's article 10 and 11 rights were engaged, to acquit the defendant on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's article 10 and 11 rights applying the principles in *Ziegler*?
>
> "2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4 The prosecution appeal against the acquittal on three grounds:

(1) The prosecution did not engage articles 10 and 11 rights;

(2) If the defendant's prosecution did engage those rights, a conviction for the offence of aggravated trespass is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights. The decision in *Ziegler* did

not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

(3) In any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5 Before the judge, the prosecution accepted that the defendant's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the defendant suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither ground 1 nor ground 2 was advanced before the judge.

6 The defendant contends that it should not be open to the prosecution to raise grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that ground 1 is being pursued; and that although ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7 Crim PR r 35.2(2)(c) relating to an application to state a case requires: "The application must— . . . (c) indicate the proposed grounds of appeal . . ."

8 The prosecution did not include what is now ground 1 of the grounds of appeal in its application to the magistrates' court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9 Applying well-established principles set out in *R v R (Practice Note)* [2016] 1 WLR 1872 at paras 53–54, *R v E* [2018] EWCA Crim 2426 at [17]–[27] and *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [25]–[31], we are prepared to deal with ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the defendant, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10 Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."

"(2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

"(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

"(4) [Repealed.]

"(5) In this section 'land' does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of land in subsection (9) of that section; or (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11 Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12 The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity; (iii) the defendant must do an act on the land; (iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13 Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual background

14 The defendant was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15 The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London – West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

16 The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

A **17** Protesters against the HS2 project had occupied the Land and the defendant had dug a tunnel there before 2 March 2021. The defendant occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18 The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed
B from trees on the site. On the same day the team found the defendant in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The defendant went back into the tunnel.

19 The HS2 team instructed health and safety experts to help with the
C eviction of the defendant and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The defendant left the Land voluntarily at about 14.00 on 18 March 2021.

20 The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21 HS2 contractors were unable to go onto the Land until it was
D completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The proceedings in the magistrates' court

22 On 18 March 2021 the defendant was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not
E guilty. The trial took place on 21 September 2021.

23 At the trial the defendant was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions:

(i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 [of the
F Convention]. It is of general applicability. It is not limited to offences of obstructing the highway";

(ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

(a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at
G para 12). Accordingly, in determining a criminal charge where issues under articles 10 and 11 of the Convention are raised, the court is obliged to take account of those rights;

(b) Second, violence is the dividing line between cases where articles 10 and 11 apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest
H in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the defendant was not violent;

(iii) Accordingly, before the court could find the defendant guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate

interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at paras 71–78, 80–83 and 85–86). This required a fact-sensitive assessment.

24 The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the defendant's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see para 10 of the case stated).

25 The judge made the following findings:

"1. The tunnel was on land owned by HS2.

"2. Albeit that the defendant had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

"3. The act of defendant taking up occupation of the tunnel on 15 March, sleeping overnight and retreating into the tunnel having been served with the notice to vacate was an act which obstructed the lawful activity of HS2. This was his intention.

"4. The defendant's article 10 and 11 rights were engaged and the principles in *Ziegler* were to be considered.

"5. The defendant was a lone protester only occupying a small part of the land.

"6. He did not act violently.

"7. The views of the defendant giving rise to protest related to important issues.

"8. The defendant believed the views he was expressing.

"9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

"10. The land specifically related to the HS2 project.

"11. HS2 were aware of the protesters were on site before they acquired the land.

"12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of £billions.

"13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195,000, I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the defendant's article 10 and 11 rights."

Convention rights

26 Article 10 of the Convention provides:

"*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."

27 Article 11 of the Convention provides:

"*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."

28 Because section 68 is concerned with trespass, it is also relevant to refer to article 1 of the First Protocol to the Convention ("A1P1"):

"*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"

29 Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: "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."

30 Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court (section 6(3)).

31 In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v France* (1991) 14 EHRR 362 at para 37).

32 The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevičius v Lithuania* (2015) 62 EHRR 34 at para 91). A

33 Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevičius*, the Grand Chamber of the European Court of Human Rights ("the Strasbourg court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" (para 92). B

34 The defendant submits, relying on the Supreme Court judgment in *Ziegler* [2022] AC 408 at para 70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the defendant's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality. C

35 Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see eg *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 at para 44, cited in *City of London Corpn v Samede* [2012] PTSR 1624 at para 43; *Kudrevičius* at paras 150 and 155). D

36 The defendant relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (eg *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 at para 28). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevičius* at para 97). E

37 Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevičius* at paras 149 and 172–174; *Ezelin* at para 53; *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009 at paras 43–44 and 47–48). F

38 In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights. G H

39 *Barraco* and *Kudrevičius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no

A right of access at all. The defendant submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (para 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the defendant's B argument (e g *Samede* [2012] PTSR 1624 at para 5 and see Lindblom J (as he then was) in *Samede* [2012] EWHC 34 (QB) at [12] and [136]–[143]; *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth London Borough Council v Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40 Instead, we gain much assistance from *Appleby v United Kingdom* C (2003) 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg court decided that the landowner's A1P1 rights were engaged (para 43). It also observed that a shopping centre of this kind may assume the characteristics of D a traditional town centre (para 44). Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41 Instead, the court stated at para 47:

> "[Article 10], 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 E 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 F 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 the Convention rights by regulating property rights. The corporate town, where the entire municipality is controlled by a private body, might be an example (see *Marsh v Alabama* [(1946) 326 US 501], cited at para 26 above)."

G The court indicated that the same analysis applies to article 11 (see para 52).

42 The example given by the court at the end of that passage in para 47 shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the H applicants did have alternative methods by which they could express their views to members of the public (para 48).

43 Likewise, *Taranenko v Russia* (2014) 37 BHRC 285 does not assist the defendant. At para 78 the court restated the principles laid down in *Appleby* at para 47. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public

building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks (paras 25, 61 and 79). The qualified public access was an important factor.

44 The defendant also relied upon *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business people protested by occupying the market at night. The Strasbourg court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

45 We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant'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 paras 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* [2014] AC 635 and the important statement made by Lord Hughes JSC at para 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 Convention for the Protection of Human Rights and Fundamental Freedoms 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 JSC (see para 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 JSC. 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.

49 The proposition which the defendant 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 para 20 and has recently been summarised by Lord Reed PSC in *R (AB) v Secretary of State for Justice* [2022] AC 487 at paras 54–59, that this is not the function of a domestic court.

50 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.

Ground 2

51 The defendant's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* [2022] AC 408 had decided that in any criminal trial involving an offence which has the effect of restricting the exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in question did not have a "lawful excuse". If that submission is accepted, ground 2 would fail.

52 Secondly, if that first contention is rejected, the defendant submits that the court cannot allow the appeal under ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it

is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53 On this second part of ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54 In *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617, the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at para 4). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Kenneth Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do so (paras 27–36). One reason for this was to avoid the risk of inhibiting legitimate participation in protests (para 27). It was in that context that Liberty had intervened (para 37).

55 Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 (para 37). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly, he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass (para 38). It was in this context that he said at para 39:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56 Moses LJ then went on to say that his earlier judgment in *Dehal v Crown Prosecution Service* (2005) 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is

A nothing more to prove, including proportionality, to convict of that offence (para 40).

57 In *James v Director of Public Prosecutions* [2016] 1 WLR 2118, the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any B restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate (paras 31–34). Offences falling into that first category were the subject of the decisions in *Norwood v Director of Public Prosecutions* [2003] Crim LR 888, *Hammond v Director of Public Prosecutions* (2004) 168 JP 601 C and *Dehal*.

58 The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado." Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see D Ouseley J at para 35).

59 The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required (paras 37–38).

60 *James* concerned an offence of failing to comply with a condition E imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a F direction imposing conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. G There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 (paras 38–43). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61 There are also some instances under the common law where proof H of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 of the Convention. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the

community. In *Gifford v HM Advocate* 2011 SCCR 751, the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" (para 15). Lord Reed added at para 17:

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under articles 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

62 Similarly, in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, the appellant rightly accepted that articles 10 and 11 of the Convention do not provide a defence to the offence of public nuisance as a matter of substantive criminal law (para 37). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights (paras 24–39).

63 *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James*. Indeed, in *Ziegler* [2020] QB 253 at paras 87–91, the Divisional Court referred to the analysis in *James*.

64 The second question certified for the Supreme Court in *Ziegler* [2022] AC 408 related to the "lawful excuse" defence in section 137 of the Highways Act (paras 7, 55–56 and 98–99). Lord Hamblen and Lord Stephens JJSC referred at para 16 to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65 The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way sub silentio suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* [2013] 1 WLR 3617 or offences such as section 68. That was unnecessary to resolve the issues before the court.

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

A statement in *Richardson* [2014] AC 635 at para 3 or to cases such as *Appleby* 37 EHRR 38.

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 B rights.

68 The passages in *Ziegler* upon which the defendant relies have been wrenched completely out of context. For example, the statements in para 57 about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application C whenever a criminal offence engages articles 10 and 11. The same goes for the references in paras 39–60 to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paras 62–70 are entitled "Deliberate obstruction with more than a de minimis impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

D **69** We are unable to accept the defendant's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends E on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70 Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to F be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration G of incompatibility under section 4 of the 1998 Act would arise. If granted, it would remain a matter for Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71 Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory H offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well established that such measures are permissible (see e g *Animal Defenders International v United Kingdom* [2013] EMLR 28).

72 It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.

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* (Application No 70930/01) (unreported) 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.

78 Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

79 Sixthly, the Supreme Court in *Richardson* [2014] AC 635 regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies a fortiori to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.

80 We gain no assistance from para 80 of the judgment in *R (Leigh) v Comr of Police of the Metropolis* [2022] 1 WLR 3141, relied upon by Mr Moloney. The legislation considered in that case was enacted to address

A public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81 It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision B of the Supreme Court in *Ziegler* [2022] AC 408 nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on ground 2.

Ground 3

C **82** In view of our decision on ground 2, we will give our conclusions on ground 3 briefly.

83 In our judgment the prosecution also succeeds under ground 3.

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 D 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 E national interest. One object of section 68 is to discourage disruption of the kind committed by the defendant, which, according to the will of Parliament, is against the public interest. The defendant (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 F 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.

G **85** The judge accepted arguments advanced by the defendant which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a H proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86 In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the defendant did not act violently. But if the defendant had been violent, his

protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

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 $2\frac{1}{2}$ days, whereas the project as a whole will take 20 years and cost billions of pounds. 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.

88 In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89 We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler* [2022] AC 408:

(1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the Convention;

(2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevičius* 62 EHRR 34 and *Barraco* 5 March 2009 are instructive on the correct approach (see para 39 above);

(3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question.

90 The appeal must be allowed. Our answer to both questions in the case stated is "no". The case will be remitted to the magistrates' court with a direction to convict the defendant of the offence charged under section 68(1) of the 1994 Act.

Appeal allowed.
Case remitted to magistrates' court with direction to convict.

Jo Moore, 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 a□ected 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 su□ered 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.

Court of Appeal

*National Highways Ltd *v* Persons Unknown and others

[2023] EWCA Civ 182

2023 Feb 16; 23 Dame Victoria Sharp P, Sir Julian Flaux C, Lewison LJ

Injunction — Final — Anticipatory — Highway authority applying for summary judgment seeking final anticipatory injunction prohibiting protestors from disrupting strategic road network — Whether necessary for authority to prove protestors had already committed threatened torts in order to obtain injunction — CPR r 24.2

The claimant highway authority brought claims in trespass, private nuisance and public nuisance in connection with a series of protests in which the protesters were blocking motorways and other roads that formed part of the strategic road network. Having obtained interim anticipatory injunctions against a number of named defendants and "persons unknown", the claimant applied for summary judgment under CPR Pt 24[1] seeking a final anticipatory injunction against all defendants. The judge granted a final injunction against 24 named defendants who had already been found to have been in contempt of court for breaching the interim injunctions, but granted only an interim injunction against the 109 remaining named defendants and the unnamed defendants. The claimant appealed on the ground that the judge had erred in law in concluding that summary judgment for a final injunction could not be granted against the defendants if the claimant had not shown on the balance of probabilities that they had already committed the tort of trespass or nuisance.

On the appeal—

Held, allowing the appeal, that when considering whether an anticipatory injunction (whether final or interim) ought to be granted, it was not a necessary criterion that the defendant should have already committed the threatened tort; that, rather, the essence of an anticipatory injunction was that the tort was threatened and that, for some reason, the claimant's cause of action was not complete; that the test to be 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 defendant had no real prospect of successfully defending the claim for an injunction; that it followed that the judge in the present case had erred in law in assuming that, before summary judgment for a final anticipatory judgment could be granted, the claimant had to demonstrate that each 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, further, in applying the test under rule 24.2, the fact that very few of the defendants had served a defence or any evidence or otherwise engaged with the proceedings, despite having been given ample opportunity to do so, was of considerable relevance as supporting the claimant's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial; that if the judge had applied the right test under rule 24.2 and had proper regard to the requirement in rule 24.5 that, if a respondent to a summary judgment application wished to rely on written evidence, he should file and serve such evidence he would, and ought to have, concluded that the 109 named defendants and the unnamed defendants had had no realistic prospect of successfully defending the claim at trial;

[1] CPR r 24.2: "The court may give summary judgment against a . . . defendant on the whole of a claim or on a particular issue if— (a) it considers that . . . (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial . . ."

R 24.5(1): "If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must— (a) file the written evidence; and (b) serve copies on every other party to the application, at least 7 days before the summary judgment hearing."

and that, accordingly, a final injunction would be granted to the claimant in respect of all the defendants (post, paras 37–43).

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 and *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, CA applied.

Decision of Bennathan J [2022] EWHC 1105 (QB) reversed in part.

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

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)
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, CA
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043, DC
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Director of Public Prosecutions v Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985, SC(E)
Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd [2009] EWHC 339 (Ch)
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
King v Stiefel [2021] EWHC 1045 (Comm); (Note) [2022] 1 All ER (Comm) 990
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2

The following additional cases were cited in argument or referred to in the skeleton arguments:

Abaidildinov v Amin [2020] EWHC 2192 (Ch); [2020] 1 WLR 5120
Barking and Dagenham London Borough Council v Persons Unknown [2021] EWHC 1201 (QB); [2022] JPL 43
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417
Cream Holdings Ltd v Banerjee [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661; [2007] FSR 3, CA
Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)
Hooper v Rogers [1975] Ch 43; [1974] 3 WLR 329; [1974] 3 All ER 417, CA
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch)
Lloyd v Symonds [1998] EHLR Dig 278, CA
Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)
Ward (AC) & Son Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301, CA

APPEAL from Bennathan J

On 21 and 24 September and 2 October 2021 the claimant, National Highways Ltd, issued three claim forms using the modified CPR Pt 8 procedure provided by CPR r 65.43 by which it applied for interim

anticipatory injunctions against the defendants, persons unknown, who from 13 September 2021 onwards had been involved in protests organised by Insulate Britain in and around London and south-east England, blocking highways forming part of the strategic road network ("SRN"). Interim injunctions without notice were granted (i) on 21 September 2021 by Lavender J in relation to the M25, (ii) on 24 September 2021 by Cavanagh J in relation to parts of the SRN in Kent and (iii) on 2 October 2021 by Holgate J in relation to M25 feeder roads. The injunctions were originally made only against persons unknown but contained an express obligation on the claimant to identify and add named defendants. On 1 October 2021 May J ordered that 113 people arrested for participation in the protests be added as named defendants. On the return date of 12 October 2021 the three injunctions were continued until trial or further order and the claims were ordered to proceed together. The claimant continued to add further named defendants as protests continued.

On 22 October 2021 the claimant applied under CPR Pt 81 for an order committing certain defendants to prison for contempt of court for alleged breaches of the M25 injunction. The committal applications were determined on 17 November 2021 (*National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB)), on 15 December 2021 (*National Highways Ltd v Buse* [2021] EWHC 3404 (QB)) and on 2 February 2022 (*National Highways Ltd v Springorum* [2022] EWHC 205 (QB)), with 24 of the 133 named defendants ("the contemnor defendants") being found to have been in contempt of court.

Also on 22 October 2021 the claimant filed consolidated particulars of claim in three actions, claiming that the conduct of the protesters constituted (i) trespass; (ii) private nuisance; and/or (iii) public nuisance. In October and November 2021 the claims were served on the named defendants. No named defendants were added after November 2021. On 24 March 2022 the claimant applied for summary judgment under CPR r 24.2 and final anticipatory injunctions against all defendants. By orders dated 9 and 12 May 2022 Bennathan J [2022] EWHC 1105 (QB) dismissed the application in part, granting summary judgment and a final injunction against the 24 contemnor defendants but refusing to grant summary judgment and granting an interim injunction against the remaining 109 named defendants and the unnamed defendants.

By an appellant's notice filed on or about 3 November 2022 and with the permission of and pursuant to the orders of the Court of Appeal (Whipple LJ) dated 27 October 2022 and 8 November 2022, the claimant appealed on the ground that the judge had erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on the claimant to show, on the balance of probabilities, that the defendants had already committed the torts in question. Pursuant to CRP rr 6.15(3)(b) and 23.4(2)(c) permission was given for the appeal to be heard without notice, the defendants having seven days from the date of the order within which to apply to set it aside or vary it, service of documents by posting being dispensed with pursuant to CPR rr 6.15 and 6.27, leave being given to serve by electronic means as detailed in the order.

The facts are stated in the judgment of the court, post, paras 2–25.

A *Myriam Stacey KC*, *Admas Habteslasie* and *Michael Fry* (instructed by *DLA Piper UK LLP*) for the claimant.

David Crawford and Matthew Tulley, two of the named defendants, in person on behalf of the 109 named defendants.

The court took time for consideration.

B 23 February 2023. **SIR JULIAN FLAUX C** handed down the following judgment of the court.

Introduction

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

E *Factual and procedural background*

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

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

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

(2) In QB-2021-003626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent.

(3) In QB-2021-003737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.

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

4 Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur a number of disclosure orders were made, providing for chief constables of the relevant police forces to

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

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

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

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

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

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

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

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

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

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

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

F

The judgment below

13 Having set out the background to the claims, the judge referred to the SJ application at para 5. He evidently considered summary judgment a distinct process from the grant of a final injunction, since, at para 4 of the judgment, he says that the application for a final injunction is being made "in
G addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at paras 24–36 then with the injunction at paras 37–49 of the judgment.

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

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

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

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

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

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

18 The judge then turned to the question of injunction. At para 37 he cited the test for the grant of an interim injunction in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

> "the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protesters, some of whom may have no assets, damages would obviously not be an adequate remedy."

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

> "(1) Is there a strong possibility that the defendants will imminently act to infringe the claimants' rights?
>
> "(2) If so, would the harm be so 'grave and irreparable' that damages would be an inadequate remedy[?] I note that the use of those two

A words raises the bar higher than the similar test found within *American Cyanamid*."

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

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

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

> "(1) The courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
>
> "(2) The terms must be sufficiently clear and precise to enable persons E potentially effected [sic] to know what they must not do [*Ineos* and *Canada Goose*].
>
> "(3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights [*Canada Goose*]."

22 The judge then referred to cases where the balance between the F competing rights of protesters and others have been considered, starting with *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act 1998 came into force and has to be read with a degree of caution in the light of *Director of Public Prosecutions v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the district judge dismissing the G prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *Director of Public Prosecutions v Cuciurean* [2022] QB 888, saying at para 44:

> "The limits to *Ziegler* were made clear in *Director of Public Prosecutions v Cuciurean* in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 H of the Criminal Justice and Public Order Act 1994, as article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under article 1 of Protocol 1, by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not

allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway."

23 It is worth noting, at this point, that under regulation 15 of the Motorways Traffic (England and Wales) Regulations 1982 (SI 1982/1163), pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey to that provision, it was not relied upon by NHL, either before the judge or before this court.

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

"in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*Jones* and *Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protesters to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*National Highways Ltd v Heyatawin* [2022] Env LR 17]."

25 At para 49, in balancing the competing interests, he said:

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

The ground of appeal

26 NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the 109

named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show, on the balance of probabilities, that all defendants had actually already committed the torts in question.

The submissions

27 Ms Stacey submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* [2019] 4 WLR 100, para 34(1). This form of injunction was granted when the claimant's rights were threatened, but, for whatever reason, the claimant's cause of action was not complete: per Marcus Smith J in *Vastint* [2019] 4 WLR 2, para 31(2):

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

28 The court's jurisdiction to grant quia timet or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint*, para 27. Ms Stacey referred to the two-stage test for considering whether to grant a quia timet injunction, set out by Marcus Smith J in *Vastint*, adopted by the judge in the present case and which we quoted at para 19 above. In relation to the first stage, whether there is a strong possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey drew attention to the factors identified by Marcus Smith J at para 31(4), in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public, such as missing a hospital appointment or a funeral or having an accident.

29 In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey submitted that, whilst the law had been in a state of flux the decision of the Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295 ("*Barking*") represents the law as it currently stands. In that case, this court held that there was power under section 37 of the Senior Courts Act 1981 to grant a final injunction against persons who were unknown and unidentified, so-called "newcomers". This court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose* [2020] 1 WLR 2802.

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

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

32 In relation to summary judgment under CPR Pt 24, Ms Stacey submitted that there was no suggestion in CPR r 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at para 24.2.3 of *Civil Procedure 2022*, vol 1. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ application.

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

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

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

35 At the hearing of the appeal, some 20 of the named defendants attended court. Three of those were contemnor defendants against whom the judge granted a final injunction and in respect of whom there was no appeal before the court. The other 17 were some of the 109 defendants.

A One of them, David Crawford, was deputed to address the court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

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

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

D *Discussion*

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

E 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

F 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

G 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)

H 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.

41 It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see para 35(5) of the judgment), the defendants' general attitude was of disinterest in court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly, it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel* [2021] EWHC 1045 (Comm). If the judge had applied the right test under CPR r 24.2 and had had proper regard to CPR r 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that, accordingly, NHL was entitled to a final injunction against those defendants.

42 Although *Barking* [2023] QB 295 was cited to the judge and he refers to it at para 36 of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown, as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

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

Appeal allowed.

CATHERINE MAY, Solicitor

Neutral Citation Number: [2023] EWHC 1038 (KB)

Case Nos: QB-2021-003841
and QB-2021-004122

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2023

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

TRANSPORT FOR LONDON	**Claimant**
- and -	
(1) PERSONS UNKNOWN	
(2) MR ALEXANDER RODGER AND 137 OTHERS	**Defendants**

- -
- -

Andrew Fraser-Urquhart KC and Charles Forrest (instructed by **TfL**) for the **Claimant**
Barry Mitchell and **David Rinaldi** (Named Defendants 9 and 135) attended.
No attendance by or representation for the other **Defendants**

Hearing dates: 29 and 30 March 2023

- -

Approved Judgment

Mr Justice Morris :

Introduction

1. By this action Transport for London ("the Claimant") seeks a final injunction against 129 of the 138 named defendants ("the Named Defendants") and certain defined persons unknown ("Persons Unknown"). The Defendants, including the Persons Unknown, are supporters of, and activists connected with, "Insulate Britain" ("IB"). This is the final trial of the action.

2. The claims arise from disruptive protests on the highway since September 2021 under the auspices of IB and other affiliated groups. A very large proportion of those protests have involved protesters deliberately blocking roads by sitting down in the road, and often gluing themselves to its surface and/or "locking" themselves to each other to make their removal more time-consuming. The 129 Named Defendants are all alleged to have taken part in one or more IB protests.

3. By the final injunction, the Claimant seeks an order that prevents the blocking, for the purpose of protests, of roads and surrounding areas at 34 identified locations, referred to as the "IB Roads". The IB Roads are a very important part of the TfL Strategic Road Network (the "GLA Roads"). GLA Roads are, broadly speaking, the most important roads in Greater London, carrying a third of London's traffic, despite comprising only 5% of its road network length. The locations fall into two categories: first, bridges or junctions of great importance and their surrounding access roads; and secondly, certain longer protected stretches of road, such as the A4 and the North Circular Road.

4. This case is the latest in a number of similar "protest" cases which have come before this Court and the Court of Appeal. In particular, some of those cases concern protests under the auspices of a related group "Just Stop Oil" ("JSO"). In a number of those cases, written judgments have been handed down, covering issues, both legal and factual, similar to those in this case. In particular I have in mind the judgments of Bennathan J and the Court of Appeal in the case which I refer to as *NHL v IB*, reported at [2022] EWHC 1105 (QB) and [2023] EWCA Civ 182 respectively, and the judgments of Freedman J and Cavanagh J in the case which I refer to as *TfL v JSO*, reported at [2022] EWHC 3102 (KB) and [2023] EWHC 402 (KB) respectively. I also refer to the judgment of Lavender J in another NHL case dated 17 November 2021 [2021] EWHC 3081 (QB). In this judgment, I do not repeat all of the relevant factual and legal background; rather, where uncontroversial or where I agree, I cross-refer to, and adopt, certain passages in those judgments.

Summary conclusion

5. For the reasons set out in this judgment, I am satisfied that the Claimant has established its case and that it is appropriate to grant a final injunction against 129 of the Named Defendants and against Persons Unknown in the terms set out in the orders which I make today.

Brief procedural history

6. The Claimant has brought two actions, commenced, respectively, on 12 October 2021 and 8 November 2021. Interim injunctions in the two actions had already been granted

on an urgent and without notice basis, respectively, by May J on 8 October 2021 and by Jay J on 4 November 2021. At subsequent on notice hearings, these interim injunctions were extended, in some cases in varied form. On 11 October 2022 the interim injunctions which are currently in force were made by Cotter J. On the same occasion the judge ordered an expedited trial. Initially the Claimant intended to apply for summary judgment. However following the judgment of Bennathan J in *NHL v IB*, it decided to proceed instead to a final trial. That decision was made and the direction given before the Court of Appeal, more recently in February this year, granted full summary judgment in *NHL v IB*. In the course of the hearing before me, I indicated that the interim injunctions would remain in place until this judgment is handed down.

7. The final prohibitory injunction is sought against 129 Named Defendants and against Persons Unknown when acting for the purposes of protesting in the name of IB (as defined more specifically in the title to the claim). (The activities of the Named Defendants which are enjoined are not limited to them acting in the name of IB). The final order, as originally sought, was in terms very similar to the interim injunctions currently in force, and included provision both for alternative service and for third party disclosure from the Metropolitan Police. As matters developed at the hearing, the Claimant no longer seeks any order for third party disclosure: see further paragraph 62 below.

8. The Claimant's evidence for this trial comprises witness statements of Mr Abbey Ameen, the Claimant's principal in-house solicitor and Mr Glynn Barton, formerly the Claimant's Director of Network Management and now its Chief Operating Officer, both dated 27 February 2023. Each gave evidence in court verifying the contents of his statement. The former sets out at some considerable length, with extensive exhibits, detailed information about the various protest groups and the array of different proceedings brought by different parties (as set out below). He gave detailed evidence of the IB (and the JSO) protests that have taken place and of their effect, both in the London area and elsewhere, particularly around the M25. He also gave evidence of the service of documents and other steps taken to bring the proceedings to the attention of the Defendants and IB. Mr Barton's statement sets out the justification for the roads selected by the Claimant to be protected by the final injunction sought. He provides evidence as to why the IB Roads are so strategically important and why they should be protected. His evidence is that their strategic importance means that they are more likely to be targeted by IB protesters, whose intention is to cause maximum disruption and thus maximum damage is caused to other users of the highway and the wider public interest.

The Parties

The Claimant

9. The Claimant is a statutory corporation created by the Greater London Authority Act 1999. It is both the highway authority and the traffic authority for the GLA Roads. More detail of the Claimant's statutory functions, powers and duties in relation to the GLA Roads and the provisions under which it brings these proceedings are set out in Freedman J's judgment in *TfL v JSO* at §§8 and 9.

10. The Claimant makes this claim pursuant to its duties under section 130 Highways Act 1980 (power to take legal proceedings as part of performing the duty to assert and

protect the rights of the public to use and enjoy the highway) and on the basis that the conduct of the Defendants in participating in the IB protests constitutes (i) trespass, (ii) private nuisance and/or (iii) public nuisance.

The Named Defendants

11. The claim forms identify, at Annex 1, the 139 Named Defendants, each individually numbered from 1 to 139. The Named Defendants have all participated at IB protests (M25 or IB roads) or JSO protests.

12. Mr Ameen has explained in detail the steps taken to serve the Named Defendants with all relevant court documents in the course of the proceedings, following the making of earlier orders for alternative service. As regards this trial, the Named Defendants were sent, by first class post, the notice of hearing for this trial on 10 January 2023. It was also emailed to IB on 10 January 2023 and was put up on the TfL and Greater London Authority websites. In a further witness statement dated 2 April 2023, Mr Ameen has explained how all the written materials relevant to this trial were sent to the Named Defendants, including the evidence, draft final orders and skeleton argument, on dates between 28 February 2023 and 16 March 2023.

13. No defendant has acknowledged service or filed a defence. Up until the final trial, no defendant had attended any hearing in these claims since 12 November 2021; and no defendant has served any evidence or skeleton argument for this trial. However, at or leading up to this trial, four Named Defendants have made representations.

14. First, Matthew Tulley, Named Defendant 65, in advance of the hearing, offered an undertaking to the Court. In an email to Mr Ameen, he asserted that he has not breached the existing injunctions and that he has no intention of doing so. Secondly, Mr David Rinaldi, Named Defendant 135 both wrote to the Claimant and appeared on the first morning of the hearing. Thirdly, Mr Barry Mitchell, Named Defendant 9, also attended court on the first morning of the hearing. Each of these three Named Defendants has offered an undertaking in terms similar to the terms of the final injunction which I have decided to grant. Accordingly, whilst each remains a party to the claims, the final injunction is not made as against them and their names are now excluded from Annex 1 to the final injunction.

15. A fourth defendant, James Bradbury (Named Defendant 39), following notification on 10 January 2023, wrote to the Claimant on 16 January 2023, claiming that he had not blocked any TfL infrastructure and asking for clarification of the case against him. Following a rather general reply from the Claimant, he wrote again on 10 February 2023 maintaining his position and asking why his name had been added to the injunction. Following that email, the Claimant served all the trial materials on Mr Bradbury at his home address, which sets out the case against him both generally and the specific evidence against him individually. In this regard, and in response to my inquiry since the date of the hearing, Mr Ameen has provided a further witness statement dated 28 April 2023, explaining that the initial trial materials were sent to Mr Bradbury twice, by first class post on 28 February 2023 and by an email from him personally to Mr Bradbury sent on 8 March 2023 (responding in fact to Mr Bradbury's email of 16 January 2023). Mr Bradbury did not reply to that email. On 15 March 2023 further trial materials were sent by post to Mr Bradbury. He has not responded to

any of those materials sent to him. Absent any such response, I am satisfied that the final injunction is properly made against Mr Bradbury.

16. However, in relation to six Named Defendants, the Claimant seeks permission to discontinue the proceedings pursuant to CPR 38.2(2)(a)(i). In the case of five of those Defendants, the Claimant has not been able to effect service of documents upon them, due to the lack of a correct, or any, address for service. In addition, one further Defendant has, unfortunately, since died. I therefore grant permission to the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) in respect of Named Defendants 8, 34, 91, 102, 108 and 112 and an order under CPR 6.28 dispensing with service of the Notice of Discontinuance on these six Named Defendants. I will order that the discontinuance of the proceedings against them will take effect on the date of the order of the Court; their names are thus excluded from Annex 1 to the final injunction. I will also order that these six Named Defendants will be entitled to their costs (if any).

17. In these circumstances, excluding these six Named Defendants and the two Named Defendants who appeared at the hearing, I was satisfied that it was appropriate to proceed to hear the trial in the absence of the remaining 131 Named Defendants, pursuant to CPR 39.3(1).

18. It further follows that the final injunction order is made against 129 Named Defendants as set out in Annex 1 to the order which I will make.

The Factual Background

Insulate Britain

19. Insulate Britain (IB) is an environmental activist group which takes direct protest action in furtherance of two demands: first, that the UK government immediately promises to fully fund and take responsibility for the insulation of all social housing in Britain by 2025; and secondly that the UK government immediately promises to produce within four months a legally binding national plan to fully fund and take responsibility for the full low-energy and low-carbon whole-house retrofit, with no externalised costs, of all homes in Britain by 2030 as part of a just transition to full decarbonisation of all parts of society and the economy. IB says doing so will provide warmer homes and contribute to reducing the UK's carbon emissions.

20. The Named Defendants are those who have been engaging in deliberately highly disruptive protests under the banner "Insulate Britain". All protests are peaceful. IB has repeatedly made un-retracted statements that its protests will continue until his demands are met.

Other groups: Extinction Rebellion and Just Stop Oil

21. There are two other similar groups: Extinction Rebellion and Just Stop Oil (JSO). Extinction Rebellion describes itself as an international movement that uses non-violent civil disobedience in an attempt to halt mass extinction and minimise the risk of social collapse through, inter alia, reducing greenhouse gas emissions to net zero by 2025. Extinction Rebellion has engaged in deliberately disruptive protests on, inter alia, public highways. However on 31 December 2022 it announced that it would

temporarily cease disruptive protests. IB was founded by six members of Extinction Rebellion.

22. JSO is a group, formed in December 2021, which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. There is an intersection between the groups Insulate Britain, JSO and Extinction Rebellion. In February 2022 IB joined the JSO coalition, although IB and JSO are not in formal coalition with each other. JSO has also repeatedly said that it will continue its deliberately disruptive protests until its demands are met. More detail about JSO is set out at §§19 to 21, and 23 to 26 of Freedman J's judgment in *TfL v JSO*.

23. Since September 2021, the courts have granted a number of other injunctions, similar in form to the interim injunctions granted in this case, against members and supporters of those organisations. These were obtained at the behest of other bodies, including National Highways Limited ("NHL") and HS2 Ltd. Many of the same named defendants appear in a number of the cases.

IB protests

24. Mr Ameen refers to a substantial number of IB protests. IB protests started in about September 2021. The last protest on the road solely under the IB banner was on 4 November 2021. Individual acts of IB protest took place up until April 2022. The last IB protest on the roads, as part of the JSO coalition, but retaining the IB identity took place on 12 October 2022. Mr Ameen's evidence is that the interim injunctions had been effective in reducing and/or pausing IB protests.

25. Despite this, in early 2023 IB made a public statement that it would continue with its protests, and despite the announcement from Extinction Rebellion. An article in The Guardian dated January 2023 reported as follows:

> *Insulate Britain and Just Stop Oil have doubled down on their commitment to disruptive climate "civil resistance" after Extinction Rebellion announced new tactics prioritising "relationships over roadblocks".*
>
> *Insulate Britain said its supporters remained prepared to go to prison. "Insulate Britain supporters remain committed to civil resistance as the only appropriate and effective response to the reality of our situation in 2023," its statement said.*
>
> *"In the UK right now, nurses, ambulance drivers and railway workers are on strike because they understand that public disruption is vital to demand changes that governments are not willing or are too scared to address."*

26. As of 30 March 2022, 174 people had been arrested, 857 times, during IB protests on public highways. Mr Ameen's evidence is that the IB and JSO protests have been very dangerous and disruptive, creating an immediate threat to life, putting at risk the lives of those protesting, those driving on the roads and those policing the protests. At times, the protests have also caused a risk of violence between protesters and ordinary users

of the highways; in some cases force has been used to remove protesters from the highway. He gives examples of particular such incidents.

JSO protests: April 2022 onwards

27. JSO protests started in March or April 2022. These protests have, until recently, largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. There were protests daily by JSO between 1 October and 31 October 2022. During that period, there were, on a daily basis, large scale protests at key areas of largely the central London road system. On many occasions, JSO have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London have continued, even after interim injunctions were made and served. More detail of these JSO protests is set out at §§27 and 28 of Freedman J's judgment in *TfL v JSO*. Since November 2022 there have been further JSO protests, including a new tactic of "slow marches", as explained by §13 of Cavanagh J's judgment.

Other proceedings

The Claimant and GLA Roads: proceedings in relation to JSO

28. In addition to the current proceedings, in October 2022 the Claimant commenced proceedings in respect of JSO protests, *TfL v JSO*, and was granted an urgent without notice interim injunction against certain named defendants and persons unknown in connection with protests which involved JSO protesters sitting down in and blocking GLA Roads. This injunction was continued, on notice, on 31 October 2022 by Freedman J and again by Cavanagh J on 24 February 2023, who at the same time directed an expedited final trial and made an order under CPR 31.22. These are the judgments referred to at paragraph 4 above.

29. There is a large overlap between the defendants named in the *TfL v JSO* injunctions and the Defendants in this case. Of the 138 Named Defendants in this case, 65 are also named defendants in the *TfL v JSO* claim. As regards those 65 individuals the injunctions sought in this case and those granted (and now applied for) in *TfL v JSO* have precisely the same effect, since, in their case, the prohibition is not limited by reference to the banner under which any protest might take place. It follows that the final injunction against the Named Defendants in this case will also cover their participation in any future JSO protests on the IB Roads.

National Highways Limited and the M25 (SRN): IB and JSO

30. NHL has also obtained injunctions in respect of major parts of The Strategic Road Network, namely the M25 and feeder roads on to the M25. NHL initially obtained interim injunctions, and has now obtained a final anticipatory injunction against IB protesters – in part from Bennathan J on 9 May 2022 and then more extensively from the Court of Appeal recently on 14 March 2023. The judgments in this case are referred to in paragraph 4 above. Since autumn of 2022, NHL also has an ongoing claim against

JSO protesters protecting structures on the M25 such as overhead gantries. On 21 November 2022 Soole J granted an interim injunction in respect of such JSO protests.

The Issues

31. I consider the position of the Named Defendants and Persons Unknown in turn. The issues that fall for consideration are as follows

(1) *The Named Defendants:* whether the Court should grant a final injunction in the terms sought against the remaining Named Defendants. This involves consideration, in particular, of the following:

- the Claimant's underlying causes of action, in general;

- the conditions for the grant of a final anticipatory prohibitory final injunction, in general;

- the position under Articles 10 and 11 European Convention of Human Rights ("ECHR").

(2) *Persons Unknown:* whether the Court should grant a final injunction in the terms sought against Persons Unknown. This involves, additionally, consideration of the provision for alternative service and briefly, the now withdrawn application for a third party disclosure order. The three orders (as originally sought) - an injunction against Persons Unknown, an order for alternative service and a third party disclosure order – are closely interrelated. In general and in practice, to date, the Claimant (and others) have sought and obtained injunctions against persons unknown and at the same time obtained a direction for alternative service and third party disclosure orders against the police in order to identify persons hitherto unknown who had taken part in protests. Once the identity of those protesters was then disclosed, the Claimant was then able to serve the protesters with the relevant court documents, through the provision for alternative service.

(1) The grant of a final injunction against the Named Defendants

The relevant legal principles

The causes of action

32. In the present case, the Claimant's case is that its rights are or will be infringed by the Defendants committing one or more of the torts of trespass, public nuisance and private nuisance. The relevant principles applicable to each of these torts, particularly in the context of protests on the highway, are set out by Bennathan J in *NHL v IB* at §§28 to 31. See also *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) ("*HS2*") at §§74, 77-79, 84-90.

33. 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 and11 ECHR.

34. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonably 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.

35. 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 (*HS2* at §84). The position in relation to an obstruction of the highway for the purposes of public nuisance is stated in *Halsbury's Laws* Vol 55 (2019) at §354: (a) a nuisance with reference to a highway has been defined as 'any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely and conveniently passing along it'; (b) whether an obstruction amounts to a nuisance is a question of fact; (c) an obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle; but an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (d) generally, it is a nuisance to interfere with any part of the highway; and (e) 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.

The requirements for a final anticipatory injunction

36. The Claimant seeks a final anticipatory (also referred to as a precautionary or *quia timet*) prohibitory injunction against the Named Defendants. To grant such an order the Court must be satisfied that (1) there is a strong probability that that the defendants will imminently act to infringe the claimant's rights and (2) the ensuing harm would be so grave and irreparable that damages would be an inadequate remedy: see *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) at §31(3)-(4). There is no requirement for the Claimant to prove that its rights have already been infringed; but only that there is a real and imminent risk that they will be infringed: *NHL v IB* (CA) at §§37-39 and 19. The question here therefore is whether there is a real and imminent risk that one or more of the three torts will be committed by the Defendants.

Articles 10 and 11 ECHR

37. A protest which obstructs the highway may be lawful by reason of Articles 10 and 11 ECHR. (Articles 10 and 11 ECHR are set out at §34 of Freedman J's judgment in *TfL v JSO*). If so, this provides a defence to the alleged torts of trespass (and private and public nuisance). The relevant principles are derived from *DPP v Ziegler* [2021] UKSC 23 approving *City of London Corp v Samede* [2012] EWCA Civ 160 at §§38-44. In summary, the issues which arise under Articles 10 and 11 require consideration of the following five questions:

    (1) Is what the defendant did in exercise of one of the rights in Articles 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 paragraph (2) of Article 10 or Article 11?

(5) If so, is the interference 'necessary in a democratic society' so that a fair balance was struck between the legitimate aim and the requirements of freedom of expression and freedom of assembly?

38. Question (5) is the requirement of "proportionality" – a fact-specific inquiry which requires evaluation of the circumstances in the individual case. Question (5) in turn requires consideration of four sub-questions as follows:

(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/intrusive 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?

As regards sub-question (4), a non-exhaustive list of relevant factors is set out in *DPP v Ziegler* at §§59, 61, 70-78, 81-86 and 116.

Application to the facts of this case

39. I turn to apply these legal principles to the facts of this case.

The causes of action: the torts

40. On the evidence before me I am satisfied that, subject to the considerations arising under Articles 10 and 11 ECHR, the conduct, both in the past and threatened in the future, of the Defendants in protesting on the IB Roads by deliberately blocking and obstructing those roads, prima facie constitutes the torts of trespass, private nuisance and public nuisance. As to trespass, the protesters directly enter on to land in the possession of the Claimant and use the land for a purpose other than exercising a public right of way; whether they are justifiably exercising a right to protest turns upon the application of Articles 10 and 11. Secondly, as to private nuisance the protests causes a substantial and unreasonable interference with the enjoyment and exercise of the rights of way of other road users. Thirdly, as to public nuisance, as a result of the protests, the public are prevented from freely, safely and conveniently passing along the IB Roads (the highway); the protests deliberately cause a physical obstacle on the IB Roads rendering them impassable or more difficult to pass along. I consider in paragraphs 44 and 45 below, whether, nevertheless, the protests are lawful under Articles 10 and 11.

Requirements for grant of final anticipatory injunction

41. First, I am satisfied that, on the facts here, that there is a real and imminent risk of further protests (on the part of the Defendants) and that, subject to the Article 10 and 11 issues, those protests will infringe the Claimant's rights. The evidence of Mr Ameen demonstrates that the Named Defendants have repeatedly, deliberately and over a long

period carried out those protests in order to cause the maximum disruption to the Claimants and the public. IB has repeatedly stated that they will continue to protest and that they will not be discouraged by injunctions. Further the fact that, apart from those Defendants referred to in paragraphs 14 and 15 above, none of the Named Defendants has sought to engage with the proceedings suggests that there is no arguable defence to the Claimant's claim including its claim for a final anticipatory injunction; see *NHL v IB* (CA) at §§40 and 41. The final injunction sought *in relation to the Named Defendants* is not limited to protesting under the IB banner; it applies to them individually protesting under whatever banner they choose.

42. I have considered whether the fact that the last protest solely under the IB banner took place in November 2021 (and last joint protest in October 2022) affects my assessment of whether there is a real and imminent risk of further future IB protests on the IB Roads, such that an anticipatory injunction is not justified. I have concluded that nevertheless there is such a real and imminent risk. First, IB itself (and expressly in contrast to the position of Extinction Rebellion) continues to state that it will continue its protests and has so stated recently (see paragraph 25 above). Secondly, I accept that the level of IB protests since November 2021 is likely to have been affected by a combination of the effect of the interim injunctions granted in this case and colder weather in the winter months. It follows that in the summer months the prospect of protest activity is likely to increase. Moreover if no final injunction were to be granted, then the chilling effect of the court injunctions to date would be removed, increasing the risk of the resumption of protests. Thirdly, if no final injunction were to be granted in respect of protests under the IB banner, then, it might well be that the recent switch from protests under the IB banner to protests under the JSO banner would be reversed, not least because of the more recent imposition of interim injunctions in the *TfL v JSO* case. (I note that in *NHL v IB* both Bennathan J and CA granted injunctions "against IB", despite the fact that, by that time, the transition from IB to JSO had occurred). Finally, in the case of the Named Defendants, since the final injunction will apply to them, regardless of the banner under which they protest, I take account of the fact that JSO protests have been continuing and of JSO's recent statements of intent. This is particularly relevant in the case of the 65 Named Defendants who are also defendants in the *TfL v JSO* case.

43. Secondly, I am satisfied and find that the ensuing harm from further protests at IB Roads will be grave and irreparable. As demonstrated by the evidence relating to past protests, the deliberate blocking of roads so that vehicles of all types cannot pass would cause serious disruption to many people, risk to life and of violence, economic harm, nuisance and the diversion of public resources. Damages would be an inadequate remedy for such harm, in the light of the matters to which I have referred; first, because much of it will be unquantifiable; secondly because the Claimant could not recover for losses sustained by others; and thirdly, the Defendants would be unlikely to be able to pay such damages as might be quantifiable.

Articles 10 and 11 ECHR

44. In the present case the answers to the first four questions set out in paragraph 37 above are as follows:

    (1) By participating in IB protests on the public highway, the Defendants have been, and will be, exercising their rights to freedom of expression and freedom of

assembly in Articles 10 and 11 ECHR respectively: see Lavender J at §31(1) and Freedman J in *TfL v JSO* at §39.

(2) The grant of a final injunction would be an interference with those Article 10 and 11 rights.

(3) Any such interference is prescribed by law i.e. by the power contained in section 37 Senior Courts Act 1981, the case law which govern the exercise of that power and the Claimant's duties as a highway and traffic authority under section 130 Highways Act 1980: see Lavender J at §31(3) and *HS2* at §200.

(4) The interference is in pursuit of a legitimate aim, namely the protection of the rights and freedoms of others, such as other lawful highway users (under Article 11(2)) and in the interests of public safety and the prevention of disorder on the IB roads (under Articles 10(2) and 11(2)).

45. Turning then to question (5) - whether the interference is "necessary in a democratic society" - and each of the four sub-questions in paragraph 38 above, I find as follows:

(1) The aims of preventing the obstruction of the public using the important IB roads and preventing the violence and danger which occur when this is jeopardised are sufficiently important to justify the interference with the Defendants' rights. The evidence is that the IB protests have caused considerable disruption and a risk to safety (see paragraph 26 above).

(2) There is a rational connection between the means chosen (final injunctive relief) and the aim in view. The aim is to allow road users to exercise their right to use the road system and final injunctive relief would prohibit the deliberate obstruction of the IB Roads by protesters which prevents or hinders the exercise of that right. The grant of interim injunctions in this case and in other cases has been successful to date in reducing such deliberately obstructive protests on the highways: see paragraph 24 above.

(3) There are no less restrictive or alternative means to achieve these aims than a final injunction in the form sought. Damages would not prevent any further protests, for the reasons given in paragraph 43 above. Prosecutions for offences involved in protests can only be brought after the event and in any case are not a sufficient deterrent because IB (and JSO) protesters have said they protest in full knowledge of and regardless of this risk and many have returned to the roads multiple times having been arrested, bailed, prosecuted, and convicted. Other traditional security methods such as guarding or fencing of IB Roads are wholly impractical for resource and logistical reasons. Recent changes to the law in the form of the Policing, Crime, Sentencing and Courts Act 2022, which came into force in May and June 2022, have not changed the approach of protesters.

(4) Finally, as to sub-question (4) I find that making a final injunction strikes "a fair balance between the rights of the individual and the general interest of the community, including the rights of others". Applying the factors enumerated in *Ziegler*, the factors favouring the grant of the final injunction include the ten points referred to by Freedman J in *NHL v JSO* at §§43 to 51. Whilst in that case his findings were directed towards JSO protests, I am satisfied that they apply

with equal force to past and future IB protests. As regards the fourth point made by Freedman J (intention to block the highway), in the present cases, the locations of the IB protests have varied widely across London and have been chosen with a view to causing maximum disruption. Further a final injunction relating to the IB Roads does not prevent the Defendants from continuing to express their views at another location or near to the IB Roads provided they do not breach the terms of the injunction. In addition a failure to make a final injunction would encourage the continuation of IB's protests on the IB Roads which are liable to be targeted because of their strategic importance and the damage and disruption which would necessarily entail. IB has repeatedly and recently stated that it will continue to protest until its demands are met. On the other side of the balance, I have taken into account, to the appropriate degree, the sincerity of the protesters' views on what is an important matter of public interest, the nature of their message and objectives and the potential availability of alternative routes or modes of transport around the protest. As to the protesters' views, I refer to the observations of Lord Neuberger MR in *Samede* at §41. It is not appropriate for the Court to express agreement or disagreement with those views. Overall, and having myself considered all matters relevant to the balance under sub-question (4), in reaching this conclusion on the "fair balance", I have taken into account and endorse the final balance of points made by Freedman J at §61

46. In these circumstances I am satisfied that it is just and convenient for a final injunction to be made against the Named Defendants.

(2) The position of Persons Unknown, Alternative Service and Third Party Disclosure

47. I turn to consider whether the final injunction should also be granted against "persons unknown". On the present case, the "persons unknown" are identified specifically through an express link to Insulate Britain. The final injunction applies only to a "person unknown" who is protesting "on behalf of, in association with, under the instruction or direction of, or using the name of, Insulate Britain". (The position of Named Defendants is different in this regard: see paragraph 41 above). As explained in paragraph 31(2) above, this issue and the issues of alternative service (and third party disclosure) are interrelated to some extent.

An order against Persons Unknown in principle

The relevant legal principles

Barking and Dagenham LBC v Persons Unknown

48. In principle, "persons unknown" include both anonymous defendants who are identifiable at the time the proceedings commence, but whose names are unknown and also what have been referred to as "newcomers", that is to say people who at the relevant time of the issue of proceedings and at the time of the grant of the injunction are unknown and unidentified, but who in the future will join the protest and as a result with then fall within the description of the "persons unknown".

49. As regards the making of a final injunctive order against "newcomer" persons unknown, the relevant principles are contained in the decision of the Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2022]

EWCA Civ 13 [2022] 2 WLR 946 ("*Barking and Dagenham*") at §§75,77, 79-89, 91, 107-108, 117. The principles can be summarised as follows:

(1) The court has power to grant a final injunction that binds individuals who are not parties to the proceedings at that time, including against persons who at the time of the grant of the injunction are unidentified and unknown (i.e. "newcomers").

(2) A person unknown (newcomer) who subsequently *knowingly* acts in breach of the terms of the injunction thereby makes himself a party to the proceedings and is bound by the injunction. It is the act of infringing the order (with knowledge of the order) that makes the infringer a party. There is no need to serve formally that person with the proceedings in order for him or her to become a party to the proceedings and be bound by the injunction.

(3) Even after a final injunction is granted the court retains the right to supervise and enforce it; the proceedings are not at an end until the injunction is discharged.

(4) Where a newcomer breaches the injunction and thereby makes himself a new party to the proceedings, he can apply to set aside the injunction.

(5) Persons unknown must be described with sufficiently clarity to enable persons unknown to be served with proceedings.

(6) These principles apply to the tortious actions of protesters (as well as to persons unknown in other types of case, such as those setting up unauthorised encampments).

(7) All persons unknown injunctions, including final injunctions ought normally to have a fixed end point for review and it is good practice to provide for a periodic review.

An appeal to the Supreme Court in *Barking and Dagenham* was heard in February this year and judgment is now awaited. Nevertheless the foregoing represents the current state of the law: see *NHL v IB* (CA*)* at §42.

The Canada Goose guidelines

50. In the earlier case of *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 at §82, the Court of Appeal set out seven guidelines for the grant of *interim* injunctions against persons unknown. These are set out at §84 of Freedman J's judgment in *TfL v JSO* and were applied to the facts in that case at §§85 to 91. Subject to necessary modifications and in so far as applicable, it appears that these guidelines apply also to the grant of a *final* injunction against persons unknown: see *Barking and Dagenham* at §89. I am satisfied that each of the seven guidelines are met in this case. Whilst he was considering *interim* relief in respect of *JSO* protests, in my judgment the analysis and reasoning of Freedman J at §§85 to 91 applies with equal force to persons unknown protesting under the IB banner. Taking each in turn:

(1) At the beginning of and during the course of these proceedings, identified defendants have been joined as Named Defendants and have been served with the Claim and subsequent documentation. As regards the future, the provisions for

the alternative service (see section on this below) ensure fairness for any newcomers who will, under the final injunction, have liberty to apply to the Court to vary or discharge the final injunction against him/her specifically or everyone.

(2) The identification of "Persons Unknown" is clear, precise and targets their conduct, and derives further clarity from the fact that the conduct in question has been ongoing for many months and is threatened to continue. The identification of Persons Unknown through the express link with IB provides further clarity and precision and limits the scope of Persons Unknown.

(3) In so far as this applies also to *final* anticipatory relief, there is a sufficiently real and imminent risk of a tort being committed: see paragraphs 41 and 42 above.

(4) The final injunction identifies the Named Defendants individually and, as regards persons unknown, the final injunction contains provisions for alternative service, which will enable them to be served with the order.

(5) The concern that the prohibited acts must correspond to the threatened tort is not acute in the present case; in both trespass and nuisance, defining the unlawful conduct is straightforward. It involves the deliberate interference with the free passage of the public along the highway by land for the purposes of protesting.

(6) The prohibited conduct and the description of persons unknown uses non-technical language without reference to any cause of action and is clear in its scope and application and capable of being understood by a defendant. Its reliance on personal intention (i.e. "deliberate" actions for "the purpose of protesting") can be proven without undue complexity and it is necessary to prevent capturing what may otherwise be lawful ordinary highway use, by Named Defendants or anyone else.

(7) The final injunction has a clear geographical limit, being restricted to the IB Roads which are select in number, of high strategic importance, and which are therefore also liable to be targeted by IB. The temporal limit is less acute in relation to final injunctions, but here it is satisfied by the time limit, review and liberty to apply provisions referred to in paragraph 52 below.

51. For these reasons I am satisfied that it is just and convenient to grant the final injunction against the Persons Unknown.

Time limit and review

52. In order to protect the public and the Claimant's rights, and given the extent and nature of the Defendants' disruptive protests and IB repeated statements that they will not stop protesting until their demands are met, the final injunction will last for a period of 5 years. In addition provision is made for a yearly review by the Court for supervisory purposes. A review provision was included in the final injunctions made by Bennathan J and the Court of Appeal in *NHL v IB*. This will also enable the Court to consider the implications, if any, of the Supreme Court judgment in the *Barking and Dagenham* case. In any event, the final injunction will provide for liberty for any Defendant (Named or Person Unknown) to apply to vary or discharge the injunction at any time.

Alternative service (and third party disclosure)

53. The Claimant seeks an order for alternative service, similar to that contained in the existing interim injunctions (and in many other NHL and TfL cases). It also sought an order for third party disclosure, again similar to that contained in the interim injunctions. In the course of the hearing, it withdrew that application for reasons I explain below.

54. The alternative service to be permitted is service of all documents by email to IB itself coupled with individual posting through the letterbox, or affixing to the front door, a package, with a notice in prominent writing. In principle, the underlying purpose of the provision for alternative service is to provide a method of ensuring that those who might breach its terms are made aware of the order's existence: see *NHL v IB* (Bennathan J) at §50 and *TfL v JSO* (Cavanagh J) at §32. I am satisfied that, for the reasons set out in Mr Ameen's witness statement and by Cavanagh J at §32, it is appropriate to permit alternative service in the terms proposed in the draft final injunction

55. In my judgment, there might appear to be a tension between the rationale for the provision for alternative service and the analysis in *Barking and Dagenham* in relation to persons unknown. On the one hand, it is said that alternative service is required so as to make a person aware of the proceedings and the injunction; on the other hand, *Barking and Dagenham* establishes that merely knowingly acting in breach of the injunction is sufficient to render a person party to the proceedings and automatically in breach and that formal service itself is not necessary.

56. I note that in the orders made in *NHL v IB* by both Bennathan J and the Court of Appeal there was express provision that persons who had not been served would not be bound by the terms of the injunction (and the fact that the order had been sent to the relevant organisation's website or otherwise publicised did not constitute service). Bennathan J explained at §52 that the effect of that provision was that anyone arrested at a protest could be served and risked imprisonment if they *thereafter* breached the terms of the injunction. The making of such a provision however seems to me to be inconsistent with the decision in *Barking and Dagenham* that merely *knowingly* acting in breach of the injunction is sufficient to render a person party to the proceedings and that service is not required to make such a person bound or in breach. This was picked up by Cavanagh J in *TfL v JSO* at §52 where he pointed out that (1) given the wide media coverage and publicity, it was "vanishingly unlikely" that anyone minded to take part in a protest was unaware that injunctions had been granted by the courts; (2) as a result it was not necessary to include an order in the terms made by Bennathan J; and (3) he noted TfL's stated intention of not commencing committal proceedings against a person unknown unless that person had previously been arrested and then served with the order.

57. In the present case Mr Fraser-Urquhart KC has indicated that the Claimant will continue to adopt this "two strike" practice: it would not seek to commit a person unknown who attends a prohibited protest (even with knowledge of the injunction) first time round, but would only do so if that person is then served with the injunction and attends a second prohibited protest. By that time, such a person would no longer be a Person Unknown.

58. In the light of this indication, I then questioned the purpose of the inclusion of Persons Unknown in the final injunction. Mr Fraser-Urquhart accepted that the Claimant's intended practice could be seen to dilute the deterrent effect of the Persons Unknown element of the final injunction. He nevertheless submitted that its inclusion would increase the preventative effectiveness of the final injunction by way of wider publicity; and further that an injunction limited only to Named Defendants would substantially weaken that wider deterrent effect. I accept these contentions. There is a distinction between, on the one hand, the making a final injunction against a newcomer and, on the other, the consequences of such a final injunction – i.e. whether a person unknown becomes a party and is subject to, and in breach of, the injunction, which depends on knowingly acting contrary to the terms of the final injunction. *Barking and Dagenham* is not authority for the proposition that the court can only grant a final injunction against a newcomer person unknown where the Court can be sure that the person unknown acting in breach of its terms in the future will know that he is acting in breach.

59. As a result, I do not consider that the Claimant's intended practice undermines the appropriateness of including Persons Unknown in the final injunction nor of making orders for alternative service.

60. One final point in this regard: since mere knowledge of the injunction on the part of a person unknown is sufficient to render him potentially bound by its terms, and in order to increase the preventative purpose of the injunction, I took the view that the Claimant should bolster the steps it takes to publicise more widely the making of the final injunction. As a result the Claimant has now included at paragraph 7b of the draft final injunction additional provisions: to email a copy of the order not only to IB, but also to JSO, and other environmental protest groups; to post on the Claimant's twitter feed; to notify the Press Association and to place a notice in the London Gazette. In this way the likelihood of someone minded to take part in protests being unaware of the Court's order will be further diminished.

Third party disclosure order

61. To date, in many cases, claimants have sought and obtained an order for third party disclosure under CPR 31.17 directing the police to disclose to the claimant details of those who have been arrested at protests. Such orders were made in the interim injunctions in the present case, providing, first, for disclosure of the name and address of any person arrested at an IB protest on the IB Roads and, secondly, for all arrest notes and footage relating to any breach or potential breach of the injunction or any predecessor injunctions. (The former provision concerned persons unknown and the latter was directed to support possible contempt proceedings against Named Defendants). Moreover, and significantly, those injunctions provided for those disclosure duties to be "continuing" duties, for as long as the injunction remained in force. Similar orders have been made in the *NHL v IB* and *TfL v JSO* cases.

62. In the present case, the Claimant sought the inclusion in the final injunction of a third party disclosure order in the same terms. In advance of the hearing, I raised with the Claimant questions in relation to this issue, and in particular as to the Court's jurisdiction to make an order in the terms sought (under CPR 31.17, s.34 Senior Court Act 1981 or otherwise), including whether there is power to order disclosure of documents/information which are/is not yet in existence, but which may only come into existence in the future (and if so, whether it should) – in other words, in relation to

protests which have not yet happened. Subsequently, in the course of argument, Mr Fraser-Urquhart informed the Court that the Claimant did not pursue the application for third party disclosure order. It did not require any information about protests which had already taken place. He indicated that the Claimant might come back to the Court and seek a disclosure order in the event that a further protest had occurred. I say no more about this issue, save to say that in my judgment, if it arises for consideration again, the Court would greatly be assisted by detailed submissions for and against the making of such an order.

Conclusion

63. In the light of my conclusions at paragraphs 46, 51 and 54 above, there will be judgment for the Claimant for a final injunction in the terms of the draft order submitted.

Neutral Citation Number: [2023] EWHC 1201 (KB)

Case No: KB-2022-003542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 26th May 2023

Before :

MR JUSTICE EYRE

- -

Between :

TRANSPORT FOR LONDON	**Claimant**
- and -	
(1) PERSONS UNKNOWN	**Defendant**
(2) MS ALYSON LEE AND 167 OTHERS	

- -
- -

Andrew Fraser-Urquhart KC and Charles Forrest (instructed by **TfL**) for the **Claimant**
Benjamin Buse, Carole Caldwell, Joanna Blackman, Mair Bain, Anthony Harvey, James Green, Benjamin Larson, Matthew Parry and Rachel Payne (Named Defendants 8, 63, 65, 74, 102, 110, 140, 143, and 145) attended.
No attendance by or representation for the **other Defendants**

Hearing date: 4th May 2023

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 26th May 2023.

Mr Justice Eyre :

Introduction.

1. The Claimant is the highway authority and traffic authority for the GLA Roads. Those are roads in the Greater London area which were formerly trunk roads. Although the GLA Roads comprise only 5% of the length of London's road network they carry approximately one-third of the traffic in the Greater London area.

2. This judgment follows the trial of the Claimant's claim for a final injunction against 168 named defendants ("the Named Defendants") together with persons unknown. As will be seen below the Claimant no longer seeks an injunction against most of the Named Defendants. The Claimant seeks an injunction preventing certain forms of disruptive protest on a number of the GLA Roads against the remainder of the Named Defendants and against persons unknown. The claim is brought in response to actions taken as a part of the campaigning activity of Just Stop Oil ("JSO").

3. The background to these proceedings is set out in detail in the judgments of Freedman and Cavanagh JJ at [2022] EWHC 3102 (KB) and [2023] EWHC 402 (KB) respectively given when granting the Claimant interim injunctions in this matter. The general history of related protest activity undertaken as part of campaigns by Insulate Britain and Extinction Rebellion is summarised by Morris J in his judgment in *Transport for London v Persons Unknown & others* [2023] EWHC 1038 (KB) ("*Insulate Britain")*. I adopt the analysis of the history set out in those judgments and need only give the shortest of summaries here. After the trial of this matter Cotter J handed down his judgment in *National Highways Ltd v Persons Unknown & others* [2023] EWHC 1073 (KB) which primarily addressed matters arising out the activities of the Insulate Britain campaign but which also referred to aspects of the JSO campaign.

4. JSO is a campaigning group. Its particular demand is that the government should halt all licensing consents for the exploration, development, and production of fossil fuels in the United Kingdom. However, it lends its name to a wider coalition of campaigning groups with related aims and overlapping bodies of supporters. Those groups include Insulate Britain and Extinction Rebellion. Their campaigns arise out of environmental concerns and in particular out of beliefs as to the action needed to address the effects of climate change and/or to prevent further harmful effects from the use of fossil fuels. The failure of the government to take the measures or at the speed which the members and supporters of these groups regard as adequate caused a number of those persons to engage in protests.

5. The protest action with which I am concerned has taken the form of the blocking of roads. It has involved those protesting taking various steps to hinder their removal from the roads in question; to extend the duration of the road blockage; and to heighten the effect of those blockages. The methods used have included the linking together of those engaged in obstructing the highway; the affixing of persons or objects to the highway or to structures on the highway; and the damaging of such structures (examples have included the covering of signs). Latterly the protests have taken the form of slow marching namely walking slowly in a body on a road so as markedly to reduce the speed and flow of traffic along the road. Those actions have had and have been intended to have a significant disruptive effect on the use of the roads in question by other road users. That disruptive effect has not been limited to the roads actually obstructed nor to

the immediate vicinity of the obstruction as Freedman, Cavanagh, and Morris JJ have explained. Those speaking for JSO and individual members of the campaign have asserted their intention to continue with such protests until their objectives are achieved. The peak of the activity was in October 2022 when for a period roads were being obstructed daily in London though there was also a high level of such activity in November and December 2022. There has been some reduction in this disruptive activity since then. The Claimant says that this reduction is not the result of any change of belief or of approach on the part of those engaging in these campaigns but that it has been caused by a combination of the harsher weather during the winter months and of the interim injunctions which have been granted in this matter (together with other court orders in related proceedings).

6. The judgments of Freedman and Cavanagh JJ set out the history to February 2023. As disclosed by the updating evidence from the Claimant the activities of the JSO campaign since then have been largely confined to instances of slow marching on various roads. However, it is of note that those speaking for JSO have said that the group has been engaged in a campaign of civil disobedience since 24th April 2023 and that there appears to have been an increase in the instances of slow marching since then. There has been no renunciation by JSO or those speaking on its behalf of the previous forms of disruption. It is also to be noted that there have been repeated assertions by those speaking for JSO that the campaign of disruption will continue until the group's objectives have been achieved.

The Procedural History.

7. The claim form was issued on 20th October 2022.

8. On 18th October 2022 by an order sealed on 19th October 2022 Yip J granted an interim injunction. The injunction was with some modifications extended until the disposal of this matter by orders made by Freedman and Cavanagh JJ on 4th November 2022 and 27th February 2023 respectively. Those judges also gave various directions for the further conduct of the case.

9. There was some addition of further named defendants in the course of the proceedings. By the time of the trial before me there were 168 Named Defendants. However, the Claimant no longer sought relief in respect of two of those. They were Arne Springorum and Xavier Gonzalez Trimmer (Named Defendants 5 and 48 respectively): the former had not been served and the latter had sadly died in the course of the proceedings.

10. Nine of the Named Defendants attended the hearing. At the hearing eight of these gave undertakings in terms mirroring the injunction sought by the Claimant and the ninth, Joanna Blackman (Named Defendant 65) provided a signed form of undertaking subsequently. In light of that the Claimant no longer sought injunctive relief against those defendants.

11. With the exception of Joanna Blackman those Named Defendants who attended the hearing had sent written submissions to the court or to the Claimant. In the case of Anthony Harvey (Named Defendant 102) I was told that the submission had been approved by and was being made on behalf the other Named Defendants who attended the hearing (with the exception of Joanna Blackman) and further forty-two Named Defendants**.** I gave those Named Defendants who attended the hearing an opportunity

to address the court. A number of them did so while others chose to confirm that they stood by the contents of their written submissions. Those written and oral submissions explained the conduct and motivation of their makers and commented on the actions of JSO more generally. In addition they raised matters relevant to the assessment of the degree of risk of further conduct of the kind which the Claimant seeks to enjoin and of the proportionality of and need for relief by way of injunction. Although those Named Defendants who have given undertakings are no longer at risk of being subject to the injunction sought I have taken account of their submissions when considering the position of the other Named Defendants and of Persons Unknown in the ways I will explain below.

12. A further six of the Named Defendants did not attend but did send written submissions to the court or to the Claimant. Those were David Crawford (Named Defendant 15), Louise Lancaster (Named Defendant 30), Meredith Williams (Named Defendant 33), Jane Neece (Named Defendant 63), Christine Welch (Named Defendant 64), and Adrian Howlett (Named Defendant 71).

13. At the hearing I indicated that I would not hand down any judgment until after Friday 19th May 2023 to give further Named Defendants an opportunity to proffer undertakings. A considerable number of those defendants did so (including the six Named Defendants listed in the preceding paragraph) with the consequence that no further relief is sought against them. The consequence is that there only remain ten Named Defendants against whom the Claimant seeks a final injunction.

14. No other Named Defendant either attended the hearing or made any representations. I was, however, satisfied that there had been compliance with the directions for alternative service made by Cavanagh J and that it was appropriate to proceed with the trial in the absence of the other Named Defendants.

The Relief sought by the Claimant.

15. In the course of this action the Claimant has revised the relief it is seeking. It now seeks an injunction mirroring that granted by Morris J in *Insulate Britain.*

16. The proposed order would last for a period of five years with annual reviews. The Claimant seeks to enjoin the Named Defendants and persons unknown from blocking, slowing down, obstructing, or otherwise interfering with access to or the flow of traffic onto or along twenty-three specified roads or junctions for the purpose of protesting and from causing, assisting, or encouraging other persons to do so. The proposed order identifies a number of activities including locking onto other persons or to the roads or structures thereon which are within the proposed prohibition. However, it expressly provides that the prohibition does not extend to the practice of slow marching.

17. The Claimant says that these roads and junctions are of particular strategic importance to the London traffic network. It says that they were chosen to be the subject of the proposed order for two reasons. The first is that they are perceived because of that strategic importance to be at higher risk than other roads of being subject to protests in the form of obstruction of the flow of traffic on or along them. The second is the extent of the harm and disruption which would result from a blockage of the particular roads. It is said that in respect of each a blockage would have effects spreading more widely affecting the surrounding areas and potentially affecting the traffic network more

widely. Glynn Barton is the Claimant's Chief Operating Officer and he has provided a witness statement explaining the reasoning for the choice of each road. In respect of each road he has identified the volume of traffic involved; the effect which a blockage of the traffic at that point would be likely to have; and particular facilities, such as hospitals, which would be affected by such a blockage of traffic. Of the twenty-three roads or junctions eleven have previously been the subject of protests involving the disruption of traffic flow as part of the campaign by JSO and associated groups.

18. In enforcing the interim injunction against persons unknown the Claimant has adopted an approach of not seeking to commit a person breaching the injunction for contempt on the first occasion that such a person breaches the order. The Claimant's response to the first breach by a person who becomes a defendant by reason of such a breach has been to serve notice of the injunction on that person with an indication that the person in question would be at risk of committal proceedings in the event of a further breach. The Claimant says that it intends to continue that approach if the final injunction is granted in the terms sought. I have concluded that this cannot be a material factor in my consideration of the appropriateness or otherwise of the order sought. I have to consider whether it is appropriate to make the proposed injunction against persons unknown in circumstances where a single breach would suffice to put a person in breach at risk of committal proceedings.

The Applicable Law.

19. In his judgment in *Insulate Britain* at [33] - [35] Morris J explained the necessary elements of the three causes of action on which the Claimant relies thus:

> "33. 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 and11 ECHR.
>
> 34. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonably 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.
>
> 35. 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 (*HS2* at §84). The position in relation to an obstruction of the highway for the purposes of public nuisance is stated in *Halsbury's Laws* Vol 55 (2019) at §354: (a) a nuisance with reference to a highway has been defined as 'any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely and conveniently passing along it'; (b) whether an obstruction amounts to a nuisance is a question of fact; (c) an obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle; but an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (d) generally, it is a nuisance to interfere with any part of the highway; and (e) 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."

20. The requirements which have to be satisfied before an anticipatory injunction can be granted are well-established. The effect of the decision of Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 and of the decision of the Court of Appeal in *National Highways Ltd v Persons Unknown & others* [2023] EWCA Civ 182 is that such an injunction will only be granted where there is a strong probability that unless restrained the defendant will act in breach of the claimant's rights and that the harm resulting from such a breach would so grave and irreparable that damages would not be an adequate remedy. At [31] Marcus Smith J identified a non-exhaustive list of factors relevant to that assessment. The words and actions of a defendant will be of particular significance in making that assessment. The court can be satisfied that there is a sufficiently strong probability of breach even in respect of a defendant who has not yet breached the claimant's rights (see the Court of Appeal's decision at [37] – [39]). However, as Julian Knowles J pointed out in *High Speed Two Ltd & another v Persons Unknown & others* [2022] EWHC 2360 (KB) at [95] – [96], as a matter of common sense rather than law the court may be more readily satisfied that there is sufficient probability that a defendant will act in breach a claimant's rights unless restrained when the defendant in question has already breached those rights. Again as a matter of common sense this will be all the more so where the defendant has not disavowed those past actions and still more where an intention of repetition has been expressed.

21. A protest on a highway may amount to an exercise of the protester's rights of freedom of expression and/or freedom of assembly under articles 10 and 11 of the European Convention on Human Rights. In those circumstances the effect of the decisions in *DPP v Zeigler* [2021] UKSC 23, [2022] AC 408, *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624, and *Cuadrilla Bowland Ltd & others v Persons Unknown & others* [2020] EWCA Civ 9, [2020] 4 WLR 29 is that the court must consider five further questions namely:

    (1) Is what the defendant did in exercise of one of the rights in Articles 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? The relevance of this requirement being that article 10 envisages the right to freedom of expression being subject to such restrictions as are prescribed by law and that article 11 provides that only such restrictions as are prescribed by law shall be placed on the right to freedom of assembly.

    (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Article 10 or Article 11?

    (5) If so, is the interference 'necessary in a democratic society' such that a fair balance is struck between the legitimate aim and the requirements of freedom of expression and freedom of assembly?

22. The fifth of those questions raises an issue of proportionality which requires the court to consider a further four sub-questions which are:

(1) Is the aim of the interference which would result from the injunction sufficiently important to justify interference with a fundamental right?

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

(3) Are there less restrictive or intrusive 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?

23. The assessment of proportionality is a fact-specific exercise requiring close consideration of the circumstances of the particular case. Potentially relevant factors were identified by Lord Neuberger MR in *Samede* at [39] and following and by Lords Hamblen and Stephens in *Zeigler* at [71] – [78]. In addition to those matters it can, as explained by Leggatt LJ in *Cuadrilla* at [94] – [95], be relevant to consider whether the disruption resulting from a protest was a side-effect or an intended consequence of the actions in question and whether those engaged in a protest are seeking to persuade others or are attempting to compel those others to act or to desist from acting in a particular way.

24. The sincerity of the views of those protesting and the importance of the issue or issues being addressed are potentially relevant to the balancing exercise. Thus the freedom of expression rights of those genuinely seeking to raise concerns on matters of political or economic importance and of general concern will carry more weight than those of persons seeking to give vent to matters of more limited concern or of less importance. However, it is important to note both the limited weight that attaches to that factor and also that the court's agreement or disagreement with the views expressed by those protesting or with the outcome which the protesters wish to achieve is entirely irrelevant to that exercise and can play no part in the court's conclusion as to the grant or refusal of relief. It is not for the court to evaluate the views being expressed and still less to express agreement or disagreement with them: see the explanations given in *Samede* at [39] – [41]; by Freedman J in his judgment at the interim stage in this case at [53] – [55]; by Lavender J in *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB) at [34] – 37]; and by Cotter J in *National Highways Ltd v Persons Unknown* at [83] and [106] – [107].

25. I have had regard to the approach to the balancing exercise which Morris J adopted in the *Insulate Britain* case together with the decisions of Lavender J in *National Highways Ltd v Persons Unknown* and of Bennathan J in *National Highways Ltd v Persons Unknown & others* [2022] EWHC 1105 (QB). In doing so, however, I bear in mind that the balancing exercise is fact-specific and that regard must be had to the particular circumstances of the current case. It follows that those decisions illustrate factors which can be relevant and conclusions which can be reached as to where the applicable balance falls but that they cannot determine the outcome of the balancing exercise which I must undertake. I have also had regard to the judgments of Freedman and Cavanagh JJ in this case. In their judgments Freedman and Cavanagh JJ were considering the particular circumstances of this case as they were at the time of those judgments. It follows that the identification by those judges of the potentially relevant factors and of the proportionality of granting relief in this case must carry great weight. It is nonetheless to be remembered that Freedman and Cavanagh JJ were identifying

relevant factors and assessing proportionality at the interim stage. I have to assess the position at the stage of trial with a view to the making of a final injunction (with the Claimant seeking an injunction to run for five years). It is possible that the weight to be attached to particular factors might be different at the interim and final stages of the process and also possible that the conclusion as to proportionality might be different at those stages.

26. There are additional requirements which have to be satisfied before the court will grant an anticipatory injunction against persons unknown. As explained by Morris J in *Insulate Britain* at [50] the seven guidelines for the grant of an interim injunction against such persons unknown as identified by the Court of Appeal in *Canada Goose UK Retail Ltd & another v Persons Unknown & others* [2020] EWCA Civ 303, [2020] 1 WLR 2802 at [82] also govern the grant of final injunctions against persons unknown. I will address those guidelines below when considering the appropriateness or otherwise of the relief sought against Persons Unknown.

27. I turn now to the application of those requirements to the circumstances of this case. In respect of the Named Defendants it will be necessary to consider their positions individually though as will be seen they fall into three categories with substantially the same considerations applying to all of those in a particular category but with marked differences between the positions of those in each category. It is of note that none of the remaining Named Defendants have chosen to engage in the court or the Claimant in any way. I have taken account of the submissions and the statements made by those of the Named Defendants who gave undertakings when considering the issues of risk and proportionality more generally. In respect of the other remaining Named Defendants their decision not to participate in the proceedings whether by way of attendance or the provision of submissions is of considerable relevance as explained by the Court of Appeal in *National Highways Ltd v Persons Unknown & others* at [40]. At that point the Chancellor (delivering the judgment of the court) was addressing relevance for the purposes of summary judgment but the position is all the greater at trial. The failure of those Named Defendants to participate in the proceedings or to make submissions is to be taken as indicating that they have chosen not to challenge the case being asserted in relation to them. In addition a failure to engage with the court or with the Claimant can, particularly when combined with the failure to take an opportunity to resolve matters through the giving of an undertaking, give an insight into the intention of the defendant in question as to his or her future conduct (as Cotter J explained in his judgment at [121]).

The Causes of Action.

28. In *Insulate Britain* Morris J was satisfied that the actions in question would if committed be a breach of the Claimant's rights. With the substitution of the roads with which I am concerned for "the IB roads" the analysis in the following terms at [40] of Morris J's judgment applies here.

> "On the evidence before me I am satisfied that, subject to the considerations arising under Articles 10 and 11 ECHR, the conduct, both in the past and threatened in the future, of the Defendants in protesting on the IB Roads by deliberately blocking and obstructing those roads, prima facie constitutes the torts of trespass, private nuisance and public nuisance. As to trespass, the protesters directly enter on to land in the possession of the Claimant and use the land for a purpose other than exercising a public right of way; whether they are

> justifiably exercising a right to protest turns upon the application of Articles 10 and 11. Secondly, as to private nuisance the protests causes a substantial and unreasonable interference with the enjoyment and exercise of the rights of way of other road users. Thirdly, as to public nuisance, as a result of the protests, the public are prevented from freely, safely and conveniently passing along the IB Roads (the highway); the protests deliberately cause a physical obstacle on the IB Roads rendering them impassable or more difficult to pass along. …"

Is there a strong Probability that the Remaining Named Defendants and/or Persons Unknown will act in Breach of the Claimant's Rights?

29. I will first consider whether there is in general terms a risk of the resumption or initiation of the actions which the Claimant seeks to restrain at the locations with which I am concerned and then turn to address the positions of the particular Named Defendants.

30. I take account of the fact that during 2023 the principal tactic of those engaged in the JSO campaign has been that of slow marching, an activity which the Claimant does not seek to restrain. Nonetheless I am satisfied that in the absence of an injunction there is a strong probability that at least some of those engaged in that campaign will resume the blocking of roads along the lines of the action taken in October 2022 and immediately thereafter. In that regard I accept the Claimant's contention that the reduction in such activity has been in part due to weather conditions and also that it has been a consequence of the injunctions which have been imposed. It is highly likely that the onset of warmer weather combined with the discharge of the existing injunction would be followed by a resumption of the blocking of roads.

31. It is also of note that not only has there been no assertion by those speaking on behalf of JSO that there will be no resumption of its former activities but that rather on 24th April 2023 it was said that JSO was committed to a campaign of civil disobedience. There has, moreover, been an increase in the frequency of protests taking the form of slow marching since then.

32. Considerable caution is needed in taking account of the submissions made by those Named Defendants who did participate in the proceedings as a basis for conclusions about the intentions of those who did not. Nonetheless I do take account of those submissions as providing an insight into the state of mind of those associated with the JSO campaign. That is because I am satisfied that the submissions made by those of the Named Defendants who participated in the court process throw light on the state of mind of those who have associated themselves with the JSO campaign. This is particularly so as the picture which emerges from those submissions is consistent as between the submissions and is consistent also with the position as revealed by the other evidence. It is relevant that none of those making submissions disavowed the objectives or tactics of the JSO campaign and none of them said that the objectives of the campaign had been achieved such that protest action was no longer needed. Rather those persons have chosen for differing reasons to give undertakings rather than be subject to a continuing injunction and to the risks of liability for costs.

33. In those circumstances I am satisfied that there is a real and imminent risk that in the absence of an injunction there would be protests under the banner of the JSO campaign and taking the form of the blocking of roads at the locations identified by the Claimant.

I have taken account of the fact that not all of those locations have previously been the site of such protests. Nonetheless all are locations in London where the blocking of the road will be liable to cause substantial and widespread congestion. They are precisely the kind of location at which such protests have previously occurred and the fact that a particular location has not previously been targeted is not an indication of the absence of risk. That risk is not confined to the remaining Named Defendants but also extends to other persons both those whose identity is currently unknown but who have participated in such protests previously and those who join or associate themselves with the JSO campaign in the future. It follows that there is a real and imminent risk of obstruction of these locations by persons unknown.

34. I turn to the remaining Named Defendants. It was open to each of them to give an undertaking or to engage with the court process as the great majority of the other Named Defendants have done. There has been no response from these defendants to the proceedings let alone any indication that they do not intend to engage in the blocking of roads. As explained above such a failure to engage is to be seen as a deliberate decision on the part of the relevant defendants not to challenge the case advanced against them and as an indication of their intentions in terms of future conduct.

35. The remaining Named Defendants fall into three broad groups. The first is made up of those defendants who have at least once engaged in the blocking of roads or related actions in furtherance of the JSO and/or Insulate Britain campaigns and who have also participated at least once in further actions in the context of those protests. Several have done so repeatedly; a number have been subject to injunctions; and three have acted in breach of injunctions. That category comprises Named Defendants 3, 7, 20, 45, 46, 56, 84, and 137. The second category contains only Named Defendant 51 in respect of whom the case is simply that he has been subjected to two injunctions in other proceedings. The final category is made up of Named Defendant 142 who is said to have engaged on one occasion in the blocking of a road as part of the JSO activities in October 2022.

36. In Schedule 1 I have listed those Named Defendants in the first category and have summarised the matters which are said to justify the conclusion that there is a strong probability that they would, if unrestrained, act in breach of the Claimant's rights. Each of these defendants has engaged in JSO or Insulate Britain protests at least twice when at least one of those occasions has involved the blocking of roads. In the case of several of these defendants there have been multiple instances of such conduct combined with acting in breach of an injunction and/or the gluing of the defendant to court furniture. I have included Andrew Worsley Named Defendant 3 in this category because although only one instance of the blocking of a road is expressly put forward in his case he has been subject to two injunctions in connexion with JSO or Insulate Britain protests. One of those injunctions was that granted by the Court of Appeal in *National Highways v Persons Unknown* and as I will explain below the effect of that is that he had been found to have engaged in a protest in relation to the events leading up to that injunction. In circumstances where there has been no engagement with the court by any of these defendants and where none has disavowed the objectives or tactics of the JSO campaign I am satisfied that there is a strong probability that in the absence of an injunction each of these defendants would act in breach of the Claimant's rights by obstructing one or more of the roads with which I am concerned.

37. Ben Newman Named Defendant 51 falls into a different category. The justification advanced for including him as a named defendant is that he has been subject to two other injunctions in respect of protests as part of the JSO or Insulate Britain campaign. He was subject to the injunctions granted in *Thurrock Council & another v Adams & others* [2022] EWHC 1324 (QB) and to the injunction granted by the Court of Appeal in *National Highways v Persons Unknown.* The effect is that on two separate occasions the court has concluded that there is a sufficiently grave and imminent risk of this defendant engaging in protest activity to warrant the grant of an injunction against him. If the evidence went no further than that I would doubt whether this defendant's inclusion in the current injunction would be warranted. The fact that a court is satisfied that there is a risk of particular activity at a different location would not without more suffice to establish the necessary degree of risk that there would be protest activity at the locations with which I am concerned. However, on proper analysis the evidence does go further than that. It is apparent from paragraph 8 of HH Judge Simon's judgment in the *Thurrock Council* case and from paragraph 35 of Bennathan J's judgment in the *National Highways Ltd* case that in order to have been joined in those actions as a named defendant it was necessary that Mr Newman had been arrested in connexion with protest activity at the sites with which those injunctions were concerned. As Bennathan J noted it is possible that a particular arrest was mistaken or unjustified. The position, however, is that Mr Newman has twice been arrested in the context of JSO or Insulate Britain protest activity with the arrests being at different locations. Mr Newman has chosen not to participate in these proceedings. It would have been open to him to contend that his presence at the sites in question was unrelated to the protest activity or to disavow that activity. He has chosen not to take such a step and in those circumstances I am satisfied that the Claimant has established that there is a real and imminent risk of Mr Newman engaging in the obstruction of the roads in question here if not restrained.

38. Finally, Gregory Dring Named Defendant 142 was involved in obstructing one of the roads with which I am concerned on a single occasion as part of the protests by JSO in October 2022. I note that there has been no relevant protesting activity by him since October 2022 and in his case there was only one instance of such activity. I have reflected whether this conduct is sufficient to establish that there is a strong probability that if unrestrained this defendant will act in breach of the Claimant's rights. I am satisfied that such a strong probability is shown here. The balance is tipped in favour of that conclusion by the combination of the facts that he took part in a JSO protest on a relevant road; that he has chosen not to engage in the court process; and that he has neither disavowed the aims of the JSO campaign nor stated that he will no longer engage in the same.

39. It follows that the necessary strong probability that the defendant will act in breach of the Claimant's rights has been established in respect of each of the remaining Named Defendants.

Will such a Breach cause grave and irreparable Harm such that Damages will not be an adequate Remedy?

40. I am satisfied that the breach of the rights of the Claimant and of others by the blocking of roads at the locations in question here would cause grave and irreparable harm. I will address the nature and extent of the harm further when considering the question of proportionality below. It suffices at this stage to say that the blocking of these roads

will inevitably cause serious disruption to the lives of many people. The harm will be to their economic interests but also to their personal lives in ways which although not measurable in financial terms will be real and lasting. Some of those affected will be prevented from attending meetings or appointments or taking part in particular one-off activities in circumstances where the opportunity to participate which has been lost will never be regained. In addition there will be a substantial diversion of finite public resources from other tasks of public value.

41. In *Insulate Britain* at [43] Morris J explained that damages would not be an adequate remedy because much of the harm would be unquantifiable; the Claimant would not be able to recover for the losses sustained by others; and because the ability of the Defendants to pay such damages as could be quantified is questionable at best. The same considerations apply here and I adopt that analysis.

The first four *Zeigler* Questions.

42. These questions can be answered shortly and as will be seen I substantially adopt the approach taken by Freedman J in his judgment at the interim stage in this matter; by Lavender J at [31] in *National Highways Ltd v Persons Unknown*; and by Morris J in the *Insulate Britain* case at [44].

43. It was accepted by the Claimant that participation by the Named Defendants and by persons unknown in JSO protests on the public highway would be an exercise of their article 10 and article 11 rights of freedom of expression and assembly. I proceed on that basis.

44. The grant of a final injunction would clearly be an interference with the exercise of those rights.

45. The grant of an injunction would also clearly be an interference prescribed by law as being one flowing the court's powers under section 37 of the Senior Courts Act 1981 and by way of enforcement of the Claimant's rights and duties under the Highways Act 1980 and at common law.

46. The interference with the Defendants' article 10 and 11 rights would be in pursuit of a legitimate aim within the scope of those articles. That aim would be protection of the rights and freedoms of others being not just the Claimant but also those whose passage along and use of the highway would be impeded by the actions which the Claimant asks the court to restrain.

The Balancing Exercise and Consideration of whether the Interference with the Named Defendants' Article 10 and Article 11 Rights is Necessary and Proportionate.

47. The first three of the sub-questions forming part of the balancing exercise can be addressed shortly before I turn to the issue of proportionality and of the drawing of a fair balance between the Defendants' rights and those of others and the interests of the wider community. In the following analysis it will be seen that I have drawn heavily on the conclusions reached by Freedman J in his judgment at the interim stage in this matter and by Morris J in *Insulate Britain*.

48. The aim of protecting the rights of the Claimant and the rights and freedoms of others to use these important roads is of sufficient importance to warrant an interference with the Defendants' Convention rights provided that a proper balance is drawn and the interference is proportionate.

49. There is a clear rational connexion between the way in which there is an interference with the Defendants' rights and the aim of protecting the rights and freedom of others. The aim is to allow others to use the roads with which the court is concerned and the proposed injunction would prohibit the obstruction of those roads in such a way as to interfere with those rights.

50. I am satisfied that there are no less restrictive or intrusive ways in which that aim could be achieved. As I have already noted damages would be an inadequate remedy for the harm to the rights of the Claimant and of the public more generally. It is apparent that the risk of being liable for damages has not deterred those Named Defendants who have chosen not to give undertakings. In addition I adopt by reference to the roads with which I am concerned the analysis of Morris J [45(3)] that:

> "… Prosecutions for offences involved in protests can only be brought after the event and in any case are not a sufficient deterrent because IB (and JSO) protesters have said they protest in full knowledge of and regardless of this risk and many have returned to the roads multiple times having been arrested, bailed, prosecuted, and convicted. Other traditional security methods such as guarding or fencing of IB Roads are wholly impractical for resource and logistical reasons. Recent changes to the law in the form of the Policing, Crime, Sentencing and Courts Act 2022, which came into force in May and June 2022, have not changed the approach of protesters."

51. I turn then to the question of proportionality and the fair balance between the Defendant's Convention rights and the rights of others.

52. The following factors operate in particular against the granting of an injunction:

    i) Proper regard must be had to the importance of the Defendants' Article 10 and 11 rights. The court must not simply pay lip service to such rights but must give them real weight. In that context there is force in the contention that some degree of disruption to others is if not necessarily inherent in the right to protest then a likely corollary of many forms of protest.

    ii) The subject matter of the Defendants' protests is an issue of real seriousness and importance. In that regard it is of note that those engaging in the protests have not done so lightly and it is apparent that many of them feel that they are compelled to act in this way believing that no other action is effective to prevent future harm to others.

    iii) The protests are not violent. This was a point which was made in a number of the submissions put to me but in the context with which I am concerned it has only very limited weight. It is correct that those engaging in the obstruction of roads are not themselves violent to others but the purpose of their actions is to obstruct others. The persons affected by the obstruction of the roads are compelled to suffer that impact until those creating the obstruction choose to depart or are physically removed. Those involved in the JSO campaign do not depart from the roads which they have chosen to block voluntarily. Moreover,

in many instances their actions by way of linking themselves together or attaching themselves to structures are deliberately designed to hinder and delay their removal.

iv) It was said in the submissions made to me that those engaged in the JSO protests deliberately leave a "blue light" lane free or that they will voluntarily clear the road sufficiently to allow an ambulance or fire engine displaying its flashing lights to pass through an obstruction. This point was combined with an argument that the drivers of emergency vehicles are trained to deal with congestion and are experienced in working their way through congested streets. In addition the point was made that congestion can occur on London's roads as a consequence of accidents or road works or a host of other matters and that these are not generally regarded as thwarting the movement of emergency vehicles. I accept that those engaged in the protests will be prepared to allow through an emergency vehicle with flashing lights at the point of their obstruction of the road. However, when regard is had to the nature and effect of the obstructions this is of little weight. The effect of the obstruction of the roads with which I am concerned is to cause substantial congestion of traffic over a wide area. Indeed that is its objective. Such congestion will necessarily have an impact on the passage of emergency vehicles and will do so over an area extending beyond the immediate point of obstruction. Skilled and experienced though the drivers of such vehicles are their passage through congested traffic will inevitably be slower than their passage along roads which are not heavily congested. It barely needs stating that delay in the passage of emergency vehicles creates a risk of harm to health or property: that is why they are equipped with sirens and flashing lights and why other road users cede them right of way. The lifting of an obstruction at the point of obstruction to allow the passage of an emergency vehicle is only a minor amelioration of the effect on such vehicles and of the risk to those awaiting their arrival or travelling in them. There is similarly little force in the point that congestion can and does arise from other causes. That is because the congestion resulting from the obstruction of roads such as those in issue here is in addition to that occurring in the normal course of events. Moreover, the importance of these roads and junctions to the flow of traffic is such that their obstruction will cause more extensive congestion than that resulting from road works or accidents at other locations.

53. The following matters stand in the other side of the balance:

i) First is the extent and effect of the disruption which will be caused by the obstruction of these roads. As explained at [17] above the obstruction of the passage of traffic at the roads in question will have wide-ranging effects. There is likely as a consequence to be congestion of traffic across a wide area. In a number of instances there is no alternative or no practicable alternative to use of the roads in question. As Freedman J said, at [61], "the protesters choose where to protest, but they deprive other road users of any choice to avoid the protests and to avoid being held up for long periods of time with all the personal or economic consequences which may follow." Those personal and economic consequences will be varied but they will be real and will affect many people.

ii) Addressing the protests and dealing with the congestion resulting from the obstruction of these roads has occupied the time and resources of the police

service and of the Claimant as the highway authority. That time and those resources are finite and the time and money spent in addressing these matters cannot be used in other ways conducive to the public good. The harm resulting is necessarily difficult to identify with precision but it is nonetheless real and at the very lowest the consequence is that there is a delay in achieving the public goods which would otherwise be achieved by use of that time and those resources.

iii) Next it is significant that the objective of the blockage of the roads is the disruption of the lives of others and the diversion of resources to which I have just referred. The obstruction of others; the infliction on those others of the personal and economic consequences; and the diversion of public resources are not side-effects of these protests rather they are the objectives of the protest. This is apparent from the fact that the obstructions have taken place without warning and without cooperation with the police. Those obstructing the roads are not seeking thereby to persuade others of their arguments nor thereby to bring their arguments to the attention of others who would be otherwise unaware of them. This is not a case where the protesters are seeking to force others to stop acting in a way of which the protesters disapprove but their objective is nonetheless coercion rather than persuasion. Their objective is to put pressure on the government not by way of persuasion or democratic argument but by disrupting the lives of their fellow citizens and by the contention that the price to be paid for the ending of the disruption is implementation of the measures for which they are campaigning. In that regard it is of note that the locations in question are not connected with parliament or with government other than by chance. As Freedman J said, at [61], "the protests in this case are not directed at a specific location which the subject of the protest".

iv) Where inconvenience to others is a side-effect of a protest and particularly where the inconvenience is modest then the reaction to the protest of those subjected to the inconvenience can carry little weight in the balancing exercise. In many cases the anger of those inconvenienced cannot be a reason of substance for curtailing the Convention rights of others. Such modest inconvenience may be seen as inherent in a democratic society. However, the position is different where the inconvenience to others is the intended effect of the protest and where large numbers of persons are subjected to a significant interference with their lives. That is the position here and in those circumstances it is relevant, albeit still a factor of only limited weight, that the protest gives rise to a risk of public disorder. Those whose passage along these roads is obstructed and whose lives are as a consequence disrupted will in some instances be liable through anger and frustration to seek to remove the protesters themselves. The risk of the consequent disorder is a factor operating in favour of the injunction.

v) Next, as Freedman and Morris JJ both noted the injunction sought does not prohibit all protest. It prohibits protest of a particular kind at a limited number of locations. The Defendants will not be in breach of the injunction by protesting at other locations and even at the specified locations slow marching will not be prohibited by the injunction. Echoing the point made by Freedman J the Defendants will remain free to choose where to protest subject only to the exclusion of the locations covered by the injunction.

vi) Finally, just as proper regard must be had to the Defendants' Convention rights so proper regard must be had to the importance of the rights which the proposed injunction will protect. The importance of enabling large numbers of citizens to go about their normal lives and occupation and to pursue their personal and economic interests is a potent factor.

54. In those circumstances I am satisfied that the proposed injunction is proportionate and strikes a fair balance between the Convention rights of the Defendants and the rights of others including the community generally.

55. I will consider the duration of the injunction and the issue of whether it should be in the same terms against all the Named Defendants when I consider the form of the order below.

The Position in respect of Persons Unknown.

56. I have already explained that I am satisfied that there is a real and imminent risk of the obstruction of the roads with which I am concerned by persons in addition to the Named Defendant. In *Insulate Britain* Morris J set out at [47] –[51] the additional requirements for the grant of a precautionary injunction against Persons Unknown and explained why the requirements were satisfied on the facts of that case. I agree with and adopt his analysis of the applicable law. Similarly, for the same reasons as Morris J but with the substitution of JSO for IB I am satisfied that the requirements of the *Canada Goose* guidelines are met in this case and that it is just and convenient to grant the final injunction sought against Persons Unknown.

The Form of the Order.

57. The Claimant seeks an injunction lasting for five years with provision for annual reviews and for a Defendant or any other person affected by the order to apply on notice for its variation or discharge. In those respects the proposed order mirrors the terms of the order made by Morris J in *Insulate Britain*. I agree with Morris J for the reasons he gave in his judgment at [52] that an order of that duration is necessary for there to be adequate protection of the rights of the members of the public generally. I am also satisfied that an injunction of that duration is proportionate having regard to the balancing exercise I have explained above. However, because of the close relation between these proceedings and those leading to the *Insulate Britain* order and to avoid any confusion or uncertainty the injunction will run for five years from the date of the order made by Morris J in that action with the consequence that both will come to an end at the same time.

58. A number of the Named Defendants in this action are already subject to the injunction granted by Morris J in *Insulate Britain*. Those are Named Defendants 3, 7, 20, 45, 46, 51, and 56. That injunction applies to many of the roads and junctions in relation to which the Claimant has sought relief in this action. Of the twenty-three roads and junctions with which I am concerned only six are not also covered by Morris J's order. Those are Millbank, A4 Knightsbridge and Scotch Corner, St Georges Circus/Road, Shoreditch, Victoria Embankment, and Talgarth Road around Barons Court tube station.

59. The proceedings leading to Morris J's order were triggered by protests under the banner of the Insulate Britain campaign. However, Morris J made it clear that the terms of his order are such that obstructing the roads in the ways specified was prohibited regardless of the campaign of which the actions were a part. In particular Morris J spelt out that such actions would be a breach of the injunction if undertaken as part of the JSO campaign: see at [29] and [41].

60. For the Claimant Mr Fraser-Urquhart KC nonetheless contended that it was appropriate for me to grant an injunction in respect of all twenty-three locations against all the remaining Named Defendants even though it would mean that some of them were subject to two injunctions each granted to the Claimant and each prohibiting the same conduct at the same location. He said that this would be conducive of certainty and clarity because the focus of Morris J's order was the Insulate Britain campaign while the Claimant was seeking from me an order focussed on the JSO campaign. He also said that in practice the Claimant would only seek the committal of a defendant under one or other but not both of the injunctions. I do not accept that submission. In light of the terms of Morris J's order and of his judgment there is no uncertainty nor is there any scope for confusion. Indeed rather than being conducive of clarity there would be a risk of confusion as to the basis on which action was being taken against a defendant said to be in breach of the order if there were two orders in respect of the same conduct at the same location. Moreover, it cannot be said that injunctive relief in respect of obstructing the road at a particular location is necessary against a particular Named Defendant if that person is already subject to a final injunction in favour of the Claimant prohibiting the same behaviour at the same location.

61. Accordingly, in respect of those Named Defendants who are subject to the *Insulate Britain* order the injunction I will grant will be confined to the six locations which are not subject to Morris J's order. I will invite submissions in due course as to the appropriate form of order to achieve this result.

62. As explained above a large number of Named Defendants have signed undertakings which have been provided to the Claimant and which are in the course of being sent to the court. Initially I had concerns as to the steps which might be necessary for the court to be satisfied that those giving these undertakings understood the gravity of the step they were taking. However, I have reflected further on the terms of the undertakings and have considered the approach set out by Cotter J in his judgment at [116] – [118]. In light of those matters I am satisfied that the terms of the undertaking are clear and that the effect of a breach are sufficiently spelt out on the face of the undertaking such that there is no realistic risk that any Named Defendant who signs the undertaking will not understand the consequences of doing so. Accordingly, I will not require any further communication to the court from those who have signed the undertakings. I will in due course invite submissions as to the recording of the undertakings in the final order.

Alternative Service.

63. The provisions of the proposed order in relation to service mirror those of Morris J's *Insulate Britain* order. Morris J addressed these at [53] – [60] and the proposed order here includes the additional provisions identified by him at [60]. I agree with Morris J that these are appropriate and that they are sufficient to minimise the risk of a person who is minded to take part in protests at a relevant location being unaware of the court order.

64. It follows that an injunction in the terms proposed by the Claimant subject to the modifications indicated above is to be granted against the remaining Named Defendants and Persons Unknown.

Costs.

65. My provisional view subject to further submissions is that those Named Defendants against whom I have granted an injunction are to be ordered to pay the Claimant's costs.

SCHEDULE 1

Defendant Number	Name	Summary of Activity
3	Andrew Worsley	Subject to two injunctions and has also taken part in an Insulate Britain road blockage.
7	Ben Taylor	Subject to three injunctions; repeated involvement in the blocking of roads in the context of JSO and Insulate Britain protests including acting in breach of an injunction.
20	Emily Brocklebank	Repeated involvement in the blocking of roads in the context of JSO and Insulate Britain protests including acting in breach of an injunction.
45	Tessa-Marie Burns	Subject to two injunctions; multiple instances of involvement in the blocking of roads in the context of JSO protests.
46	Theresa Norton	Subject to two injunctions; in breach of two injunctions; two instances of involvement in the blocking of roads in the context of JSO protests; and one instance of gluing herself to court steps.
56	Samuel Johnson	Engaged in digging tunnels as part of a JSO protest and in blocking a road as part of an Insulate Britain protest.
84	Lora Johnson	Involved in blocking roads on two occasions in JSO protests in October 2022.
137	Tristan Strange	Involved on one occasion in blocking in a JSO protest in October 2022 and in one instance of gluing himself to a painting in a JSO protest.

Neutral Citation Number: [2023] EWHC 1719 (KB)

Case No: QB-2022-001236

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before :

MR JUSTICE SWEETING

- -

Between :

NORTH WARWICKSHIRE BOROUGH COUNCIL	**Claimant**
- and -	
(1) DAVID BALDWIN	**Defendants**
(2) THOMAS BARBER	
(3) MICHELLE CADET-ROSE	
(4) TIM HEWES	
(5) JOHN HOWLETT	
(6) JOHN JORDAN	
(7) CARMEN LEAN	
(8) ALISON LEE	
(9) AMY PRITCHARD	
(10) STEPHEN PRITCHARD	
(11) PAUL RAITHBY	
(12) HOLLY ROTHWELL	
(13) NO LONGER PURSUED	
(14) JOHN SMITH	
(15) BEN TAYLOR	
(16) JANE THEWLIS	
(17) ANTHONY WHITEHOUSE	
(18) NO LONGER PURSUED	
(19) PERSONS UNKNOWN WHO ARE ORGANISING, PARTICIPATING IN OR ENCOURAGING OTHERS TO PARTICIPATE IN PROTESTS AGAINST THE PRODUCTION AND/OR USE OF FOSSIL FUELS, IN THE LOCALITY OF THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA	
(20) JOHN JORDAN	

-and-

THE ADDITIONAL DEFENDANTS LISTED AT SCHEDULE A TO THIS JUDGMENT

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- -

Jonathan Manning and Charlotte Crocombe (instructed by **North Warwickshire Borough Council, Legal Services**) for the **Claimant**
Stephen Simblet KC (instructed by **Hodge, Jones and Allen Solicitors**) for **Jake Handling (Defendant) and Jessica Branch (Interested Person)**

Hearing dates: 5 May 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

MR JUSTICE SWEETING :

Introduction

1. I granted interim injunctive relief to the Claimant while sitting as the interim applications judge during the court vacation. This is my judgment following the return date when I heard oral argument. There were further written submissions after the hearing had taken place.

2. The Claimant is North Warwickshire Borough Council (the "Council"). The Council sought an interim anticipatory injunction, an order for alternative service and a power of arrest. There were both named and unnamed defendants ("persons unknown").

3. The Council is a democratic body controlled by elected Councillors answerable to the people of the borough of North Warwickshire. The borough includes Kingsbury which is a small, but ancient, town and parish situated between Birmingham and Tamworth. Kingsbury lies on the course of the River Tame, a major tributary of the River Trent, and is known, amongst other things, for the Kingsbury Water Park. There are eight statutory sites of special scientific interest in the area, seven local nature reserves and 27 non-statutory sites of local importance. Kingsbury has a primary and secondary school.

4. According to the most recent, although now dated, population census there are nearly 8,000 inhabitants in the parish area. The M42 motorway runs to the west and north of the town and joins the M6 motorway a few miles to the south. To the east of the town is the Kingsbury Oil Terminal ("the Terminal").

The Kingsbury Terminal

5. The Terminal is a complex of individual oil terminals operated by Shell UK Ltd United Kingdom, Oil Pipelines Ltd, Warwickshire Oil Storage Ltd and Valero Energy Ltd. These companies share assets such as fire-fighting systems and have formed a user group to address common issues, particularly in relation to safety. Some parts of the complex are no more than a few hundred metres from the eastern boundary of the town and close to residential areas.

6. The Terminal is described as "multi-fuel"; storing petrol, diesel, heating oils and jet fuel, in some 50 storage tanks. Fuel is supplied by the United Kingdom Oil Pipeline System through pipelines entering the site underground. There are further storage tanks which contain ethanol (biofuel) which is brought in by road. With a storage capacity of around 405 million litres, the terminal is the largest inland oil storage depot in the United Kingdom.

7. The Terminal is an upper tier site for the purposes of the Control of Major Accident Hazards Regulations 2015 ("the 2015 Regulations"). An "upper tier site" is designated a "high risk establishment" by reason of the quantity of dangerous substance stored on site. Emergency access to the Terminal is critical in the event of a "major accident". Regulation 2 of the 2015 Regulations define a "major accident" as: *"An occurrence such as a major emission, fire, or explosion resulting from uncontrolled developments in the course of the operation of any establishment to which these Regulations apply and leading to serious danger to human health or the environment (whether immediate or delayed) inside or outside the establishment and involving one or more dangerous substances"*.

8. The presence of highly flammable products creates a risk of gas vapour igniting if fuel is released and a vapour cloud forms. The nature of that risk is now a matter of experience rather than conjecture. On 11 December 2005 there was major fire at an oil storage facility at the Buncefield Oil Storage Terminal in Hertfordshire. Both the causes and consequences of that fire are public knowledge because it was the subject of a "major incident report". The fire burned for five days, 43 people were injured and about 2,000 were evacuated from their homes. The fire started when fuel escaped from a storage tank and vapour was ignited. The Buncefield terminal is smaller than the Kingsbury site. The need for stringent measures to ensure that a risk of this sort does not eventuate at an oil terminal such Buncefield or Kingsbury is self-evident.

9. At Kingsbury, all employees and contractors entering the Terminal undergo training to ensure that they are aware of the risks of working with hazardous substances and do not do anything which might put them or the wider public in danger. Due to the risk of fire and explosion, electrical equipment such as mobile phones, key fobs and pagers, together with lighters and matches are designated as "controlled items", under an operational plan prepared by the Warwickshire Fire and Rescue Service, and are strictly prohibited within the site perimeter.

10. The boundaries of the sites forming the Terminal complex are fenced with chain link or palisade fencing. Pedestrian access is tightly controlled by turnstile gates. There are locked, hinged gates for tanker access. Visitors and employees are required to have designated passes. Manned security and CCTV are in operation around the clock on each day of the year.

11. The Terminal is a critically important supply point for the Midlands, providing fuel to forecourts, public services and major regional airports, such as Birmingham International and East Midlands. Although incoming fuel is supplied through pipelines (except for additives or biofuels), it is distributed from the Terminal using road tankers. Hundreds of tankers come and go from the Terminal every day. They are allowed access only if they are registered and have gone through a driver and vehicle accreditation process.

Protest at the Terminal

12. Protests began at the Terminal during March 2022 and continued on successive days into April. At the time of the initial injunction application, the protests had been characterised, amongst other things, by protestors:

    a. Gluing themselves to roads so preventing access to the Terminal;

    b. Breaking into the Terminal compounds by sawing through gates and trespassing on private land;

    c. Climbing onto storage tanks containing unleaded petrol, diesel and fuel additives;

    d. Using mobile phones within the Terminal to make video films of their activities including while standing on top of oil tankers and storage tanks and next to fuel transfer equipment;

e. Interfering with oil tankers by climbing onto them and fixing themselves to the roof or by letting air out of their tyres, often once traffic had first been brought to a standstill by protestors glued to the road;

f. Obstructing the public highway and the entrances to the Terminal as well as the slip roads at junction 9 and 10 of the M42, causing tailbacks on the motorway; and

g. Using climbing equipment to abseil from a road bridge to gain access to the Terminal.

13. These activities were highly organised and coordinated, often involving large groups. The police had stopped a group of protestors with a van containing climbing ropes, a large quantity of timber and "lock on" devices, all of which was to be used to build and occupy a structure in a tree. Another group blocked an entrance to the Terminal by lying on mats in the roadway with their hands glued to the ground preventing personnel working at the Terminal from entering or leaving. There were repeated incidents involving the blocking of gates in ways that prevented protestors being removed physically. This not only caused the Terminal, or parts of it to shut, interrupting supplies of fuel but in the event of an incident would have prevented access by emergency services. One of the tactics employed to gain entry to the Terminal was to gather in large numbers at an entrance and "swarm" in when a gate was opened.

Protest on 7th April

14. At half past midnight on the 7th of April a group of protesters approached one of the main Terminal entrances and attempted to glue themselves to the road. When the police were deployed to remove them a second group of some 40 protesters approached the same enclosure from fields to its rear. This second group then 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 tops of three large fuel storage tanks containing petrol, diesel and fuel additives, the tops of two fuel tankers and the "floating roof" of a large fuel storage tank. A "floating roof", as its name suggests, is a roof which floats on the surface of stored liquid hydrocarbons. The ignition of liquid fuel or vapour in such a storage tank is again an obvious source of risk to life and health. The protestors used locks and equipment they had brought with them to secure themselves. A complex and challenging policing operation was required using specialist teams working alongside the terminal staff and the fire service to remove the protesters. It took until 5pm in the afternoon to clear all of them from the compound and the roadway, leading to 127 arrests.

Protest on 9th April

15. A significant degree of planning and preparation was evident. On the 9th of April protesters placed a caravan at the side of the road on Piccadilly Way which is the main route running South of the Terminal. The caravan was heavily reinforced with corrugated iron and pallets to prevent entry. About 20 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 inside. The fact that tunnelling was taking place was disguised by the use of the caravan. Multiple arrests were made but two protesters remained in the tunnel and two remained on top of the caravan until the late afternoon of the following

day. The road remained closed over the entire period while specialist removal teams attended. The Council had to assess the structural integrity of the road which then required expensive repairs and further reinforcement. The road is used by heavily laden oil tankers leaving the terminal as well as local traffic. The collapse of a tunnel as a tanker passed over it courted the risk not only of injury to the driver of the vehicle and anyone nearby, including in the tunnel itself, but also of the escape of its liquid load. Tunnelling activity raised the prospect of inadvertent or deliberate damage to oil pipelines.

16. Planned attempts to break into the Terminal or climb onto vehicles involved groups of protestors congregating at entrance points where the gates had to be opened to allow waiting tankers to enter. Using cutting tools to gain entry elsewhere necessarily involved approaching and standing next to the Terminal fences.

The Local Effect of Protest

17. The protests caused fuel shortages across the West Midlands region. The Council had to give "mutual aid" to Nuneaton and Bedworth Borough Council in order to allow essential statutory services to keep running.

18. The problems faced by the police were summarised in a witness statement from the Assistant Chief Constable, Mr Smith:

> "the scale and duration of the policing operation has been one of the most significant that I have experienced in my career. Large numbers of officers, drawn from right across the force, have been deployed to Kingsbury day and night since the 1st of April. This has meant that we have had to scale down some non-emergency policing services, including those that serve North Warwickshire. Although core policing services have been effectively maintained across the county during this, the protests have undoubtedly impacted on the quality and level of the policing services that we are able to deliver. Officers who may have ordinarily been policing the communities of North Warwickshire, the road networks of North Warwickshire, or supporting victims of crime in North Warwickshire have had to be redeployed to support the policing operation linked to Kingsbury. It has also meant that we have had to bring in additional officers from other regional forces, in addition to more specialist teams such as working at heights teams and protestor removal teams. All of these will come at significant additional costs to the force and ultimately the public of Warwickshire. The impact on the local community has been substantial. There have been almost daily road closures of the roads around the oil terminal which has created disruption and inconvenience. The M42 has also been disrupted on occasions as a result of the protest activity. There has been a significant policing presence since the 1st of April which I am sure has created a level of fear and anxiety for the local community. The policing operation has also extended into unsociable hours, with regular essential use of the police helicopter overnight disrupting sleep. The reckless actions of the protesters has also created increased risk of potential fire or explosion at the site which would likely have catastrophic implications for the local community including the risk of widespread pollution of both the ground, waterways and air. Finally, the actions of the protesters has impacted the supply of fuel to petrol forecourts in the region leading to some shortages, impacting upon not only local residents but the broader West Midlands region."

19. Mr Smith concluded:

> "I have grave concerns for public safety should the behaviour of the protesters continue in its current form. The Kingsbury site is an extremely hazardous site where the very presence of certain items and clothing on site is restricted because of the potential dangers of explosion or fire. The protesters have had no regard for their own or others safety with actions including the use of mobile phones on site (strictly prohibited), the scaling and locking on to very volatile fuel storage tanks, the tunnelling activity in close proximity to high pressure fuel pipes, and the forced stopping, and then scaling, of fuel tankers on the public highway. Not only does this cause unacceptable levels of risk to themselves and the public, it also puts my officers in significant danger as they have to attempt to remove them from the places they have decided to put themselves."

Earlier Court Orders and the Escalation of Protest Activity

20. An injunction was obtained by Valero Energy Ltd on 21 March 2022 for the part of the Terminal which it occupies (and other sites elsewhere in the country). It did not extend to the highways affected and could not be supported by a power of arrest. That court order and the actions of the Police in carrying out numerous arrests for suspected criminal offences, appeared to have little if any effect. The evidence from the Chief Executive of the Council, Mr Maxey, was that the behaviour of protestors had consistently worsened and become bolder and more dangerous between the 1st and the 11th of April. His evidence referred to a conversation with Mr Briggs the Assistant Chief Fire Officer for Warwickshire Fire and Rescue service in which Mr Briggs, having seen pictures of protesters using phones from the top of tankers, commented:

> "I don't think they have any understanding of the level of risk they are posing to themselves or others through their actions."

21. Mr Maxey regarded the incident of the 7th of April (referred to above) as having changed the position significantly in relation to public safety and the risk of serious environmental pollution. The attempt to tunnel on the 9th of April, given that oil is delivered by underground pipes, was viewed by the Council as marking a serious escalation such that it determined:

> "to use its powers to seek an injunction with a power of arrest to seek to control the locations in which and the manner in which the current protests at the terminal are conducted."

22. The Council were concerned that without effective measures in place there would be a risk of a major accident so that the need to seek an injunction was urgent. Mr Maxey explained the balancing exercise that the Council had sought to carry out and the nature of its concerns in his first witness statement:

> "14. In reaching this conclusion, I have sought to strike a balance between the rights of the protesters and the rights of the community within the North Warwickshire area to be kept safe from the risk of a major emergency at the terminal and to be protected from nuisance, criminality and anti-social behaviour that has characterised these protests.

> 15. My reference to the community within North Warwickshire is a reference to all the people within the borough who are affected in different ways, including staff at the terminal, workers from other companies who attend there for their jobs, local residents, and businesses, all of whom are affected by the disruption. I also include other road users who have been affected by protestors on motorway slip roads and other highways causing blockages by their dangerous activities, members of the emergency services who are required to attend the Terminal on a daily basis and who would be forced to deal with the consequences of fire or explosion there, the protestors themselves whose safety is at risk and all those other members of the public and the borough who are affected by the disruption and whose safety would be compromised by an emergency at the Terminal."

23. In a subsequent witness statement Mr Maxey confirmed that as a public authority the Council faces protests on a range of issues from time to time but had never sought injunctive relief against protestors. He emphasised that the Council had issued the present proceedings because it regarded the actions of protesters as giving rise to "wholly unacceptable risks to public safety and the environment".

The Without Notice Application

24. The application was sought against two categories of defendant. First, named defendants who had come to the attention of the police on arrest; secondly "persons unknown" identified as "persons unknown who are organising, participating in or encouraging others to participate in protests against the production and or use of fossil fuels, in the locality of the site known as Kingsbury Oil Terminal, Tamworth B78 2HA." I consider the definition of this second category of defendant later in this judgment.

25. The application was, broadly, to restrain acts of trespass and or nuisance in the circumstances I have summarised. I concluded that the application was urgent and that an application without notice was justified given the likelihood that further protest would take place over the Easter weekend and that giving formal notice might lead to a further escalation in unlawful conduct. The Council's concerns in this respect proved prescient.

26. As Mr Manning and Ms Crocombe, counsel for the Council, observed in their subsequent written submissions the attachment of a power of arrest (as well as the extent of any exclusion zone and the extension of the injunction to the public highway) was "the subject of considerable judicial scrutiny" at the hearing on the 14th of April. The order made did not prohibit obstruction of the highway which I considered would inevitably involve questions of fact and degree which could not be assessed in advance and would be inappropriate where the injunction was sought, in part, against "persons unknown" supported by a power of arrest.

The Exclusion or "Buffer" Zone

27. The Council sought an exclusion, or "buffer zone" around the Terminal, extending to the boundaries of the town and, in some directions, hundreds of meters from the fences surrounding the Terminal. The rationale was to follow linear features in the landscape which would be easy to identify. However, the effect would also have been to displace protest, including lawful protest, to a considerable distance from the Terminal. In

practice, a buffer zone of this extent would have meant that protest could not take place on the public highway around the Terminal at all; the nearest points outside the exclusion zone being in Kingsbury itself or near a small housing estate to the northeast of the Terminal. The argument for an exclusion zone was predicated upon the fact that there had been organised and determined attempts to breach the perimeter fences together with the significant risks arising from the behaviour of protestors once entry had been obtained. Entering the Terminal by scaling or cutting through fencing necessarily involved approaching or congregating alongside the fences. This was the precursor to the most serious tortious and criminal conduct which the Council was seeking to restrain. The Court's powers to grant interlocutory injunctive relief under section 37 of the Supreme Court Act 1981 are not limited to restraining conduct which is itself tortious or otherwise unlawful (see further below) and may include measures which are necessary to ensure that injunctive relief is effective to protect a legitimate interest of the claimant (see *Burris v Azadani* [195] 1 WLR 1372).

28. In *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 Warby J. (as he then was) made an order incorporating an exclusion zone of 10 metres from the entrance or exists of premises at which protest was taking place in connection with industrial action. He concluded that the actions of protestors were likely to go beyond the limits of lawful protest and had involved incursions onto private land and obstruction and interference with lawful activities, In relation to the exclusion zone, he said at [55]:

> "This seems to me in principle to be a legitimate approach. It is one which has been taken regularly over several years in cases concerned with striking a balance between the protest rights of animal rights campaigners and those of research organisations and their staff. Such an order sets no limit on the kinds of speech that may be used by those involved in a protest. It defines where protest may take place. It is possible to frame an order of this kind which sets clear boundaries, without destroying the essence of the right to protest, which does not depend on location, and without interfering disproportionately with Article 10 and 11 rights: see *Appleby v United Kingdom* (2003) 37 EHRR 38 [47], *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) [37], where the court was concerned with a protest camp in the vicinity of a fracking site. I am prepared in principle to grant such an order."

29. Another example is *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (QB), 2021 WL 05234982 where the order made provided for an exclusion zone around the immediate entrance to the site outside of which protest was taking place. The central complaint in that case was in relation to the protestors' activities when people entered or left the site.

30. I accepted in the circumstances that an exclusion zone was justified but concluded that it could be limited to five meters from the boundary fences without interfering significantly with lawful protest. An exclusion zone around the entire perimeter was necessary, in my view, because protestors had sought to cut through fences and enter the Terminal at various points. A short distance of this length could easily be estimated and would make the actions of any protestors intent on gaining entry to the Terminal obvious. Because of the relatively isolated nature of the Terminal site an exclusion zone of this extent did not give rise to the concerns identified by the Court of Appeal in *Canada Goose -v- Persons Unknown* [2020] EWCA Civ 303 [93] where an exclusion

zone on a busy shopping street had an inevitable impact on "neighbouring properties and businesses, local residents, workers and shoppers".

31. Although the five metre zone impinged to some extent on the highway, mostly in the vicinity of entrances to individual compounds, the injunction did not prevent the Defendants "from using any public highway within the buffer zone for the purpose of travelling to or from a protest held, or to be held, outside the buffer zone." The individual enclosures are surrounded by privately owned farmland, a military range and railway sidings save where parts of the boundary fencing run along roads. Most of the five metre zone was therefore on private land where there was no right to protest. Protest could only feasibly take place on or close to the public highway, including the verges alongside the metalled roads. The conduct which, for this purpose, the Council sought to prevent, in so far as it did not involve cutting through or climbing over fences, was mainly directed at the entrances to the terminals where vehicles entered and exited and were required to halt so that gates could be opened. I concluded that this could be addressed by the specific prohibitions which the Council sought. Although there was evidence that long tailbacks had been caused on the nearby motorways, I reached the view that this could, if necessary, properly be dealt with through the medium of existing police powers to prevent obstruction of a public highway.

32. In *DPP v Ziegler* [2021] UKSC 23 the Supreme Court, decided by a majority that even a deliberate obstruction which was more than minimal, and prevented other users from using the highway, could constitute lawful protest on the highway and that the proportionality of any interference with the qualified rights under Articles 10 and 11 of the European Convention on Human Rights ("ECHR") would fall to be considered (see further below).

33. In *City of London Corpn v Samede* [2012] PTSR 1624 Lord Neuberger of Abbotsbury MR identified factors which were to be considered in assessing proportionality. The non-exhaustive list 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."

34. The actions of protestors in this case went well beyond what was being considered in *Ziegler*, in terms of the nature, duration and effect (both actual and potential) of the protest. As I did not accede to the Council's proposal that the injunction should expressly extend to prohibiting obstruction of the highway, the limited exclusion zone in my view struck a fair balance and was a proportionate interference with the exercise of Convention rights. I consider the application of Articles 10 and 11 generally and in relation to other provisions of the injunction later in this judgment.

35. I concluded that a power of arrest was necessary given the significant risk of harm arising from the nature of the protests and that the requirements for interim injunctive relief at a without notice hearing had been met (see further below).

Protest on 22-23rd April

36. Following the granting of the interim injunction there was a serious incident involving an incursion into one of the compounds at the Terminal by two protestors. The police became aware that they had entered the compound at 23.30 on 22nd April. It is not clear how they had done so but plainly it was by stealth given that the Terminal is manned and secured by fencing.

37. When the police attended at the compound, they found two men on the roof of a bay which formed part of a fuel filling station. Both had mobile phones and other items capable of igniting fuel vapour. After a short while one of the protestors came down from the pipework and confirmed to the police that both were aware of the injunction. The remaining protestor stayed in the roof space for several hours before he also came down and was arrested.

38. Some hours later the control room noticed that fuel additive was not being injected into some of the tanks. The fuel bay concerned was closed down and an investigation began. When the CCTV record was examined it showed the protestor who had remained longest tampering with and moving valves. The footage recorded him testing whether valves could be moved by hand and, if they could, trying to move them. He can have had no knowledge of whether what he was doing would lead to an escape of liquid fuel or vapour, or would otherwise have harmful and potentially dangerous effects. As the Claimant subsequently observed, this was precisely the high risk associated with entry to the Terminal that had prompted the application for the injunction.

The Effect of the Injunction

39. The incident of 22-23rd April proved to be the last significant incident before the return date. The Claimant's summary of the position was:

> "After a period of continuing unlawful and dangerous behaviour by protestors, there has more recently been a marked decline in kinds of unlawful behaviour that formed the basis for the claim. In particular, the events of 22-23 April 2022 ...were the last occasion on which the boundaries of the Terminal were breached. The last time the entrances to the terminal were obstructed was on 26 April 2022. The Claimant is not aware of tunnelling activity or other conduct breaching para.1(b) of the Injunction since that date."

40. Mr Maxey made a further statement dated 3rd May in which he commented:

> "The chronology of events at Kingsbury Oil Terminal have moved from unlawful actions, then the granting of the Order and then a move to lawful and legitimate forms of protest. In my opinion the evidence shows that the move to lawful and legitimate forms of protest would not have come about but for the granting of the Order..."

The Return Date

41. On the return date Mr Simblet KC was instructed to represent Jake Handling and Jessica Branch to resist the Council's application to continue the interim injunction until trial and to apply for its discharge. Mr Handling was one of the protestors involved in the incident on 22nd April (referred to above). It was Mr Handling who had been captured on CCTV attempting to open valves. Jessica Branch was not a defendant, had not

protested at the Terminal and did not seek to be made a defendant. She did not appear to have been affected directly by the injunction but, it was said, she might be in future. She wished to make representations about the application for injunctive relief and the importance of the right to protest. The Council did not oppose her doing so and I was assisted by, and grateful for, Mr Simblet's oral submission, and Mr Simblet and Mr Greenhall's submissions in writing. Jessica Branch appears to have instructed, or funded the instruction of, counsel in other cases involving protest. I did not reach any view as to her standing given the absence of objection and that counsel were representing Jake Handling (a named defendant) and making submissions on his behalf which were not identified as being distinct from any made on behalf of Jessica Branch. In those circumstances there was no argument as to whether she fell within CPR 40.9. which had not been raised expressly in the written arguments as a basis for her participation. The Council had served further evidence but with the exception of the witness statement from Jessica Branch's solicitor there was no evidence from any person affected or from any defendant.

Summary of the Defendants' Submissions

42. Mr Simblet made a number of submissions in his initial skeleton argument in relation to whether or not there had been compliance with the obligations placed on those seeking an interim injunction. A number of the suggested deficiencies which he relied upon appear to have been due to the lack of contact details or knowledge of the identity of defendants. As I have indicated, Jessica Branch, whose solicitor provided a witness statement on this point, was not a party and had not protested at Kingsbury and was not therefore in the contemplation of the Council as an affected party. The Council's skeleton argument for the initial hearing dealt with the relevant law and the points that might be made in opposition. The evidence justified the need for urgent relief and the decision not to give formal notice. It explained why it was not possible for the Council to identify the persons concerned or likely to be concerned in the conduct it sought to prohibit, apart from the named defendants. The need for an exclusion zone and a power of arrest was tested in the course of the application. The interpretation of the relevant statutes was discussed and alterations made to the draft order. The note of hearing bears out these observations. I am satisfied that the Council complied with its obligations at the without notice hearing and subsequently.

43. Mr Simblet's written submissions characterised the exclusion zone as a disproportionate interference with Articles 10 and 11 of the ECHR in relation to demonstrations on the public highway. I do not accede to that submission for the reasons already given. I have considered separately (below) whether other provisions of the order interfere with Article 10 and 11 rights.

44. Mr Simblet also argued that:

    a. There was no cause of action pursuant to which the injunction could be granted;

    b. There was no entitlement to a power of arrest as the injunction was not made for the benefit of a person suffering nuisance or annoyance;

    c. The definition of 'Persons Unknown' was too broad and did not comply with *Canada Goose* requirements;

d. The service provisions were inadequate;

e. The order was likely to have a chilling effect on protest.

The Injunction

45. The Council had continued to review the effect of the injunction against the background set out above, including the change in protestor behaviour. As it did not seek to stifle or restrict lawful protest in the five-meter buffer zone, the Council no longer identified any need for such an exclusion zone by the return date. The original order, which the Claimant sought to continue to trial, was amended to remove the exclusion zone. The prohibitions then read as follows:

> "1. The Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):
>
> (a) organise or participate in (whether by themselves or with any other person), or encourage, invite or arrange for any other person to participate in any protest against the production or use of fossil fuels, at Kingsbury Oil Terminal (the "Terminal"), taking place within the areas the boundaries of which are edged in red on the Map attached to this Order at Schedule 1.
>
> (b) in connection with any such protest anywhere in the locality of the Terminal perform any of the following acts:
>
> (i) entering or attempting to enter the Terminal
>
> (ii) congregating or encouraging or arranging for another person to congregate at any entrance to the Terminal
>
> (iii) obstructing any entrance to the Terminal
>
> (iv) climbing on to or otherwise damaging or interfering with any vehicle, or any object on land (including buildings, structures, caravans, trees and rocks)
>
> (v) damaging any land including (but not limited to) roads, buildings, structures or trees on that land, or any pipes or equipment serving the Terminal on or beneath that land
>
> (vi) affixing themselves to any other person or object or land (including roads, structures, buildings, caravans, trees or rocks)
>
> (vii) erecting any structure
>
> (viii) abandoning any vehicle which blocks any road or impedes the passage of any other vehicle on a road or access to the Terminal
>
> (ix) digging any holes in or tunnelling under (or using or occupying existing tunnels under) land, including roads;
>
> (x) abseiling from bridges or from any other building, structure or tree on land or

(xi) instructing, assisting, or encouraging any other person to do any act prohibited by paragraphs (b)(i)-(x) of this Order."

46. The areas referred to as being edged in red under paragraph 1(a) were the areas enclosed by the fenced boundaries of the Terminal. The prohibition at 1(a) therefore referred entirely to protest on private land to which there was no right of access and where, on the evidence, some of the most dangerous conduct had taken place.

47. Paragraph 1(a) in its original form was:

> "1. The Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):
>
> (a) organise or participate in (whether by themselves or with any other person), or encourage, invite or arrange for any other person to participate in any protest against the production or use of fossil fuels, at Kingsbury Oil Terminal (the "Terminal"), taking place within the areas the boundaries of which are edged in red on the Map attached to this Order at Schedule 1, or within 5 metres of those boundaries (edged in red) (the "buffer zone").
>
> For the avoidance of doubt, this prohibition does not prevent the Defendants from using any public highway within the buffer zone for the purpose of travelling to or from a protest held, or to be held, outside the buffer zone."

48. The provisions for alternative service were set out at Schedule 2 and were:

> "1. Service of the Claim Form and this Order shall be effected by
>
> (i) placing signs informing people of
>
> (a) this Claim,
>
> (b) this Order and power of arrest, and the area in which they have effect and
>
> (c) where they can obtain copies of the Claim Form. Order and power of arrest, and the supporting documents used to obtain this Order in prominent locations along the boundary of the buffer zone referred to at para.1 of this Order and particularly outside the Terminal and at the junctions of roads leading into the zone,
>
> (ii) placing a copy prominently at the entrances to the Terminal;
>
> (iii) posting a copy of the documents referred to at para.1(i)(c) above Order on its website, and publicising it using the Claimant's Facebook page and twitter account, and posting on other relevant social media sites including local police social media accounts, and/or.
>
> (iv) any other like manner as the Claimant may decide to use in order to bring the Claim Form and this Order and power of arrest to the attention of the Defendants and other persons likely to be affected.

2. If the Claimant intends to take enforcement proceedings against any person in respect of this Order, the Claimant shall, no later than the time of issuing such proceedings, serve on that person,

(i) a copy of the Claim Form and all supporting documents relied on to obtain this Order; and

(ii) a copy of this Order and power of arrest.

3. The Court will consider whether to join the person served to the proceedings as a named Defendant and whether to make any further Order."

49. Similar provisions for alternative service by the use of notices in conspicuous positions in the area where an injunction applies have been adopted in other "persons unknown" cases involving protest and are necessary if injunctive relief is to be effective. The fact that defendants cannot be identified in advance may constitute a good reason under the provisions of CPR 6.15(1) for the normal provisions for service to be departed from. Given the nature of the Terminal site, in open countryside with limited public routes by which it can be approached, I considered that the methods proposed could reasonably be expected to bring the court's orders to the attention of anyone wishing to protest at the Terminal site: *Cameron -v- Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 [21]. That would not, of course, prevent an argument that the provisions for alternative service had operated unfairly against anyone facing a committal application for breach of the injunction (*Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) [63]). The provision at (iv) was intended to allow the Council to add methods of service of a similar type to those set out at (i-iii) if it emerged that they were likely to bring the order to the attention of those protesting at the Terminal. It followed on from the words "and/or" at (iii). To avoid any confusion as to whether (iv) is an entire alternative to other methods rather than an adjunct, the word "or" should have been avoided.

50. There was no evidence served on behalf of Mr Handling that he did not know of the terms of the injunction. At his committal hearing for breach of the injunction by reason of his participation in the incident on 22-23rd April the evidence established that he was aware of it at that time. This suggested that protestors had quickly became aware of the order as a result of the methods of alternative service used and, no doubt, from others because of the organised nature of the protests.

51. There has been a subsequent order in relation to service, at a hearing of an application to add additional named defendants (in effect persons unknown who had become known to the Council) and to make directions for trial. The provisions for alternative service for these defendants reflect the information the Council has as to whether defendants have a fixed postal address, e-mail addresses or can be contacted via particular websites Where there are no direct methods of contact the order provides for various methods of publicising the application and the supporting documents.

The Legal Framework

The Power of the Council to Seek Injunctive Relief

52. The Council has statutory powers to institute civil proceedings, including seeking injunctive relief to protect its local population, under s.222(1), Local Government Act 1972 ("the 1972 Act"). It also has a general power to do anything which an individual with full capacity can do pursuant to section 1 of the Localism Act 2011.

53. Section 222 of the 1972 Act provides:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name..."

54. It was common ground that this provision does not give rise to a cause of action but gives local authorities the right to seek to protect public rights where such proceedings previously required the consent of central government by way of a relator action brought in the Attorney General's name.

55. Mr Simblet argued that the Council had failed to identify any damage that it had itself suffered or would suffer and that this was a prerequisite to the injunctive relief sought. However, and as he subsequently conceded, proof of special damage is not required in relator actions; nor is it a requirement under section 222 of the 1972 Act. The Council was acting on behalf of the local population to protect it from the potentially serious consequences of the actions of protestors.

56. In *Stoke on Trent CC v B&Q Retail* [1984] A.C. 754, Lord Templeman said, at p.773G:

> "In proceedings instituted to promote or protect the interests of inhabitants generally, special damages are irrelevant and were therefore not mentioned in section 222."

57. Mr Simblet submitted that it was an "insuperable problem" for a claim brought under section 222 of the 1972 Act that the Council does not have a responsibility to enforce the private rights of others by which he meant the owners or operators of the Terminal. I think the short answer to this point is that the Council were not seeking to do so.

58. In the present proceedings the Council took action in order to:

    a. prevent a public nuisance and;

    b. in support of the criminal law.

59. These are recognised bases for relator actions and hence for the exercise of the power conferred by section 222 of the 1972 Act (see, for example, *Worcestershire County Council v Tongue* [2004] EWCA Civ 140).

60. There were two further, similar, factors which Mr Simblet characterised as insurmountable obstacles to the granting of an injunction. These were that there was no one individual who could be said to be continually flouting the criminal law, and that there was no identifiable tortfeasor continuing to act in a way which required restraint. His contention was that it was not possible to aggregate the activities of a number of individuals to produce a composite defendant. I doubt that the premise of this

submission, the absence of an identified individual, is factually correct. Jake Handling, for whom he appeared, had arguably engaged in conduct that was both tortious and criminal, as had other named defendants. Although these are Part 8 proceedings the Council had drafted Particulars of Claim which give details of the conduct of named defendants. No evidence was served disputing the accounts given in the evidence relied on by the Council as to the nature of protest at the Terminal.

61. What might be regarded as the point of principle is also, in my view, not maintainable. Both the criminal law and the law of tort have well developed doctrines of joint participation and accessory liability. The common design which was evident in the incidents of 7th and 9th April plainly involved a number of protestors acting together even if they played different parts (see above). The police had made numerous arrests prior to the grant of injunctive relief. The injunction was aimed at preventing and controlling behaviour that gave rise to significant public risk arising from tortious behaviour or the commission of crimes by individuals. There was ample evidence on which to conclude that either the named defendants or persons unknown would continue that behaviour. The Council was not seeking to amalgamate disparate innocent activity to produce a public nuisance or a criminal act. The acts relied upon were of the same type by groups of people acting in combination in the same place.

The Highways Act

62. The Council also relied on its obligations under section 130 of the Highways Act 1980 ("the 1980 Act"), which provides:

> "130. - Protection of public rights.
>
> (1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.
> (2) Any Council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.
> (3) Without prejudice to subsections (1) and (2) above, it is the duty of a Council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—
> (a) the highways for which they are the highway authority, and
> (b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.
> (4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.
> (5) Without prejudice to their powers under section 222 of the Local Government Act 1972 , a Council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient."

63. The potential overlap between s.222 of the 1972 Act and s.130 of the 1980 Act was considered by the Court of Appeal in *Nottingham City Council v Zain* [2001] EWCA Civ 1248 where Schiemann LJ said at [16]:

> "Mr Wise submitted that the existence of the power conferred by s.130(5) of the Highways Act indicated that section 222 was not to be used in such Highways Act cases. I do not consider that s.130(5) in any way diminishes the power which had been conferred by section 222 of the Local Government Act which had been passed 8 years earlier. It does not purport to have that effect. Indeed the opening words of section 130 point in the opposite direction. Furthermore the preconditions which must be fulfilled in relation to the use of the section 222 power - that the authority deem that use to be expedient for the promotion or protection of the interests of the inhabitants of their area - do not need to be fulfilled in relation to the use of the powers conferred by section 130. These are imperfectly overlapping sections and it is not permissible to read down s.222 by reference to s.130(5) of the later Act".

64. The provisions of section 130 of the 1980 Act confer statutory power on the Council, as the local authority but not highway authority for the area, to assert and protect the rights of the public to use the highway and any highway waste (the area that runs alongside the highway) and to prevent any obstruction or encroachment. This section does not appear to me to create a cause of action in itself and that was not the basis on which the application was made but it did mean that the Council could not simply sit on its hands. The latitude that may need to be afforded to lawful protest which causes a temporary obstruction does not extend to the undermining of the highway by tunnelling or the deliberate obstruction of verges, over many hours, by parking caravans on them to facilitate tunnelling.

Public Nuisance

65. In *Nottingham City Council v Zain* [2001] EWCA Civ 1248 Scheimann LJ adopted the definition of public nuisance set out in earlier case law:

> "8...The following passage from the judgement of Romer L.J. in *Attorney−General v PYA Quarries Ltd*. [1957] Q.B. 169 at 184 has generally been accepted as authoritative.
>
> > "I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross−section of the class has been so affected for an injunction to issue."

66. He went on:

> "9. Not everyone however is entitled to sue in respect of a public nuisance. Private individuals can only do so if they have been caused special damage. Traditionally the action has been brought by the Attorney General, either of his own motion, or, as was the situation in the *PYA* case, on the relation of someone else such as a local authority. In *Solihull Council v Maxfern Ltd* [1977] 127, Oliver J. considered the history of the legislative predecessors of s.222 and concluded that the effect of section 222 is to enable a local authority, if it thinks it expedient for the promotion or protection of the interests of the inhabitants of their area, to do that which previously it could not do, namely, to sue in its own name without invoking the assistance of the Attorney General, to prevent a public nuisance. I recognise that in that case the Local Authority was not suing in nuisance but rather was enforcing the criminal law in an area for which it had been given express responsibility, namely the enforcement of the Sunday trading provisions of the Shops Act 1950. Nonetheless I respectfully agree with Oliver J.'s conclusion in relation to suing in nuisance.
>
> 10. Mr Wise who appeared for the respondent rightly submitted that in cases such as the present there was another principle engaged. This was that a local authority, being a creature of statute, could only do that which it was expressly or impliedly empowered to do. However, this principle thus stated is of no assistance when the question at issue is whether s.222 enables a local authority to sue for public nuisance. If the answer to that question is in the affirmative then the principle is satisfied.
>
> 11. There is no doubt that at common law it is a tort to create a public nuisance..."

67. In *PYA* (above) Lord Justice Denning, as he then was, emphasised the role of the Attorney General in defending public rights where the effect of a nuisance would potentially be felt across a community; he said (at p.191):

> "...a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."

68. There can be little doubt in my view that a representative cross section of the local community, at least arguably, would be, and had been, affected by the threatened and actual public nuisance that the Council sought to prevent.

69. Mr Simblet submitted that because the Council were not entitled to exercise any legal rights over the Terminal this meant that the land on which they stood could not be "..land or any area, that is properly the subject of a claim in public nuisance." He sought to confine the scope of any claim for injunctive relief to the public highway asserting that the Council had no basis for any claims which went beyond an area to which the public had access.

70. Whilst the obstruction of dedicated roads may be a prevalent example of public nuisance that does not limit the tort to such situations. The tort may be unusual in that it is parasitic on the existence of a crime and vindicates public rather than private rights, but the definition of a public nuisance approved in *Zain* does not preclude activities

taking place on private land from giving rise to a public nuisance; it would be surprising if it did.

71. In *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep. 1 (litigation arising out of the Buncefield terminal fire – see above) the explosion for which the defendants were held responsible affected public health over a wide area. The argument that claimants who owned property within the affected area were confined to claims in private nuisance (and not also in public nuisance) was rejected. In *PYA* the relator action arose from the blasting, vibration and dust caused by the operation of a quarry on private land which nevertheless constituted a public nuisance. The person liable for a nuisance is the wrongdoer whether or not they are in occupation of the land on which it arises (*Hall v Beckenham Corp* [1949] 1 K.B. 716).

72. Mr Simblet made additional written submissions following the return date hearing in which he argued that none of the prohibited conduct at paragraph 1(b) of the injunction was capable of amounting to a public nuisance and that this was, in itself, fatal to the relief sought. He gave as an example that "digging a hole" was not a public nuisance and could not therefore be the subject of an injunction obtained to prevent public nuisance. Framing the issue in this way does not seem to me to be a helpful forensic approach. It entirely ignores the significance which attaches to an action as a result of its context. Digging holes on the public highway or land to which the public have access seems to me to be quite capable of constituting a public nuisance; digging holes which undermine the highway all the more so. Equally Mr Simblet did not suggest that digging holes was an intrinsic part of lawful protest.

73. Leaving aside any question as to whether the general proposition is correct as a matter of fact in the present case, given that some of the prohibited conduct is unarguably unlawful and tortious, the submission ignores authority to the opposite effect, that conduct prohibited by an injunction does not have to be unlawful in itself or amount to a tort.

74. In *Burris* Sir Thomas Bingham M.R. said (at 1377 B):

> "If an injunction may only properly be granted to restrain conduct which is in itself tortious or otherwise unlawful, that would be a conclusive objection to term (c) of the 28 January 1994 injunction...
>
> I do not, however, think that the court's power is so limited. A Mareva injunction granted in the familiar form restrains a defendant from acting in a way which is not, in itself, tortious or otherwise unlawful. The order is made to try and ensure that the procedures of the court are in practice effective to achieve their ends. The court recognises a need to protect the legitimate interests of those who have invoked its jurisdiction."

75. A similar observation was made in *Hubbard v Pitt* [1976] QB 142 where Orr L.J said:

> "I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76. On this point both *Burris* and *Hubbard* were approved by the Court of Appeal in *Canada Goose* [78]. In *Caudrilla* Leggatt LJ (as he then was) said [50]:

> "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"

77. In *Canada Goose* the Court of Appeal said [78]:

> "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."

78. The purpose of the injunction was to prohibit conduct which if unchecked would amount to, or lead to, a public nuisance. It was the threat of significant harm, constituting a public nuisance, which led the Council to act and to seek restrictions which it regarded as necessary to afford effective protection to the public. Whilst the terms of an injunction should in so far as possible prohibit unlawful behaviour it is not the law that an injunction may only prohibit a tortious act; even lawful conduct may be prohibited if there is no other proportionate means of protecting rights. In the context of a threatened public nuisance of this nature and the form that protest had taken is not at all clear how injunctive relief could otherwise be framed effectively.

Public Nuisance as an Offence

79. The tort of public nuisance was until recently also a common law offence but the offence has now been put on a statutory basis. The common law offence was defined in *Archbold: Criminal Pleadings Evidence and Practice* as follows*:*

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

80. The fist limb of that definition is plainly engaged where, for example, protestors commit acts of trespass which endanger the life and health of the public.

81. The common law offence was replaced by the statutory offence of intentionally or recklessly causing public nuisance under s. 78 of the Police, Crime, Sentencing and Courts Act 2022 which provides:

> **"78. Intentionally or recklessly causing public nuisance**
>
> (1) A person commits an offence if—

(a) the person—

(i) does an act, or

(ii) omits to do an act that they are required to do by any enactment or rule of law,

(b) the person's act or omission—

(i) creates a risk of, or causes, serious harm to the public or a section of the public, or

(ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and

(c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.

(2) In subsection (1)(b)(i) "serious harm" means—

(a) death, personal injury or disease,

(b) loss of, or damage to, property, or

(c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.

[…]

(6) The common law offence of public nuisance is abolished.

(7) Subsections (1) to (6) do not apply in relation to-

(a) any act or omission which occurred before the coming into force of those subsections, or

(b) any act or omission which began before the coming into force of those subsections and continues after their coming into force.

(8) This section does not affect—

(a) the liability of any person for an offence other than the common law offence of public nuisance,

(b) the civil liability of any person for the tort of public nuisance, or

(c) the ability to take any action under any enactment against a person for any act or omission within subsection (1)."

82. This change in the law does not affect the position in these proceedings.

Injunctions in Support of the Criminal Law

83. Mr Simblet pointed out that in a number of the cases cited the local authority had a duty to enforce particular statutory provisions such as those relating to Sunday trading; a feature which he said was absent in the present case.

84. That does not seem to me to be a point on which anything turns; public nuisance is itself an offence. In *Zain* Keene LJ commented at [27]:

> "The position therefore is that where a local authority seeks an injunction in its own name to restrain a use or activity which is a breach of the criminal law but not a public nuisance, it may have to demonstrate that it has some particular responsibility for enforcement of that branch of the law. But where it seeks by injunction to restrain a public nuisance, it may do so in its own name so long as it "considers it expedient for the promotion or protection of the interests of the inhabitants" of its area (section 222(1)). That is so even though it is seeking to prevent a breach of the criminal law, public nuisance being a criminal offence."

85. In addition, by section 17 of the Crime and Disorder Act 1998 the Council is in fact under a general statutory duty to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.

86. In his further written submissions Mr Simblet argued that for an injunction to be granted in support of the criminal law "the behaviour prohibited must constitute an actual criminal offence". This was a similar submission to that made in relation to tortious conduct and public nuisance. Mr Simblet illustrated this point by saying that "it is not a crime to enter the terminal". That may questionable since it depends upon the intention of the person doing so and the method of entry. However, there was clearly no lawful entitlement on the part of protestors to enter private property and, on the evidence, offences of aggravated trespass, criminal damage and obstruction of the highway could be made out by reference to the conduct referred to at paragraph 1(b) of the injunction (as Mr Simblet's skeleton argument of 4th May conceded). The court can exercise its jurisdiction to grant an injunction in proceedings instituted under section 222 of the 1972 Act to restrain a breach of the criminal law even if the defendant may have a defence to the alleged crime, since the existence of an alleged defence is not a matter of jurisdiction; see *Kirklees Metropolitan Borough Council v Wickes Building Supplies* Ltd [1992] 3 All ER 717, [1993] AC 227, HL.

87. There seems to me to be no doubt that the criminal law was engaged since the police had arrested large numbers of protestors for criminal offences. The challenges the police faced were described in the evidence. The purpose of the injunction sought was to support the criminal law not to mirror its provisions. If the behaviour prohibited had to "constitute an actual criminal offence" then it would be necessary to set out the elements of the offence including any mental elements in the prohibition. It is, at the very least, not good practice to define prohibited acts by reference to legal concepts or a defendant's intention but, more to the point perhaps, there is no support in the case law for the contention that prohibited conduct has to be restricted in this way where injunctive relief supports the criminal law.

88. In *City of London v Bovis Construction Limited* 1988 WL 622732 [1992] 3 All ER 697, the claimant local authority served a noise control notice under s.60 of the Control of Pollution Act 1974 in relation to unreasonable and excessive noise from a development next to a housing estate. The defendant failed to comply with the notices. Bingham LJ (as he then was) said:

> "It seems to me strongly arguable that by early November 1987 Bovis would have been amenable to action in any one of a number of ways. An individual resident of Petticoat Square could have sued in private nuisance. The Attorney General could have sued in public nuisance either ex officio or on the relation of the local authority or a resident of Petticoat Square. The local authority could have sued in their own name for public nuisance by virtue of section 222 of the Local Government Act 1972 if they considered it expedient for the protection of the interests of the inhabitants of their area. One cannot at this interlocutory stage assert that those claims would necessarily have succeeded, but on the evidence they would appear to have had a very fair prospect of success.
>
> As it was, none of these procedures was invoked. Instead, the local authority decided in late October to issue summonses under section 60(8) alleging contraventions of the section 60 notice. The first summonses were issued on the 3rd November. Then, on the 12th November, in the light of further complaints, the Lord Mayor having ruled that the matter was by its very nature urgent, authority was given to launch the present proceedings. The local authority considered proceedings to be expedient for the protection of the inhabitants of the area, and the authority given was to prosecute proceedings under section 222 of the 1972 Act."

89. In relation to the Court's jurisdiction to grant relief he explained:

> "It is made plain by the highest authority that the jurisdiction to grant an injunction in support of the criminal law is exceptional and one of great delicacy to be exercised with caution (*Gouriet v. Union of Post Office Workers [1978] A.C. 435 at 481, 491, 500, 521*). Where, as in the present case, Parliament has shown a clear intention that the criminal law shall be the means of enforcing compliance with a statute, the reasons for such caution are plain and were fully explained by their Lordships in *Gouriet* . The criminal law should ordinarily be pursued as the primary means of enforcement. The case law shows that the archetypal case in which this jurisdiction is exercised is one in which a criminal penalty has in practice proved hopelessly inadequate to enforce compliance: see, for example, *Attorney General v. Sharp [1931] 1 Ch. 121, Attorney General v. Premier Line Ltd. [1932] 1 Ch. 303, Attorney General v. Barstow [1957] 1 Q.B. 514,* and *Attorney General v. Harris [1961] 1 Q.B. 74*.
>
> I do not, however, think that all the decided cases can be brought within that category. In *Attorney General v. Chaudry [1971] 1 W.L.R. 1614* there had been no criminal conviction (and no hearing, because an early hearing date could not be obtained) but the defendants were held to be deliberately flouting the law and the risk of grave and irreparable harm was held to justify the grant of an injunction. In *Kent County Council v. Batchelor (No. 2) [1979] 1 W.L.R. 213* an injunction was granted to restrain breaches of tree preservation orders even though such breaches were an offence and there had been no convictions. In *Runnymede Borough*

Council v. Ball [1986] 1 W.L.R. 353 there had been no resort to the criminal law but an injunction was granted because of the risk of irreversible damage."

90. He summarised the applicable principles as follows:

> "The guiding principles must, I think, be –
>
> (1) that the jurisdiction is to be invoked and exercised exceptionally and with great caution: [..];
>
> (2) that there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see the *Stoke-on-Trent* case at 767B, 776C, and *Wychavon District Council v. Midland Enterprises (Special Events) Ltd. [1987] 86 L.G.R. 83 at 87*;
>
> (3) that the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them: see the *Wychavon* case at page 89."

91. These principles have been followed and applied in subsequent cases (see *Birmingham City Council v Shafi* [2009] 1 WLR 1961 [33-36] where they were described as having been "broadened" to some extent in so far as injunctions were considered to be in support of the criminal law even where they were obtained pre-emptively of any criminal conduct).

92. As to the application of these principles to the facts of the case in *Bovis,* Bingham LJ observed:

> "It is accepted here that if the preliminary condition of section 222 is met the local authority stands in the same position as the Attorney General. It is not, I think, challenged that the preliminary condition of section 222 is met here. So the question is whether the local authority can show anything more (and, I would interpolate, substantially more) than an alleged and unproven contravention of the criminal law, and whether the inference can be drawn that noise prohibited by the notice will continue unless Bovis are effectively restrained by law and that nothing short of an injunction will effectively restrain them.
>
> I am in no doubt that these questions must be answered in favour of the local authority. The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and flagrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct which may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents.

> The local authority have issued 18 summonses but, even if convictions are obtained, the delay before the hearing will deprive the residents of Petticoat Square of any but (at best) minimal benefit. The local authority are charged with a power – and perhaps a corresponding duty – to protect their interests. It would be lamentable if their interests in the present case were left without protection. In my view the deputy judge was entitled to grant an injunction and was right to do so."

93. In the same case Taylor LJ (as he then was) described the practical limitations of the criminal law:

> "The noise resulting from the works constituted not merely a breach of the criminal law but also a nuisance gravely affecting the local inhabitants. Every disturbed night or weekend they suffer involves irreversible damage. The issue of criminal proceedings did not end the breaches. Time would inevitably pass before those proceedings could be heard. Should they be contested (as we have been told they are to be) and should the proceedings succeed, there would still remain the prospect of an appeal by way of re-hearing causing further delay. In those circumstances, it is clear that criminal proceedings were likely to be ineffective to protect the inhabitants, and I am satisfied that the grant of an injunction was therefore appropriate."

94. In the present case the evidence from the Assistant Chief Constable was:

> "Although large numbers of arrests have been made, the offences for which they can be arrested (obstruction of the highway etc) are generally low level and summary only offences which means the criminal justice options can be limited. We have also utilised bail conditions to try and prevent protesters returning to the site but these have largely proved to be unsuccessful with many of the protesters already being arrested multiple times from the Kingsbury site. Even when protestors breached their bail conditions, unless further arrested for a further substantive offence, they are merely dealt with for the original offence for which they were arrested prior to the bail conditions being set. As stated, these are low level summary offences and therefore charge and remand in custody is not an option open to us."

95. The present case does, in my view, involve the factors identified in *Bovis,* namely a risk of irreversible damage leading to grave and irreparable harm as a result of the deliberate flouting of the law such that nothing short of an injunction would be effective to restrain the conduct giving rise to that risk. The Council did not act precipitously in seeking an injunction. It left the matter in the hands of the police until it became clear that dangerous activity was escalating and those arrested were simply returning to the Terminal site when released under investigation and were not deterred by the prospect of criminal prosecution and the imposition of fines.

Other Remedies

96. Mr Simblet submitted that there were other remedies open to the Council which it was obliged to pursue or which at the very least militated against the granting of injunctive relief. He relied upon *Birmingham City Council v Shafi* [2009] 1 WLR 1961 in which the court held that the local Council should not have applied for an injunction under section 222 rather than applying to a Magistrates Court or the Crown Court for an Anti-

Social Behaviour Order ("ASBO") because the terms of the injunction sought were identical or almost identical to those which could be obtained via an ASBO in circumstances where the criminal law could not be said to be ineffective and where it was unfair to circumvent the criminal standard of proof.

97. However, the court in *Shafi* characterised its decision as a departure from what it accepted were the general principles laid down in *Bovis* and *Stoke on Trent City Council v B&Q Retail Ltd* [1984] AC 754 as the Court of Appeal observed when later considering *Shafi* in *Sharif v Birmingham CC* [2020] EWCA Civ 1488.

98. Although Mr Simblet's submissions proceeded on the basis that an ASBO was one of the "relevant powers" available to the Council, that form of order was abolished under the provisions of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"), the gap being filled by civil injunctions and Criminal Behaviour Orders ("CBO"). The relief sought in this case is not identical to that which could be achieved by way of a CBO (which can only be made following conviction) nor are the conditions at all similar to those which led to the decision in *Shafi.*

99. As far as a CBO was concerned, Bean LJ said in *Sharif*:

> "41...Even assuming (without deciding) that a CBO is an appropriate order to be made on conviction for a motoring offence such as dangerous driving or racing on the highway, it could only be made against an individual who had been prosecuted and convicted of an offence, a process which might well take several months. The purpose of the injunction was to prevent future nuisances, not to impose penalties for past ones.
>
> 42. Judge Worster and Judge McKenna were well entitled to conclude, in the words of Bingham LJ's third criterion in *Bovis*, that car cruising in the Birmingham area would continue unless and until effectively restrained by the law and that nothing short of an injunction would be effective to restrain them. I regard this as a classic case for the grant of an injunction."

100. For similar reasons in *Runnymede Borough Council v Ball and others* [1986] 1 All ER 629 the Court of Appeal decided that a local authority was entitled to seek a civil remedy under s.222 of the 1972 Act without first exhausting the processes of the criminal law.

101. *Sharif* expressly considered and rejected the argument that an injunction should not have been granted to prohibit street cruising when there was an alternative remedy available to a Council of itself making a "public spaces protection order" ("PSPO") under Part 4 of the 2014 Act. Although Mr Simblet pointed out that in *Dulgheriu v LB Ealing* [2019] EWCA Civ 1490, such an order was made to regulate protest, that case did not involve any consideration of whether or not a local authority was bound to use a PSPO rather than seek injunctive relief. It is effectively silent on the point for which Mr Simblet sought to recruit it.

102. At [34] in *Sharif* the Court of Appeal noted:

> "In *Birmingham City Council v James* [2014] 1 WLR 23; [2013] EWCA Civ 552 Jackson LJ observed that there are many situations in which, on the facts, two

different pre-emptive orders are available and that there is no "closest fit" principle which cuts down the court's statutory powers to make pre-emptive orders. He advised at [31] that "in future cases the Court of Appeal should not be invited to trawl through the legislation in some quest for the closest fit". *In Mayor of London v Hall* [2011] 1 WLR 504; [2010] EWCA 817 this court upheld the grant of an injunction restraining protestors from occupying Parliament Square, in aid of the enforcement of byelaws which provided for a modest financial penalty only and had proved ineffective: see per Lord Neuberger MR at [52]-[57]."

103. In fact, the Council had, in the present case, considered whether a PSPO would be a satisfactory alternative to an injunction and had decided that it would not be. It gave its reasons in the evidence of its chief executive. It rejected such an order as an alternative because, as Mr Maxey explained, a PSPO requires consultation and publicity before it can be made. That was likely to take many weeks whereas the need for injunctive relief was urgent. In addition, the only penalties for breach are financial, being a penalty of a fine (to a maximum of £1,000) or a fixed penalty notice; neither of which the Council considered would be an adequate deterrent in the circumstances. These reasons were then summarised in the Particulars of Claim.

104. Mr Simblet referred to the case of *L v Chief Constable of Merseyside* [2006] 1 WLR 375 for the principle that "that public powers must be exercised in accordance with the purpose of the statute" suggesting that it supported his submission that the Council was required to make a PSPO order rather than seeking an injunction. That case concerned the operation of two sections of the same statute, the Children Act 1989, which allows the court to make an emergency protection order ("EPO") under section 44 and gives the police a power to remove children who are in need of emergency protection under section 46. The court's conclusion was that "where a police officer knows that an EPO is in force, he should not exercise the power of removing a child under section 46, unless there are compelling reasons to do so" [36].

105. I do not consider that a decision concerning the operation of a statutory scheme within a single piece of legislation supports the conclusion that Parliament must have intended that local authorities are obliged to make orders themselves rather than seeking an order from the court or that the court is, in turn, required to decline to give injunctive relief.

106. Mr Simblet said of the Council's decision not to proceed by way of PSPO: "Essentially, Mr Maxton [sic] is, as [sic] no more than an officer in a small local authority, asking the Court to over- ride what Parliament has decided should be the pre-conditions before prohibitions on the use of public spaces are imposed, or the sanctions that Parliament considers appropriate for breach. That is far from sufficient."

107. The more accurate characterisation of the situation might be that protestors had taken it upon themselves to decide the level of significant risk and public nuisance to which the local community of Kingsbury and those working at or visiting the Terminal or using the roads leading to it, should be exposed. Parliament has given the local authority a range of powers and duties in those circumstances. There is nothing in the authorities cited before me to suggest that the Council was obliged to pursue a PSPO, or any other alternative remedy, rather than seek an injunction.

Power of Arrest

108. Section 27, Police and Justice Act 2006 ("the 2006 Act") permits the court to attach a power of arrest to injunctions made under s.222 of the 1972 Act where the conditions in that section are met. It provides:

> "(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972 (power of local authority to bring, defend or appear in proceedings for the promotion or protection of the interests of inhabitants of their area).
>
> (2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.
>
> "(3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either–
>
> > (a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or
> >
> > (b) there is a significant risk of harm to the person mentioned in that subsection.
>
> (4) Where a power of arrest is attached to any provision of an injunction under subsection (2), a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of that provision."

109. Parliament therefore intended that a power of arrest could be added to an injunction obtained by a local authority under section 222 of the 1972 Act in the most serious cases where there was the use or threat of violence or a risk of harm of a high order. This contrasts with the position of a private litigant and reflects the duties of a local authority to protest the interests of the inhabitants of its area. A police officer making an arrest is required to have reasonable cause for suspicion that an arrested person is in breach of a provision of the order; equivalent therefore to an arrest for a criminal offence. Anyone arrested has to be brought before the court within 24 hours.

110. The Council did not make its application for a power of arrest on the basis that there was any threatened use of violence but under subsection 3(b), relying on "a significant risk of harm" occurring to local inhabitants and those present at or the vicinity of the Terminal as a result of conduct capable of causing nuisance or annoyance. The first question is therefore whether there was a significant risk of harm. This is a high threshold requirement, no doubt intended as an important control on the attachment of a power of arrest. In so far as this refers to a significant risk of harm to classes of individuals, including those living nearby in Kingsbury, working at or visiting the Terminal or using public roads I consider that the answer must, undoubtedly, be in the affirmative for the reasons I have set out earlier.

111. Mr Simblet's submission was that the Council was not "entitled to a power of arrest, specifically the injunction was not made for the benefit of a person suffering nuisance or annoyance". He did not elaborate further on this argument. To begin with, I consider it does not reflect the wording of section 27 of the 2006 Act which applies where a local authority is bringing proceedings to protect the inhabitants of its area from conduct

"capable" of causing nuisance or annoyance, giving rise to a "significant risk" of harm. This involves an assessment by the court of the potential consequences of the conduct which it is sought to prohibit.

112. Although the statute refers to "a person" I do not conclude that this restricts section 27 to a single or named person rather than a group or class of persons who can be shown to be at significant risk of harm. In such a case the greater will, by definition, include the lesser. It would be an odd result if there was such a restriction given that section 27 of the 2006 Act is specific to the power exercisable under section 222 of the 1972 Act which is concerned with the protection of the "interests of inhabitants".

113. CPR 65.9 sets out the procedural requirements where a power of arrest is sought under the 2006 Act. In accordance with the rules, a power of arrest was sought in the Particulars of Claim and the application. It was supported by written evidence. Although rule 69.5(3) requires personal service that is expressed to apply to an application made on notice, which this was not.

114. In *LB Barking and Dagenham* [2021] EWHC 1201 (QB) Nicklin J. expressed misgivings about the attachment of a power of arrest to injunctions against persons unknown [79]. This was in the context of orders made in respect of unauthorised encampments by travellers where meeting the requirements of section 27(3) of the 2006 Act was always likely to be difficult. In practice it is not unusual for a power of arrest to be attached to orders obtained by local authorities against persons unknown where there are proper grounds for concluding there is a risk of significant harm.

115. In *Croydon London Borough Council v Persons Unknown* [2016] EWHC 3018 (QB) a power of arrest pursuant to s.27 of the 2006 Act was attached to an injunction where "street cruising" had already led to injury and death, appeared to be worsening and had not been controlled by other means. *Sharif* was also a street cruising case where the power of arrest was attached to an order made in respect of anyone participating as the driver or rider of, or passenger in, a vehicle. The power of arrest attached to the interim injunction in *Afsar* related to three named defendants and persons unknown (as Mr Manning who was counsel in that case confirmed). In *London Borough of Hackney v Persons Unknown* [2020] EWHC 1900 (QB) a power of arrest was attached to parts of an interim injunction made to prevent various forms of anti-social behaviour which were said to amount to the tort of public nuisance and to have been taking place in the London Fields park. In *Thurrock Council -v- Adams* [2022] EWHC 1324 a power of arrest under section 27 was attached to an injunction made in respect of named defendants and persons unknown where protestors had been intercepting tankers leaving fuel terminals. Some of the potential harms described in that case arise from similar conduct and attendant risk to that identified by the Council in the present case.

Injunctive Relief

116. Section 37(1) of the Senior Courts Act 1981 provides that the High Court may grant an interlocutory or final injunction where it appears to the court to be just and convenient.

117. Because the application is for interim precautionary relief the test to be applied is set out in *American Cyanamid v Ethicon* [1975] AC 396. The usual test is:

a. is there a serious question to be tried? (the Claimant does not have to prove its case on an application for an interim injunction)

b. (if so) would damages be an adequate remedy for a party injured by the grant of, or failure to grant, an injunction?

c. (if not) where does the balance of convenience lie?

118. In cases where wrongs have already been committed as opposed to merely threatened the evidential threshold for establishing that conduct will continue unless restrained, may as a matter of common sense, at least, be lower (*Secretary of State for Transport and HS2 limited v Persons Unknown* [2019] EWHC 1437 (Ch) [122 to 124]; *Secretary of State for Transport v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB) [96]). The purpose of the injunction will be to prevent the repetition of conduct from which a real risk of imminent unlawful harm can reasonably be apprehended so that a precautionary remedy is required. There was clear evidence of such a risk in this case given the prior actions of protestors. The injunction sought may have been precautionary, but it was founded upon evidence of a pattern of behaviour which was likely to continue.

119. As far as the requirements in *American Cyanamid* are concerned, they are, in my view, clearly satisfied. The Council has a strong case that the protests have involved the conduct described in the evidence and the Particulars of Claim, much of it captured in video recordings. There is a serious issue to be tried as to whether this conduct was unlawful and amounted to a public nuisance. I consider that the Council is likely to obtain injunctive relief at trial, so satisfying the requirements of section 12 of the Human Rights Act (see further below). The risk of serious harm to individuals and the environment is significant and damages would not be an adequate remedy given the risk of irreparable harm. As to any lesser harm or financial loss, there was no suggestion that protestors had the means to satisfy an award of damages.

120. The balance of convenience favours the grant of injunctive relief. The defendants are not deprived of the opportunity to protest lawfully. Peaceful protest has taken place after the injunction was granted. The risks to public health and safety if injunctive relief is not granted are grave. The fact that protest has continued at the Terminal suggests that the injunction has not had, and is not likely to have, a chilling effect. There was no evidence to suggest otherwise.

Undertaking in Damages

121. A local authority seeking an interlocutory injunction under s.222 of the 1972 Act will not necessarily be required to give an undertaking in damages, when exercising a law enforcement function in the public interest (*Kirklees MBC v Wickes Building Supplies Ltd* [1993] A.C. 227). I was referred to the decision of Warby J. (as he then was) in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB) in support of the contention that such an undertaking was necessary. The decision in that case was, however, expressed to be made in "the particular circumstances" and turned on the fact that the action was not being taken on behalf of the public at large but rather a section or some sections of the public; the main beneficiaries being teachers, other staff and pupils at the school to which the injunction related. In *FSA v Sinaloa Gold plc & others* [2013] UKSC 11 at Lord Mance observed [31]:

> "Different considerations arise in relation to law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions. Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty. In the present context, the fact that an injunction is discharged, or that the court concludes after hearing extended argument that it ought not in the first place to have been granted, by no means signifies that there was any breach of duty on the public authority's part in seeking it."

122. I do not consider that the Council should be required to give a cross undertaking in damages in the present circumstances where it is seeking to restrain conduct which has potentially catastrophic consequences.

Human Rights Act 1998

123. Where s12(3) of the Human Rights Act 1998 ("HRA") is engaged a modified version of the *American Cyanimide* test applies. Section 12, of the HRA provides:

> "(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. […]
> (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."

124. Thus, the Council must establish that it would be likely to obtain the injunction sought at trial not just that there is a serious question to be tried (*Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100). The submissions made addressed this question on the basis that "likely" means more likely than not (as the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 said would be the normal position). The approach in *Ineos* applies in a case where the question of restraint of publication arises.

125. The word 'publication' in section 12(3) has been interpreted widely in this context to apply to any restraint on a communication which engages Article 10 rights (see B*irmingham City Council v Afsar* [2019] EWHC 1560 (QB) at [60-61]). The Council's position was nevertheless that s12(3) did not apply because the injunction did not relate to publication but, if it did, the evidence demonstrated that the Council is "likely" in the relevant sense to obtain the desired relief at trial. Notwithstanding the Council's primary position my attention was properly drawn to s.12(3) at the initial hearing. I do not need to determine any issue as to publication at this stage as I am satisfied that the Council would obtain injunctive relief at trial.

126. A Claimant must also satisfy section 12(2) of the 1998 Act in relation to notice:

> "(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."

127. The Council did seek to notify informally those who had been arrested by the police and whose details they had been given on the day before the without notice hearing but the overriding concern expressed by Mr Maxey was that a full inter parties hearing, before an order was in force, would lead to more dangerous activities in the period before the matter came to court. I accepted when granting the original injunction that these concerns were justified, that the matter was urgent and that the Council had taken all practicable steps in those circumstances to notify named defendants, and alternatively, that there were compelling reasons why there should not have been notification.

Freedom of Assembly and Expression – Articles 10 and 11

128. The Council accepted that the application affected the rights of the protesters under Article 10 and, arguably, so long as protest was peaceful, under Article 11 of the ECHR, so that the Council had to show that any interference with those rights was justified.

129. Articles 10 and 11 are qualified rights subject to restrictions prescribed by law which are necessary in a democratic society. Those restrictions may be necessary, amongst other things, for reasons of public safety, to protect the health and rights of others and to prevent disorder or crime (they may also have to be balanced against the right to property protected by Article 1 of the first protocol, 'A1P1').

130. Article 10 provides:

> "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…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…"

131. Article 11 provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others…
>
> 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… 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…"

132. The Supreme Court considered the application of Articles 10 and 11 ECHR in relation to protests which involve obstruction of the highway in the case of *DPP v Ziegler* [2021] UKSC 23.

133. In that case the defendant protesters were charged with obstructing the highway contrary to section 137 of the Highways Act 1980. Their protest consisted of obstructing the road by lying across it and locking themselves to structures so that it was difficult for police to remove them. Whilst they accepted that they had caused an obstruction to the highway, they argued that they had not done so 'without lawful excuse' because, amongst other things, they were exercising their rights under Articles 10 and 11. The Supreme Court set out the questions which had to be addressed in those circumstances:

> "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?

134. Question e can be sub-divided into a number of further questions:

> 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?

135. The answers to questions a to b (above) are not in issue. Interference with the Defendants' rights is prescribed by law under section 37 of the Senior Courts Act 1981 in so far as the Council is entitled to seek a precautionary injunction on the basis of the causes of action discussed above. The interference is in pursuit of legitimate aims set out in Articles 10 and 11; the prevention of crime and disorder and the protection of the health and rights of others. It was accepted by the Council that the protests relate to a "matter of general concern". The question of whether in this country and globally we should go further and faster in eliminating reliance on fossil fuels in order to tackle climate change may be the defining issue of our age and underlines the importance of the fundamental right to protest. These proceedings are not however the forum in which government policy on this issue falls to be examined. It is trite to say that extreme forms of protest are more likely to attract attention but that does not in itself justify them. The methods employed in protest have to be balanced against the rights of others in a democratic society. Whilst disruption and inconvenience may to some extent be inevitable there must also, inevitably, be boundaries. The *Zielger* questions relate to protests on highways where it is well established that Articles 10 and 11 are engaged but even here a balance has to be struck. There is no right to protest on privately owned land or on public land from which the public are generally excluded (See *DPP v Cuciurean* [45]) and there is no absolute right to engage in protest which threatens the health and safety of others.

136. The aim of preventing a public nuisance posing a grave risk to local inhabitants and the environment was sufficiently important to justify interference with the right to protest. There is a rational connection between the terms of the injunction and that aim. Each of the prohibitions can be explained and justified by reference to that aim and there were no less restrictive means available. The injunction does not prevent protest, as was apparent after it came into effect. The terms of the injunction do, in my view, strike a fair balance between the rights of the individual protesters and the general interest of the community. The injunction does not prevent lawful protest.

137. Mr Simblet relied in his written and oral submissions on the case of *Regina (Laporte) v Chief Constable of Gloucestershire Constabulary* [2002] UKHL 55 which he argued "represents a decision, at the highest level, supportive of the principle that protest, even disruptive protest is lawful and the court cannot prevent it unless there is a clear necessity to do so." I agree with Mr Simblet that this case does emphasise the importance of the entitlement to exercise rights under Articles 10 and 11 by protesting but, as the formulation of his proposition also recognises, restrictions in the manner in which these rights are exercised may be imposed where that is necessary. I disagree with the bald assertion that disruptive protest is necessarily lawful. Beyond this however I did not find the case to be of great assistance. The factual circumstances in *Laporte* were very different. The police stopped and turned back three coaches carrying protestors travelling from London to demonstrate at an air base in Gloucestershire. The police did not seek an order from the court. They sought to exercise a power to take steps short of arrest to prevent a breach of the peace in circumstances where any such breach was not sufficiently imminent to justify arrest. Their actions were premature and indiscriminate and as such represented a disproportionate restriction on rights under Articles 10 and 11. They prevented anyone on the coaches from protesting. There is no suggestion in the judgments that the protests to which the coaches were travelling are examples of disruptive but nevertheless lawful protest; the reverse is the case, there had been instances of serious unlawful protest which had led to measures being put in place to ensure that peaceful protest could take place and disruptive protest prevented. Lord Carswell summarised the position [103]:

> "The situation which the police faced at Fairford was difficult and delicate. Incursions into the base had taken place in the recent past and it was clear that extreme protesters were ready to commit further damage, quite possibly extending to acts of serious sabotage. With the commencement of the war with Iraq, the risk of damage to the operation of the base and the concomitant likelihood that the US military forces at the base might react strongly to attempts at trespass, there was a real prospect that unless matters were handled with great care very serious consequences could result. The Gloucestershire police very creditably formed an elaborate plan designed to allow considerable opportunity to peaceful protesters to exercise liberty of speech and assembly, while putting in place plans to prevent disruptive and potentially damaging behaviour carrying a threat to the safety of the base."

Applications against Persons Unknown

138. The ability of the court to grant an injunction against 'persons unknown' has been recognised for at least two decades. In *Bloomsbury Publishing Group v News Group Newspapers* [2003] 1 WLR 1633, such an injunction was obtained to prevent any use being made of a Harry Potter novel that had been stolen ahead of its publication date.

Protests involving trespass were similarly restrained in *Hampshire Waste Services v Persons Intending to Trespass and/or Trespassing upon Incinerator Sites* [2003] EWHC 1738 (Ch) notwithstanding that the threatened trespass had not occurred and that the defendants could only be identified by reference to the conduct injuncted. In such cases a person becomes a party once they commit the prohibited act knowing of the injunction (*South Cambridgeshire District Council v. Gammell* [2005] EWCA Civ 1429). They are within the jurisdiction of the court because they can be identified, other than by name, and served by alternative means if necessary (*Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 147).

139. The principles which apply to injunctions against 'persons' unknown in the context of the wider range of activities that might be involved in protest were set out in *Boyd v Ineos Upstream* [2019] EWCA Civ 515, and further elaborated on and developed in *Canada Goose Retail Limited v Persons Unknown* [2020] EWCA Civ 303 and then in *Barking and Dagenham London Borough Council v Persons Unknown* [2021] EWCA Civ 13. In the latter case the Court of Appeal invoked the exceptional grounds identified in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 for departing from its earlier decision in *Canada Goose.*

140. The central issue of difference between the two cases was one of principle in relation to "newcomers"; whether it should be possible for newcomers to be in breach of a final injunction in circumstances where they were not aware of or party to the proceedings at which the injunction was made and were, by definition, not in a position to be heard in those proceedings.

141. However, contrary to the Council's submissions before me, the departure from *Canada Goose* in *Barking and Dagenham* was not complete in so far as *Canada Goose* gave guidance, at [82], in relation to interim injunctions against 'persons unknown". Indeed paragraph 82 was set out in full and endorsed at [56] of the Court of Appeal's judgment in *Barking and Dagenham*. The Master of the Rolls introduced those guidelines as follows [55]:

> "At [62]-[88] in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron, Gammell, Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v. Pitt* [1976] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [82], the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at [83]-[88] applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction."

142. I do not therefore accept the Council's argument that: "The fact that the Court of Appeal, in *Barking*, did not specifically identify para.[82] in *Canada Goose* as erroneous does not mean that that passage escapes the overall rulings or logic of the *Barking* decision."

143. The *Canada Goose* guidance in relation to interim injunctions against "persons unknown", at [82] is:

> "(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.

144. As to the second of these requirements Mr Manning on behalf of the Council, contended that the description used was lawful and appropriate and that alternative descriptions were not likely to aid comprehensibility but were apt to mislead. He pointed out that the evidence of Mr Maxey, served for the return date indicated that the police had taken particular care to draw the prohibitions in the order to the attention of protesters before seeking to exercise any power of arrest. No protester could conceivably be in breach of the terms of the injunction or susceptible to arrest unless they had breached one of the specific prohibitions.

145. However the present description of persons unknown, set out earlier in this judgment, identifies that class of defendant simply by participation in the protests against fossil fuels at the Terminal. It does not, on its face, meet the requirements set out in *Canada Goose.*

146. As far as paragraphs 1, 3, 4, and 5 are of the *Canada Goose* guidance are concerned I consider that the order meets these requirements for the reasons given earlier in this judgment.

147. As far as the clarity of the prohibitions is concerned, paragraph 1a of the prohibitions relates to the fenced Terminal land on which there is no right to protest and where protest would give rise to very significant risks. The area concerned is delineated by a map. The prohibited activity is clear.

148. The prohibitions at paragraph 1(b) relate to acts which have been preparatory to attempts to enter the Terminal or are themselves capable of amounting to a public nuisance in the context in which they have occurred. They are expressed in ordinary language. They reflect the evidence as to the activities of protesters at the Terminal. They are similar to prohibitions which have been put in place in other cases involving protest because the methods employed to protest have been similar in those cases (see by way of recent examples *Thurrock* (above), *Three Counties Agricultural Society v Persons Unknown*: [2022] EWHC 2708 (KB), *Transport for London v Lee*, [2022] EWHC 3102 (KB), 2022 WL 16609167). The restraints are not a ban on protest they are limitations on where and how protest can be carried on. The conduct restrained is not an essential or intrinsic part of lawful protest. The disruption caused was not simply incidental to lawful protest but was deliberate and, because it was targeted at an oil terminal and oil tankers, involved significant risks of harm. The entrances to the Terminal have been a particular flashpoint where there has been deliberate swarming and obstruction. Protestors who lock themselves together and on to structures or glue themselves to roads form a barrier that cannot be quickly removed. Interference with the operation of the Terminal in these circumstances was not a transient part of protest but the intended consequence. For obvious reasons unimpeded access to the Terminal by the Fire Service and other emergency services is essential at all times. To the extent that there may be interference with lawful activities the restrictions are proportionate and necessary to prevent a public nuisance and in support of the criminal law.

149. The layout of the site entrances and roads do not lend themselves to the use of an exclusion zone of the sort employed in *Afsar*. The geographical restriction to the "locality" was it was submitted a term commonly found in injunctive relief and statute. A number of the prohibitions could in any event only relate to conduct at or next to the Terminal entrances or structures. In *Manchester v Lawler* 31 HLR 119, the Court of Appeal considered the term "locality" in contempt proceedings following an injunction granted under section 152(1) of the Housing Act 1985 which provides:

> "The High Court or a county court may, on an application by a local authority, grant an injunction prohibiting a person from
>
> (a) engaging in or threatening to engage in conduct causing or likely to cause a nuisance or annoyance to a person residing in, visiting or otherwise engaging in a lawful activity in residential premises to which this section applies or in the locality of such premises

> […]
>
> (c) entering residential premises to which this section applies or being found in the locality of any such premises."

150. Judge LJ (as he then was) said:

> "it is unnecessary to repeat the terms of s 152 in this judgement, but a rapid glance at the section demonstrates that the word "locality" recurs. It was plainly used deliberately. Moreover section 152(7) provides for the grant of an injunction "under" that is, in the terms of the section. Although wide the statutory language is not imprecise. In this context "locality" is an ordinary, readily understood English word without specialised or refined meaning. The operation of the section is flexibly linked to a geographical place."

151. The operation of the prohibitions is in my view sufficiently geographically identified. The terms of an interim injunction may be kept under review by the court and changes made to the terms of the order if they are having an unintended effect or are leading to contempt applications for trivial infringements (*MBR Acres Ltd v Free the MBR Beagles*, [2022] EWHC 3338 (KB), 2022 WL 17835649. There is nothing to suggest that this is the case here.

152. The interim order was expressed to "continue until the hearing of the claim unless previously varied or discharged by further Order of the Court". It provided for reconsideration at a hearing. Directions for trial have now been given and a trial window identified with the intention that the case will be heard once the result of the appeal to the Supreme Court in *Barking & Dagenham* is known. The claim will not be left in abeyance and the order is therefore subject to a temporal limit. I consider that an interim injunction in the form of the present order is appropriate and necessary and that on the evidence before the court the Council appears more likely than not to succeed at trial in obtaining injunctive relief.

153. Although there is a persons unknown defendant to the claim the description of persons unknown does not comply with the guidance in *Canada Goose.* The claim form and orders will require amendment. That was the course taken in *Afsar* and *MBR* where there were similar, and other, deficiencies but where the interim injunctions were continued. If that cannot be done by agreement then the Court will need to determine the precise terms on application by the Council.

154. The application to discharge the order is accordingly refused and subject to the changes required as a result of this judgment the interim order will remain in place to trial.

SCHEDULE A

(21) THOMAS ADAMS
(22) MARY ADAMS
(23) COLLIN ARIES
(24) STEPHANIE AYLETT
(25) MARCUS BAILIE
(26) MAIR BAIN
(27) JEREMY BAYSTON
(28) PAUL BELL
(29) PAUL BELL
(30) SARAH BENN
(31) RYAN BENTLEY
(32) DAVID ROBERT BERKSHIRE
(33) MOLLY BERRY
(34) GILLIAN BIRD
(35) RACHEL JANE BLACKMORE
(36) PAUL BOWERS
(37) KATE BRAMFITT
(38) SCOTT BREEN
(39) ALICE BRENCHER
(40) EMILY BROCKLEBANK
(41) TOMMY BURNETT
(42) TEZ BURNS
(43) GEORGE BURROW
(44) JADE CALLAND
(45) OLWEN CARR
(46) CAROLINE CATTERMOLE
(47) IAN CAVE
(48) MICHELLE CHARLESWORTH
(49) ZOE COHEN
(50) JONATHAN COLEMAN
(51) PAUL COOPER
(52) CLARE COOPER
(53) JEANINIE DONALD-MCKIM
(54) KATHRYN DOWDS
(55) JANINE EAGLING
(56) STEPHEN EECKELAERS
(57) SANDRA ELSWORTH
(58) HOLLY JUNE EXLEY
(59) CAMERON FORD
(60) WILLIAM THOMAS GARRATT-WRIGHT
(61) ELIZABETH GARRATT-WRIGHT
(62) ALASDAIR GIBSON
(63) ALEXANDRA GILCHRIST
(64) STEPHEN GINGELL
(65) CALLUM GOODE
(66) KATHRYN GRIFFITH
(67) FIONA GRIFFITH
(68) JOANNE GROUNDS

(69) ALAN GUTHRIE
(70) DAVID GWYNE
(71) SCOTT HADFIELD
(72) SUSAN HAMPTON
(73) JAKE HANDLING
(74) FIONA HARDING
(75) GWEN HARRISON
(76) DIANA HEKT
(77) ELI HILL
(78) JOANNA HINDLEY
(79) ANNA HOLLAND
(80) BEN HOMFRAY
(81) JOE HOWLETT
(82) ERIC HOYLAND
(83) REUBEN JAMES
(84) RUTH JARMAN
(85) STEPHEN JARVIS
(86) SAMUEL JOHNSON
(87) INEZ JONES
(88) CHARLOTTE KIRIN
(89) JENNIFER KOWALSKI
(90) JERARD LATIMER
(91) CHARLES LAURIE
(92) PETER LAY
(93) VICTORIA LINDSELL
(94) EL LITTEN
(95) EMMA MANI
(96) RACHEL MANN
(97) DAVID MANN
(98) DIANA MARTIN
(99) LARCH MAXEY
(100) ELIDH MCFADDEN
(101) LOUIS MCKECHNIE
(102) JULIA MERCER
(103) CRAIG MILLER
(104) SIMON MILNER-EDWARDS
(105) BARRY MITCHELL
(106) DARCY MITCHELL
(107) ERIC MOORE
(108) PETER MORGAN
(109) RICHARD MORGAN
(110) ORLA MURPHY
(111) JOANNE MURPHY
(112) GILBERT MURRAY
(113) CHRISTIAN MURRAY-LESLIE
(114) RAJAN NAIDU
(115) CHLOE NALDRETT
(116) JANE NEECE
(117) DAVID NIXON
(118) THERESA NORTON

(119) RYAN O TOOLE
(120) GEORGE OAKENFOLD
(121) NICOLAS ONLAY
(122) EDWARD OSBOURNE
(123) RICHARD PAINTER
(124) DAVID POWTER
(125) STEPHANIE PRIDE
(126) HELEN REDFERN
(127) SIMON REDING
(128) MARGARET REID
(129) CATHERINE RENNIE-NASH
(130) ISABEL ROCK
(131) CATERINE SCOTHORNE
(132) JASON SCOTT-WARREN
(133) GREGORY SCULTHORPE
(134) SAMUEL SETTLE
(135) VIVIENNE SHAH
(136) SHEILA SHATFORD
(137) DANIEL SHAW
(138) PAUL SHEEKY
(139) SUSAN SIDEY
(140) NOAH SILVER
(141) JOSHUA SMITH
(142) KAI SPRINGORUM
(143) ANNE TAYLOR
(144) HANNAH TORRANCE BRIGHT
(145) JANE TOUIL
(146) JESSICA UPTON
(147) ISABEL WALTERS
(148) CRAIG WATKINS
(149) SARAH WEBB
(150) IAN WEBB
(151) ALEX WHITE
(152) WILLIAM WHITE
(153) SAMANTHA WHITE
(154) LUCIA WHITTAKER-DE-ABREU
(155) EDRED WHITTINGHAM
(156) CAREN WILDEN
(157) MEREDITH WILLIAMS
(158) PAMELA WILLIAMS

Neutral Citation Number: [2023] EWHC 1837 (KB)

Case No: QB-2022-001098

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2023

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

(1) ESSO PETROLEUM COMPANY, LIMITED	**Claimant**
(2) EXXONMOBIL CHEMICAL LIMITED	
- and –	
(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT) UPON ANY OF THE FOLLOWING SITES ("THE SITES")	**Defendants**

(A) THE OIL REFINERY AND JETTY AT THE PETROCHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED RED AND GREEN BUT EXCLUDING THOSE AREAS EDGED BLUE ON THE ATTACHED 'FAWLEY PLAN')
(B) HYTHE OIL TERMINAL, NEW ROAD, HARDLEY SO45 3NR (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HYTHE PLAN')
(C) AVONMOUTH OIL TERMINAL, ST ANDREWS ROAD, BRISTOL BS11 9BN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'AVONMOUTH PLAN')
(D) BIRMINGHAM OIL TERMINAL, WOOD LANE, BIRMINGHAM B24 8DN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'BIRMINGHAM PLAN')
(E) PURFLEET OIL TERMINAL, LONDON ROAD, PURFLEET, ESSEX RM19 1RS (AS SHOWN FOR IDENTIFICATION EDGED RED AND BROWN ON THE ATTACHED 'PURFLEET PLAN')

(F) WEST LONDON OIL TERMINAL, BEDFONT ROAD, STANWELL, MIDDLESEX TW19 7LZ (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'WEST LONDON PLAN')
(G) HARTLAND PARK LOGISTICS HUB, IVELY ROAD, FARNBOROUGH (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HARTLAND PARK PLAN')
(H) ALTON COMPOUND, PUMPING STATION, A31, HOLLYBOURNE (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'ALTON COMPOUND PLAN')

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT OR THE SECOND CLAIMANT) UPON THE CHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED PURPLE ON THE ATTACHED 'FAWLEY PLAN')
(3) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER ONTO ANY OF THE CLAIMANTS' PROPERTY AND OBSTRUCT ANY OF THE VEHICULAR ENTRANCES OR EXITS TO ANY OF THE SITES (WHERE "SITES" FOR THIS PURPOSE DOES NOT INCLUDE THE AREA EDGED BROWN ON THE PURFLEET PLAN)
(4) PAUL BARNES
(5) DIANA HEKT

- -
- -

Timothy Morshead KC and **Yaaser Vanderman** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
No appearance or representation by the **Defendants**

Hearing date: 10 July 2023
- -

Approved Judgment

This judgment was handed down remotely at 2pm on 18 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

Mr Justice Linden :

Introduction

1. This was the trial of the Claimants' claim for an injunction to restrain certain forms of trespass by Extinction Rebellion and Just Stop Oil protesters at specified sites around the country ("the Sites").

Procedural matters

2. An interim injunction was first granted in these proceedings by Ellenbogen J at a without notice hearing on 6 April 2022, and that injunction was extended by Bennathan J on the return date, which was 27 April 2022. That hearing was not attended by any of the Defendants, and they were not represented, but Counsel instructed by a person involved in the environmental movement attended and made submissions to the court with a particular focus on whether the Claimants had sufficient proprietary interests in the Sites which they sought to protect, to be entitled to bring a claim in trespass.

3. The injunction was then extended again by Collins Rice J at a hearing on 27 March 2023. However, she was unwilling to do so on an interim basis for a period of a year, as proposed by the Claimants, and she therefore gave directions for trial. Again, there was no attendance or representation on the Defendants' side. But four individuals who had been identified as actual or potential Defendants gave assurances that they did not intend to act inconsistently with the terms of the injunction. On that basis Collins Rice J directed that they were not subject to its terms.

4. Similarly, no Defendants attended the trial before me or were represented or submitted evidence. However, the Fourth and Fifth Defendants gave undertakings which were satisfactory to the Claimants, and these will be embodied in an Order which applies to their cases.

5. In the course of Mr Morshead KC's submissions, however, it became apparent that a person in the public gallery wished to address the court. She told me she was Ms Sarah Pemberton, that she was qualified as a barrister (though not practising) and that she was informally representing her friend, Mr Martin Marston-Paterson, because he would not have been able to attend the hearing until the afternoon. I allowed her to address the court and she drew to my attention the fact that there had been correspondence between Bindmans LLP, who were acting for Mr Marston-Paterson, and Eversheds Sutherland (International) LLP who were instructed by the Claimants. Bindmans had proposed that the hearing be adjourned pending the decision of the Supreme Court in the appeal from the decision in *London Borough of Barking & Dagenham & Others v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295 (now *Wolverhampton City Council & Others v London Gypsies and Travellers & Others* UKSC 2022/0046).

6. Ms Pemberton stressed that she was not making an application to adjourn the trial but she pointed out that if the Supreme Court were to overturn the decision of the Court of Appeal in the *Barking & Dagenham* case, any final injunction which I granted would likely be unlawful. She also told me that submissions had been made to the Supreme Court to the effect that the risk of an adverse order for costs was having a chilling effect on climate change protesters who might otherwise have contested this type of application for injunctive relief. She said that provision for a review of any injunction which I granted

would not adequately safeguard the position of the Defendants given that I would have made findings of fact which it would be problematic to reopen in circumstances in which, at least possibly, Defendants had been prevented from putting in evidence by the risk of an order for costs.

7. The correspondence was handed up to me by Mr Morshead. This showed that the matter had been raised by Bindmans on 30 June 2023. In a phone call and an email dated 3 July, Eversheds Sutherland said that their clients would be unwilling to consent to an adjournment, pointing out that Collins Rice J had directed that the trial take place. No threat of an application for costs in the event of an adjournment was made. On 7 July, Bindmans confirmed that they were not instructed to apply to adjourn or to intervene in the matter.

8. I decided not to adjourn the trial. It had been listed, by Order of Collins Rice J, since 5 May 2023. There had expressly not been any application to adjourn. Nor had I been shown any evidence that submissions or evidence would have been put before the court by any Defendant or interested party were it not for the fear of an adverse costs order, still less given an indication of what those submissions or that evidence might be. The appropriate course was, in my view, to decide the Claim on the law as it currently stands but to make provision in any Order for a review shortly after the judgment of the Supreme Court is handed down. This, in my judgment, fairly addressed any risk of injustice caused by proceeding with the trial.

9. As far as service and notice of the trial are concerned, I had regard to section 12(2) of the Human Rights Act 1998 which, so far as is relevant for present purposes, provides that in cases where the court is considering whether to grant any relief which might affect the exercise by the respondent of the right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR"), and the respondent is not present or represented, such relief must be refused unless the court is satisfied *"(a) that the applicant has taken all practicable steps to notify the respondent"*. Each of the judges who has dealt with this matter has considered this question and, in the case of Bennathan J and Collins Rice J, whether the alternative directions for service in the preceding order had been complied with. Each has been satisfied that they had been and that, accordingly, all practicable steps had been taken for the purposes of section 12(2)(a).

10. As far as the trial is concerned, Collins Rice J directed that service of her Order and any further documents would be effected on the First to Third Defendants by fixing copies in clear transparent containers at a minimum of 2 locations on the perimeter of each of the Sites, together with notices which stated that they could be obtained from the Claimants' solicitors and viewed at a specified company website. Service was also to be effected by posting the documents on that company website and by sending an email to specified email addresses for Extinction Rebellion and Just Stop Oil, notifying them of the availability of the documents on that website.

11. Mr Nawaz Allybokus, who is one of the solicitors acting for the Claimants in these proceedings, gave evidence, in his 6th witness statement dated 24 May 2023, that the Order of Collins Rice J and the Notice of Trial were served in accordance with the directions of the Court on 12 May 2023. In his 8th witness statement, dated 4 July 2023, he gives evidence that the directions as to service of the evidence relied on by the Claimants for

the purposes of the trial were complied with in the third week in June 2023 and therefore in good time before the trial.

12. I was therefore satisfied that sufficient notice of the hearing had been given to the Defendants. They had also been provided with access to the materials on which the Claimants rely, and all practical steps had been taken to notify them for the purposes of section 12(2)(a) of the 1998 Act. I decided to proceed notwithstanding the absence of any Defendant but, bearing this in mind, to probe the Claimants' case appropriately.

13. Mr Morshead answered questions from the court about the identity of the parties and the scope of the relief which he was seeking. He had put in a skeleton argument dated 4 July 2023, and he developed some of the points in that document orally. At the invitation of the court there was a particular focus on the question whether it was appropriate to impose a final injunction in the light of the evidence about the risk of acts of trespass by protesters at the sites in question and the likelihood of harm as a result in the event that the injunction was refused.

14. I also gave Ms Pemberton an opportunity to make any points in reply which she wished to make. She did not specifically challenge what Mr Morshead had submitted about the risk of trespass in the future, or the potential risks if this were to happen, but she drew attention to the distinction between the official positions of Extinction Rebellion and Just Stop Oil in relation to direct action, the former having said in January 2023 that it was stepping back from direct action. She also emphasised the risk that a lack of clarity in any Order which I might make could have a chilling effect on the rights to freedom of expression and association. I have taken these points into account in coming to my decision.

15. Ms Pemberton also raised a concern that Mr Marston-Paterson had not received the full trial bundle. She told me that she had checked and had received a message from him during the hearing which confirmed this point. Whereas Mr Morshead was referring to a 708-page bundle, the bundle which had been forwarded to Mr Marston-Paterson by Extinction Rebellion by email dated 16 June 2023 ran to 413 pages. Mr Morshead said, in response, that his instructions were that the full bundle had been sent to Extinction Rebellion. At her request, I gave permission for Mr Marston-Paterson to put in evidence on this matter if he wished, and permission to the Claimants to reply within 24 hours.

16. I then reserved judgment and extended the interim injunction pending the handing down of my decision.

17. On the day after the trial, I received statements made by Ms Pemberton and Mr Allybokus, both dated 11 July 2023. Her statement covered new matters, reprised what had happened at the trial and provided more detail on points which she made to me. No doubt inadvertently, some aspects of her account of what happened at the trial were not accurate but, in any event, I was not prepared to admit further evidence other than in relation to the question of service of the trial bundles. Ms Pemberton had an opportunity to put in any evidence on which she wished to rely before the trial and, other than the extent which I had indicated, it was not in the interests of justice for her to be permitted to do so after it had concluded.

18. There was then a 10th witness statement submitted by Mr Allybokus on 12 July 2023 but, with respect to him, this did not add anything material.

19. The evidence shows that Mr Allybokus sent the correct trial bundles to the three email addresses identified in the Order of Collins Rice J on 16 June 2023. They were enclosed via Mimecast. The email said that copies of the trial bundles would be uploaded shortly onto the company website. Ms Pemberton says in her statement that she manages the relevant email address for Extinction Rebellion and therefore read Mr Allybokus' email on 16 June 2023. She did not access the documents via Mimecast for reasons which she does not explain in her statement. Instead, she went on the company website and downloaded the bundles from there on 16 and 18 June. The final versions had not yet been uploaded at this point: that took place on 20 June 2023.

20. I do not consider that this issue means that the trial was unfair and Ms Pemberton does not suggest that it does. The concern which she raised with me about Mr Marston-Paterson not having the full bundle, and him messaging her during the trial to confirm this, is not referred to in her statement. What she says is that she read the trial bundles which she had downloaded and that the purpose of her attendance at the hearing was to observe and take a note. She does not suggest that she is a party. She then became concerned because her version of volume 2 to the trial bundle did not contain documents to which Mr Morshead referred in his oral submissions.

21. From the section of volume 2 of the trial bundle which Ms Pemberton says she did not see, Mr Morshead referred me to the undertakings which were given by the Fourth and Fifth Defendants and two press reports in which Just Stop Oil made statements about their intention to carry on protesting until they achieved their objectives. The material parts of these statements were read out by him in open court and they are referred to by me below. This point was also covered in the witness statements, and the press statements were two examples amongst many. I have not taken any other document in volume 2 into account in coming to my conclusion. Nothing in Ms Pemberton's statement therefore causes me to think that it would be in accordance with the overriding objective for me to revisit my decision to proceed with the trial.

Factual background

22. The detail of the factual background is set out in the witness statements relied on by the Claimants for the purposes of the trial, in particular the witness statements of Mr Anthony Milne (Global Security Adviser at the First Claimant) dated 3 April 2022; Mr Stuart Wortley (Partner at Eversheds Sutherland) dated 4 April 2022; Mr Allybokus dated 22 April 2022, 20 March 2023 and 13 June 2023; and Mr Martin Pullman (European Midstream Manager at the First Claimant) dated 27 February and 6 June 2023. The facts which led to the interim injunctions are also helpfully summarised by Ellenbogen J in her judgment of 6 April 2022, neutral citation number [2022] EWHC 966 (QB) and therefore need not be rehearsed by me in detail.

23. In outline, the Claimants are well known oil, petroleum and petrochemical companies. The injunction which they seek would restrain certain forms of trespass on their sites at the Fawley Petrochemical Complex in Southampton, the Hythe Terminal in Hardley, the Avonmouth Terminal near Bristol, the Birmingham Terminal, the Purfleet Terminal, the

West London Terminal, the Hartland Park Logistics Hub near Farnborough and the Alton compound at Holybourne.

24. Ellenbogen J carefully considered whether the Claimants had a sufficient proprietary rights in each of these sites to bring a claim in trespass and concluded that they did: see [21] of her judgment. At [6]-[8] she found that the Fawley Petrochemical Complex comprises an oil refinery, a chemical plant, and a jetty. The First Claimant is the freehold owner of the refinery and the chemical plant, and the registered lessee of the jetty. The Second Claimant is the lessee of the chemical plant. This is the explanation for a separate category of persons unknown: the Second Defendant in the proceedings.

25. Fawley is the largest oil refinery in the United Kingdom. It provides twenty per cent of the country's refinery capacity and is classed as Tier 1 Critical National Infrastructure. The chemical plant has an annual capacity of 800,000 tonnes, is highly integrated with the operations of the refinery, and produces key components for a large number of finished products here and elsewhere in Europe.

26. Ellenbogen J found that the First Claimant is also the freehold owner of the oil terminals at Hythe (primarily serving the South and West of England); that part of Birmingham which is material to the application (primarily serving the Midlands); Purfleet (primarily serving London and the South East of England); and West London (serving a range of customers in Southern and Central England and supplying aviation fuel to Heathrow Airport). It is also the registered lessee of the Avonmouth Terminal (primarily serving the South West of England). Title to the Purfleet jetty is unregistered, although the First Claimant has occupied the jetty for approximately 100 years. These Terminals are large and they play an important role in supplying the national economy.

27. The First Claimant has an unregistered leasehold interest in Hartland Park which is a temporary logistics hub comprising project offices, welfare facilities and car parking for staff and contractors, together with storage for construction plant materials, machinery and equipment in connection with the construction of a replacement fuel pipeline between the Fawley Petrochemical Complex and the West London oil terminal. It is also the freehold owner of the Alton compound, comprising a pumping station and another compound at Holybourne used in connection with the replacement fuel pipe line.

28. Submissions on this subject were addressed to Bennathan J on 27 April 2022 by Counsel for the interested person but he rejected them: see his judgment at [2022] EWHC 1477 (QB) [27]. He said that he was fully satisfied that the Claimants had the necessary proprietary interests. No evidence has been put before me to question the decisions of Ellenbogen and Bennathan JJ on this point and I therefore accept and adopt their findings.

29. Extinction Rebellion and Just Stop Oil are well known campaigns on the issue of climate change. The latter is focussed on the fossil fuel sector, and the former on climate change more generally.

30. The evidence before Ellenbogen and Bennathan JJ was that Just Stop Oil and Extinction Rebellion were organising action against the fossil fuel industry in March and April 2022. The intention was that groups or teams would block or disrupt oil networks including refineries, storage units and adjacent roads. Individuals were also being encouraged to sign up to direct action which would lead to their arrest.

31. Ellenbogen J summarised the evidence before her that, between 1 and 4 April 2022, four of the Sites - West London, Hythe, Purfleet and Birmingham - were subject to direct action as part the wider campaign which was disrupting various oil terminals in the United Kingdom. The evidence was that both Extinction Rebellion and Just Stop Oil were claiming involvement in that action on social media and through logos and banners which were displayed during some of the incidents.

32. On 1st April 2022, the operations of each of these four sites had been disrupted. At Birmingham approximately 20 people blocked the entrance in the small hours of the morning, preventing the collection of fuel from the site. A tanker was stopped at the entrance and two individuals climbed onto it. Others sat in front of it. One person glued himself to the path outside the Terminal. Police attended and around six arrests were made. The protest was dispersed and the site reopened at 5.30 p.m. that day.

33. At around the same time, approximately 24 people blocked the entrance to the West London Terminal by attaching barrels to the gates to the entrance used by vehicles so as to weigh them down and prevent them from lifting. Tripods were also erected immediately outside the access gate so as to block access. At approximately 6.45 a.m., four people cut a hole in the access fence and scaled one of the fuel storage tanks. The First Claimant was obliged to initiate its emergency site procedures, including the temporary shutdown of the pumping of aviation and ground fuels from Fawley to the West London Terminal. The four, and approximately eight others, were arrested a few hours later. As a result, by around 3:00 p.m., those responsible for the direct action had left the site and it was reopened.

34. At around 5:00 a.m. on the same day, seven people blocked the access to the Hythe Terminal, using the Extinction Rebellion “pink boat” and preventing access to the site. The police attended, the boat was removed at around 11.45 a.m. and the protesters were moved away. The site reopened an hour later.

35. Also on 1 April 2022, at around 6:30 a.m., 20 people blocked the access road to the Purfleet Terminal. Six people climbed onto a lorry which was delivering additives to the site. The police attended. By 3:00 p.m., some individuals remained on the lorry, but others in attendance had been arrested, or had dispersed. The site opened to customers at approximately 5:00 p.m.

36. On 2 April 2022, at around 09:45 a.m., approximately 20 people blocked access to and from the Purfleet Terminal. Some locked themselves to the access gates, and others sat in the access road. The police made a number of arrests and removed the protestors. The site opened to customers at approximately 5:30 p.m. There were other protests at other terminals across the country, albeit not terminals owned by the First Claimant and it was reported in the Press that around 80 arrests had been made.

37. At around 5:00 a.m., on 3 April 2022, approximately 20 protestors blocked access to the Birmingham Terminal by sitting in the road. Some also climbed on to a Sainsbury's fuel tanker. One protestor cut through the security fence around the Terminal, scaled one of the fuel storage tanks and displayed a Just Stop Oil banner. The First Claimant therefore initiated its emergency site procedures, including the temporary shutdown of the pumping

of ground fuel from Fawley to the Terminal. The police attended and made a number of arrests. The site was reopened to customers at around 4:00 p.m.

38. At around 4.30 a.m. on 4 April 2022, approximately 20 protestors arrived at the West London Terminal and used a structure to obstruct access to and egress from the Site. That evening, a number of individuals were arrested whilst they were on their way to the Purfleet site.

39. At [14] Ellenbogen J also noted a number of earlier incidents, going back to August 2020, which she accepted were evidence of the risk of the disruption continuing. These incidents were similar in nature to the incidents at the beginning of April 2022, although they varied in seriousness. At least four of the incidents had included displaying Extinction Rebellion banners or other insignia, and Extinction Rebellion had also associated itself with a number of these activities in the Press and on social media. In an incident in October 2021 protesters had broken into the Fawley Petrochemical Complex using bolt cutters and had climbed to the top of two storage tanks. In December 2021 they had used the same method to break into the site at Alton and had caused extensive damage to buildings, plant, and equipment there.

40. According to the evidence of Mr Allybokus there were further incidents around the time of the Order made by Ellenbogen J which included the following:

    a. On 6 April 2022, a group blocked a roundabout on the main route from the M25 to the Purfleet Terminal by jumping onto a tanker and gluing themselves onto the road. Another group blocked a roundabout on the main route to the West London Terminal by jumping onto lorries.

    b. On 8 April 2022, around 30 individuals blocked a main route from the M25 to the Purfleet Terminal.

    c. On 13 April 2022, a group blocked an access road near the Purfleet Terminal, and 3 people climbed on top of a tanker.

41. Mr Wortley also gives evidence of more than 500 arrests in March/April 2022 at the Kingsbury Terminal operated by Valero Energy Limited in Staffordshire, and of injunctions being granted in that case.

42. However, the evidence is that the interim injunctions which were granted in the present case have been complied with.

43. In relation to the risk of trespass should the claim for a final injunction be refused, Mr Morshead also relied on the evidence of Mr Pullman that Just Stop Oil protesters have targeted the First Claimant's Southampton to London pipeline (which does not comprise one of the Sites). This included digging and occupying a pit so as to obstruct specialist construction equipment, and it led to injunctions being granted by Eyre J on 16 August 2022 and then HHJ Lickley KC on 21 October 2022. There was also a committal of one person to prison for breach of Eyre J's Order. Another admitted that he had breached that Order but the Court accepted his undertaking not to do so again.

44. Protesters have organised a number of events in order to carry out direct action against various targets, all with some connection to the energy industry. They have also targeted the offices of the Claimants' solicitors including by a sit-down protest in November 2022 which obstructed the entrance and by throwing purple paint over the glass structure of the building.

45. Although, in January 2023, Extinction Rebellion announced that it was changing its tactics and moving away from public disruption as a primary tactic, Just Stop Oil has made clear its intention to continue with this approach. Mr Morshead showed me public statements by Just Stop Oil along the lines that the public should "expect us every day and anywhere" and that its supporters "will be returning – today, tomorrow and the next day – and the next day after that – and every day until our demand is met: no new oil and gas in the UK". This includes asking people to "Sign up for arrestable direct action…".

46. Mr Morshead also relied on evidence that, more generally, there has been no let-up in the activities of climate change protesters. For example, there was disruption of the Grand National and the World Snooker Championship in April 2023, as well as a sit-down protest at the Global Headquarters of Shell following a weekend of protest in central London organised by Extinction Rebellion. Since 24 April 2023 there has been a campaign of "slow marching" in London and Just Stop Oil protesters were arrested in or around Whitehall and Parliament in May 2023. There was also disruption of the Chelsea Flower Show and other sporting events including the Ashes test match and Wimbledon. Mr Pullman also gave evidence about extensive litigation in the civil and criminal courts arising out of protest activities with a number of injunctions being granted and/or extended, and various prosecutions and convictions in the Magistrates Court for public order offences.

47. As for the harm which would result from the acts of trespass which are sought to be restrained, disruption of the Claimants' operations is in itself harmful to their interests. The evidence is that such disruption has potential financial consequences for them, but it also has consequence for the wider economy given the impact on the businesses of wholesale and retail suppliers of fuel, and the effect on access to fuel for purposes including road, rail and air transport as well as heating. Indeed, in March/April 2022 Just Stop Oil and Extinction Rebellion were open about the fact that they were seeking to emulate the 2000 protests by haulage drivers, which disrupted supplies of oil to the country with severe economic consequences.

48. There is also evidence of the risk of serious physical harm resulting from acts of trespass by protesters. This refers not merely to the damage to property which results from them cutting through security fences and vandalising the Sites, but also to the risk of very serious accidents. The Claimants' sites are used for the production and storage of highly flammable and otherwise hazardous substances. As is obvious, this is a highly dangerous activity and for this reason there are stringent security and health and safety measures in operation at the Sites. Access is strictly controlled, and all of the Claimants' employees and contractors are trained in relation to the hazards which they might encounter and, where appropriate, provided with protective clothing and equipment.

49. Mr Milne and Mr Pulman give written evidence on this subject. The Petrochemical Complex at Fawley and each of the oil Terminals are regulated by the Health & Safety Executive under the Control of Major Accident Hazards Regulations 2015 (COMAH).

All of the Sites have fully licensed security personnel, security barriers at the point of vehicular access, closed circuit television infrastructure linked to an Access Control system and fenced areas where active operations are undertaken. The operational area of the Petrochemical Complex at Fawley is protected by 2 fences, one of which is electrified.

50. All authorised visitors to the Sites are required to watch an induction safety video which highlights both the hazards and the emergency safety procedures. Most of the Sites include higher risk areas which require additional safety precautions. Within these areas, authorised personnel are required to wear fire retardant clothing and the appropriate personal protective equipment (hard hats, safety glasses, fire retardant gloves, safety shoes).

51. In some areas, devices which measure hydrocarbon vapour levels in the air must be carried. One of the potential hazards inside these facilities is a vapour cloud, which can result from an unplanned release of hydrocarbon or biofuels. Such a release can be extremely hazardous. Potential ignition risks such as smoking, using mobile phones or cameras and wearing clothes which accumulate static electricity (e.g. nylon) are strictly prohibited within the higher risk areas.

52. Protesters will not be trained in relation to the risks on these sites, nor familiar with which areas are the more dangerous ones, and nor are they likely to be wearing appropriate protective clothing. As I have noted, in previous incidents in 2021 and 2022 protesters have used bolt cutters to cut through both security fences at the Fawley Petrochemical Complex, the security fence at the First Claimant's compound in Alton and the security fences at the West London and Birmingham Terminals. During the protests in 2022 some protesters broke into higher risk areas and were carrying iPhones, cameras, cigarette lighters and/or nylon sleeping bags, thus exposing themselves and others to the risk of death or serious injury.

53. Apart from the risk of an explosion or a fire, there are obvious risks in protesters climbing onto fuel tanks 20 metres above the ground without the necessary safety equipment, and in climbing onto fuel tankers as they have been. Moreover, blocking access to the Sites prevents evacuation and access for emergency vehicles in the event of an incident.

Jurisdiction

54. In *London Borough of Barking and Dagenham & Others v Persons Unknown* (supra) the Court of Appeal confirmed that the jurisdiction to grant both interim and final injunctions in this context is provided by section 37 Senior Courts Act 1981. This states, so far as material:

> *"(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."*

55. The Court of Appeal held that there is, therefore, jurisdiction to grant a final injunction against persons unknown who are "newcomers" i.e., persons who have not committed or

threatened to commit any tortious act against the applicant for the injunction and therefore have not been served with the proceedings and made subject to the jurisdiction of the court before the order was made. Provided such a person has been served with the order they will become a party to the proceedings if they knowingly breach the terms of the injunction. Any risk of injustice which arises from this position is mitigated by the fact that such a person may apply to vary the injunction or set it aside, and by the fact that the duration of the injunction can be limited by the court, and it can be subject to periodic review. As I have noted, an appeal was heard by the Supreme Court in February this year and judgment is awaited. However, at the time of writing the law is as stated by the Court of Appeal.

The Claimants' cause of action

56. The cause of action relied on by the Claimants is now limited to trespass, and the relief which they seek is limited to restraining protesters from entering the Sites in order to carry out their activities. This point is important because of the effect which it has on the balancing of rights under the ECHR.

57. As a general proposition *"seriously disrupting the activities of others is not at the core of"* the right to freedom of assembly and this is relevant to the assessment of proportionality: see Lords Hamblen and Stephens in *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408 at [67]. As Leggatt LJ (as he then was) put it in *Cuadrilla Bowland Ltd & Others v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 at [94]:

> *"... the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest…this is an important distinction. ...intentional disruption of activities of others is not "at the core" of the freedom protected by Article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… ...persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire….;"*

58. But, in addition to this, in *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] 3 WLR 446 at [45] the Divisional Court held that there is no basis in the caselaw of the European Court of Human Rights:

> *"to support the ... 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 ... consistently said that Articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights ... 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."*

59. This means that in the present case the injunction sought by the Claimants does not engage Articles 10 and 11 ECHR or, if they are engaged, it would be compatible with these provisions for it to be granted because restraining trespass would obviously be

proportionate. Section 12(3) of the Human Rights Act 1998 is not engaged because it applies to interim injunctions.

60. The tort of trespass to land consists of any unjustified intrusion, whether by a person or an object, by one person upon land in the possession of another. It may also include intrusion into the airspace above land. There is no requirement that the intrusion be intentional or negligent provided it was voluntary. Trespass is actionable without proof of damage and by a person who is in possession i.e., who occupies or has physical control of the land. Proof of ownership is prima facie proof of possession but tenants and licensees will have rights of possession and be entitled to claim in trespass in order to secure those rights. In broad terms, entry onto another's land may be justified by proving a legal or equitable right to do so, or necessity to do so in order to preserve life or property. Justification therefore does not arise in the present case. (Clerk & Lindsell on Torts 23rd Edition, chapter 18).

Is relief just and convenient in principle?

61. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch); [2019] 1 WLR 2 Marcus Smith J said this at [31(3)] in relation to final anticipatory injunctions:

> *"(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"*

62. He then went on to give guidance as to what may be relevant to the application of this approach in a given case.

63. With respect, I confess to some doubts about whether the two questions which he identified are part of a *"test"* or a *"two stage"* test. To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is *"just and convenient"* but they are not threshold tests. I also note that, even taking into account *Vastint*, the editors of Gee on Commercial Injunctions (7th Edition) say at 2-045:

> *"There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."*

64. Where the court is being asked to grant an injunction in circumstances where no tort has been committed or completed it will naturally need to be persuaded that the risks and consequences of not making such an order are sufficiently compelling to grant relief. Where, as in the present case, tortious conduct has taken place but the identity of the tortfeasors is unknown, and relief is sought on a final basis against future tortfeasors who

are not a parties and are identified only by description, again the court will be cautious. But it would be surprising if, for example, a court which considered that there was a significant risk of further tortious conduct, but not a strong probability of such conduct, was compelled to refuse the injunction no matter how serious the damage if that conduct then took place.

65. However, Marcus Smith J analysed the authorities carefully, successive cases have adopted his test and the matter was hardly argued before me. I therefore do not propose to depart from what he said. Nor do I need to. Bennathan J was satisfied that the *Vastint* test was satisfied in this case, and so am I in the light of the evidence before me: I am also satisfied that, having regard to the risks in the event that relief is refused, it is just and convenient to grant relief.

66. As noted above, this was the issue on which I pressed Mr Morshead bearing in mind that only some of the incidents in 2021/2022 involved trespass and only on some of the Sites. There has been compliance with the injunctions ordered by Ellenbogen and Bennathan JJ. Extinction Rebellion announced a change of tactics in January 2023 and a good deal of the evidence about protest activities since April 2022 is about activities of a different nature to those which led to the injunctions in this case. Where protesters have been identified in these proceedings, they have been prepared to give undertakings not to trespass on the Sites. All of these considerations could be argued to show something less than a strong probability of further trespassing on the Sites.

67. Having considered the evidence in the round, however, I was satisfied that the first limb of the *Vastint* test is satisfied. It would have been very easy for Extinction Rebellion or Just Stop Oil to give assurances or evidence to the court that there was no intention to return to their activities of 2021/2022, and no risk of trespass on the Sites or damage to property by protesters in the foreseeable future, but they did not do so. One is therefore left with the evidence relied on by the Claimants. This shows that they intend to continue to challenge the oil industry vigorously, including by causing disruption. As to the form that that disruption will take, it appears that the effect of the various injunctions which have been granted in this case and others has been to prevent or deter them from taking the steps prohibited by the orders of the court although, of course, not invariably so. If, therefore, an injunction is refused in the present case the overwhelming likelihood is that protests of the sort which were seen in 2021/2022 will resume, and that they will include acts of trespass of the sort to which I have referred.

68. As to the second limb of the *Vastint* test, I had little hesitation in holding that it is satisfied. Whatever the merits of the protesters' cause, and I make no comment on this, their activities in breaking into the Sites are highly disruptive and dangerous. These activities have significant financial and wider economic consequences which are unquantifiable in damages, and any award of damages would likely be unenforceable in any event. They also risk very serious damage to property and endanger the protesters and others.

69. I have considered Ms Pemberton's suggestion of a distinction between Extinction Rebellion and Just Stop Oil protesters but found this unconvincing in the absence of any assurance from Extinction Rebellion. As Mr Morshead pointed out, their strategy could change at any time. Given the risk posed by Just Stop Oil protesters, relief is appropriate and it would be naïve of the court to leave open the possibility of trespass on the Sites by protesters who said that they were acting under the Extinction Rebellion banner. If there

is no intention on the part of Extinction Rebellion protesters to trespass on the Sites, the injunction will not affect them anyway.

70. I have also considered whether relief should be limited to certain Sites and not others given that some had not been subjected to trespass but I agree with Ellenbogen J that the essence of anticipatory relief, where it is justified, is that the claimant need not wait until harm is suffered before claiming protection: see her judgment in these proceedings at [2022] EWHC 966 (KB) [29].

Canada Goose

71. Turning to the other considerations identified by the Court of Appeal in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 at [82], albeit in relation to interim injunctions:

    a. Those "persons unknown" (as defined) who can be identified have been and they have given assurances or undertakings. There were six of them. The four who gave assurances are therefore not named defendants. The Fourth and Fifth Defendants were joined to the proceedings by Order of Collins Rice J and have given separate undertakings and will be subject to a separate order ([82(1)] *Canada Goose)*.

    b. The "persons unknown" are defined in the originating process and the Order by reference to their conduct which is alleged to be unlawful i.e. they are people who enter or remain on the Sites without the consent of the Claimants for the purposes of the Extinction Rebellion and the Just Stop Oil campaigns ([82(2) and (4)]). People who have not entered the Sites will not be parties to the proceedings or subject to the Order.

    c. I have addressed the question of anticipatory relief, above, in relation to final injunctions ([83(3)]);

    d. The acts prohibited by the injunction correspond to the threatened torts and do not include lawful conduct given that they are all acts which take place in the context of trespass i.e., on the Sites delineated in the plans attached to the Order ([82(5)]).

    e. The terms of the injunction are clear and precise so as to ensure that those affected know what they can and cannot do. ([82(6)]).

    f. The injunction has clear geographical and temporal limits. The geographical limits are indicated on the plans attached to the Order and the duration of the injunction will be five years subject to a review following the handing down of the judgement of the Supreme Court in the *Wolverhampton* case and annually in any event ([82(7)]). I note that a five year term with annual reviews was ordered, for example, by Eyre J in *Transport for London v Lee* [2023] EWHC 1201 (KB) at [57]. There is also provision for applications on notice to vary or discharge the Order.

Service of the Order

72. I approve the terms of the draft Order as to service. There is good reason to permit alternative methods of service (see CPR rules 6.15 and 6.27), namely that standard methods of service in accordance with CPR rule 6 are not practicable. The arrangements in the draft Order are those which have been approved by Ellenbogen, Bennathan and Collins Rice JJ.

Conclusion

73. For all of these reasons I am satisfied that it is just and convenient to grant the Order which I have made.