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

AUTHORITIES

Wolverhampton CC v London Gypsies & Travellers [2024] 2 WLR 45	**8.**
HS2 v Persons Unknown [2024] EWHC 1277	**9.**
Arla Foods v Persons Unknown [2024] EWHC 1952	**10.**
Drax Power Ltd v Persons Unknown [2024] EWHC 2224	**11.**
North Warwickshire BC v Persons Unknown [2024] EWHC 2254	**12.**
Thurrock Council v Adams [2024] EWHC 2576	**13.**

Criminal Justice and Public Order Act 1994 c. 33
s. 68 Offence of aggravated trespass.

Law In Force With Amendments Pending

Version 6 of 6

28 June 2022 - Present

Subjects
Criminal law; Penology and criminology

England and Wales

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68.— Offence of aggravated trespass.

(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.

(1A) The reference in subsection (1) above to trespassing includes, in Scotland, the exercise of access rights (within the meaning of the Land Reform (Scotland) Act 2003 (asp 2)) up to the point when they cease to be exercisable by virtue of the commission of the offence under that subsection.

(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) [...]

(5) In this section *"land"* does not include— [

(a) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part 3 of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part 2 of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984;

(aa) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967; or

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(b) a road within the meaning of the Roads (Northern Ireland) Order 1993.

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Northern Ireland

[

68.— Offence of aggravated trespass.

(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.

(1A) The reference in subsection (1) above to trespassing includes, in Scotland, the exercise of access rights (within the meaning of the Land Reform (Scotland) Act 2003 (asp 2)) up to the point when they cease to be exercisable by virtue of the commission of the offence under that subsection.

(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) [...]

(5) In this section *"land"* does not include— [

(a) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part 3 of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part 2 of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984;

(aa) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967; or

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(b) a road within the meaning of the Roads (Northern Ireland) Order 1993.

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Scotland

68.— Offence of aggravated trespass.

(1) A person commits the offence of aggravated trespass if he trespasses on land [...]1 and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land [...]1 , 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.

[

(1A) The reference in subsection (1) above to trespassing includes, in Scotland, the exercise of access rights (within the meaning of the Land Reform (Scotland) Act 2003 (asp 2)) up to the point when they cease to be exercisable by virtue of the commission of the offence under that subsection.

][2]

(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) A constable in uniform who reasonably suspects that a person is committing an offence under this section may arrest him without a warrant.

(5) In this section *"land"* does not include— [

(a) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part 3 of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part 2 of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984;

(aa) a road within the meaning of the Roads (Scotland) Act 1984 unless it falls within the definitions in section 151(2)(a)(ii) or (b) (footpaths and cycle tracks) of that Act or is a bridleway within the meaning of section 47 of the Countryside (Scotland) Act 1967; or

][3]

(b) a road within the meaning of the Roads (Northern Ireland) Order 1993.

Notes

1 Words repealed by Anti-social Behaviour Act 2003 c. 38 Sch.3 para. (January 20, 2004 as SI 2003/3300)
2 Added by Land Reform (Scotland) Act 2003 asp 2 (Scottish Act) Sch.2 para.13 (February 9, 2005)
3 S.68(5)(a) and (aa) substituted for s.68(5)(a) by Police, Crime, Sentencing and Courts Act 2022 c. 32 Pt 4 s.84(11) (June 28, 2022)
4 Repealed by Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007/288 Sch.2 para.1 (March 1, 2007)
5 Repealed subject to transitory provisions specified in SI 2005/3495 art.2(2) by Serious Organised Crime and Police Act 2005 c. 15 Sch.17(2) para.1 (January 1, 2006: repeal has effect subject to transitory provisions specified in SI 2005/3495 art.2(2))

Human Rights Act 1998 c. 42
s. 12 Freedom of expression.

Law In Force

Version 1 of 1

2 October 2000 - Present

Subjects
Human rights

Keywords
Freedom of expression; Human rights; Relief; Treaties

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).

Other rights and proceedings > s. 12 Freedom of expression.

Public Order Act 2023 c. 15
s. 1 Offence of locking on

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law

Keywords
Interpretation; Locking on; Reasonable excuse; Sentencing

1 Offence of locking on

(1) A person commits an offence if—

(a) they—

(i) attach themselves to another person, to an object or to land,

(ii) attach a person to another person, to an object or to land, or

(iii) attach an object to another object or to land,

(b) that act causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend that act to have a consequence mentioned in paragraph (b) or are reckless as to whether it will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection.

(3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(4) In subsection (3), *"the maximum term for summary offences"* means—

(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(5) In this section *"dwelling"* means—

(a) a building or structure which is used as a dwelling, or

(b) a part of a building or structure, if the part is used as a dwelling,

and includes any yard, garden, grounds, garage or outhouse belonging to and used with a dwelling.

Part 1 PUBLIC ORDER > Offences relating to locking on > s. 1 Offence of locking on

s. 2 Offence of being equipped for locking on

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law

Keywords
Equipment; Fines; Locking on

2 Offence of being equipped for locking on

(1) A person commits an offence if they have an object with them in a place other than a dwelling with the intention that it may be used in the course of or in connection with the commission by any person of an offence under section 1(1) (offence of locking on).

(2) A person who commits an offence under subsection (1) is liable on summary conviction to a fine.

(3) In this section *"dwelling"* has the same meaning as in section 1.

Part 1 PUBLIC ORDER > Offences relating to locking on > s. 2 Offence of being equipped for locking on

s. 3 Offence of causing serious disruption by tunnelling

Law In Force

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Interpretation; Reasonable excuse; Sentencing; Tunnelling

3 Offence of causing serious disruption by tunnelling

(1) A person commits an offence if—

(a) they create, or participate in the creation of, a tunnel,

(b) the creation or existence of the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend the creation or existence of the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether its creation or existence will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for creating, or participating in the creation of, the tunnel.

(3) Without prejudice to the generality of subsection (2), a person is to be treated as having a reasonable excuse for the purposes of that subsection if the creation of the tunnel was authorised by a person with an interest in land which entitled them to authorise its creation.

(4) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 3 years, to a fine or to both.

(5) For the purposes of this section—

(a) *"tunnel"* means an excavation that extends beneath land, whether or not—

(i) it is big enough to permit the entry or passage of an individual, or

(ii) it leads to a particular destination;

(b) an excavation which is created with the intention that it will become or connect with a tunnel is to be treated as a tunnel, whether or not—

(i) any tunnel with which it is intended to connect has already been created, or

(ii) it is big enough to permit the entry or passage of an individual.

(6) References in this section to the creation of an excavation include—

(a) the extension or enlargement of an excavation, and

(b) the alteration of a natural or artificial underground feature.

(7) This section does not apply in relation to a tunnel if or to the extent that it is in or under a dwelling.

(8) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

Part 1 PUBLIC ORDER > Offences relating to tunnelling > s. 3 Offence of causing serious disruption by tunnelling

s. 4 Offence of causing serious disruption by being present in a tunnel

Law In Force

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Interpretation; Presence; Reasonable excuse; Sentencing; Tunnelling

4 Offence of causing serious disruption by being present in a tunnel

(1) A person commits an offence if—

(a) they are present in a relevant tunnel having entered it after the coming into force of this section,

(b) their presence in the tunnel causes, or is capable of causing, serious disruption to—

(i) two or more individuals, or

(ii) an organisation,

in a place other than a dwelling, and

(c) they intend their presence in the tunnel to have a consequence mentioned in paragraph (b) or are reckless as to whether their presence there will have such a consequence.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for their presence in the tunnel.

(3) Without prejudice to the generality of subsection (2), a person ("P") is to be treated as having a reasonable excuse for the purposes of that subsection if P's presence in the tunnel was authorised by a person with an interest in land which entitled them to authorise P's presence there.

(4) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 3 years, to a fine or to both.

(5) For the purposes of this section—

(a) *"tunnel"* means an excavation that extends beneath land, whether or not it leads to a particular destination;

(b) an excavation which is created with the intention that it will become or connect with a tunnel is to be treated as a tunnel, whether or not any tunnel with which it is intended to connect has already been created.

(6) In this section *"relevant tunnel"* means a tunnel that was created for the purposes of, or in connection with, a protest (and it does not matter whether an offence has been committed under section 3 in relation to the creation of the tunnel).

(7) References in this section to the creation of an excavation include—

(a) the extension or enlargement of an excavation, and

(b) the alteration of a natural or artificial underground feature.

(8) This section does not apply in relation to a tunnel if or to the extent that it is in or under a dwelling.

(9) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

Part 1 PUBLIC ORDER > Offences relating to tunnelling > s. 4
Offence of causing serious disruption by being present in a tunnel

s. 5 Offence of being equipped for tunnelling etc

Law In Force

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Equipment; Interpretation; Sentencing; Tunnelling

5 Offence of being equipped for tunnelling etc

(1) A person commits an offence if they have an object with them in a place other than a dwelling with the intention that it may be used in the course of or in connection with the commission by any person of an offence under section 3(1) or 4(1) (offences relating to tunnelling).

(2) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(3) In subsection (2), *"the maximum term for summary offences"* means—

(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(4) In this section *"dwelling"* has the same meaning as in section 1 (offence of locking on).

Part 1 PUBLIC ORDER > Offences relating to tunnelling > s. 5 Offence of being equipped for tunnelling etc

s. 6 Obstruction etc of major transport works

Law In Force

Version 1 of 1

2 July 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Defences; Interpretation; Obstruction of major transport works; Sentencing

6 Obstruction etc of major transport works

(1) A person commits an offence if the person—

(a) obstructs the undertaker or a person acting under the authority of the undertaker—

(i) in setting out the lines of any major transport works,

(ii) in constructing or maintaining any major transport works, or

(iii) in taking any steps that are reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of any major transport works, or

(b) interferes with, moves or removes any apparatus which—

(i) relates to the construction or maintenance of any major transport works, and

(ii) belongs to a person within subsection (5).

(2) It is a defence for a person charged with an offence under subsection (1) to prove that—

(a) they had a reasonable excuse for the act mentioned in paragraph (a) or (b) of that subsection, or

(b) the act mentioned in paragraph (a) or (b) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.

(3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.

(4) In subsection (3) *"the maximum term for summary offences"* means—

(a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;

(b) if the offence is committed after that time, 51 weeks.

(5) The following persons are within this subsection—

(a) the undertaker;

(b) a person acting under the authority of the undertaker;

(c) a statutory undertaker;

(d) a person acting under the authority of a statutory undertaker.

(6) In this section *"major transport works"* means—

(a) works in England and Wales—

(i) relating to transport infrastructure, and

(ii) the construction of which is authorised directly by an Act of Parliament, or

(b) works the construction of which comprises development within subsection (7) that has been granted development consent by an order under section 114 of the Planning Act 2008.

(7) Development is within this subsection if—

(a) it is or forms part of a nationally significant infrastructure project within any of paragraphs (h) to (l) of section 14(1) of the Planning Act 2008,

(b) it is or forms part of a project (or proposed project) in the field of transport in relation to which a direction has been given under section 35(1) of that Act (directions in relation to projects of national significance) by the Secretary of State, or

(c) it is associated development in relation to development within paragraph (a) or (b).

(8) In this section *"undertaker"* —

(a) in relation to major transport works within subsection (6)(a), means a person who is authorised by or under the Act (whether as a result of being appointed the nominated undertaker for the purposes of the Act or otherwise) to construct or maintain any of the works;

(b) in relation to major transport works within subsection (6)(b), means a person who is constructing or maintaining any of the works (whether as a result of being the undertaker for the purposes of the order granting development consent or otherwise).

(9) In this section—

"associated development" has the same meaning as in the Planning Act 2008 (see section 115 of that Act);

"development" has the same meaning as in the Planning Act 2008 (see section 32 of that Act);

"development consent" has the same meaning as in the Planning Act 2008 (see section 31 of that Act);

"England" includes the English inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act);

"maintain" includes inspect, repair, adjust, alter, remove, reconstruct and replace, and *"maintenance"* is to be construed accordingly;

"nationally significant infrastructure project" has the same meaning as in the Planning Act 2008 (see section 14(1) of that Act);

"statutory undertaker" means a person who is, or who is deemed to be, a statutory undertaker for the purposes of any provision of Part 11 of the Town and Country Planning Act 1990;

"trade dispute" has the same meaning as in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992, except that section 218 of that Act is to be read as if—

(a) it made provision corresponding to section 244(4) of that Act, and

(b) in subsection (5), the definition of worker included any person falling within paragraph (b) of the definition of worker in section 244(5) of that Act;

"Wales" includes the Welsh inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act).

(10) In section 14 of the Planning Act 2008 (nationally significant infrastructure projects), after subsection (3) insert—

"(3A) An order under subsection (3)(a) may also amend section 6(7)(a) of the Public Order Act 2023 (obstruction etc of major transport works)."

Part 1 PUBLIC ORDER > Offences involving works and infrastructure > s. 6 Obstruction etc of major transport works

s. 7 Interference with use or operation of key national infrastructure

Law In Force

Version 1 of 1

2 May 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Defences; Interference with key national infrastructure; Interpretation; Regulations; Sentencing

7 Interference with use or operation of key national infrastructure

(1) A person commits an offence if—

(a) they do an act which interferes with the use or operation of any key national infrastructure in England and Wales, and

(b) they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that—

(a) they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection, or

(b) the act mentioned in paragraph (a) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.

(3) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, to a fine or to both.

(4) For the purposes of subsection (1) a person's act interferes with the use or operation of key national infrastructure if it prevents the infrastructure from being used or operated to any extent for any of its intended purposes.

(5) The cases in which infrastructure is prevented from being used or operated for any of its intended purposes include where its use or operation for any of those purposes is significantly delayed.

(6) In this section *"key national infrastructure"* means—

(a) road transport infrastructure,

(b) rail infrastructure,

(c) air transport infrastructure,

(d) harbour infrastructure,

(e) downstream oil infrastructure,

(f) downstream gas infrastructure,

(g) onshore oil and gas exploration and production infrastructure,

(h) onshore electricity generation infrastructure, or

(i) newspaper printing infrastructure.

Section 8 makes further provision about these kinds of infrastructure.

(7) The Secretary of State may by regulations made by statutory instrument—

(a) amend subsection (6) to add a kind of infrastructure or to vary or remove a kind of infrastructure;

(b) amend section 8 to add, amend or remove provision about a kind of infrastructure which is in, or is to be added to, subsection (6) or is to be removed from that subsection.

(8) Regulations under subsection (7)—

(a) may make different provision for different purposes;

(b) may make consequential, supplementary, incidental, transitional, transitory or saving provision.

(9) A statutory instrument containing regulations under subsection (7) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(10) In this section—

"England" includes the English inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act);

"trade dispute" has the same meaning as in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992, except that section 218 of that Act is to be read as if—

(a) it made provision corresponding to section 244(4) of that Act, and

(b) in subsection (5), the definition of worker included any person falling within paragraph (b) of the definition of worker in section 244(5) of that Act;

"Wales" includes the Welsh inshore region within the meaning of the Marine and Coastal Access Act 2009 (see section 322 of that Act).

s. 8 Key national infrastructure

Law In Force

Version 1 of 1

3 May 2023 - Present

Subjects
Criminal law; Penology and criminology

Keywords
Gas; Interference with key national infrastructure; Interpretation; Newspapers; Petroleum; Pipelines; Statutory definition

8 Key national infrastructure

(1) This section has effect for the purposes of section 7.

(2) *"Road transport infrastructure"* means—

(a) a special road within the meaning of the Highways Act 1980 (see section 329(1) of that Act), or

(b) a road which, under the system for assigning identification numbers to roads administered by the Secretary of State or the Welsh Ministers, has for the time being been assigned a number prefixed by A or B.

(3) *"Rail infrastructure"* means infrastructure used for the purposes of railway services within the meaning of Part 1 of the Railways Act 1993 (see section 82 of that Act).

(4) In the application of section 82 of the Railways Act 1993 for the purposes of subsection (3) *"railway"* has the wider meaning given in section 81(2) of that Act.

(5) *"Air transport infrastructure"* means—

(a) an airport within the meaning of the Airports Act 1986 (see section 82(1) of that Act), or

(b) any infrastructure which—

(i) does not form part of an airport within the meaning of that Act, and

(ii) is used for the provision of air traffic services within the meaning of Part 1 of the Transport Act 2000 (see section 98 of that Act).

(6) *"Harbour infrastructure"* means a harbour within the meaning of the Harbours Act 1964 (see section 57(1) of that Act) which provides facilities for or in connection with—

(a) the embarking or disembarking of passengers who are carried in the course of a business, or

(b) the loading or unloading of cargo which is carried in the course of a business.

(7) *"Downstream oil infrastructure"* means infrastructure used for or in connection with any of the following activities—

(a) the refinement or other processing of crude oil or oil feedstocks;

(b) the storage of crude oil or crude oil-based fuel for onward distribution, other than storage by a person who supplies crude oil-based fuel to the public where the storage is for the purposes of such supply;

(c) the loading or unloading of crude oil or crude oil-based fuel for onward distribution, other than unloading to a person who supplies crude oil-based fuel to the public where the unloading is for the purposes of such supply;

(d) the carriage, by road, rail, sea or inland waterway, of crude oil or crude oil-based fuel for the purposes of onward distribution;

(e) the conveyance of crude oil or crude oil-based fuel by means of a pipe-line within the meaning of the Pipe-lines Act 1962 (see section 65 of that Act).

(8) *"Downstream gas infrastructure"* means infrastructure used for or in connection with any of the following activities—

(a) the processing of gas;

(b) the storage of gas for onward conveyance, other than storage by a person who supplies gas to the public otherwise than by means of a pipe-line where the storage is for the purposes of such supply;

(c) the import or export of liquid gas;

(d) the carriage, by road or rail, of gas for the purposes of onward distribution;

(e) the conveyance of gas by means of a pipe-line.

(9) In subsection (8)—

"gas" has the same meaning as in section 12 of the Gas Act 1995;

"pipe-line" has the same meaning as in the Pipe-lines Act 1962 (see section 65 of that Act).

(10) *"Onshore oil and gas exploration and production infrastructure"* means onshore infrastructure used for or in connection with—

(a) searching or boring for petroleum, or

(b) getting petroleum.

(11) In subsection (10)—

"onshore infrastructure" means infrastructure situated on land (excluding land covered by the sea or any tidal waters);

"petroleum" has the same meaning as in Part 1 of the Petroleum Act 1998 (see section 1 of that Act).

(12) *"Onshore electricity generation infrastructure"* means onshore infrastructure—

(a) used for or in connection with the generation of electricity for the purpose of giving a supply to any premises or enabling a supply to be so given, and

(b) which has a total installed capacity equal to or greater than 100 megawatts.

(13) In subsection (12)—

"onshore infrastructure" means infrastructure situated on land (excluding land covered by the sea or any tidal waters);

"supply", in relation to electricity, has the same meaning as in Part 1 of the Electricity Act 1989 (see section 4(4) of that Act).

(14) *"Newspaper printing infrastructure"* means infrastructure the primary purpose of which is the printing of one or more national or local newspapers.

(15) In subsection (14)—

"local newspaper" means a newspaper which is published at least fortnightly and is in circulation in a part of England and Wales;

"national newspaper" means a newspaper which is published at least fortnightly and is in circulation in England, in Wales or in both;

"newspaper" includes a periodical or magazine.

s. 10 Powers to stop and search on suspicion

Law In Force

Version 1 of 1

20 December 2023 - Present

Subjects
Criminal law; Penology and criminology; Police; Sentencing

10 Powers to stop and search on suspicion

In section 1(8) of the Police and Criminal Evidence Act 1984 (offences in relation to which stop and search power applies)—

(a) omit the "and" at the end of paragraph (d), and

(b) after paragraph (e) insert—

"(f) an offence under section 137 of the Highways Act 1980 (wilful obstruction) involving activity which causes or is capable of causing serious disruption to two or more individuals or to an organisation;

(g) an offence under section 78 of the Police, Crime, Sentencing and Courts Act 2022 (intentionally or recklessly causing public nuisance);

(h) an offence under section 1 of the Public Order Act 2023 (offence of locking on);

(i) an offence under section 3 of that Act (offence of causing serious disruption by tunnelling);

(j) an offence under section 4 of that Act (offence of causing serious disruption by being present in a tunnel);

(k) an offence under section 6 of that Act (obstruction etc of major transport works); and

(l) an offence under section 7 of that Act (interference with use or operation of key national infrastructure)."

s. 11 Powers to stop and search without suspicion

Law In Force

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Authorisations; Powers of seizure; Public order; Reasonable belief; Stop and search

11 Powers to stop and search without suspicion

(1) This section applies if a police officer of or above the rank of inspector reasonably believes—

(a) that any of the following offences may be committed in any locality within the officer's police area—

(i) an offence under section 137 of the Highways Act 1980 (wilful obstruction) involving activity which causes or is capable of causing serious disruption to two or more individuals or to an organisation;

(ii) an offence under section 78 of the Police, Crime, Sentencing and Courts Act 2022 (intentionally or recklessly causing public nuisance);

(iii) an offence under section 1 (offence of locking on);

(iv) an offence under section 3 (offence of causing serious disruption by tunnelling);

(v) an offence under section 4 (offence of causing serious disruption by being present in a tunnel);

(vi) an offence under section 6 (obstruction etc of major transport works);

(vii) an offence under section 7 (interference with use or operation of key national infrastructure), or

(b) that persons are carrying prohibited objects in any locality within the officer's police area.

(2) In this section *"prohibited object"* means an object which—

(a) is made or adapted for use in the course of or in connection with an offence within subsection (1)(a), or

(b) is intended by the person having it with them for such use by them or by some other person,

and for the purposes of this section a person carries a prohibited object if they have it in their possession.

(3) If the further condition in subsection (4) is met, the police officer may give an authorisation that the powers conferred by this section are to be exercisable—

(a) anywhere within a specified locality within the officer's police area, and

(b) for a specified period not exceeding 24 hours.

(4) The further condition is that the police officer reasonably believes that—

(a) the authorisation is necessary to prevent the commission of offences within subsection (1)(a) or the carrying of prohibited objects (as the case may be),

(b) the specified locality is no greater than is necessary to prevent such activity, and

(c) the specified period is no longer than is necessary to prevent such activity.

(5) If it appears to a police officer of or above the rank of superintendent that it is necessary to do so to prevent the commission of offences within subsection (1)(a) or the carrying of prohibited objects, the officer may direct that the authorisation is to continue in force for a further period not exceeding 24 hours.

(6) This section confers on any constable in uniform power—

(a) to stop any person and search them or anything carried by them for a prohibited object;

(b) to stop any vehicle and search the vehicle, its driver and any passenger for a prohibited object.

(7) A constable may, in the exercise of the powers conferred by subsection (6), stop any person or vehicle and make any search the constable thinks fit whether or not the constable has any grounds for suspecting that the person or vehicle is carrying a prohibited object.

(8) If in the course of a search under this section a constable discovers an object which the constable has reasonable grounds for suspecting to be a prohibited object, the constable may seize it.

(9) This section and sections 12 (further provisions about authorisations and directions under this section), 13 (further provisions about searches under this section) and 14 (offence relating to this section) apply (with the necessary modifications) to ships, aircraft and hovercraft as they apply to vehicles.

(10) In this section and the sections mentioned in subsection (9)—

"specified" means specified in an authorisation under this section;

"vehicle" includes a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960.

(11) The powers conferred by this section and the sections mentioned in subsection (9) do not affect any power conferred otherwise than by this section or those sections.

Part 1 PUBLIC ORDER > Powers to stop and search > s. 11 Powers to stop and search without suspicion

s. 12 Further provisions about authorisations and directions under section 11

Law In Force

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Authorisations; Chief police officers; Notification; Public order; Reasonable belief; Stop and search

12 Further provisions about authorisations and directions under section 11

(1) If an inspector gives an authorisation under section 11, the inspector must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed.

(2) An authorisation under section 11 must—

(a) be given in writing signed by the officer giving it,

(b) specify the grounds on which it is given, and

(c) specify the locality in which and the period during which the powers conferred by that section are exercisable.

(3) A direction under section 11(5) must—

(a) be given in writing, or

(b) where it is not practicable to comply with paragraph (a), be recorded in writing as soon as it is practicable to do so.

(4) References (however expressed) in section 11 or this section to a police officer of or above a particular rank include references to a member of the British Transport Police Force of or above that rank.

(5) In the application of section 11 to a member of the British Transport Police Force by virtue of subsection (4), references to a locality within the officer's police area are to be read as references to a place in England and Wales of a kind mentioned in section 31(1)(a) to (f) of the Railways and Transport Safety Act 2003.

Part 1 PUBLIC ORDER > Powers to stop and search > s. 12 Further provisions about authorisations and directions under section 11

s. 13 Further provisions about searches under section 11

Law In Force

Version 1 of 1

2 May 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Applications; Authority; Destruction of evidence; Public order; Reasonable belief; Regulations; Retention; Seized property; Stop and search; Time limits

13 Further provisions about searches under section 11

(1) A person who is searched by a constable under section 11 is entitled to obtain a written statement that the person was searched under the powers conferred by that section.

(2) Subsection (1) applies only if the person applies for the statement within the period of 12 months beginning with the day on which the person was searched.

(3) Where a vehicle is stopped by a constable under section 11, the driver is entitled to obtain a written statement that the vehicle was stopped under the powers conferred by that section.

(4) Subsection (3) applies only if the driver applies for the statement within the period of 12 months beginning with the day on which the vehicle was stopped.

(5) Any object seized by a constable under section 11 may be retained in accordance with regulations made by the Secretary of State.

(6) The Secretary of State may make regulations regulating the retention and safe keeping, and the disposal or destruction in circumstances prescribed in the regulations, of such an object.

(7) Regulations under this section are to be made by statutory instrument.

(8) Regulations under this section—

(a) may make different provision for different purposes;

(b) may make consequential, supplementary, incidental, transitional, transitory or saving provision.

(9) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

s. 14 Offence relating to section 11

Law In Force

Version 1 of 1

20 December 2023 - Present

Subjects
Penology and criminology; Police

Keywords
Obstructing police; Public order; Reasonable belief; Sentencing; Stop and search

14 Offence relating to section 11

(1) A person commits an offence if the person intentionally obstructs a constable in the exercise of the constable's powers under section 11.

(2) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 3 on the standard scale or to both.

(3) In relation to an offence committed before the coming into force of section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales), the reference in subsection (2) to 51 weeks is to be read as a reference to 1 month.

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.

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 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.

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 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 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

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

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

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

A 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 B 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:

C "*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 D 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."

E **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 F 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"

G **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 H (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

A 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 B 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 C 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, D 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 E 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 F 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 G 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 H 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: [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

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- -

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.

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

Claim no: QB-2022-000904

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

Date: 26th January 2024

Before:
MR JUSTICE RITCHIE

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BETWEEN

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

Claimants

-and-

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

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

OVER AND ACROSS THE ROADS IN THE VICINITY OF
THE 8 SITES (defined below)

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

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

Hearing date: 17th January 2024

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Approved Judgment

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

Mr Justice Ritchie:

The Parties

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

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

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

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

The 8 Sites

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

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

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

Bundles

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

Summary

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

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

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

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

The Issues

10. The issues before me were as follows:

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

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

10.3 What should the terms of any such injunction be?

The ancillary applications

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

Pleadings and chronology of the action

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

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

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

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

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

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

18. On the 28th of July 2023, before Bourne J., the Claimants agreed not to pursue contempt applications for breaches of the orders of Mr Justice Butcher and Mr Justice Bennathan for any activities before the date of the hearing. Present at that hearing were counsel for Defendants 31 and 53. Directions were given permitting a redefinition of "Unknown

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

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

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

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

The lay witness evidence

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

Service evidence

23. The previous orders made by the Judges who have heard the interlocutory matters dealt with all previous service matters. In relation to the hearing before me I carefully checked the service evidence and was helpfully led through it by counsel. A concern of substance arose over some defective evidence given by Miss Hurle which was hearsay but did not state the sources of the hearsay. This was resolved by the provision

of a further witness statement at the Court's request clarifying the hearsay element of her assertion which I have read and accept.

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

Substantive evidence

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

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

27. In his second witness statement David Blackhouse summarised the protest events at Kingsbury terminal on the 1st of April 2022 (which were carried out in conjunction with similar protests at Esso Purfleet, Navigator at Thurrock and Exolum in Grays). He was present at the Site and was an eye-witness. The protesters blocked the access roads which were public and then moved onto private access roads. More than 30 protesters

blocked various tankers from entering the site. Some climbed on top of the tankers. Police in large numbers were used to tidy up the protest. On the next day, the 2nd of April 2022, protesters again blocked public and private access roads at various places at the Kingsbury site. Further arrests were made. Mr Blackhouse was present at the site.

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

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

The video concluded with the assertion "there is no question that disruption is effective, the only question is doing enough of it". In the same month Just Stop Oil was encouraging members of the public to sign up for arrestable direct action. In November

2022 Just Stop Oil tweeted that they would escalate their legal disruption. Mr. Blackhouse then summarised what appeared to be statements by Extinction Rebellion withdrawing from more direct action. However Just Stop Oil continued to publish in late 2022 that they would not be intimidated by private injunctions. Mr Blackhouse researched the mission statements of Insulate Britain which contained the assertion that their continued intention included a campaign of civil resistance, but they only had the next two to three years to sort it out and their next campaign had to be more ambitious. Whilst not disclosing the contents of the briefings received from the police it was clear that Mr. Blackhouse asserted, in summary, that the police warned that Just Stop Oil intended to have a high tempo civil resistance campaign which would continue to involve obstruction, tunnelling, lock one and at height protests at petrochemical facilities.

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

> "***September 2019***
> 6.5 The Refinery was the target of protest activity in 2019, albeit this was on a smaller scale to that which took place in 2022 at the Kingsbury Terminal. The activity at the Refinery involved the blocking of access roads whereby the protestors used concrete "Lock Ons" i.e. the protestors locked arms, within the concrete blocks placed on the road, whilst sitting on the road to prevent removal. Although it was a non-violent protest it did impact upon employees at the Refinery who were prevented from attending and leaving work. Day to day operations and deliveries were negatively impacted as a result.
> 6.6…
> ***Friday 1st April 2022***
> Protestors obstructed the crossroads junction of Trinity Road, Piccadilly Way, and the entrance to the private access road by sitting in the road. They also climbed onto two stationary road tanker wagons on Piccadilly Way, about thirty metres from the same junction, preventing the vehicles from moving, causing a partial obstruction of the road in the direction of the terminal. They also climbed onto one road tanker wagon that had stopped on Trinity Road on the approach to the private access road to the terminal. Fuel supplies from the Valero terminal were seriously disrupted due to the continued obstruction of the highway and the entrance to the private access road throughout the day. Valero staff had to stop the movement of road tanker wagons to or from the site between the hours of 07:40 hrs and 20:30 hrs. My understanding is that up to twenty two persons were arrested by the Police before Valero were able to receive road tanker traffic and resume normal supplies of fuel.
> ***Sunday 3rd April 2022***

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

Tuesday 5th April 2022

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

Thursday 7th April 2022

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

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

Saturday 9th April 2022

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

Sunday 10th April 2022

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

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

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

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

Friday 15th April 2022

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

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

6.6.12 The video footage captures the group of four males and three females sitting for several hours on the pipe rack, with two of them (one male and one female) making their way up onto the roof of the loading bay area nearby. The two on the roof sat closely together whilst the male undressed and sat naked for a considerable time sunbathing. The video footage concludes with footage of Police and the Fire and Rescue service working together to remove the two individuals.

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

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

Tuesday 26th April 2022

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

Wednesday 27th April 2022

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

Thursday 28th April 2022

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

Wednesday 4th May 2022

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

Thursday 12th May 2022

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

Monday 22nd August 2022

6.6.20 Contractors clearing undergrowth alerted Police to suspicious activity involving three persons who were on land between Trinity Road and the railway tracks which lead to the rear of the Valero and WOSL terminals. The location is about 1.5 km from the entrance to the shared private access road to the Kingsbury Terminal. A police dog handler attended and arrested two of the persons with the third making

off. Three tunnels were found close to a tent that the three were believed to be sleeping in. The tunnels started on the roadside embankment and two of them clearly went under the road. The entrances were carefully prepared and concealed in the undergrowth. Police agreed that they were 'lock in' positions for protestors intending to cause a road closure along one of the two approach roads to the oil terminals. The road was closed awaiting structural survey. I have retained a collection of the images taken by my staff at the scene.

Tuesday 23rd August 2022

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

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

Wednesday 14th September 2022

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

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

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

30. In his 5th witness statement the main threats identified by Mr Blackhouse were; (1) protesters directly entering the 8 Sites. He stated there had been serious incidents in the

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

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

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

33. Mr. Blackhouse asserted that all of the 8 Sites are classified as “Critical National Infrastructure”. The Claimants liaise closely with the National Protective Security Authority and the National Crime Agency and the Counter Terrorism Security Advisor Service of the police. Secret reports received from those agencies evidenced continuing potential activity by the 4 Organisations. In addition, on the 8th of July 2023 Extinction Rebellion stickers were placed on a sign at the refinery.

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

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

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

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

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

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

40. Miss Pinkerton provided a helpful summary of incidents since June 2023. On the 26th of June 2023 Just Stop Oil protesters carried out four separate slow marches across London impacting access on King's College Hospital. On the 3rd of July 2023 protesters connected with Extinction Rebellion protested outside the offices of Wood Group in Aberdeen and Surrey letting off flares and spraying fake oil across the entrance in Surrey. On 10th July 2023 several marches took place across London. On the 20th of July 2023 supporters of Just Stop Oil threw orange paint over the headquarters of Exxon Mobile. On the 1st of August 2023 protesters connected with Just Stop Oil marched through Cambridge City centre. On the 13th of August 2023 protesters connected with Money Rebellion (which may be associated with Extinction Rebellion) set off flares at the AIG Women's Open in Tadworth. On the 18th of August 2023 protesters associated with Just Stop Oil carried out a slow march in Wells, Somerset and the next day a similar march took place in Exeter City centre. On the 26th of August 2023 a similar march took place in Leeds. On the 2nd of September 2023 protesters associated with Extinction Rebellion protested outside the London headquarters of Perenco, an oil and gas company. On the 9th of September 2023 there was a slow march by protesters connected with Just Stop Oil in Portsmouth City centre. On the 18th of September 2023 protesters connected with Extinction Rebellion poured fake oil over the steps of the Labour Party headquarters and climbed the building letting off smoke grenades and one protester locked on to a handrail. On the 1st of October 2023 protesters connected with Extinction Rebellion protested in Durham. On the 10th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over the Radcliffe Camera library building in Oxford and the facade of the forum at Exeter University. On the 11th of October 2023 protesters connected with Just Stop Oil sprayed orange paint over parts of Falmouth University. On the 17th of October 2023 various protesters were arrested in connection with the Energy Intelligence forum in London. On the 19th of October

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

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

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

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

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

Previous decision on the relevant facts

45. In *North Warwickshire v Baldwin and 158 others and PUs* [2023] EWHC 1719, Sweeting J gave judgment in relation to a claim brought by North Warwickshire council against 159 named defendants relating to the Kingsbury terminal which is operated by Shell, Oil Pipelines Limited, Warwickshire Oil Storage Limited and Valero Energy Ltd. Findings of fact were made in that judgment about the events in March and April 2022 which are relevant to my judgment. Sweeting J. found that protests began at Kingsbury during March 2022 and were characterised by protesters glueing themselves to roads accessing the terminal; breaking into the terminal compounds by cutting through gates and trespassing; climbing onto storage tanks containing unleaded petrol, diesel and fuel additives; using mobile phones within the terminal to take video films of their activities while standing on top of oil tankers and storage tanks and next to fuel transfer equipment; interfering with oil tankers by climbing onto them and fixing themselves to the roofs thereof; letting air out of the tyres of tankers; obstructing the highways accessing the terminal generally and climbing equipment and abseiling from a road bridge into the terminal. In relation to the 7th of April Sweeting J found that at 12:30 (past midnight) a group of protesters approached one of the main terminal entrances and attempted to glue themselves to the road. When the police were deployed a group of protesters approached the same enclosure from the fields to the rear and used a saw to break through an exterior gate and scaled fences to gain access. Once inside they locked themselves onto a number of different fixtures including the top of three large fuel storage tanks containing petrol diesel and fuel additives and the tops of two fuel tankers and the floating roof of a large fuel storage tank. The floating roof floated on the surface of stored liquid hydrocarbons. Sweeting J found that the ignition of liquid fuel or vapour in such a storage tank was an obvious source of risk to life. On the 9th of April 2022 protesters placed a caravan at the side of the road called Piccadilly Way which is an access road to the terminal and protesters glued themselves to the sides and top of the caravan whilst others attempted to dig a tunnel under the road through a false floor in the caravan. That was a road used by heavily laden oil tankers to and from the terminal and the collapse of the road due to a tunnel caused by a tanker passing over it was identified by Sweeting J as including the risk of injury and road damage and the escape of fuel fluid into the soil of the environment.

Assessment of lay witnesses

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

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

The Law

Summary Judgment

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

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

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

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

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

Final Injunctions

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

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

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

54. In law a landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land: see Snell's Equity (34th ed) at para 18-012. In relation to quia timet injunctions, like the one sought in this case, the Claimants must prove that there is a real and imminent risk of the Defendant causing the torts feared, not that the torts have already been committed, per Longmore LJ in *Ineos Upstream v Boyd* [2019] 4 WLR 100, para 34(1). I also take account of the

judgment of Sir Julian Flaux in *National Highways v PUs* [2023] 1 WLR 2088, in which at paras. 37-40 the following ruling was provided:

> "37. Although the judge did correctly identify the test for the grant of an anticipatory injunction, in para 38 of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that before summary judgment for a final anticipatory injunction could be granted NHL had to demonstrate, in relation to each defendant, that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.
> 38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* [2019] 4 WLR 2 was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at para 31(1) the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.
> 39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at para 31(2) quoted at para 27 above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding, at para 35 of the judgment, that he could not grant summary judgment for a final anticipatory injunction against any named defendant unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.
> 40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case

that the defendants had no real prospect of successfully defending the claim for an injunction at trial."

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

> "82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:
> (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical

language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

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

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

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

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226—231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction

varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.
(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.
(iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.
(v) It is, on the particular facts, just and convenient that such an injunction be granted. …"

…

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

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

Compelling justification for the remedy

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

…

"(viii) *A need for review*

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

218. We now turn to more general matters and safeguards. As we have foreshadowed, any local authority applying for an injunction against

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

219. The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

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

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

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

to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible.

(4) The prohibited acts

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

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

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

(5) *Geographical and temporal limits*

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

full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

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

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

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

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

(7) *Effective notice of the order*

230. We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential

respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).
231. Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.
(8) *Liberty to apply to discharge or vary*
232. As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.
(9) *Costs protection*
233. This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.
(10) *Cross-undertaking*
234. This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate. Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-by-case basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) *Protest cases*

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

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

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

58. **(A) Substantive Requirements**

Cause of action

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

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience – compelling justification

(5) In interim injunction hearings, pursuant to *American Cyanamid v Ethicon* [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to *Wolverhampton,* this balance is angled against the applicant to a greater extent than is required usually, so that there

must be a "compelling justification" for the injunction against PUs to protect the claimant's civil rights. In my judgment this also applies when there are PUs and named defendants.

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

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

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

Applying the law to the facts

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

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

Cause of action

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

Full and frank disclosure

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

Sufficient evidence to prove the claim

64. In my judgment the evidence shows that the Claimants have a good cause of action and fully justified fears that they face a high risk and an imminent threat that the remaining 17 named Defendants (who would not give undertakings) and/or that UPs will commit the pleaded torts of trespass and nuisance at the 8 Sites in connection with the 4 Organisations. I consider the phrase "in connection with" is broad and does not require membership of the 4 Organisations (if such exists), or proof of donation. It requires merely joining in with a protest organised by, encouraged by or at which one or more of the 4 Organisations were present or represented. The history of the invasive and dangerous protests in April 2022, despite the existence of the interim injunction made

by Butcher J, is compelling. Climbing onto fuel filled tankers on access roads is a hugely dangerous activity. Invading and trespassing upon petrochemical refineries and storage facilities and climbing on storage tanks and tankers is likewise very dangerous. Tunnelling under roads to obstruct and damage fuel tankers is also a dangerous tort of nuisance. I accept the evidence of further torts committed between May and September 2022. I have carefully considered the reduction in activity against the Claimants' Sites in 2023, however the threats from the spokespersons who align themselves or speak for the 4 Organisations did not reduce. I find that the reduction or abolition of direct tortious activity against the Claimants' 8 Sites was probably a consequence of the interim injunctions which were restraining the PUs connected with the 4 Organisations and that it is probable that without the injunctions direct tortious activity would quickly have recommenced and in future would quickly recommence.

No realistic defence

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

> "9. The following general principles are well-settled, and uncontroversial on this appeal.
> (1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.
> (2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol ('A1P1'). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has *the right to possession*, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest."

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

Balance of convenience – compelling justification

67. In my judgment the balance of convenience and justice weigh in favour of granting the final injunction. The balance tips further in the Claimants' favour because I consider that there are compelling justifications for the injunction against the named Defendants and the PUs to protect the Claimants' 8 Sites d the nearby public from the threatened torts, all of which are at places which are part of the National Infrastructure. In

addition, there are compelling reasons to protect the staff and visitors at the 8 Sites from the risk of death or personal injury and to protect the public at large who live near the 8 Sites. The risk of explosion may be small, but the potential harm caused by an explosion due to the tortious activities of a protester with a mobile phone or lighter, who has no training in safe handling in relation to fuel in tankers or storage tanks or fuel pipes, could be a human catastrophe.

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

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

Damages not an adequate remedy

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

<u>(B) Procedural Requirements</u>

Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

Conclusions

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

END

Case No: KB-2022-001142

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2024] EWHC 1015 (KB)

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 20 February 2024

BEFORE:

MRS JUSTICE FARBEY

BETWEEN:

EXOLUM PIPELINE SYSTEM LIMITED & ORS

Claimant

- and -

PERSONS UNKNOWN

Defendant

MR T MORSHEAD, KC appeared on behalf of the Claimant
The Defendants did not appear and were not represented

JUDGMENT
-------- (Approved)---------

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(Official Shorthand Writers to the Court)

MRS JUSTICE FARBEY:

1. This is a review of the order of Bennathan J made on 29 April 2022. It is the second review. The claimants seek the continuation of the injunction with a further review in around 18 months' time.

2. The background is as follows. The claimants are importers, exporters and distributors of oil and chemical products. In order to carry out their business, they own and operate bulk liquid storage terminals in the United Kingdom. By a claim issued under CPR Part 8 on 11 April 2022, the claimants sought an injunction against persons unknown in relation to activities at seven of their terminals in England. The target of the injunction was and remains environmental protesters.

3. The claimant's injunction application followed a protest at and in the vicinity of the terminal at Grays. According to the evidence filed by the claimants, on 1 April 2022, protesters climbed on top of tankers they had stopped on the access road to the Grays site. Some of the protester chained or glued themselves to fuel tankers. Fuel tanker tyres were let down. By the next morning, the protesters had dug a tunnel under an access road, and some of the protesters were in the tunnel.

4. There was some further protester activity on 5 April 2022 of a lesser sort. According to the evidence, on 10 April 2022, protesters gained access to the Grays site by climbing over the boundary fence using ladders. They gained access to areas classed as hazardous under health and safety regulations because they may contain an explosive atmosphere. The protesters had with them mobile phones, which posed a risk of ignition and are therefore prohibited from being on the site. They glued themselves to each other or chained themselves to infrastructure. The protests continued through 11 April 2022. There were further protests at Grays on 13 and 15 April 2022.

5. I have seen copies of social media postings by Just Stop Oil on 10 and 11 April 2022, which publicise some of the activities at Grays. It is plain from the social media posts that the protesters were expressing their political beliefs. For example, one post says:

> "The youth have been holding Grays oil depot for over 24 hours. Young people have had enough of the UK Government's criminal inaction on the climate crisis, which is ultimately going to shorten the lives of so many young people in our society."

6. The claimants were concerned that disruptive and dangerous activity would spread to their other sites and so sought relief in this court. The kind of injunction that the claimants sought has come to be known as a "newcomer" injunction because its terms operate against persons who at the time of the injunction were neither defendants nor identifiable and are described on the injunction simply as "persons unknown" (see *Wolverhampton City Council and Others v London Gypsies and Travellers and Others* [2023] UKSC 47, [2024] 2 WLR 45).

7. By order dated 6 April 2022, Johnson J granted an interim injunction prohibiting persons unknown, as further described in two different ways in the title of the order, from doing a number of things. On the return date, Bennathan J granted injunctive relief, albeit that he reduced the number and scope of the prohibitions within the injunction. He made a separate non-party disclosure order against various Chief Constables in order that anyone arrested in the course of protesting at or in the vicinity of the claimants' terminals would have their details passed by the police to the claimants with a view to naming them as defendants in the claim.

8. On 23 January 2023, Soole J reviewed Bennathan J's order. Mr Morshead KC appeared on behalf of the claimants. No one else appeared. Soole J was satisfied that the injunction should not be discontinued. He ordered that it should be reviewed again in February 2024. That is how the matter comes before me today.

9. Soole J's order imposed various procedural requirements on the claimants, which were intended to bring the proceedings and this second review to the notice of those who might wish to resist the continuation of the injunction. I am satisfied on the evidence before me that those procedural requirements have been met. The court is not aware of any person who wishes to argue that Bennathan J's order should be discontinued. Like Soole J, I have heard from Mr Morshead, and no one else has appeared.

10. Soole J was provided with updating evidence of developments since Bennathan J's order. Among other things, there was evidence before Soole J that despite the injunction there was further disruptive and dangerous activity at Grays on 23 August 2022, when five protesters gained entry. On 3 May 2022, less than four days after the injunction was made, protesters went to the Clydebank site of Exolum Storage Limited and took actions similar to those taken at Grays.

11. I have likewise been provided with evidence of developments since Soole J's review. These developments are set out in the fourth witness statement of Mark O'Neill, who has since last year been promoted to being the North West Europe Operations and Maintenance Lead at Exolum International (UK) Limited. He confirms that service and maintenance of the injunction signage around the terminals has continued. Additional security measures have been put in place to make access to the terminals more difficult for the defendants. These measures are intended to ensure the safety of the claimants' staff and visitors as well as the defendants and other members of the public who may be in the vicinity of the terminals.

12. Mr O'Neill says that the claimants continue to provide assistance to the police in relation to the prosecution of protesters in respect of the protest activity at Grays terminal in April 2022. For example, Mr O'Neill has given evidence to the Magistrates' Court when needed. The claimants wish to use the third-party disclosure order to add named defendants to the injunction order in the event that sufficient evidence can be obtained to do so.

13. Mr O'Neill confirms that the email address advertised on the injunction signs continues to be monitored for enquiries in respect of the injunction. A request for copies of the claim documents referred to in the injunction order was made in July 2023, but there

have been no emails or other forms of communication objecting to the injunction. There has been no further disruption at any of the terminals that are subject to the injunction since the 2023 order.

14. Mr O'Neill describes the importance of maintaining the injunction in the following terms:

> "38. I believe that the injunction has been an effective deterrent to further protest activity, and the fact that there has not been such activity at the terminals since the 2023 order also supports this belief.
>
> 39. Given the fact that Just Stop Oil appear committed to further protest activity until their objective is reached, I consider that it is important for the injunction to continue.
>
> 40. The claimants also remain committed to protecting the terminals by all legal means possible, by the additional security measures, assisting the police with prosecutions, and seeking to continue the injunction at the review hearing."

15. In his submissions, Mr Morshead emphasises that the Scottish protest shows that the protesters are well organised and have sought to disrupt the claimant's business where it is not protected by the injunction.

16. Since the last review in this case, the Supreme Court has given its judgment in the *Wolverhampton* case. In his judgment in that case, with which the other members of the court agreed, Lord Reed observed at paragraph 167(iv) that newcomer injunctions are "constrained by territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon" for their making.

17. At paragraph 235, Lord Reed cautioned against treating as prescriptive in other contexts (such as protester cases) the principles about newcomer injunctions in traveller cases. He went on to state that, in protester cases, the judge must be satisfied that there is a "compelling need" for the order. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the principles explained by the court.

18. In the context of newcomer traveller injunctions, Lord Reed referred at paragraph 237 to the prospect of appropriate and early review. I do not regard that reference as limited to traveller injunctions in the sense that reviews cannot or should not take place in other cases. I agree with Mr Morshead that it remains good practice to provide for a periodic review even when a final order is made (see *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13, [2022] 2 WLR 946, paragraph 108, per Sir Geoffrey Vos MR, with whom the other members of the court agreed).

19. In his helpful written and oral submissions, Mr Morshead submits that the Supreme Court's judgment in the *Wolverhampton* case has clarified the conceptual framework to be applied to the making of newcomer injunctions. The judgment is notable for its shift from the approach in *American Cyanamid Co v Ethicon* [1975] AC 396 to the consideration of a new kind of injunction requiring a different approach. In such cases, the primary question is: what is needed for the court to intervene in cases where the practical reality is that the persons unknown are not likely to be present in court?

20. Mr Morshead submits that there are two principal considerations that arise from the *Wolverhampton* case. First, the court will only grant relief if there is a compelling need, sufficiently demonstrated by the evidence, in order to protect the claimant's rights (*Wolverhampton* paragraph 167(i)). Mr Morshead properly accepts that is a high threshold and is indeed a higher test than the balance of convenience under *American Cyanamid*. He submits that the threshold is to be flexibly applied on a case-specific basis. There may be a compelling need for the court to order injunctive relief in relation to a small risk of future disruption if the consequences of the risk materialising are serious. Conversely, if the harm that the claimants anticipate is very slight, the court may consider that there is no compelling need for an injunction, even if the risk of the harm materialising is great. Convention rights of putative protesters will always be considered (*Wolverhampton*, paragraph 167(ii)) and it is open to the court to conclude that Convention rights must prevail in circumstances where the interference caused by the injunction would be disproportionate.

21. Mr Morshead submits that the court may in the absence of any named defendants protect the rights of protesters in two ways. First, it may impose strict procedural requirements of notice of the injunction and any review, which may enable anyone affected to apply to the court for the injunction to be discharged or varied. Secondly, the court will consider the evidence that is before it and, in the absence of any defendant, may probe the claimant to satisfy itself that the duties of the court and the duties of a party appearing without an opponent are discharged.

22. Even if that approach is wrong, Mr Morshead submits that, in any event, I need not and should not at this stage apply the various familiar limbs of the full *American Cyanamid* test as if this were a fresh application for an injunction. That exercise has already been conducted on other occasions. He submits that for present purposes it is sufficient and proportionate for me to consider whether there has been a change of circumstances since the last review.

23. He accepts that I will need to balance the legal rights of the claimants against the rights of free speech (Article 10 of the Convention) and free assembly (Article 11 of the Convention) of the putative protesters. He makes the point that Johnson J and Bennathan J gave full weight to Article 10 and Article 11 rights. He submits that the evidence of continuing disruptive protests by climate change activists in various parts of England demonstrates a continued need for the injunction in the terms that have been ordered. However, in the circumstances of this case, he submits that it is difficult to conceive how any application of *American Cyanamid* would impose any higher threshold than the test of compelling need.

24. I agree with Mr Morshead. I have kept firmly in mind the high public interest in the right to express beliefs and to engage in legitimate public protest. If the *American Cyanamid* principles apply, I accept that there is and remains a good arguable case for relief and that damages are not an adequate remedy. I see no reason at this juncture to take a different view to Soole J in these regards.

25. I accept that the test of balance of convenience would add nothing to the test of compelling need. If the test of compelling need is met, then on the facts of this case the full panoply of the *American Cyanamid* requirements is met.

26. I am prepared to accept that, unless restrained, there is at least some risk, and probably a high risk, that some activity would resume at some point within an imminent period. There is at least some risk, and probably a high risk, that if protest activities were to take place at the claimants' sites there would be damage. There would not only be damage to property but also a risk to life and limb. The protesters would not know which tankers were full of explosive material and which were empty. They would not know whether even an empty tanker was clean or retained residual inflammable material. They would not know which parts of the claimants' infrastructure were dangerous and which were safe. In dangerous parts of the site, they may not know that the use of mobile phones, which has been an integral part of some of the protests in order to publicise the activities on social media, is a danger to life.

27. In terms of the court's duty to protect the protesters' Convention rights, the claimants have complied with the steps set down by the court to bring the injunction and today's hearing to the attention of those who may want the injunction discontinued. The court has sought to protect the right to protest through the full use of its case management powers.

28. The review is not a rubber stamp but has involved the court probing counsel as to its concerns for the purpose of ensuring that the continuation of the injunction is proportionate and that its duration is no longer than is necessary.

29. I have been provided with no reason to discontinue or vary the order made by Bennathan J. On the other hand, it is notable, as I have said, that the evidence is that the protesters breached the Grays perimeter, went onto its property and acted in a dangerous way that could have led to an explosion with risk to property and ultimately with risk to life and limb. There is, in my judgment, a compelling need for the order to be continued.

30. I will order that the injunction is to continue in force until the next review. I am concerned that a review period of 18 months may lead to drift. The next review will be listed on the first available date after 20 February 2025. There will be notice requirements as set out in the draft order supplied by the claimants.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk

(This judgment has been approved by the judge)

A

Supreme Court

Wolverhampton City Council and others *v* London Gypsies and Travellers and others

[On appeal from *Barking and Dagenham London Borough Council v Persons Unknown*]

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29

Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs JJSC, Lord Kitchin

C

Injunction — Trespass — Persons unknown — Local authorities obtaining injunctions against persons unknown to restrain unauthorised encampments on land — Whether court having power to grant final injunctions against persons unknown — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37

With the intent of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued D proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981[1] prohibiting "persons unknown" from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The E judge discharged the injunctions which were final and directed at unknown persons, holding that final injunctions could only be made against parties who had been identified and had had an opportunity to contest the order sought. The Court of Appeal allowed appeals by some of the local authorities and restored those final injunctions which were the subject of appeal, holding that final injunctions against persons unknown were valid since any person who breached one would as a consequence become a party to it and so be entitled to contest it.

F On appeal by three intervener groups representing the interests of Gypsies and Travellers—

Held, dismissing the appeal, (1) that although now enshrined in statute, the court's power to grant an injunction was, and continued to be, a type of equitable remedy; that although the power was, subject to any relevant statutory restrictions, unlimited, the principles and practice which the court had developed governing the proper exercise of that power did not allow judges to grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so G in a particular case but required the power to be exercised in accordance with those equitable principles from which injunctions were derived; that, in particular, equity (i) sought to provide an effective remedy where other remedies available under the law were inadequate to protect or enforce the rights in issue, (ii) looked to the substance rather than to the form, (iii) took an essentially flexible approach to the formulation of a remedy and (iv) was not constrained by any limiting rule or principle, other than justice and convenience, when fashioning a remedy to suit new H circumstances; and that the application of those principles had not only allowed the general limits or conditions within which injunctions were granted to be adjusted over time as circumstances changed, but had allowed new kinds of injunction to be formulated in response to the emergence of particular problems, including

[1] Senior Courts Act 1981, s 37: see post, para 145.

prohibitions directed at the world at large which operated as an exception to the normal rule that only parties to an action were bound by an injunction (post, paras 16–17, 19, 22, 42, 57, 147–148, 150–153, 238).

Venables v News Group Newspapers Ltd [2001] Fam 430 applied.

Dicta of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360–361, HL(E) and of Lord Jauncey of Tullichettle in *Fourie v Le Roux* [2007] 1 WLR 320, para 25, HL(E) applied.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780, SC(E), *Cameron v Hussain* [2019] 1 WLR 1471, SC(E) and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, CA considered.

South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, CA and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, CA not applied.

(2) That in principle it was such a legitimate extension of the court's practice for it to allow both interim and final injunctions against "newcomers", i e persons who at the time of the grant of the injunction were neither defendants nor identifiable and were described in the injunction only as "persons unknown"; that an injunction against a newcomer, which was necessarily granted on a without notice application, would be effective to bind anyone who had notice of it while it remained in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action; that, therefore, there was no immoveable obstacle of jurisdiction or principle in the way of granting injunctions prohibiting unauthorised encampments by Gypsies or Travellers who were "newcomers" on an essentially without notice basis, regardless of whether in form interim or final; that, however, such an injunction was only likely to be justified as a novel exercise of the court's equitable discretionary power if the applicant (i) demonstrated a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other available remedies (including statutory remedies), (ii) built into the application and the injunction sought, procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by it, (iii) complied in full with the disclosure duty which attached to the making of a without notice application and (iv) showed that, on the particular facts, it was just and convenient in all the circumstances that the injunction sought should be made; that, if so justified, any injunction made by the court had to (i) spell out clearly and in everyday terms the full extent of the acts it was prohibiting, corresponding as closely as possible to the actual or threatened unlawful conduct, (ii) extend no further than the minimum necessary to achieve the purpose for which it was granted, (iii) be subject to strict temporal and territorial limits, (iv) be actively publicised by the applicant so as to draw it to the attention of all actual and potential respondents and (v) include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the injunction; and that, accordingly, it followed that the challenge to the court's power to grant the impugned injunctions at all failed (post, paras 142–146, 150, 167, 170, 186, 188, 222, 225, 230, 232, 238).

Per curiam. (i) The theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is no reason why newcomer injunctions should never be granted. The question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis (post, paras 172, 216).

(i) To the extent that a particular person who became the subject of a newcomer injunction wishes to raise particular circumstances applicable to them and relevant to a balancing of their article 8 Convention rights against the claim for an injunction, this can be done under the liberty to apply (post, para 183).

(iii) The emphasis in this appeal has been on newcomer injunctions in Gypsy and Traveller cases and nothing said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage

A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).

Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.

B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin:

A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11

Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)

Adair v New River Co (1805) 11 Ves 429

C *Anton Piller KG v Manufacturing Processes Ltd* [1975] EWCA Civ 12; [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA

Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)

Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA

Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)

D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA

Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA

Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)

E *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)

Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)

Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA

Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)

F *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB)

Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185

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

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

British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413; G [1984] 3 All ER 39, HL(E)

Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA

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

CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm); H [2019] Lloyd's Rep FC 62

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

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417; [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380

Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Private Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA
Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd [1998] 4 VR 143

Mercedes Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929; [1995] 2 Lloyd's Rep 417, PC
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Michaels (M) (Furriers) Ltd v Askew (1983) 127 SJ 597, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Egleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487; [1986] 2 Lloyd's Rep 317, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
United Kingdom Nirex Ltd v Barton The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

The following additional cases were cited in argument:

A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)

Abortion Services (Safe Access Zones) (Northern Ireland) Bill, In re [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176; [2021] RTR 15, CA
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

On 16 October 2020 Nicklin J, with the concurrence of Dame Victoria Sharp P and Stewart J (Judge in Charge of the Queen's Bench Civil List), ordered a number of local authorities which had been involved in 38 sets of proceedings each obtaining injunctions prohibiting "persons unknown" from making unauthorised encampments within their administrative areas, or on specified areas of land within those areas, to complete a questionnaire with a view to identifying those local authorities who wished to maintain such injunctions and those who wished to discontinue them. On 12 May 2021, after receipt of the questionnaires and a subsequent hearing to review the injunctions, Nicklin J [2021] EWHC 1201 (QB); [2022] JPL 43 held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land and, by further order dated 24 May 2021, discharged a number of the injunctions on that ground.

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council; Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR,

A Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

With permission granted by the Supreme Court on 25 October 2022 (Lord Hodge DPSC, Lord Hamblen and Lord Stephens JJSC) London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group appealed against the Court of Appeal's orders. The
B following local authorities participated in the appeal as respondents: (i) Wolverhampton City Council; (ii) Walsall Metropolitan Borough Council; (iii) Barking and Dagenham London Borough Council; (iv) Basingstoke and Deane Borough Council and Hampshire County Council; (v) Redbridge London Borough Council; (vi) Havering London Borough Council; (vii) Nuneaton and Bedworth Borough Council and Warwickshire County Council; (viii) Rochdale Metropolitan Borough
C Council; (ix) Test Valley Borough Council and Hampshire County Council and (x) Thurrock Council. The following bodies were granted permission to intervene in the appeal: Friends of the Earth; Liberty, High Speed Two (HS2) Ltd and the Secretary of State for Transport.

The facts and the agreed issues for the court are stated in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchin, post, paras 6–13.

D *Richard Drabble KC*, *Marc Willers KC*, *Tessa Buchanan* and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for the appellants.

Mark Anderson KC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for the first respondent.

Nigel Giffin KC and *Simon Birks* (instructed by *Walsall Metropolitan*
E *Borough Council Legal Services*) for the second respondent.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for the third to tenth respondents.

Stephanie Harrison KC, *Stephen Clark* and *Fatima Jichi* (instructed by *Hodge Jones and Allen*) for Friends of the Earth, intervening.

Jude Bunting KC and *Marlena Valles* (instructed by *Liberty*) for Liberty,
F intervening.

Richard Kimblin KC and *Michael Fry* (instructed by *Treasury Solicitor*) for High Speed Two (HS2) Ltd and the Secretary of State for Transport, intervening.

The court took time for consideration.

G 29 November 2023. **LORD REED PSC, LORD BRIGGS JSC** and **LORD KITCHIN** (with whom **LORD HODGE DPSC** and **LORD LLOYD-JONES JSC** agreed) handed down the following judgment.

1. Introduction

(1) The problem

H **1** This appeal concerns a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. Since the members of a group of Gypsies or Travellers who might in future camp in a particular place cannot generally be identified in advance, few if any of the defendants to the proceedings were

identifiable at the time when the injunctions were sought and granted. Instead, the defendants were described in the claim forms as "persons unknown", and the injunctions similarly enjoined "persons unknown". In some cases, there was no further description of the defendants in the claim form, and the court's order contained no further information about the persons enjoined. In other cases, the defendants were described in the claim form by reference to the conduct which the claimants sought to have prohibited, and the injunctions were addressed to persons who behaved in the manner from which they were ordered to refrain.

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

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

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

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

(2) The factual and procedural background

6 Between 2015 and 2020, 38 different local authorities or groups of local authorities sought injunctions against unidentified and unknown persons, which in broad terms prohibited unauthorised encampments within their administrative areas or on specified areas of land within those areas. The claims were brought under the procedure laid down in Part 8 of the Civil

A Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR r 8.1(2). The claimants relied upon a number of statutory provisions, including section 187B of the Town and Country Planning Act 1990, under which the court can grant an injunction to restrain an actual or apprehended breach of planning control, and in some
B cases also upon common law causes of action, including trespass to land.

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

8 In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR r 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly
E displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

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

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

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

12 Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing LJJ agreed, the court held that "the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land": *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, para 7. The appellants appeal to this court against that decision.

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

(1) Is it wrong in principle and/or not open to a court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 ("the 1981 Act") so as to grant an injunction which will bind "newcomers", that is to say, persons who were not parties to the claim when the injunction was granted, other than (i) on an interim basis or (ii) for the protection of Convention rights (i e rights which are protected under the Human Rights Act 1998)?

(2) If it is wrong in principle and/or not open to a court to grant such an injunction, then—

(i) Does it follow that (other than for the protection of Convention rights) such an injunction may likewise not properly be granted on an interim basis, except where that is required for the purpose of restraining wrongful actions by persons who are identifiable (even if not yet identified) and who have already committed or threatened to commit a relevant wrongful act?

(ii) Was Nicklin J right to hold that the protection of Convention rights could never justify the grant of a Traveller injunction, defined as an injunction prohibiting the unauthorised occupation or use of land?

2. *The legal background*

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

(1) Are newcomers parties to the proceedings at the time when the injunction is granted? If not, is it possible to obtain an injunction against a

A non-party? If they are not parties at that point, when (if ever) and how do they become parties?

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

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

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

15 This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in

D the absence of a cause of action, (4) the commencement of proceedings against unidentified defendants, and (5) the service of proceedings on unidentified defendants.

(1) The jurisdiction to grant injunctions

16 As Lord Scott of Foscote commented in *Fourie v Le Roux* [2007]

E 1 WLR 320, para 25, in a speech with which the other Law Lords agreed, jurisdiction is a word of some ambiguity. Lord Scott cited with approval Pickford LJ's remark in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 that "the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form

F or by whom it is raised". However, as Pickford LJ went on to observe, the word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide—in this context, the power to grant an injunction—and the principles and practice governing the exercise of that

G power.

17 The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital*

H *Authority v Robinson* [2000] QB 775, paras 20–21 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by

order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

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

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

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

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

20 The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the *Mareva* or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21 It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root*

(UK) Ltd [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

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

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

> "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

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

(2) Injunctions against non-parties

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

24 Where the defendants are described in a claim form, or an injunction describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As

will appear, service can be problematical where the identities of the intended defendants are unknown. Furthermore, as a general rule, for any injunction to be enforceable, the persons whom it enjoins, if unnamed, must be described with sufficient clarity to identify those included and those excluded.

25 Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is that the injunction is in substance addressed to the entire world, since anyone in the world may potentially fall within the description of the persons enjoined. But persons may be affected by the injunction in ways which potentially have different legal consequences. For example, an injunction designed to deter Travellers from camping at a particular location may be addressed to persons unknown camping there (notwithstanding that no-one is currently doing so) and may restrain them from camping there. If Travellers elsewhere learn about the injunction, they may consequently decide not to go to the site. Other Travellers, unaware of the injunction, may arrive at the site, and then become aware of the claim form and the injunction by virtue of their being displayed in a prominent position. Some of them may then proceed to camp on the site in breach of the injunction. Others may obey the injunction and go elsewhere. At what point, if any, do Travellers in each of these categories become parties to the proceedings? At what point, if any, are they enjoined? At what point, if any, are they served (if the displaying of the documents is authorised as alternative service)? It will be necessary to return to these questions. However these questions are answered, although each of these groups of Travellers is affected by the injunction, none of them can be regarded as being party to the proceedings at the time when the injunction is granted, as they do not then answer to the description of the persons enjoined and nothing has happened to bring them within the jurisdiction of the court.

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

(i) Representative proceedings

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

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

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

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

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

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

H (ii) Wardship proceedings

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

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

(iii) Injunctions to protect human rights

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

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

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e g as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by

publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

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

(vi) The effect of injunctions on non-parties

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

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

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

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

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

40 In answer to the objection that the non-party who learns of the order has not been heard by the court and has therefore not had the opportunity to

put forward any arguments which he may have, Lord Oliver responded at p 224 that he was at liberty to apply to the court:

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

The non-party's right to apply to the court is now reflected in CPR r 40.9, which provides: "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied." A non-party can also apply to become a defendant in accordance with CPR r 19.4.

41 There is accordingly a distinction in legal principle between being bound by an injunction as a party to the action and therefore being in contempt of court for disobeying it and being in contempt of court as a non-party who, by knowingly acting contrary to the order, subverts the court's purpose and thereby interferes with the administration of justice. Nevertheless, cases such as *Attorney General v Times Newspapers Ltd* and *Attorney General v Punch Ltd* [2003] 1 AC 1046, and the daily impact of freezing injunctions on non-party financial institutions (following *Z Ltd v A-Z and AA-LL* [1982] QB 558), indicate that the differences in the legal analysis can be of limited practical significance. Indeed, since non-parties can be found in contempt of court for acting contrary to an injunction, it has been recognised that it can be appropriate to refer to non-parties in an injunction in order to indicate the breadth of its binding effect: see, for example, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406, 407; *Attorney General v Newspaper Publishing plc* [1988] Ch 333, 387–388.

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

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

43 An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but

A growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

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

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

46 Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an

order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2007] Bus LR 44).

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

48 Another type of injunction which can be issued against a defendant in the absence of a cause of action is a *Bankers Trust* order. In the case from which the order derives its name, *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 (para 20 above), an order was granted requiring an innocent third party to disclose documents and information which might assist the claimant in locating assets to which the claimant had a proprietary claim. The claimant asserted no cause of action against the defendant. Later cases have emphasised the width and flexibility of the equitable jurisdiction to make such orders: see, for example, *Murphy v Murphy* [1999] 1 WLR 282, 292.

49 Another example of an injunction granted in the absence of a cause of action against the defendant is the internet blocking order. This is a new type of injunction developed to address the problems arising from the infringement of intellectual property rights via the internet. In the leading case of *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, cited at paras 17 and 20 above, the Court of Appeal upheld the grant of injunctions ordering internet service providers ("ISPs") to block websites selling counterfeit goods. The ISPs had not invaded, or threatened to invade, any independently identifiable legal or equitable right of the claimants. Nor had the claimants brought or indicated any intention to bring proceedings against any of the infringers. It was nevertheless held that there was power to grant the injunctions, and a principled basis for doing so, in order to compel the ISPs to prevent their facilities from being used to commit or facilitate a wrong. On an appeal to this court on the question of costs, Lord Sumption JSC (with whom the other Justices agreed) analysed the nature and basis of the orders made and concluded that they were justified on ordinary principles of equity. That was so although the claimants had no cause of action against the respondent ISPs, who were themselves innocent of any wrongdoing.

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

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

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

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

53 As we have explained at paras 27–33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those F examples—representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case [2001] Fam 430—might however be said to be special in some way, and to depend on a principle which is not of broader application.

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

55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the

sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] 1 WLR 1119). Service is significant for many reasons. One of the most important is that it is a general requirement of justice that proceedings should be brought to the notice of parties whose interests are affected before any order is made against them (other than in an emergency), so that they have an opportunity to be heard. Service of the claim form on the defendant is the means by which such notice is normally given. It is also normally by means of service of the order that an injunction is brought to the notice of the defendant, so that he or she is bound to comply with it. But it is generally sufficient that the defendant is aware of the injunction at the time of the alleged breach of it.

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

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

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

(1) Bloomsbury

58 One of the earliest injunctions of this kind was granted in the context of the protection of intellectual property rights in connection with the forthcoming publication of a novel. The *Bloomsbury* case [2003] 1 WLR 1633, cited at para 52 above, is one of two decisions of Sir Andrew Morritt V-C in 2003 which bear on this appeal. There had been a theft of several pre-publication copies of a new Harry Potter novel, some of which had been offered to national newspapers ahead of the launch date. By the time of the hearing of a much adjourned interim application most but not all of the thieves had been arrested, but the claimant publisher wished to have continued injunctions, until the date a month later when the book was due to be published, against unnamed further persons, described as the person or persons who had offered a copy of the book to the three named newspapers and the person or persons in physical possession of the book without the consent of the claimants.

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

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

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

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

(2) Hampshire Waste Services

60 Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] D Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent E these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended F defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that G any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

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

(3) Gammell

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

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

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

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

66 The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJJ agreed, stated that each of the appellants became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case.

Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

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

(5) Later cases concerning Traveller injunctions

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

A 69 A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

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

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

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

H 73 All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who

might in future commit the acts which the injunction prohibited (e g *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an early return date.

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

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

76 These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

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

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

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

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

(6) Cameron

80 The decision of the Supreme Court in *Cameron* [2019] 1 WLR 1471 (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene.

A The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates B the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

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

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

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

84 In the *Cameron* case there was no basis for inferring that the offending driver was aware of the proceedings. Service on the insurer did H not and would not without more constitute service on that offending driver (nor was the insurer directly liable); alternative service on the insurer could not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it

had not been established that this was an appropriate case in which to dispense with service altogether for any other reason. It followed that the driver could not be sued under the description relied upon by the claimant.

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

(7) Ineos

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

87 On appeal to the Court of Appeal it was argued, among other things, that the judge was wrong to grant injunctions against persons unknown and that he had failed properly to consider whether the claimants were likely to obtain the relief they sought at trial and whether it was appropriate to grant an injunction against persons unknown, including newcomers, before they had had an opportunity to be heard.

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

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

A persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

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

C **91** Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained them, D thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary E to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

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

93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as

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

94 The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

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

(9) Cuadrilla

96 The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition

against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

97 Only a few months later, in *Canada Goose* [2020] 1 WLR 2802 (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

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

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

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

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

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

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

103 Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables* [2001] Fam 430, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron*—that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91). In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil

A jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

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

(11) The present case

C 105 The circumstances of the present appeals were summarised at paras 6–12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in
D *Canada Goose* [2020] 1 WLR 2802. The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell* [2006] 1 WLR 658, which was binding on it.

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

107 Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction
G had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8 procedure. Furthermore, as the facts of the
H earlier cases demonstrated and *Bromley* [2020] PTSR 1043 explained, the court needed to keep injunctions against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

4. A new type of injunction?

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

109 The earliest in time is *Venables* [2001 Fam 430 discussed at paras 32–33 above. The case is important as possibly the first contra mundum equitable injunction granted in recent times, and in our view correctly explains why the objections to the grant of newcomer injunctions against Travellers go to matters of established principle rather than jurisdiction in the strict sense: i e not to the power of the court, as was later confirmed by Lord Scott of Foscote in *Fourie v Le Roux* [2007] 1 WLR 320 at para 25 (cited at para 16 above). In that respect the *Venables* injunction went even further than the typical Traveller injunction, where the newcomers are at least confined to a class of those who might wish to camp on the relevant prohibited sites. Nevertheless, for the reasons we explained at paras 25 and 61 above, and which we develop further at paras 155–159 below, newcomer injunctions can be regarded as being analogous to other injunctions or orders which have a binding effect upon the public at large. Like wardship orders contra mundum (para 31 above), *Venables*-type injunctions (paras 32–33 above), reporting restrictions (para 34 above), and embargoes on the publication of draft judgments (para 35 above), they are not limited in their effects to particular individuals, but can potentially affect anyone in the world.

110 *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2017] EMLR 11; *RXG v Ministry of Justice* [2020] QB 703; *In re Persons formerly known as Winch* [2021] EMLR 20 and [2022] ACD 22); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111 The next in time is the *Bloomsbury* case [2003] 1 WLR 1633, the facts and reasoning in which were summarised in paras 58–59 above. The case was analysed by Lord Sumption in *Cameron* [2019] 1 WLR 1471 by reference to the distinction which he drew at para 13, as explained earlier,

A between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating B process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

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

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

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

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

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

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

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

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

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117 We also have difficulty in fitting the unnamed defendants in *Bloomsbury* within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron*. The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord

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A Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the B classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

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

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

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

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

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

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

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

A does stand as a precedent for the grant of relief otherwise than on an emergency basis against defendants who, although joined, have yet to be served.

125 We turn next to the supposed *Gammell* [2006] 1 WLR 658 solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of
B disobeying the relevant injunction. It has the merit of being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

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

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

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

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

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

129 The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* [2003] 2 AC 558 (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "When granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger JSC cited this with approval (at para 17) in the *Meier* case [2009] 1 WLR 2780 (para 67 above). Similarly, Baroness Hale of Richmond JSC stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

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

131 Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* (1980) 499 F Supp 791, New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

132 As it seems to us, the difficulty which has been experienced in the English cases, and to which *Gammell* has hitherto been regarded as providing

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

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose* [2020] 1 WLR 2802. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose*?

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

135 First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables*, in which a final injunction could be granted contra mundum, but that protester actions F did not fall within "that exceptional category". Accordingly, "The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive G category. Such an approach is mistaken in principle, as explained in para 21 above.

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

137 The court also observed at para 92 that "An interim injunction is temporary relief intended to hold the position until trial", and that "Once

the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43–49 above. As we have explained (e g at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

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

139 The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron*, and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (i e in the old jargon ex parte) injunction, that is an injunction which,

A at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

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

141 In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the
F assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that
G they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

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

reference to which they may be regarded as a legitimate extension of the court's practice.

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

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

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

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

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

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

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

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

(viii) Nor is the injunction designed (like a freezing injunction, search order, *Norwich Pharmacal* or *Bankers Trust* order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some

related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

144 Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in para 143(viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that closely related to the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

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

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

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

146 Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* [2007] 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the

general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see eg *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

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

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

148 In *Broad Idea* [2023] AC 389 (para 17 above) at paras 57–58 Lord Leggatt JSC (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* [2000] QB 775 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 and [2018] 1 WLR 3259, that summary in *Spry* has come to be embedded in English law. The majority opinion in *Broad Idea* also explains why what some considered to be the apparent assumption in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 that the relevant equitable principles became set in stone in 1873 was, and has over time been conclusively proved to be, wrong.

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

150 Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Pt 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* [2009] 1 WLR 2780 (para 67 above) as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in

A the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Baroness Hale JSC at para 25 is resonant:

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

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (para 130 above) at pp 499–500,
C cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 at para 14.

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

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

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

152 The third general equitable principle is equity's essential flexibility, as explained at paras 19–22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking
G development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Pt 25 and which may be modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Cia Naviera SA v*
H *International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

153 Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. This is best illustrated by the history of the supposed limiting principle (or even jurisdictional constraint) affecting all injunctions apparently laid down by Lord Diplock in *The Siskina* [1979] AC 210 (para 43 above) that an injunction could only be granted in, or as ancillary to, proceedings for substantive relief in respect of a cause of action in the same jurisdiction. The lengthy process whereby that supposed fundamental principle has been broken down over time until its recent express rejection is described in detail in the *Broad Idea* case [2023] AC 389 and needs no repetition. But it is to be noted the number of types of injunctive or quasi-injunctive relief which quietly by-passed this supposed condition, as explained at paras 44–49 above, including *Norwich Pharmacal* and *Bankers Trust* orders and culminating in internet blocking orders, in none of which was it asserted that the respondent had invaded, or even threatened to invade, some legal right of the applicant.

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

155 It will be necessary to take careful account of this objection at various stages of the analysis which follows. At this stage it is necessary to note the following. First, equity has not been blind, or reluctant, to recognise that its injunctions may in substance have a coercive effect which, however labelled, extends well beyond the persons named as defendants (or named as subject to the injunction) in the relevant order. Very occasionally, orders have already been made in something approaching a contra mundum form, as in the *Venables* case already mentioned. More frequently the court has expressly recognised, after full argument, that an injunction against named persons may involve third parties in contempt for conduct in breach of it, where for example that conduct amounts to a contemptuous abuse of the court's process or frustrates the outcome which the court is seeking to achieve: see the *Bloomsbury* case [2003] 1 WLR 1633 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, discussed at paras 37–41, 61–62 and 121–124 above. In all those examples the court was seeking to preserve confidentiality in, or the intellectual property rights in relation to, specified information, and framed its injunction in a way which would bind anyone into whose hands that information subsequently came.

A **156** A more widespread example is the way in which a *Mareva* injunction is relied upon by claimants as giving protection against asset dissipation by the defendant. This is not merely (or even mainly) because of its likely effect upon the conduct of the defendant, who may well be a rogue with no scruples about disobeying court orders, but rather its binding effect (once notified to them) upon the defendant's bankers and other reputable custodians of his assets: see *Z Ltd v A-Z and AA-LL* [1982] QB 558 (para 41 above).

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

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

D

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

F **160** Protection of the court's process from abuse, or preservation of the utility of its future orders, may fairly be said to be the bedrock of many of equity's forays into new forms of injunction. Thus freezing injunctions are designed to make more effective the enforcement of any ultimate money judgment: see *Broad Idea* [2023] AC 389 at paras 11–21. This is what Lord Leggatt JSC there called the enforcement principle. Search orders are designed to prevent dishonest defendants from destroying relevant documents in advance of the formal process of disclosure. *Norwich Pharmacal* orders are a form of advance third party disclosure designed to enable a claimant to identify and then sue the wrongdoer. Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere.

G

H **161** But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP

that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of "ordinary principles of equity": see *Cartier* [2018] 1 WLR 3259 (para 20 above) per Lord Sumption JSC at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2015] Bus LR 298, para 198.

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

163 Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

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

165 We have considered but rejected summary possession orders against squatters as an informative precedent. This summary procedure (avoiding any interim order followed by final order after trial) was originally provided for by RSC Ord 113, and is now to be found in CPR Pt 55. It is commonly obtained against persons unknown, and has effect against newcomers in the sense that in executing the order the bailiff will remove not

merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

166 Tempting though the superficial similarities may be as between possession orders against squatters and injunctions against newcomers, they afford no relevant precedent for the following reasons. First, they are the creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428–9 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons from land, but disobedience to the bailiff does not sound in contempt. Thirdly, the possession order works once and for all by a form of execution which puts the owner of the land back in possession, but it has no ongoing effect in prohibiting entry by newcomers wishing to camp upon it after the order has been executed. Its shortcomings in the Traveller context are one of the reasons prayed in aid by local authorities seeking injunctions against newcomers as the only practicable solution to their difficulties.

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

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

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

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both

to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

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

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

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

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

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

171 Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on

instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not engage with the detail of any of these points, their objection being more a matter of principle.

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

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

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

175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement

to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

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

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

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

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

A risky legal argument about whether they should have been allowed to camp there in the first place.

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

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

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

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

apply if, contrary to the general disinclination or inability of Travellers to go to court, they had the determination to do so.

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

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

186 Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate exercise of the court's equitable discretion, where the general conditions set out in para 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

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

187 We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further,

A the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land.
B We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

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

189 This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are)
D properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The
E third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more
F difficult to satisfy a court that the relief it seeks is just and convenient.

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

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

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

192 In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a

duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

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

194 The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

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

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

(iii) Planning policy

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

198 Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled *Gypsy Sites and Planning*. This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local planning authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts

A to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 13.

199 The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA B 2004") and the regulations made under it. Part 2 of the PCPA 2004 deals with local development and stipulates that the LPA is to prepare a development scheme and plan; that this must set out the authority's policies; that in preparing the local development plan, the authority must have regard to national policy; that each plan must be sent to the Secretary of State for independent examination and that the purpose of this examination is, C among other things, to assess its soundness and that will itself involve an assessment whether it is consistent with national policy.

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

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

202 The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local

authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction.

(iv) Consultation and co-operation

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

(v) Public spaces protection orders

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

(vi) Criminal Justice and Public Order Act 1994

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

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a

A reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

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

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

E (vii) Byelaws

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

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

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

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (62 & 63 Vict c 30).

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

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

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

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

(viii) A need for review

217 Various aspects of this discussion merit emphasis at this stage. Local authorities have a range of measures and powers available to them to

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

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

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

219 The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

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

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

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

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

(4) The prohibited acts

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

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

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

(5) Geographical and temporal limits

225 The need for strict temporal and territorial limits is another important consideration (see para 167(iv)). One of the more controversial aspects of many of the injunctions granted hitherto has been their duration and geographical scope. These have been subjected to serious criticism, at least some of which we consider to be justified. We have considerable doubt as to whether it could ever be justifiable to grant a Gypsy or Traveller injunction which is directed to persons unknown, including newcomers, and extends over the whole of a borough or for significantly more than a year. It is to be remembered that this is an exceptional remedy, and it must be a proportionate response to the unlawful activity to which it is directed. Further, we consider that an injunction which extends borough-wide is likely to leave the Gypsy and Traveller communities with little or no room for manoeuvre, just as Coulson LJ warned might well be the case (see generally, *Bromley* [2020] PTSR 1043, paras 99–109. Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged;

whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made.

(6) Advertising the application in advance

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

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

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

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

(7) Effective notice of the order

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

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

is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) Liberty to apply to discharge or vary

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

(9) Costs protection

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

(10) Cross-undertaking

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

(11) Protest cases

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

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

(12) Conclusion

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

6. Outcome

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

(i) The court has jurisdiction (in the sense of power) to grant an injunction against "newcomers", that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.

(ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

Colin Beresford, Barrister

Neutral Citation Number: [2024] EWHC 1277 (KB)

Case No: QB-2022-BHM-000044

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

Date: 24th May 2024

Before :

MR JUSTICE RITCHIE

- -

Between :

HIGH SPEED TWO (HS2) LIMITED [1]
THE SECRETARY OF STATE FOR TRANSPORT [2] — **Claimant**

- and –

(1) NOT USED — **Defendants**

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER THE HS2 LAND WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUBCONTRACTORS, 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, SUBCONTRACTORS, 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

(5) MR ROSS MONAGHAN (AKA SQUIRREL / ASH TREE)

(6) MR JAMES ANDREW TAYLOR (AKA JIMMY KNAGGS / JAMES KNAGGS / RUN AWAY JIM)

(7-65) THE OTHER NAMED DEFENDANTS AS SET OUT IN ANNEX A HERETO

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Michael Fry & **Jonathan Welch** of Counsel (instructed by **DLA Piper Solicitors**) for the **Claimant**
Stephen Simblet KC (instructed by **Robert Lizar Solicitors**) for the **6th Defendant**

Hearing dates: 15th May 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30pm on Friday 24th May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The first Claimant is constructing the high speed railway from London to Crewe and was then planning to construct onwards to Manchester and Leeds. The second Claimant is the Secretary of State for Transport.

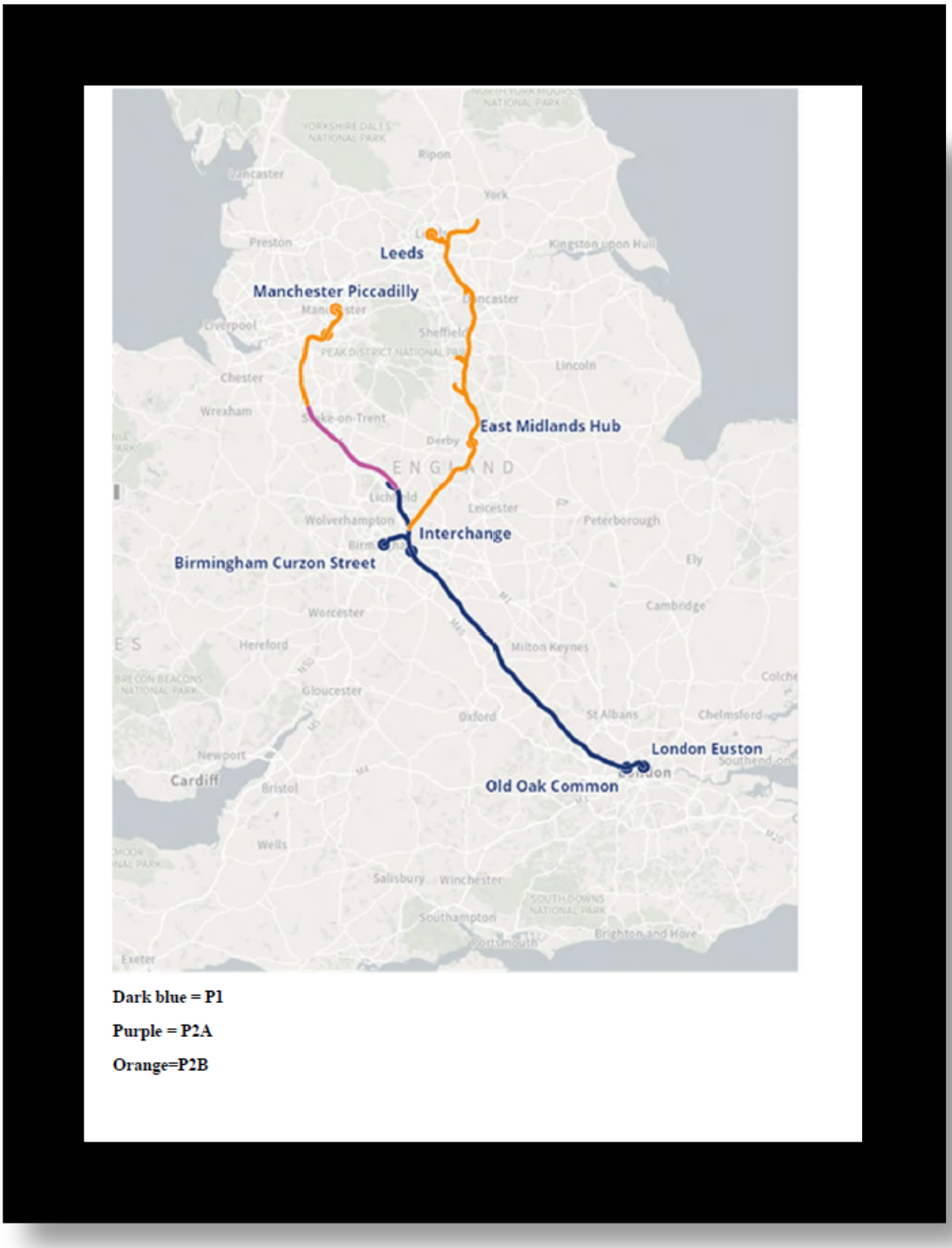
2. There are two types of Defendant. Persons Unknown (PUs) and named Defendants. The 6th Defendant (D6) attended the hearing. Many of the other named Defendants have been removed as parties to the proceedings as the claim has progressed. Most have been removed because they provided undertakings in similar format to the prohibitory interim injunctions granted to the Claimants. Some have been found in contempt of the CPL (Cotter J.) injunction and imprisoned.

Bundles

3. For the hearing I was provided with hard copy and digital bundles, beautifully prepared as follows: core bundles: A and B; supplementary bundles: A, B1 and 2, C; authorities bundles: main and supplementary. I was also provided with a skeleton argument by the Claimants and by D6 and a "Written Reasons" from D6 to amend the draft Order proposed by the Claimants.

The hearing

4. This was a review hearing of a routewide interim injunction granted to prohibit unlawful interference by known Defendants and PUs with the work being carried out by the Claimants to build the HS2 railway from London to Manchester and Leeds on land in HS2 possession. To understand the project as it stood when the claim was issued, it may help to see a simple map of it provided in evidence by the Claimants, which I set out below. There are three parts. Phase 1 is from London to the West Midlands and is shown in blue. Phase 2A was from West Midlands to Crewe and is shown in purple. Phase 2B is in orange, which takes the Western line from Crewe to Manchester and the Eastern line from West Midlands to Leeds. I shall refer to these phases both by colour and by the phase numbers.



The chronology

5. The HS2 project was authorised by Parliament through Acts dated 2017 and 2021. There were supporters of this project and there were objectors to it. Some of the objectors decided to take what they called direct action. Some of those taking direct action chose to break criminal and/or civil law as part of their direct action. Their publicly stated purposes included: causing huge expense to the Claimants by unlawful direct action on HS2 land through incurring security costs to deal with the direct action; delaying the construction of HS2 and thereby increasing the costs; persuading

Government to cease to build each and all of the phases set out above and saving the environments affected by the project. All such increased costs have been funded by UK taxpayers. It is not the role of this Courts to make any comment on any of those matters. In relation to civil unlawfulness, the Courts deal with applications and claims made by parties.

6. On 19 February 2018 Baring J. (PT 2018 000098) made an interim injunction protecting the Claimants' HS2 Harvil Road site from unlawful actions by PUs and named Defendants. Those included D28, 33, 36, and 39 in the action before me. I do not know how the claim progressed. This was renewed on 18 September 2020 by David Holland QC sitting as a Deputy High Court Judge.

7. On 23 March 2022 (QB 2022 BHM 000016) Linden J. made an interim injunction protecting the Claimants' HS2's contractor's land leased at Swynnerton, which was being used by Balfour Beatty (the contractor), which is very near to Cash's Pit Land (CPL) which the protesters called Bluebell Woods Camp. The interim injunction was to remain in force until further order and expired after 12 months. D6 in the action before me was a Defendant and appeared at that hearing. Directions were given for the claim to be pleaded out and for evidence to be filed and protection was given to PUs by the right to vary or set aside the order. I do not know how that claim progressed.

8. On 10 February 2021 (CO/361/2021) Steyn J. made an interim injunction order protecting the Claimants' HS2 land at Euston Square, London." On 28.3.2022 (QB 2021 004465) Linden J. made an interim injunction order protecting the Claimants' HS2 land at Euston Square, London. This was against Larch Maxey; Daniel Hooper (one of the Defendants in the case before me); Isla Sandford; J Stephenson-Clarke and B Croarkin. I do not know how that claim progressed.

9. The claim before me started by the issuing of the Claim Form on 28.3.2022. The Claimants sought possession of land at CPL and sought an injunction prohibiting PUs and named Defendants from trespassing and interfering with the construction of the project. They sought delivery up of possession of CPL, declaratory relief relating to possession of CPL, an injunction and costs.

10. The Claimants issued an application for urgent interim injunctions relating to CPL and routewide at the same time. D6 was represented at the hearing. Cotter J. made: (1) an order for possession of CPL against D6 and all the other Defendants, and (2) an interim injunction order against PUs and certain named Defendants who were believed to be occupying CPL (D5-20, 22, 31 and 63). The numbers and remaining Defendants' names (many have since been released from the claim) are set out in the Annex to this judgment. The original interim injunction was to last until trial or further order and expired on 24.10.2022 in any event.

11. On 20.9.2022 Julian Knowles J. handed down judgment on the Claimants' application in this action for a routewide interim injunction covering all HS2 land. At the hearing the Claimants had sought a final injunction. Julian Knowles J. noted that he was dealing not just with PUs but also with named Defendants and some of them might wish to dispute the claims against them, and indeed D6 objected to there being a final injunction. Thus, Knowles J. refused to make a final injunction and dealt with the application as one for an interim injunction (see para. 9 of his judgment). Knowles J. dealt with a wealth of evidence but no witness was cross-examined. I refer to and incorporate the chronology of events set out in the judgment. At para. 24 he set out the bit by bit litigation put in evidence before him which had preceded the routewide injunction application. He set out the Claimants' rights to the HS2 land; the Claimants' action for trespass and nuisance; the Defendants' clearly publicised intention to continue direct action protests against the construction of HS2 across the whole of the HS2 land; D6's submissions in opposition (lawful protest, no right to possession, lack of real and imminent risk, inadequate definition of PUs, inadequate constraint terms in the draft order, discretionary relief should not be granted, disproportionate exercise of power, breach of Art. 10 and 11 of the ECHR, challenges to service methods and other complaints). Julian Knowles J. set out the legal principles relating to trespass and nuisance and then covered the law relating to interim injunctions at paras. 91-102. In summary, he considered such injunctions were to "hold the ring pending the final hearing"; the Court was to apply the just and convenient test; adequacy of damages was to be considered; where wrongs had already been committed by the Defendant/s the quia timet threshold was lower and the evidential inference was that such infringements would continue until trial unless restrained; the Claimants had to show more than a real issue to be tried, he followed the principle in *Ineos v PUs* [2019] 4 WLR 100, at paras. 44-48, that the Court must be satisfied that the Claimants will likely obtain an injunction (preventing trespass) at the final hearing; and, for precautionary relief (what we fear, or quia timet), whether there was a sufficiently real and imminent risk of torts being committed which would cause harm sufficient to justify the relief. Knowles J. then set out the *Canada Goose* structural requirements for PU injunctions and considered the Defendants' ECHR rights. He then applied the law and made findings. He found that the Claimants had sufficient title to the HS2 land to make the claims. He accepted the Claimants' evidence of trespass and damage at CPL by PUs and Defendants "to the requisite standard at this stage" (para. 159). He found significant violence and criminality. He found that there was a real and imminent risk of continuing unlawfulness (para. 168). He rejected D6's submission that he had to find a risk of actual damage occurring on HS2 land and that there was no such risk. Knowles J. took account of the many past unlawful acts and the clearly expressed intention of many protesters to continue direct action by unlawful means. He found, at para. 177, that a precautionary interim injunction was appropriate and that to fail to grant one would be a licence for guerrilla tactics. These findings were not made on the "real issue to be tried" basis, but instead on the "likely to obtain the relief sought at trial" basis (para. 217); damages would not be an adequate remedy and the balance of convenience strongly favoured protecting the Claimants' HS2 land until trial. A helpful schedule of

the Defendants' responses was appended to the judgment. Some Defendants had put in defences; others had emailed or put in responses, submissions or witness statements.

12. D6 appealed the judgment of Knowles J. but permission was refused on 9.12.2022 by Coulson LJ.

13. The routewide interim injunction made by Julian Knowles J. in September 2022 was extended by me in May 2023 for another year. In para. 16 of that order and Schedule D to that order I made provision for any Defendant to apply to bring the proceedings to a final trial. This provided PUs and all named Defendants with the right to end being a party to the proceedings by that route. It provided each with the right to force the Claimants to prove their allegations on the balance of probabilities at trial, under cross-examination and after disclosure of relevant evidence and documentation. No Defendant has done so. Provisions were made for review of the interim injunction by May this year.

14. The Cotter J. version of the CPL interim injunction was breached by various Defendants back in 2022, who stayed at CPL despite the prohibitions therein. Committal proceedings were commenced and heard by me in July and September 2022. Two protestors who had been occupying CPL in treehouses gave undertakings and walked free: D62, (Leanne Swateridge, aka Flowery Zebra) and D31, (Rory Hooper). Five Defendants who had occupied tunnels were sentenced to imprisonment for contempt of Court, two of the sentences were suspended: D18, (William Harewood, aka Satchel/Satchel Baggins); D33 (Elliot Cuciurean, aka Jellytot); D61 (David Buchan, aka David Holliday); D64 (Stefan Wright); D65 (Liam Walters). One of these (Wright) never attended and is still at large.

The applications

15. Pursuant to the order I made in May 2023 the Claimants have faithfully applied for review of the interim injunction. By a notice of application dated 1.3.2024 they seek a 12 month extension of the routewide interim injunction, redefinition of the HS2 land plans; permission to update the definition of HS2 land and an extension of the prohibited acts to cover drone flying over their works on HS2 land.

16. The evidence in support of the application is set out in the following witness statements: James Dobson dated 28.2.2024; John Groves dated 28.2.2024; Julie Dilcock dated 28.2.2024 and Robert Shaw dated 27.2.2024.

17. The opposition to the application comes only from D6. Interestingly, now he submits that the Claimants should be required to progress the claim to a final hearing against all other Defendants, having submitted to Knowles J. that a final injunction should not be granted at that hearing. He wishes to be released from the claim himself. His counsel informed me at the hearing that he is crowd funded, that explains why he attends so

many of these HS2 hearings. The Claimants have never sought to enforce their costs against the crowd funding bank accounts or trustees.

The Issues

18. There were 5 substantive matters to be determined:
    18.1 Should the Claimants be required to take the claim to a final hearing?
    18.2 Should the duration of the routewide interim injunction be extended?
    18.3 Should the routewide injunction relating to the purple land be ended?
    18.4 Should the amendments to the details of the routewide injunction be permitted?
    18.5 Should D6 and 13 other Defendants be removed as parties to the claim?

The lay witness evidence

19. I have read the evidence from the Claimants' witnesses and from D6.

20. **James Dobson** is a security consultant and advisor to HS2. He reviewed the internal computer and documentary sources. He set out the Claimants' evidence. He asserted that the Claimants no longer considered 13 of the named Defendants to be a sufficient risk to the HS2 project for them to remain parties to the claim. These were D5, 6, 7, 22, 27, 28, 33, 36, 39, 48, 57, 58 and 59. After the removal of these Defendants, only 5 named Defendants would remain.

21. Mr Dobson informed the Court that since 17th March 2023 there had been no major direct action activist events or incidents targeting the HS2 project that had resulted in a delay of works by more than an hour. He considered there was direct evidence from activists that the reason the disruption to the HS2 project had stopped was the deterrent effect of the injunction and gave evidence by way of a few examples. However, he set out what he described as "minor incidences" of random trespasses to land which had not impacted on the works of the project. He asserted there were *increasing* incidences of unlawful occupation of phase 2 property and set these out. There were 24 events set out in a five column table. I summarise them below. Unfortunately he did not specify which was on phase 1 land and which was on phase 2 land. I have done my best to identify which is which in brackets below. In March 2023 urban explorers broke into the Grimstock Hotel in Birmingham (phase 1). The same month 10 caravans trespassed upon a business park in Saltley in Birmingham (phase 1) and, when challenged, left after about 10 hours. In May and June 2023 a group called Universal Law Community Trust occupied a building at Whitmore Heath, which is part of the phase 2A land. The description of the group paints them as debt buyers who control the debtors' behaviour after taking over their debt, for anarchic purposes. In May 2023 in Old Oak Common Road, London (phase 1), a man, who had previously trespassed on HS2 land, assaulted a security officer on a closed road. In July 2023 graffiti and some criminal damage had been done in Westbury Viaduct near Brackley (phase 1 land). In August 2023 three children set up a small campsite on HS2 land in Buckinghamshire (phase 1 land) and, when their parents were asked to remove them, they left. In the same month two people trespassed on land in Greatworth, Oxfordshire (phase 1) and interfered with some

machinery. In the same month a naked rambler walked onto an HS2 site in Western Cutting near Brackley (phase 1) and was escorted off. In the same month a local resident blocked access to an HS2 site at Washwood Heath in Birmingham (phase 1) but left when shown the injunction. In September 2023 D16 and another person entered HS2 land in Warwickshire (phase 1) and two other areas and took photographs which were posted on social media. The next day they went to two further HS2 sites in Warwickshire. The next day they went to one or two sites in Staffordshire (phase 2). In October 2023, at Addison Road, Calvert, (phase 1) fire extinguishers were discharged overnight. In the same month a group of urban explorers entered property at Drayton Lane, Tamworth (phase 1) and posted images. In the same month a group of urban explorers trespassed at Whitmore Heath, Whitmore (phase 2A) and shared photos with other urban explorers online. In the same month fireworks were fired towards security officers on HS2 land at Leather Lane, Great Missenden (phase 1). In November 2023 five members of a group called Unite The Union attended Old Oak Common Road, London (phase 1) with a megaphone but left when informed of the injunction. Later in November, a farm property at Swynnerton in Staffordshire (phase 2A) was entered by urban explorers. Later in November, 13 Unite The Union activists blocked access to HS2 logistics hubs at Channel Gate Road in London (phase 1). In December through to January 2024, D69 flew drones over multiple HS2 sites. However, he has given an undertaking which is satisfactory to the Claimants and so he is not being joined to the claim. In December 2023 vandalization occurred to a site in Aylesbury (phase 1). In January 2024 urban explorers entered an HS2 building at Birmingham Interchange (phase 1) and were escorted off site. Later that month urban explorers trespassed at Drayton Lane, Tamworth (phase 1). Finally, in February 2024 a person asserting to be a social media auditor flew drones over HS2 land at Victoria Road in London (phase 1) and caused a nuisance.

22. In his evidence Mr Dobson set out records of what he described as the displacement of activists to other causes and unlawful direct actions by them for other causes. He asserts that direct action protesters have transferred their interest to other causes including Palestine Action and Just Stop Oil. Mr Dobson asserts that activists will look for loopholes in injunction orders, relying on evidence that D6 made such a pronouncement in relation to Balfour Beatty and the injunction they obtained, which I have set out above, asserting that protesters would attack Balfour Beatty elsewhere, outside the scope of the injunction. Mr Dobson also sought to raise his concern that the group: Universal Law Community Trust had ties with protesters wishing to Stop HS2 because their occupation of a property owned by HS2 was mentioned on some anti HS2 websites. Mr Dobson also raised his concern about urban explorers.

23. Mr Dobson summarised an announcement by the Prime Minister on the 4th of October 2023 that phase two of the HS2 project had been abandoned but he did not set out the Prime Minister's words. Mr Dobson summarised various pronouncements about hit and run tactics published by Lousy Badger, social media threats to re-enter CPL and vague threats to “be back”. Overall, Mr Dobson asserted that the Claimants reasonably fear a

return to the levels of unlawful activity experienced prior to the interim injunction if it is allowed to lapse and asserts that the interim injunction has been remarkably successful in reducing direct unlawful action against HS2 land and saving taxpayers money.

24. John Groves is the chief security officer for HS2 and gave evidence that the costs of the unlawful direct action to date to the taxpayer, through HS2, have totalled £121,000,000. He asserted that the September 2022 interim routewide injunction had had a dramatic effect by reducing direct action, which diminished the quarterly security expenditure from over half a million down to just £100,000. He produced a forecast of the costs of future unlawful direct action of £7 million for phase two, ending in 2024, due to increased security. He said that activists had started campaigning for other causes but they may believe they can cancel the whole of the HS2 scheme. He asserted that unhappy land owners, whose land was taken away in phase 2, may get involved. He asserted that the Claimants need the deterrence of the injunction or the Claimants might need to spend another £12 million on protection. He was concerned about attacks on bridges over motorways as a potential weak spot in the project. He asserted that activity was still continuing despite the injunction but relied solely on the evidence of Mr Dobson.

25. Julie Dilcock, the in house lawyer for HS2, set out a history of the claims and then the rationale for the various alterations needed to the draft order. Robert Shaw gave evidence which assisted in various tidying up operations that are going to be needed.

26. I take into account what D6 set out in his written reasons. He was content to take no further part in the claim and agreed that the Claimants could no longer maintain an injunction against him. He asserted that, according to the Civil Procedure Rules, the Claimants had to issue notice of discontinuance, obtain the Court's permission and, by implication, pay his costs under CPR part 38, if they wished to discontinue against him. However, in my judgment, this was wanting his cake and to eat it. He asserted that, because he would still be bound by the injunction under the umbrella of the term “PU”, he could still make submissions at the hearing and I permitted him to do so. His submissions were that the terms of the injunction should be modified so that it no longer covers the land relating to phase 2A of the project because the Prime Minister has announced that the project is not going ahead on phase 2 and therefore the protesters have achieved what they wanted. He suggested that the geographic scope of the injunction should be reduced so that it does not cover the purple land set out in the 2021 Act. He also raised the point that this is an interim injunction binding the world and that the Claimants were under a continuing, onerous, responsibility to disclose relevant matters to the Court as they arose. He asserted that the Claimants had failed, in a timely way, to inform the Court of the Prime Minister's announcement in October 2023 that phase 2 was being abandoned and therefore had failed in their responsibilities and that the sanction for this should be the discharge of the whole interim injunction.

27. I asked the Claimants' counsel to point the Court to the evidence, after the Prime Minister's announcement, that protesters were still going to take direct action against the HS2 land involved in phase 2A, the purple land, on which no construction work will be carried out in future because the project had been cancelled. The Claimants identified Core Bundle pages 152-155. This amounted to little more than announcements on social media of self-congratulation by a few campaigners (for instance Lousy Badger), a desire for a party at Bluebell Wood (CPL) and a call to continue to fight to persuade the Government to scrap phase 1 of the project.

The Law

28. I will set out the key points from the relevant case law put before me below. In *National Highways v PUs, Rodger and 132 Ors* [2023] EWCA Civ. 182, the claimant applied for summary judgment and final (quia timet, what we fear) injunctions, having obtained interim injunctions. The trial Judge granted summary judgment against various defendants found in contempt but not against 109 defendants who had not entered defences and were not individually identified as past tortfeasors. This was overturned on appeal. For an anticipatory injunction, whether interim or final, proof of a past tort by the individual Defendant is not a pre-requisite. The normal rules apply. So, for summary judgment, the normal application of CPR r.24.2 applied and for the quia timet (what we fear) injunction, the normal thresholds applied. The President of the KBD ruled thus:

> "40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR Part 24.2, namely whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial.
>
> 41. It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see [35(5)] of the judgment), the defendants' general attitude was of disinterest in Court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel*. If the judge had applied the right test under CPR 24.2 and had had proper regard

> to CPR 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that accordingly, NHL was entitled to a final injunction against those defendants."

29. In *TfL v Lee & PUs & Ors* [2023] EWHC 402, Cavanagh J. was considering renewal of a PU injunction about roads and Just Stop Oil protesters. He ordered an expedited trial. He then considered the extension of the interim injunction. He accepted and adopted Freeman J.'s judgment on the earlier review and asked himself this question:

> "20. … The real issue before me, therefore, is whether the evidence of events that have taken place since 31 October 2022 provides grounds for declining to extend the injunction on materially identical terms.
> 21. The answer is that there are no such grounds. The activities of JSO have continued, albeit with a change of tactics, and in my judgment the justification for interim injunctive relief to restrain unlawful activities on the JSO roads is as great as it has ever been."

30. Since the extension of the HS2 interim injunction in May 2023 the Supreme Court has passed judgment in *Wolverhampton City Council v London Gypsies* [2023] UKSC 47. This clarified that PU or newcomer injunctions can be granted on an interim or final basis subject to clear conditions and restraints. I summarised the guidance recently in *Valero Energy v PUs & Bencher & Ors* [2024] EWHC 134. I was considering both a summary judgment application and a final PU/named Defendants injunction. At paras. 57 – 60 I ruled thus:

> "57. I conclude from the rulings in Wolverhampton that the 7 rulings in *Canada Goose* remain good law and that other factors have been added. To summarise, in summary judgment applications for a final injunction against unknown persons ("PUs") or newcomers, who are protesters of some sort, the following 13 guidelines and rules must be met for the injunction to be granted. These have been imposed because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.
> 58. **(A) Substantive Requirements**
> **Cause of action**
> (1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience - compelling justification

(5) In interim injunction hearings, pursuant to *American Cyanamid v Ethicon* [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to *Wolverhampton*, this balance is angled against the applicant to a greater extent than is required usually, so that there must

be a "compelling justification" for the injunction against PUs to protect the claimant's civil rights. In my judgment this also applies when there are PUs and named defendants.

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

Damages not an adequate remedy

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

(B) Procedural Requirements - Identifying PUs

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

The terms of the injunction

(9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like "tortious" for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed

on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

> (14) The PUs must be given the right to apply to set aside or vary the injunction on shortish notice.
> **Review**
> (15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are "Quasi-final" not wholly final.
> 59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters."

31. Before me is a quia timet interim injunction. The Claimants had to and still have to prove a real and imminent risk of serious harm caused by tortious or criminal activity on their land, see *Canada Goose v PUs* [2020] EWCA Civ. 303, per Sir Terence Etherton MR at para. 82(3) (approved in *Wolverhampton*).

32. Drawing these authorities together, on a review of an interim injunction against PUs and named Defendants, this Court is not starting de novo. The Judges who have previously made the interim injunctions have made findings justifying the interim injunctions. It is not the task of the Court on review to query or undermine those. However, it is vital to understand why they were made, to read and assimilate the findings, to understand the sub-strata of the quia timet, the reasons for the fear of unlawful direct action. Then it is necessary to determine, on the evidence, whether anything material has changed. If nothing material has changed, if the risk still exists as before and the claimant remains rightly and justifiably fearful of unlawful attacks, the extension may be granted so long as procedural and legal rigour has been observed and fulfilled.

33. On the other hand, if material matters have changed, the Court is required to analyse the changes, based on the evidence before it, and in the full light of the past decisions, to determine anew, whether the scope, details and need for the full interim injunction should be altered. To do so, the original thresholds for granting the interim injunction still apply.

34. In relation to the issue of whether final quia timet injunctions can be granted against PUs, the Court of Appeal in *Canda Goose* ruled that they could not be granted (para. 89) in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. The Supreme Court in *Wolverhampton* overruled this decision. At para. 134 they together stated:

> "134. Although we do not doubt the correctness of the decision in Canada Goose, we are not persuaded by the reasoning at paras 89-93, which we summarised at para 103 above. In addition to the criticisms made by the Court of Appeal which we have summarised at para 107

above, and with which we respectfully agree, we would make the following points."

At para 143 they ruled as follows:

"143. The distinguishing features of an injunction against newcomers are in our view as follows:
(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in *Cameron*) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.
(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.
(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.
(iv) **Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.**
(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.
(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the

> local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.
> (vii**) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.**
> (viii) Nor is the injunction designed (like a freezing injunction, search order, Norwich Pharmacal or Bankers Trust order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.
> 144. Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in sub-paragraph (viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts." (My emboldening).

Furthermore at para. 167 they ruled that:

> "167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle."

35. It is clear from this passage that quia timet injunctions against PUs, relating to private land owned or possessed by a claimant, are different beasts from old fashion injunctions against known defendants which need to be taken to trial. They do not "hold the ring pending trial". They are an end in themselves for the short or the medium term and may

never lead to service of defences from the PUs, whether or not the PUs become crystallised as Defendants.

Changes in the law

36. Just before and since the interim injunction was extended, new offences relating to protesters and others were created as follows. They are in the *Public Order Act 2023.*

> **"6. Obstruction etc of major transport works**
>
> (1) A person commits an offence if the person—
>
> (a) obstructs the undertaker or a person acting under the authority of the undertaker—
>
> (i) in setting out the lines of any major transport works,
>
> (ii) in constructing or maintaining any major transport works, or
>
> (iii) in taking any steps that are reasonably necessary for the purposes of facilitating, or in connection with, the construction or maintenance of any major transport works, or
>
> (b) interferes with, moves or removes any apparatus which—
>
> (i) relates to the construction or maintenance of any major transport works, and
>
> (ii) belongs to a person within subsection (5).
>
> (2) It is a defence for a person charged with an offence under subsection (1) to prove that—
>
> (a) they had a reasonable excuse for the act mentioned in paragraph (a) or (b) of that subsection, or
>
> (b) the act mentioned in paragraph (a) or (b) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.
>
> (3) A person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding the maximum term for summary offences, to a fine or to both.
>
> (4) In subsection (3) "the maximum term for summary offences" means—
>
> (a) if the offence is committed before the time when section 281(5) of the Criminal Justice Act 2003 (alteration of penalties for certain summary offences: England and Wales) comes into force, six months;
>
> (b) if the offence is committed after that time, 51 weeks.
>
> (5) The following persons are within this subsection—
>
> (a) the undertaker;
>
> (b) a person acting under the authority of the undertaker;
>
> (c) a statutory undertaker;
>
> (d) a person acting under the authority of a statutory undertaker.

(6) In this section "major transport works" means—

(a) works in England and Wales—

(i) relating to transport infrastructure, and

(ii) the construction of which is authorised directly by an Act of Parliament, or

(b) works the construction of which comprises development within subsection (7) that has been granted development consent by an order under section 114 of the Planning Act 2008.

(7) Development is within this subsection if—

(a) it is or forms part of a nationally significant infrastructure project within any of paragraphs (h) to (l) of section 14(1) of the Planning Act 2008,

(b) it is or forms part of a project (or proposed project) in the field of transport in relation to which a direction has been given under section 35(1) of that Act (directions in relation to projects of national significance) by the Secretary of State, or

(c) it is associated development in relation to development within paragraph (a) or (b)."

…

"7. Interference with use or operation of key national infrastructure

(1) A person commits an offence if—

(a) they do an act which interferes with the use or operation of any key national infrastructure in England and Wales, and

(b) they intend that act to interfere with the use or operation of such infrastructure or are reckless as to whether it will do so.

(2) It is a defence for a person charged with an offence under subsection (1) to prove that—

(a) they had a reasonable excuse for the act mentioned in paragraph (a) of that subsection, or

(b) the act mentioned in paragraph (a) of that subsection was done wholly or mainly in contemplation or furtherance of a trade dispute.

(3) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates' court, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 12 months, to a fine or to both.

(4) For the purposes of subsection (1) a person's act interferes with the use or operation of key national infrastructure if it prevents the infrastructure from being used or operated to any extent for any of its intended purposes.

(5) The cases in which infrastructure is prevented from being used or operated for any of its intended purposes include where its use or operation for any of those purposes is significantly delayed.

(6) In this section "key national infrastructure" means—

(a) road transport infrastructure,

(b) rail infrastructure,

(c) air transport infrastructure,

(d) harbour infrastructure,

(e) downstream oil infrastructure,

(f) downstream gas infrastructure,

(g) onshore oil and gas exploration and production infrastructure,

(h) onshore electricity generation infrastructure, or

(i) newspaper printing infrastructure.

Section 8 makes further provision about these kinds of infrastructure."

Submissions

37. The Claimants submitted that the Act of 2021 (phase 2A) remains in force, despite the Government announcement on the 4th of October 2023 that construction would not go ahead on phase 2. In addition, the high speed rail link between Crewe and Manchester was covered by a bill that was still in the Parliamentary process. The second Claimant had acquired 60% of the phase 2A land and had not announced what it was going to do with it. The Claimants relied on the evidence from Mr Groves and Mr Dobson and asserted that the routewide injunction had reduced unlawful protests and reduced the wasted costs paid by the taxpayer from spending of around £100 million to spending of around £100,000. The Claimants accepted there had been no major direct action since the 17th of March 2023, there had only been isolated incidents, but they submitted this showed that the injunction was working not that it should be terminated. There were individual protests by urban explorers, drone flyers and some "freeman of the land" groups. It was submitted that the Claimants should not lose the protection of the injunction on the purple land just because the injunction had been effective, that would be self defeating.

38. In response, D6 submitted that circumstances had changed since the granting and renewal of the routewide injunction. Firstly, the Government announcement took away the very sub strata for the injunction covering the purple land of phase 2A. It was submitted that the campaigners had "won", that they had no continued interest in phase 2A and therefore the injunction should no longer cover it. No written evidence or submission was made that the injunction should not be renewed for the blue part of the track, phase 1, which is currently under construction, although an en-passant verbal attempt was so made in the hearing. Furthermore, D6 submitted that new criminal offences had been created in the *Public Order Act,* in sections 7 and 6, which meant

that there was no need for the continuation of the civil injunction. It was submitted that the Claimants had an alternative remedy through the *Public Order Act*. Thirdly, it was submitted that the Claimants had substantially broken their duty to the Court of full and frank disclosure, which is required during the life of an injunction which is anticipatory and against newcomers/PUs, because the Claimants had failed to inform the Court of the Prime Minister's announcement until finally making the application in March 2023. That failure, it was submitted, should lead the Court to refuse to deploy its equitable power to continue the injunction. Further, it was submitted that it was inappropriate for the Claimants to "warehouse" the action against the named Defendants and the PUs and to fail to seek a final hearing. It was submitted that warehousing is contrary to the Civil Procedure Rules and is an abuse of process. In addition, D6 submitted that the claim against D6 should be struck out because the Claimants now admitted that the Claimants had no continuing cause of action against D6 or any good reason to pursue the injunction any further. Alternatively, D6 submitted that the Claimants should have issued a notice of discontinuance under CPR Part 38 which would have led to a liability for costs under CPR rule 38.6, unless the Court ordered otherwise. No notice of discontinuance having been issued D6 submitted that the claim against D6 should be struck out.

Changes to material matters

39. In my judgment, there have been clear and obvious changes which are material to the interim injunction. Firstly, phase 2A to Crewe is no longer going ahead. Nor is 2B to Manchester and Leeds. This means that no construction will take place on the purple and the orange land. This takes away the primary objective of the anti-HS2 protesters in relation to that land. Secondly, there are new criminal offences which will deter and punish protesters taking direct action, with penalties including imprisonment. Thirdly, some HS2 protesters have been imprisoned for breaching the injunction. Fourthly, no protester has applied for a final hearing.

Applying the law to the facts

40. I shall consider each of the requirements for granting and, where necessary, continuing an interim injunction in turn.

(A) Substantive Requirements -

Cause of action

41. In this case there is a civil cause of action identified in the claim form and particulars of claim. A quia timet (since he fears) action is pleaded and relates to the fear of torts such as trespass, damage to property, private and public nuisance, potential tortious interference with trade contracts and on-site criminal activity. The Claimants have proven, to the satisfaction of previous judges, under the enhanced test for injunctive remedies against PUs, that previous torts (and potentially crimes) have been committed on HS2 land and proven that their fears were justified. Previous interim injunctions have been granted routewide. This condition is satisfied.

Full and frank disclosure by the Claimants

42. There has mostly been full and frank disclosure by the Claimants seeking the injunction renewal against the PUs, save that there has been delay informing the Court about the Prime Minister's announcement. That delay amounts to about 4 months. I must ask: what would the Court have done if informed in November or December about the announcement, alongside an application for a review hearing? It is likely that, taking into account the alternative service requirements necessary for PUs and Defendants, the hearing would have been listed before a High Court judge at some time in the late Winter of 2023 or Spring of 2024. In the event the application was made in March 2024 and listed in May 2024. Whilst not as serious as the default in *Ineos v PUs* [2022] EWHC 684 (Ch), this delay was inappropriate and I shall take it into account when considering the equitable remedy below.

No realistic defence

43. The Defendants have not yet been required to enter any formal defence, although some did before Knowles J. for the hearing of the application for the routewide interim injunction and many emailed their case to the Court. None have put forwards a defence to any of the past tortious or criminal actions. This, as anticipated or summarised by the Supreme Court in *Wolverhampton* is not unusual in protester PU injunction cases.

Sufficient evidence to prove the claim/likely to succeed at trial and compelling justification

44. The Claimants provided sufficient evidence to prove their claim before Knowles J. The test which I must apply when considering continuing the injunction is more than whether there is a serious issue to be tried. This is a contra mundum (against the world) PU injunction. So the test is whether the Claimants are likely to succeed at trial against the PUs and the Defendants and that there is a compelling reason for granting or continuing the interim injunction. I am aware, of course, that Julian Knowles J. has already made that finding on the evidence before him and that I renewed it in May 2023 using the same test, but that was then and this is now. This is a review. Circumstances have changed. I am not at all convinced that the Claimants will succeed at trial in relation to the purple land on the evidence before me. If the evidence had been sufficient, on the balance of probabilities, to find that the Claimants are likely to be awarded an injunction at trial over the purple land, this Court must then take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UK.SC 23. The PUs' rights under the *European Convention on Human Rights* (for instance under Articles 10(2) and 11(2)) are engaged and may be restricted by the extension of the injunction. Julian Knowles J. has also considered and ruled on that point. It is crucial to remember that I am dealing mainly but not wholly with private land. I take into account that the injunction must be necessary and proportionate to the need to protect the Claimants' rights. I take into account that the Government is no longer pursuing the purple route. I take into account that there are now specific criminal offences in S.s 6 and 7 of the *Public Order Act 2023* to punish and deter protesters

from interfering with national infrastructure, only one of which was in force when I last renewed the injunctions. Whether or not a protestor in future, entering phase 2A land on which no HS2 project construction is taking place or will ever again take place, but intent on causing loss by interfering with the effort to rewild or restore the land or to sell it, would be sufficient to justify a renewed injunction, will be a matter for another Judge dependent on the facts. I have no sufficient evidence before me which goes to show that the remaining 5 Defendants or any anti HS2 PUs wish to interfere with: rewilding or restoration, deconstruction of any HS2 construction, HS2 selling land back to previous or new owners or otherwise disposing of the purple or orange land. Quite the opposite. As the Claimants assert, many of the anti HS2 phase 2 protesters, who themselves consider that they have won, are engaged in supporting other causes. The situation is quite different for phase 1. There has been no question of any win for the anti HS2 protesters there.

45. I have carefully considered the evidence put before the Court by the Claimants. I summarised much of it, but not all, above. I also take into account the evidence accepted and found by Knowles J. Standing back, the current evidence consists of a recognition that the protestors feel that they have won in relation to stopping the construction on the purple land of phase 2A. Their motivation for using direct action against that has gone. Such future action will not delay any construction works. It is no longer a construction project on the purple land. In addition, the evidence of quia timet (what we fear) is watery, thin, scattered geographically (some of the relied on events were in London) and un-compelling. Naked ramblers, children setting up tented camps for a few hours, some graffiti and some anti-law/establishment groups are included, but these are hardly enough, in my judgment, to prove a substantial and real fear of imminent and serious harm through direct action on the purple land. I do not accept, even from experienced security experts, that the mere assertion of fear is enough. It must be logically based and it must be sufficiently evidenced. Nor do I consider that the postings of crowing or gloating by some protesters about their perceived success on phase 2A and the need to continue vaguely against HS2 generally, bites on the purple land sufficiently. The past and the recent evidence does however support the continued injunction covering the construction works in phase 1.

Damages not an adequate remedy

46. In my judgment the Claimants continue to show that damages would not be an adequate remedy in relation to their phase 1 construction work on the blue land. They have not shown that this threshold is still justified for the purple land upon which no construction is being carried out.

(B) Procedural Requirements -

Identifying PUs

47. In my judgment, in the draft injunction, the PUs are clearly and plainly identified by reference to: (a) the tortious conduct to be prohibited (and that conduct mirrors the

torts claimed in the particulars of claim (as re-amended) and (b) clearly defined geographical boundaries. Subject to the purple land being excluded from the extended interim injunction this requirement is satisfied.

The terms of the injunction

48. In my judgment, the prohibitions remain set out in clear words and are not framed in legal technical terms. Further, they do not seek to prohibit conduct which viewed on its own is lawful. In my judgment they should be extended to cover drone flying which is likely to interfere with any construction work or operations carried out by the first Claimant and is dangerously close to such works.

The prohibitions must match the claim

49. In my judgment the prohibitions in the extended injunction mirror the torts claimed (or feared) in the re-amended particulars of claim. The pleading will need re amendment to cover drones.

Geographic boundaries

50. The prohibitions in the injunctions to be extended are defined by clear geographic boundaries, but shall be altered to cover only the phase 1 blue land, not the phase 2 purple land.

Temporal limits - duration

51. The duration of the injunction is to be extended by 12 months. In the light of the continued HS2 construction of phase 1, I am satisfied that it is proven to be compellingly necessary to protect the Claimants' legal rights in the light of the evidence of past hugely extensive tortious activity and the future feared (quia timet) tortious activity for the HS2 construction work on phase 1.

Service

52. Because PUs are, by their nature, not identified, the proceedings, the evidence, this judgment and the order will be served by the alternative means which have been previously considered and sanctioned by this Court. I consider that under the *Human Rights Act 1998* S.12(2), the Claimants have previously shown that they have taken all practicable steps to notify the Defendants.

The right to set aside or vary

53. The PUs are given the right to apply to set aside or vary the injunction on shortish notice by the existing interim injunction and this will continue.

Review

54. In the extended order I shall make provision for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances and I consider that 12 months is the right length of time.

Conclusion on the extension application and balance of convenience

55. I do not consider that there are compelling reasons to continue the injunction over the purple land or that the balance of convenience test is satisfied for the purple land. For the reasons set out above I do not consider that the injunction should be extended in future in relation to the purple HS2 land acquired or possessed for the purposed of phase 2A. In summary, the reasons are that this part of the project has been abandoned; there are alternative remedies because the new *Public Order Act* provisions are in place; the evidence provided to the Court did not reach the required level to show a real and imminent need, in part because the protesters' motivation to take direct action against the purple land has gone and in part because taking direct action against purple land would not cause disruption to the construction works for the HS2 project, it would cause peripheral nuisance. In addition, the Claimants have failed fully to comply with their clear duty to inform the Court of material change which occurred when the Prime Minister announced phase 2A would not be built.

Removing various Defendants as parties.

56. Because none of the 13 Defendants to be released has made any submissions to this Court, despite due alternative service of the application and because the Claimants are content on their own information to release them and no further costs orders are sought against them, I give permission for the above listed 13 Defendants to be removed as parties to the proceedings, save in relation to D6 who I shall consider below. I dispense with the need for the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) for the 13 Defendants and make an order under CPR 6.28 dispensing with service of a Notice of Discontinuance. I note that Morris J. took a different route in *Tfl v PUs & Ors* [2023] EWHC 1038, and took that into account.

Removing D6 as a party

57. Whilst in actions in which there are only a few Defendants the procedure in Part 38 should clearly be followed. In PU injunction claims with multiple defendants, different and more flexible procedures are being developed by the Courts to bind and yet to safeguard PUs, add and then release defendants and to streamline costs. So far, many Defendants have been deleted from this claim. Some have been added. Another 13 have just been deleted with my permission in the previous paragraph. D6, wishes to be different. He has objected to any more simple method. He requires the Claimants to serve a formal Notice of Discontinuance. His rationale was nothing more than the desire for his own costs of the claim to be paid. I suspect also a desire to increase the Claimants' costs. I dealt with the costs of the hearing at the hearing so, because D6 had succeeded on the purple land point, I awarded some costs to D6 against the Claimants. Inter alia I reduced counsel's brief fee (which included the skeleton) from £18,000 to £5,000. There was no need for a Notice of Discontinuance to enable this Court to award costs for succeeding on that issue. So, the rationale for the submission was without weight in relation to costs. CPR r.38.2 requires a claimant to seek the permission of the Court to discontinue where the Court has granted an interim injunction. This the Claimants did, via their witness statements and skeleton, a formal method but not in

accordance with CPR r.38.3, which sets out the procedure and is mandatory for discontinuance. A form N279 notice is required. In this case I do not consider that such formality assists. Of the 65 named Defendants, 60 have now been removed. It has been efficient to remove and add Defendants at the various reviews. So, to the extent that it is necessary, I grant the Claimants relief from sanctions and expressly permit the Claimants to delete D6 as a Defendant to the claim and the injunction without the need for a notice. D6 had notice in the application notice anyway. No other Defendant has objected. I also bear in mind that this Court could have removed D6 as a party at the start of the hearing and then heard argument on whether he should have been heard at all on the substantive issues, but I considered that it was helpful and just to have a voice for the Defendants and the PUs at the hearing. I therefore dispense with the need for the Claimants to file a Notice of Discontinuance pursuant to CPR 38.3(1)(a) in respect of D6 and make an order under CPR 6.28 dispensing with service of any Notice of Discontinuance.

Should the claim be brought to a final hearing?

58. There is no summary judgment application made by the Claimants. I set out the law above and in particular highlighted in bold passages from the Supreme Court on the nature of these injunctions concerning private land against PUs. I have carefully considered whether D6 was right, in submissions, to assert that such claims, against named Defendants (as distinct from PUs only claim) should be brought to trial with reasonable expedition. It was submitted that claims against named Defendants should not be left on the shelf or in the warehouse. However, no Defendant has made use of the power granted to them in the May 2023 Order I made to bring the case to trial. I take into account that it is normally the Claimants' responsibility to follow through to trial with the claim which they issued. However, in claims for possession of land where a final order for possession has been granted and the trespassers have been removed, there is no longer a need for another order. What then should be done about the interim injunction? Should it be brought to a final hearing? This would usually be answered: "yes". But in claims against PUs only and claims against named defendants and PUs, different factors apply. The Claimants have been and are required to keep the list of Defendants under review. When some have been (1) evicted, or (2) proven in contempt and imprisoned, or (3) have withdrawn or truthfully disavowed their previous intention to engage in unlawful direct action, the Claimants have properly released them from the action with this Court's permission. Others have given undertakings. Procedurally, it would be a nonsense to take the actions to a final hearing for a final injunction, based on the past tortious actions of the evicted ex-Defendants and proven contemnors, who have already been released as parties. As for the claims against the 5 remaining Defendants, if they had wished to be released from the action, they could have applied to bring the action to final determination, or asked the Claimants to be released, but have not. I see little point in requiring the Claimants to go to trial against them when the basis remains quia timet, only to have them submit at trial, that the released ex-Defendants were the tortfeasors, not them. The real mischief being addressed is the Claimants' need for protection from the PUs. That is fully satisfied on a continuing

basis already by the interim injunction. I would see the merit of requiring a final hearing if the test for the interim injunction was merely a "serious issue to be tried", but in these PU claims the test is higher. It is "likely to succeed at trial". So, in relation to the burden of proof, there is no injustice in the absence of a final injunction, so long as each Defendant has the right to apply for a final hearing. In addition, the reviews give each the opportunity to gain release from the action by applying for that.

59. I shall not be making a direction requiring the Claimants to bring the claim to trial or to finality through a summary judgment application or directing defences to be filed and served, disclosure and evidence. I do not see the need for it to achieve justice in this claim. I do not seek to lay down any general rule by this decision.

Variations to the terms of the injunction

60. Certain variations were requested to the terms of the injunction for the extension. I give permission for those which were not in dispute and are necessary.

61. The potential Defendant, D69, had been identified and there was a request to add him to the claim but he signed an undertaking so I do not have to consider that application.

62. There was a typing error in the May 2023 injunction relating to service of the review papers, which should be corrected.

Conclusion

63. I shall extend the interim injunction for 12 months. It will be limited to the phase 1 works and land. I do not consider that the Claimants should be required to bring the action to finality. D6 is released from the claim and the injunction. I invite the Claimants to draft the necessary orders and directions and to submit them before 31.5.2024.

ANNEX A

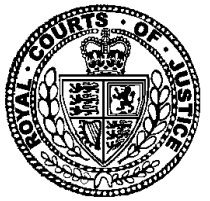
SCHEDULE OF DEFENDANTS 7-65

DEFENDANT NUMBER	NAMED DEFENDANTS
(7)	**Ms Leah Oldfield**
(8)	Not Used
(9)	Not Used
(10)	Not Used
(11)	Not Used
(12)	Not Used
(13)	Not Used
(14)	Not Used
(15)	Not Used

(16)	**Ms Karen Wildin (aka Karen Wilding / Karen Wilden / Karen Wilder)**
(17)	**Mr Andrew McMaster (aka Drew Robson)**
(18)	Not Used
(19)	Not Used
(20)	**Mr George Keeler (aka C Russ T Chav / Flem)**
(21)	Not Used
(22)	**Mr Tristan Dixon (aka Tristan Dyson)**
(23)	Not Used
(24)	Not Used
(25)	Not Used
(26)	Not Used
(27)	**Mr Lachlan Sandford (aka Laser / Lazer)**
(28)	**Mr Scott Breen (aka Scotty / Digger Down)**
(29)	Not Used
(30)	Not Used
(31)	Not Used
(32)	Not Used
(33)	**Mr Elliot Cuciurean (aka Jellytot)**
(34)	Not Used
(35)	Not Used
(36)	**Mr Mark Keir**
(37)	Not Used
(38)	Not Used
(39)	**Mr Iain Oliver (aka Pirate)**
(40)	Not Used
(41)	Not Used
(42)	Not Used
(43)	Not Used
(44)	Not Used
(45)	Not Used
(46)	Not Used
(47)	Not Used
(48)	**Mr Conner Nichols**
(49)	Not Used
(50)	Not Used
(51)	Not Used
(52)	Not Used
(53)	Not Used

(54)	Not Used
(55)	Not Used
(56)	Not Used
(57)	**Ms Samantha Smithson (aka Swan / Swan Lake)**
(58)	**Mr Jack Charles Oliver**
(59)	**Ms Charlie Inskip**
(60)	Not Used
(61)	Not Used
(62)	Not Used
(63)	**Mr Dino Misina (aka Hedge Hog)**
(64)	**Stefan Wright (aka Albert Urtubia)**
(65)	Not Used

END



Neutral Citation Number: [2024] EWHC 1952 (Ch)

Claim No.BL-2022-001396

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

26 July 2024

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

- -

B E T W E E N :

(1) ARLA FOODS LIMITED

(2) ARLA FOODS HATFIELD LIMITED

Claimants

-and-

(1) PERSONS UNKNOWN WHO ARE, WITHOUT THE CONSENT OF THE CLAIMANTS, ENTERING OR REMAINING ON LAND AND IN BUILDINGS ON ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM ("the Sites"), THOSE BEING:

a. "THE AYLESBURY SITE" MEANING ARLA FOODS LIMITED'S SITE AT AYLESBURY DAIRY, SAMIAN WAY, ASTON CLINTON, AYLESBURY HP22 5EZ, AS MARKED IN RED ON THE PLANS AT ANNEXE 1 TO THE CLAIM FORM;

b. "THE OAKTHORPE SITE" MEANING ARLA FOODS LIMITED'S SITE AT OAKTHORPE DAIRY, CHEQUERS WAY, PALMERS GREEN, LONDON N13 6BU, AS MARKED IN RED ON THE PLANS AT ANNEXE 2 TO THE CLAIM FORM;

c. "THE HATFIELD SITE" MEANING ARLA FOODS HATFIELD LIMITED'S SITE AT HATFIELD DISTRIBUTION WAREHOUSE, 4000 MOSQUITO WAY, HATFIELD BUSINESS PARK, HATFIELD, HERTFORDSHIRE AL10 9US, AS MARKED IN RED ON THE PLANS AT ANNEXE 3 TO THE CLAIM FORM; AND

d. "THE STOURTON SITE" MEANING ARLA FOODS LIMITED'S DAIRY AT PONTEFRACT ROAD, LEEDS LS10 1AX AND NATIONAL DISTRIBUTION CENTRE AT LEODIS WAY, LEEDS LS10 1NN AS MARKED IN RED ON THE PLANS AT ANNEXE 4 TO THE CLAIM FORM

(2) PERSONS UNKNOWN WHO FOR THE PURPOSE OF PROTESTING ARE OBSTRUCTING ANY VEHICLE ACCESSING FROM THE HIGHWAY THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(3) PERSONS UNKNOWN WHO FOR THE PURPOSE OF PROTESTING ARE OBSTRUCTING ANY VEHICLE ACCESSING THE HIGHWAY FROM ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(4) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING CAUSING THE BLOCKING, SLOWING DOWN, OBSTRUCTING, OR OTHERWISE INTERFERING WITH THE FREE FLOW OF TRAFFIC ON TO, OFF, OR ALONG THE ROADS LISTED AT ANNEXE 1A, 2A, 3A, AND 4A TO THE CLAIM FORM

(5) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES ON TO ANY VEHICLE WHICH IS ACCESSING OR EXITING THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(6) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES ON TO, ANY VEHICLE WHICH IS TRAVELLING TO OR FROM ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(7) 34 OTHER NAMED DEFENDANTS LISTED AT SCHEDULE 1 OF THE INJUNCTION ORDER

Defendants

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

Caroline Bolton and Natalie Pratt (instructed by Walker Morris LLP) for the Claimants
The Defendants did not appear and were not represented
Hearing date: 23 July 2024

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

APPROVED JUDGMENT

JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

Introduction

1. The First Claimant is the largest farmer-owned dairy co-operative in Europe, owned by approximately 9600 dairy farmers, 2,400 of whom are in the UK. It provides 40% of the milk supplied to supermarkets in the UK and is the largest supplier of milk in the UK. While it operates from several sites in the UK producing a range of dairy products, the present proceedings concern four of those sites that produce and distribute milk (the **"Sites"**). The four sites are at Aylesbury Dairy, Samian Way, Aston Clinton Aylesbury HP22 5EZ (the **"Aylesbury Site"**), Oakthorpe Dairy, Chequers Way, Palmers Green, London N13 6BU (the **"Oakthorpe Site"**), Hatfield Distribution Warehouse, 4000 Mosquito Way, Hatfield Business Park, Hatfield, Hertfordshire AL10 9US (the **"Hatfield Site"**) and finally Pontefract Road, Leeds LS10 1AX and the National Distribution Centre at Leodis Way, Leeds LS10 1NN (the **"Leeds Site"**).

2. The Second Claimant, a wholly owned subsidiary of the First Claimant, holds the leasehold title to the Hatfield Site.

3. By the present Part 8 proceedings, the Claimants seek injunctions against a number of identified defendants and persons unknown to restrain future action at the Sites by animal rights activists associated with the protest group initially known as Animal Rebellion, which rebranded last year to Animal Rising (the **"Claim"**).

4. The Claimants sought and obtained from Bacon J on 31 August 2022 urgent and without notice relief to restrain apprehended unlawful acts of protest. The interim relief was continued by Fancourt J at a return date on 4 October 2022, and the Judge permitted the Claimants to add 31 named defendants. By way of a 25 October 2022 order, three further defendants were added, one of whom was identified only by a photograph rather than by name. Following the Claimants' 12 January 2023 application, the final disposal of the claim was adjourned pending the expedited appeal to the Supreme Court in *Wolverhampton City Council and Others v London Gypsies and Travellers and others* [2023] UKSC 47; [2024] 2 WLR 45, which concerned whether injunctions could be granted against persons unknown and if so what the test for doing so should be. Following the handing down of the Supreme Court decision in *Wolverhampton* on 29 November 2023, the case was brought on for a final hearing before me to deal with the disposal of the claim against the identified Defendants and a continuation of the injunction order against the defendant persons unknown. This is my judgment following that hearing.

5. Therefore, the Defendants fall into two categories: 34 named or identified Defendants and six categories of persons unknown. 33 of the former category of Defendants are named and one- the 40th Defendant- identified by photograph. All 33 of the named Defendants have now agreed to stays of the proceedings through consent orders in return for the giving of undertakings.

6. That leaves the 40th defendant, who is identified by image 1 at Schedule 1A of the re-Amended Claim Form but whose name is not known by the Claimants and therefore who cannot be asked by them to sign an undertaking.

7. A number of the signed draft consent orders supplied to the Claimants at midnight the day before the hearing contained an error in the main body of it, so I agreed not to provide a draft judgment for 24 hours in order that these could be corrected, and I have duly made the consent orders in the terms sought.

8. The Claimants were represented before me by Caroline Bolton and Natalie Pratt. I am grateful for their submissions. The Defendants did not appear, were not represented, and have not acknowledged service or filed any evidence in the proceedings.

Decision

9. For the reasons set out below, I grant the order sought.

10. I shall take first the relevant factual background, before setting out the law and then applying it.

Relevant factual background

11. Animal Rising have two stated objections to the dairy industry: what they see as its contribution to climate change and its use of animals in the production of milk. For convenience, I shall refer to the individuals involved as animal rights protestors in this judgment.

12. The Claimants have adduced witness evidence from a number of sources:

    (1) Four individuals to explain, among other things, the operation of the sites and the past actions on them: Joanne Taylor (Aylesbury), Melanie Savage (Hatfield); David Dons (Oakthorpe) and Anne-Frances Ball (Leeds);

    (2) Nicholas McQueen (partner) and James Damarell (senior associate) of Walker Morris LLP, their solicitors;

    (3) one of their directors; Afshin Amirahmadi; and

    (4) Samantha Sage, the Quality, Environmental, Health and Safety Manager at the Aylesbury Site.

13. I have not had the benefit of having the evidence tested by arguments from the defendants. However, having considered it carefully, I have no reason to doubt its veracity or accuracy, and I accept it. I set out the key points from its below.

14. To understand the actions that have occurred and the causes of action relied on, it is first necessary to understand in outline the layout of the Sites and their operation.

The layout and operation of the Sites

15. The First Claimant holds the freehold title to the Aylesbury Site. The Aylesbury Site is the largest dairy in the UK, processing around 10% of the milk in the UK. Therefore, it

is a significant contributor to the UK dairy industry. 700 members of staff are employed at the dairy and it is very busy, such that free access to the Site is required at all times to ensure that operations at the dairy can run, and that the surrounding road network remains free-flowing and is not adversely impacted by operations at the dairy. Around 300 trucks enter and leave the dairy each day, consisting of 160 raw milk deliveries and 140 outbound departures.

16. The trucks that enter and leave the site are a mixture of tankers and other HGV lorries, and as the A41 is the only access road to the site, apart from Samian Way, all vehicles travelling to and from the site use this road. There are three access points to the site, Gatehouses 1 to 3, each of which serves a different function: one is used for raw milk intake and outbound exits, another for access to the employee and visitor car park and the third as the outbound access. All of the access points are from Samian Way, which is an adopted highway for which the local highway authority is responsible. Gatehouses 1 and 2 are manned, and Gatehouse 3 is unmanned but visitors enter using a swipe-card at the barrier or by ringing the intercom to make themselves known to the security staff.

17. Significant security measures have been put in place at the site since the anticipation of protests in September 2022.

18. The Second Claimant holds a 15 year lease to the Hatfield Site. Arla operates the Hatfield Site as a distribution centre, employing 500 staff there. The centre handles around 350 million kilograms of palletised food products and around 520 million kilograms of fresh milk, which is delivered direct to the stores of Arla's customers, mostly supermarkets. The centre processes a very significant proportion of the total milk supplied by Arla in the UK. It also stores and processes significant proportions of the UK's cheese and other dairy product supply. The Site is like the Aylesbury Site a busy one, with around 400 vehicular movements a day: around 180 inbound and 220 outbound.

19. Most if not all of these vehicles will use the A1001 and/or A1(M) when travelling to and from the Site. There are two vehicular access points to the Site, both directly off adopted highways maintained by the local highway authority. The first is Gypsy Moth Avenue, from which the HGVs access and exit the site. They travel a short way along a private road into the site before coming to a manned entry barrier. The second is Mosquito Way, where cars access and exit the Site from. That access is controlled by a barrier that is operated by a swipe-card and intercom system. Pedestrian access to the Site is located at the Mosquito Way access, next to the vehicle barrier, through a swipe-card and intercom operated turnstile.

20. The Site is staffed around the clock by a security team so that two people are always on duty, it is fully fenced and it is monitored by CCTV.

21. The First Claimant holds the freehold title to the Oakthorpe Site. It operates a dairy business at the Site, processing 350 million litres of milk every year and employing approximately 200 staff. It produces fresh milk, organic milk and fresh cream products for major retailers. It also produces fresh organic milk under its Yeo Valley brand at the dairy.

22. The Site is busy with vehicular movements, and relies on the same for the operation of its business. There are around 40-50 inbound HGV vehicles a day and around 50-60

outbound HGVs, together with the movement of around 10-20 other vehicles, such as contractors, goods deliveries and waste collections.

23. The Site is surrounded by a perimeter fence, although access is possible from the bank of Pymmes Brooke, which runs along the southern and eastern boundaries of the Site. It could in theory also be possible to access the site from neighbouring properties, but Arla considers that both of these routes would be incredibly challenging.

24. There are 5 vehicular access points to the Site:

(1) Chequers Way, which is an adopted highway. There is a swing gate at the access point which is left open to facilitate HGV access. Inside the access point HGVs can turn left to access the dairy's intake or straight on, in which case they encounter a barrier preventing access to the rest of the Site, which is operated by a swipe-card and intercom system.

(2) There is a second access point off Chequers Way, which can be used by cars, larger vehicles and small trucks but not for tankers, trailers or larger vehicles. It is accessed through a swing gate, which is left open to facilitate access to the Site, and just inside the gate is a barrier and pedestrian access point which require swipe-card access or use of the intercom to contact the Site's security staff.

(3) There are two vehicle access points from Owen Road, which is a public highway: one facilitates inbound traffic and the other outbound traffic. They utilise a barrier requiring swipe-card access or use of an intercom to speak to the Site's security staff. There is also a pedestrian turnstile.

(4) There is a vehicular access off Ostliffe Road, a highway, which utilises a barrier requiring the same measures to enter as set out above. This access is used only as an exit point and almost exclusively as the HGV exit, although temporary use can be made as an exist for all vehicles.

25. Aside the measures set out above, there is a security building on the site, vehicle barriers operate automatic number plate recognition cameras, all entry and exit points are covered by CCTV and monitored by security staff, and one vehicular access pointt is closed between 7pm and 7am to minimise disruption to local residents.

26. The First Claimant holds freehold title to the Leeds Site. The Site actually comprises two sites: the Stourton dairy and Arla's national distribution centre. The two sites are next to each other, linked by an inter-site gate, such that they form one large site. 450 Arla employees work at the dairy, along with 150 embedded contractors for various services, and the distribution centre employs 405 staff. The dairy processes just over 750 million litres of milk each year. It is the third largest dairy in the UK and Arla's second largest dairy, the Aylesbury Site being the largest. The dairy accounts for around 7% of the UK's milk supply output. The dairy produces own label milk for supermarkets, Arla's branded Cravendale filtered milk, fresh creams, fermented creams, cottage cheese, custard, alcohol cream and milkshake and ice-cream sundae products.

27. Like the other Sites, the Leeds Site is busy with vehicular movements and relies on the same for the operation of its business. There are around 300 vehicular movements a day

around the dairy and around 225 around the distribution centre. Most, if not all, of these vehicles will use the A639 and/or the M1 when travelling to or from the Site. There are four vehicular access points:

(1) The distribution centre can be accessed from two points off Leodis Way, a highway, which are a few metres apart. One is the HGV entry and exit point and the second the entry and exit point to the car park that services the distribution centre, including for pedestrians. Access through the former is by barrier, controlled by a full-time manned security gatehouse. Access to the latter is by keycard- controlled automatic gate, and only be used to access the car park and not the rest of the site.

(2) The dairy can be accessed at two points off Pontrefract Road, a highway. One is for HGVs and cars to enter, and the other, which is 200 metres away, is for their exit. One security guard is present in the gatehouse at the entrance, and the entrance and exit are controlled by keycard operated gates.

28. Each of the access points is well signed and utilise distinctive green fencing, so their location could be easily identified by protestors. Arla could, if the Pontefract Road access points were blocked, run its operation from the access points on Leodis Way. However, if all access points were blocked, operations would likely have to cease within a matter of hours, with the consequence that a significant volume of milk would be lost, and the distribution centre would have to cease operations within around two hours.

29. In addition to the security measures above, the dairy is surrounded by a security fence, most of its internal doors are keycard controlled, and around 75% of its internal areas are covered by CCTV. The distribution centre is also surrounded by a perimeter fence, has a significant CCTV system both externally and internally, and all staff at the distribution centre are issued with a security access card which must be used at strategic points of the site to allow access and to pass through the Site.

Past animal rights protests at the Sites

30. There have been past animal rights protests at three of the sites: the Oakthorpe, Aylesbury and Hatfield Sites.

31. Animal rights protestors first entered one of the sites in March 2020. Animal Rebellion has claimed on its website that members of its group were responsible for the relevant action. On 3 March, two protestors entered the Oakthorpe Site and climbed on silos in which dairy product was stored. They were arrested and a minor delay in production operations was caused. Four days later, a much larger demonstration occurred, to which the 3 March demonstration appears to have been a precursor. Around 100 Animal Rebellion protestors entered the site and handcuffed themselves to the railings next to the tanker bay at the Site. They were removed by the Police. The protestors also erected a makeshift structure outside the site and attached themselves to it. They were removed and arrested. The protests came at a financial cost to the Claimants' business, both in the additional resources needed to protect the business and the adjustments needed to mitigate the impact.

32. On 31 August 2021, at around 5.30 am, around 50 protestors associated with Animal Rebellion attended the Aylesbury Site. The protest lasted approximately 24 hours. They

(a) prevented access to the dairy by blocking Samian Way between the roundabout and first gatehouse; (b) erected two bamboo towers on Samian Way and attached themselves to the towers; and (c) parked a Luton-style van lengthways across the road, making the road impassable and locked themselves to the van. Further (d) several protestors sat in the road and erected and occupied tents on the grass verges, which are within Arla's freehold title.

33. Thames Valley Police arrived at the Site at around 6 am and remained there for the majority of the 24 hour period. They removed the protestors that had attached themselves to the bamboo structure, and dismantled the structure itself. Around twelve of the protestors were arrested. The blocking of access to the dairy necessitated the closure of the A41 for most of the day, Samian Way was closed for most of the 24 hour period and there was also significant traffic disruption caused in the neighbouring village of Buckland as a result of the closure of the A41.

34. Animal Rebellion's website, as it stood at 28 August 2022, details a campaign called "*Down with Dairy*", which includes a description of the campaign, stating, among other things, that:

> "*The action is part of a sustained campaign, which saw a march and blockade of the Arla Factory by Animal Rebellion in March the previous year.*"
>
> "*Thirteen of the world's largest dairy corporations, including Arla, together emitted more greenhouse gases in 2017 than major polluters BHP and ConocoPhillips, mining and oil giants respectively.*"
>
> "*We're not just demanding that Arla go plant-based by 2025, we're demanding that the government supports companies like Arla by funding a just transition for workers in meat and dairy industries to just and sustainable alternatives.*"
>
> "*You can read more about some of those involved in our campaign against Arla here.*"

35. More generally, the website explained the "*Down with Dairy*" campaign as follows:

> "*Animal Rebellion is calling on the dairy industry to transition to plant-based production by 2025…*"

36. The August 2021 protests caused the following harm: (a) it prevented inbound deliveries of raw milk and other raw materials to the Aylesbury Site, which were all diverted elsewhere, and which in turn meant that around 80 farms could not have their milk collected; (b) outbound deliveries were disrupted, which caused disruption to 76 stores operated by Arla customers in the UK and impacted international cream products; (c) finished product went to waste; (d) other activities at the Aylesbury site were also impacted, customer audits of Arla's facilities were cancelled, tenants on other areas of Arla's land away from its dairies and distribution centres were impacted, and their operations stopped. The main financial loss was the loss of revenue from uncollected milk of around £170,000. There were also additional cleaning and security costs.

37. The following accommodations also needed to be made, which caused a significant disruption to Arla's operations: (a) Arla staff were required to park on Samian Way, walk to work, or use the emergency access; (b) raw milk deliveries were diverted away from the Aylesbury Site; (c) planned deliveries such as fuel, bottle resin and packaging, were rescheduled for the following day; (d) outbound vehicles were stuck at the dairy and unable to leave, and no empty vehicles could enter the Site to load outbound deliveries; (e) the dairy only had 250 milk cages on-site due to the inability to replenish stocks and could not therefore run; and (f) additional security was requested to cover the third gatehouse and patrols.

38. Moving forward to 2022, in or around August 2022 the Claimants became aware from Animal Rebellion's website of a plan to disrupt the dairy supply in the UK in September over a one to two week period. The website included a section entitled "*This Changes Everything- A Plant Based Future*", which stated, among other things, as follows:

> "*The near term goal is fairly simple, this September we will be disrupting the dairy supply across the UK with 500 people over a 1-2 week period, cutting off the supply of milk to supermarkets and causing unignorable high-level disruption which will be felt by tens of millions of people across the UK and be a sustained no.1 news story. This will result in more than one thousand arrests and put the damage and exploitation of animal agriculture at centre stage. We will then build on that momentum with a large-scale occupation in the centre of London…*
>
> *This is the beginning of a long term civil resistance project, where we will be raising the stakes through the actions we take and also continuing our resistance through the court systems…*
>
> ***Strategy***
>
> *The two key mechanisms / tools to achieve our aims are large-scale material disruption and the drama of interactions with the public by more localised disruptions…*
>
> *We need to make sure we create a crisis at the start, so going in with maximum intensity to make sure our issue is a number one news story, and after that we can keep the debate going with relatively minimal effort….*
>
> *A key action design principle is all actions must be "simple, unbeatable and repeatable".*
>
> *…*
>
> ***Action plan:***
>
> *Phase 1- warm up actions and mobilisation starting at the beginning of June*
>
> *…*
>
> *Phase 2- two weeks high-intensity in September with 500+ people*

The objective is simple- we are going to have supermarket shelves empty of milk for two weeks, and will stack all energy and mobilisation towards this goal. We will be asking for people to commit to taking one week off. This phase will have a clear end and a clear ask for people to join us at phase 3…

<u>Phase 3- mobilise to the city</u>

Phase 3 will be an openly-organised mass occupation in London with no barrier to entry. We will mobilise during Phase 2 and we can double down on this by taking out newspaper adverts and by our spokespeople press releases talking about the meeting date and location. This will happen a week or so after Phase 2 and may be part of a broader coalition with XR [Extinction Rebellion] and JSO [Just Stop Oil]."

39. There was also a concern that the Leeds Site may have been surveyed by potential protestors and/or other persons associated with Animal Rebellion, because a dog-walker was seen on 24 August 2022 walking near the Leeds Site and appearing to be recording a video when doing so.

40. This all led to the 31 August 2022 without notice application, and order bearing the same date made by Bacon J against the persons unknown described in the heading to this judgment e.g. "*Persons unknown, who are, without the consent of the Claimants, entering into or remaining on land and in buildings on any of the sites listed in Schedule 2 of the Claim Form*". The order barred the following acts: (a) entering into, entering onto, tunnelling under or remaining on the Sites (paragraph 2.1 of the order); (b) blocking, slowing down, obstructing or otherwise interfering with vehicular access to or from the highway at the Sites (paragraph 2.2); (c) approaching, slowing down, or obstructing any vehicle on or moving along the roads identified in various annexes to the order, for the purpose of (i) disrupting vehicular access to or from the Sites or (ii) protesting (paragraph 2.3); (d) entering, climbing onto, climbing into, or climbing under any vehicle travelling to or from the Sites (paragraph 2.4); (e) affixing themselves ("locking on") to any vehicle on, entering or existing the Sites where the locking on is for the purpose of protesting (paragraph 2.5); (f) affixing themselves or any other items to any of the roads in (c) or any other person or object on, under or over those roads for the purposes of (i) disrupting vehicular access to or from any of the Sites; or (ii) protesting (paragraph 2.6); or (g) erecting any structure on those roads for the purpose of (i) disrupting vehicular access to or from any of the Sites or (i) protesting (paragraph 2.7).

41. Alternative service was allowed by a number of methods, including placing the order and documents leading to it on the First Claimant's websites and Facebook pages, e-mailing a copy of this order to Animal Rebellion, and placing signs and/or notices on the perimeter of each of the Sites. The injunction order was duly placed on the First Claimant's website on 2 September 2022, a relevant entry added to the First Claimant's Facebook page the same day, an e-mail sent to Animal Rebellion the same day, which led to an auto-reply from two Animal Rebellion e-mail addresses, and signs placed on the perimeters of the Sites that day.

42. However, three protest incidents occurred a few days later in September 2022 at the Sites: one on 4th September at the Aylesbury Site, one on 5th September at the Aylesbury Site and one on 8th September at the Hatfield Site.

43. The incident at the Aylesbury Site on 4 September 2022 started at about 5.30 am. Four protestors entered the Site and climbed on top of four milk silos, where they stayed for the next 10 to 12 hours. As a result of this, and the risk of contamination to the milk product contained in the silos, it was necessary to dispose of 640,000 litres of milk. Trespassing on the Aylesbury Site was a breach of paragraph 2.1 of the 31 August 2022 injunction order, so this appears to have breached that order.

44. Six protestors entered the Site and climbed on top of three raw milk tankers. Again, that appears to have been a breach of paragraph 2.1 of the 31 August 2022 injunction order.

45. Several protestors also blocked 'College Road', one of the access routes to the Site, which was protected under the injunction order, and climbed aboard and occupied vehicles on the road. It took until approximately 1.30 pm for all of the protestors to be removed from the road and vehicles in the vicinity of the Site, and for free access to the Site to recommence. These actions appear to have been in breach of paragraphs 2.2 to 2.5 of the injunction order.

46. 23 protestors were arrested in connection with the incident.

47. The next morning, 5 September 2022, at around 2.30 am, approximately 6 protestors entered the Site, and climbed aboard tankers or lay in the loading areas. All protestors were removed by around midday and 4 protestors were arrested.

48. Three days later, on 8 September 2022, at around 10 am, approximately 20 supporters of Animal Rebellion entered the Hatfield Site. A number of them caused physical damage by drilling into tyres and/or cutting the valves off lorry tyres to immobilise the lorries, before climbing onto a lorry in the loading bay and occupying the site. Over 400 tyres were either drilled or had their valves cut and had to be disposed of. The costs of replacement would be over £170,000. 17 people were arrested for aggravated trespass and criminal damage.

49. There were no similar incidents in September 2022 at the other two Sites, namely the Oakthorpe and Leeds Sites.

50. However, there were a number of other actions taken in relation to the dairy campaign between 3 and 8 September 2022. These included protests on 4 September at three sites owned by Muller, entering two Muller facilities on 5 September, disrupting three dairy sites on 6 September (including one of Muller), staging a sit in at four supermarkets and preventing customers at those stores accessing dairy and meat products, staging a protest at Westminster, and again entering a Muller facility on 8 September, blocking entry to the site and gluing themselves to the entry to the site.

51. The period of protest was temporarily paused on 8 September because of the death of Queen Elizabeth II.

Developments since September 2022

52. When the matter came back before Fancourt J on 4 October 2022 for the return date of the injunction, the Claimants applied to add 31 persons as named defendants in light of their involvement in the September 2022 incidents, and an order was made continuing the injunction and adding them.

53. Following the pause for the death of Queen Elizabeth II, Animal Rebellion engaged in a number of pieces of direct action protest in October to December 2022, including attending Fortnum & Mason, Harrods and supermarkets in London, Norwich, Manchester and Edinburgh and pouring milk taken from the shelves of those shops onto the floor. Three of the individuals named in the 25 October 2022 order appear each to have been involved in or linked to one of the acts. Of the remaining named defendants, Rosa Sharkey is stated in an Animal Rebellion website article to be the spokesperson for the 12 supporters of Animal Rebellion who broke into and took 18 beagle puppies from the MBR Acres facility in Wyton, Cambridgeshire on 20 December 2022.

54. As explained above, the final disposal of the claim was adjourned in light of the Supreme Court proceedings in the *Wolverhampton* case.

55. There have not been any further cases of direct action against the dairy industry since the matters set out above. Animal Rising have focused largely, although not exclusively, on animal-related sporting events in 2023, such as high-profile horse racing events, although there was at least one farming-related incident, where three Animal Rising activists entered the Appleton Farm on the Sandringham Estate, from which they removed three lambs without the permission of the owner of the animals.

56. However, the Claimants remain concerned that future acts of direct action and protest will occur. This is largely for a combination of the following reasons:

(1) The Animal Rebellion website continues to seek the support of new activists.

(2) The August 2022 website entry described the September 2022 intended action as the start of a long-term civil resistance project that stated that it would include large scale disruption.

(3) That website specifically, in its reporting of the 2021 incident, named and targeted Arla as a large dairy producer.

(4) The campaign against the dairy industry has, from Animal Rising's perspective, not been won.

(5) On the contrary, the plan to bring about a transition to a plant-based system by 2025 is now more pressing than ever given how close 2025 is. Given that the Claimants supply 40% of milk to UK supermarkets, and the stated aim of Animal Rising of stopping the supply of dairy to UK supermarkets, achieving their aim is likely in their minds to involve further action against the Claimants' Sites.

(6) The Claimants consider that the September 2022 action was not as extensive as Animal Rebellion had hoped, given the statements made on its website in August 2022 about the scale of the action planned.

(7) There was further direct action in October to December 2022, including in relation to the dairy industry.

(8) The Claimants consider that the absence of action since September 2022 is a product in large part of the injunctions in place. Therefore, were they to fall away, that deterrent would be lost. They accept that the September 2022 action against the Claimants occurred despite the injunction, but contend that other dairy and

distribution sites, particularly those operated by Muller, appeared to be disproportionately targeted, and the Claimants infer this is because Muller has no such injunction.

57. Therefore, the Claimants seek draft orders, with the same substantive restrictions as in the orders sought before and granted by Bacon J and Fancourt J, but for five years with annual review in respect of the element of the order relating to persons unknown.

58. It was explained to me, in response to a question that I asked during the hearing, that the website was changed around 10 days before the hearing, and that as part of this it removed reference to the specific plan to bring about a transition to a plant-based system by 2025. I asked for a witness statement to evidence the points that I was told of orally, and this was duly provided the next day. While I think it would have been desirable for this to be provided before the hearing started, I consider it appropriate to admit this in so that the duty of full and frank disclosure can be satisfied.

59. The website appears to have been revamped. As part of the description of Animal Rising's activities, it states that "*the key solution to these challenges [the challenges caused by the animal farming and fishing industries] is to support farming and fishing communities in the necessary and urgent transition to a sustainable and just plant-based food system*". The "*How We Achieve It*" section contains three routes. The first is "*[b]y generating a national conversation on the need to transform our food system with bold and impactful campaigns*", the second is supporting local people to create change for themselves, and the third is building alliances with key stakeholders. There is a page on previous campaigns, which states under "*2022 PLANT-BASED FUTURE*" that those involved "*successfully stopped the supply of milk to supermarkets across the South of England*".

The evidence relating to the named defendants who have not signed consent orders

60. Finally, I set out a summary of the evidence in relation to the remaining identified defendant who has- necessarily- not signed a consent order, namely the 40th Defendant.

61. The 40th Defendant appears to be female and have blue hair on the basis of a video taken of the 8 September incident at the Hatfield Site. There is video evidence of her trespassing on the Hatfield Site during the 8 September 2022 incident and filming the activities of the Animal Rebellion protestors. Such filming appears to have been carried out for Animal Rebellion, who post footage of their incidents on their website. In the video evidence, she is seen leaving the site by herself before arrests were made.

The legal test

62. The injunction is sought to restrain:

(1) trespass on the Claimants' Sites;

(2) interference with the Claimants' common law rights, and the rights of their assigns and licensees, to access the highway from the Claimants' Sites; and

(3) public nuisance caused by obstruction of the highway.

63. I shall start with the requirements of (1), (2) and (3), and then deal with what must be shown in the present case to order (a) an injunction against the 40th Defendant as an identified defendant and (b) against persons unknown.

Trespass to land

64. Starting with trespass to land, that consists of any unjustifiable intrusion by one person upon land in the possession of another. No further elaboration is necessary for present purposes.

65. The Claimants submitted that deciding whether a trespass has occurred (or in the present case would or might occur in the future) does not involve any balancing of the Claimants' rights to possession with the Defendants' rights of expression or freedom of assembly under Articles 10 and 11 of the European Convention on Human Rights (**"ECHR"**), because:

(1) Articles 10 and 11 do not include any right to trespass when exercising those rights: *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515 at [36]-[37] per Longmore LJ;

(2) trespass is a blatant and significant interference with the Claimants' rights under Article 1 of the First Protocol to the ECHR; and

(3) the exercising of rights under Articles 10 and 11 cannot normally justify a trespass: *Cuciurean v The Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 359 ("***Cuciurean (2021)***") at [9(1)] to [9(2)] per Warby LJ.

66. I accept that submission.

67. Article 10 provides as follows:

> "10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

68. Article 11 provides as follows:

> "(1) Everyone has the right to freedom of peaceful assembly …

> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. …"

69. Article 1 of the First Protocol provides that:

> "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 the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

70. The other provision to mention is section 12 of the Human Rights Act 1998 (**"HRA"**). Section 12(1) provides that section 12 applies if a Court is considering whether to grant any relief which, if granted, might affect the exercise of the ECHR right to freedom of expression, namely that in article 10. Where section 12 applies, then, among other things, the Court must have particular regard to the importance of the ECHR right to freedom of expression: section 12(4).

71. In *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408, the Supreme Court endorsed at [58] the Divisional Court's identification of the five questions that arise when an Article 10 or 11 right may be engaged, which was expressed in the following terms by the Divisional Court:

> "63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following 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, for example the protection of the rights of others?

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

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

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

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

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

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

In *Ziegler*, the question arose in the context of a statutory provision, namely section 137(1) of the Highways Act 1980.

72. It is convenient to deal in this section on the legal principles with whether Articles 10 and 11 could justify a trespass in the present case. In my judgment, they could not, for the following reasons:

(1) The exercising of rights under Articles 10 and 11 cannot normally justify a trespass: *Cuciurean (2021)* at [9(1)] to [9(2)]. Here, I see nothing to take this out of the ordinary case.

(2) Articles 10 and 11 do not include any right to trespass when exercising those rights: *Boyd* (above) at [36]-[37]. The reason for that is that Articles 10 and 11 do not contain any right to protest on privately owned land: *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661 (***"Cuciurean (2022)"***) at [31], applying the European Court of Human Rights decision in *Appleby v UK* (2003) 37 EHRR 38. The Court of Appeal endorsed in the latter case the explanation of the Divisional Court at [45] of its judgment, where Lord Burnett CJ and Holgate J explained 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. 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 further 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."

(3) As the European Court explained in *Appleby* at [43], one must also consider the rights under Article 1 of Protocol 1: "*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 Article 1 of Protocol No.1*". That underlies the specific points in (1) and (2) above.

(4) It appears that the result of the application of the above principles is that the proportionality exercise does not apply in a case where the protest takes place on private land: *Cuciurean (2022)* at [33].

73. Therefore, as did Ritchie J in *Valero Energy Limited v Persons Unknown* [2024] EWHC 134 (KB), I do not consider that articles 10 and 11 provide any defence to what would otherwise constitute a trespass in the present case.

74. It was accepted by the Claimants that I should consider whether articles 10 and 11 are engaged here, whether as a result of considering whether section 12 of the HRA applies, and if so in having particular regard to the importance of the ECHR right to freedom of expression, or the Court's duty as a public authority under section 6(1) of the HRA. Therefore, I do not need to consider that question further.

<u>*Public nuisance*</u>

75. As in *Ineos* (above), the Claimants asked me to proceed on the basis that the same core principles applied to public nuisance and the criminal offence of obstructing the highway under section 137(1) of the Highways Act 1980. I am content to do so, and would expect the two to march hand in hand.

76. As explained at [65] of that judgment, for there to be an offence under section 137(1), it must be shown that:

"(1) There is an obstruction of the highway which is more than de minimis; occupation of part of a road, thus interfering with people having the use of the whole road, is an obstruction…

(2) The obstruction must be wilful, ie. deliberate;

(3) The obstruction must be without lawful authority or excuse; 'without lawful excuse' may be the same thing as 'unreasonably' or it may be that it must in addition be shown that the obstruction is unreasonable."

77. The purposes for which a highway may be used are not limited to travelling. As Lord Irvine stated in *DPP v Jones* [1999] 2 AC 240 at 245G-255A:

> "*The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I have set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a right to peaceful assembly on the public highway.*"

78. A highway may be put to many other uses. It would be surprising if "*two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of Salvation Army singing hymns and addressing those who gather to listen*": [1999] AC 240 at 254F-G. Therefore, there is a right to peaceful assembly on the highway.

79. As Lord Reed explained in *The Safe Access Zones Bill Reference* [2022] UKC 32 at [22], the approach in *Jones* was, prior to the coming into force of the HRA, to use *common law* rights of freedom of speech and assembly as an important factor in assessing whether the use of the highway was reasonable. That would apply equally to section 137(1) as it would to the Public Order Act 1986 offence considered in *Jones*.

80. In *Ziegler* the Supreme Court considered the interaction of section 137(1) with Articles 10 and 11 in light of the coming into force of the HRA. The Court held that section 137 has to be read and given effect, in accordance with section 3 of the HRA, on the basis that the availability of the defence of lawful excuse, in a case raising issues under Articles 10 or 11, depends on a proportionality assessment, as the Divisional Court had considered.

81. Their Lordships in *Ziegler* adopted at [72] the non-exhaustive list of factors to consider when evaluating proportionality that had been set out by Lord Neuberger MR in *City of London Corporation v Samede* [2012] EWCA Civ 160 at [39]-[41]. Paraphrasing that content, those factors are:

(1) the extent to which the continuation of the protest would breach domestic law;

(2) the importance of the precise location to the protestors;

(3) the duration of the protest;

(4) the degree to which the protestors occupy the land;

(5) 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;

(6) whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of considerable breadth, depth and relevance'; and

(7) whether the protestors 'believed in the views that they were expressing'.

82. In the *Safe Access Zones Bill Reference* case, Lord Reed, giving the judgment of the Court, considered that the Divisional Court in *Ziegler* should- before resorting to the special interpretative duty imposed by section 3 of the HRA- have considered whether the established interpretation of section 137, as stated for example by Lord Irvine in *Jones*, would result in a breach of Convention rights: [23]. However, given that the question of the need to apply in the context of section 137 the proportionality test set out in *Ziegler* was not before the Court, Lord Reed made no specific comment on it: [26].

83. What he did address was the comment in *Ziegler* at [59] that "*[d]etermination of the proportionality of an interference with ECHR rights is a fact-sensitive enquiry which requires the evaluation of the circumstances in the individual case*". He stated that while this might be the useful position in a criminal trial of offences charged under section 137 where Article 9, 10 or 11 rights were engaged, if the section was interpreted as it was in *Ziegler*, that would not universally be the case: [28]-[29]. Questions of proportionality, particularly where they concerned the compatibility of a *rule or policy* with ECHR rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case: [29]. Further, it is possible for a piece of legislation to ensure that its application in individual circumstances will meet the proportionality requirements under the ECHR without any need for evaluation of the circumstances in the individual case: [34].

84. Therefore, when a defendant relies on Article 9, 10 or 11 in the defence of a protest-related defence, the Court should- if those articles are engaged- consider whether the ingredients of the defence themselves strike the proportionality balance: [55]. If it considers that they do not strike such a balance, the Court's duty under section 6 of the HRA is to consider whether there is a means by which the proportionality of a conviction can be ensured, whether through using the interpretative duty under section 3 in the case of construing the legislation creating a statutory offence or developing the common law where the offence arises at common law: [56]-[61].

85. In the present case, the Claimants accept, as explained above, that the requirements for public nuisance should be the same as those in section 137 of the Highways Act 1980. Therefore, on the face of it, the proportionality requirements set out in *Ziegler* would apply, and I consider that I should apply them given that Lord Reed made clear in *Safe Access Zones Bill Reference* that he was not specifically considering this point in the context of section 137.

86. The Claimants submit in relation to the injunction sought against persons unknown that it is not possible to apply the proportionality requirements under the ECHR to *specific individual* protestors because by definition the identity and circumstances of those individuals is not presently known. Rather at one should apply a proportionality test to the restrictions imposed by the draft order sought with future protests in mind. I accept that I should take the latter course.

87. As explained below, I consider that the order sought satisfies that test.

Right to access the public highway

88. Lord Atkin explained this right with characteristic succinctness in *Marshall v Blackpool Corporation* [1935] AC 16 at 22:

> "*The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so…whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access; just as the right of access is subject to the rights of the public and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway.*"

89. An interference with the right is actionable without proof of loss, and if an interference does cause a loss, then damages can be obtained.

90. Taking the last part of the extract from *Marshall* above, in my judgment the key question here is the qualification of the right of access by the rights of the public. In *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch), Morgan J considered at [107] the interaction of the adjoining landowner's right of access to the highway with the protestors' right to a reasonable use of the highway. He assumed in favour of the protestors that if they were carrying on a reasonable use of the highway which impacted on the rights of the claimants in that case to access the highway, that would not be an infringement of the right of access to the highway.

91. While Morgan J did not have to decide the point, because the claimants in that case put their case on the basis of public nuisance rather than the landowner's right to access the highway, in my judgment that is correct and I should take the same approach here. The rights of the public include the right to reasonable use of the highway. Therefore, applying the principles set out in *Marshall*, a reasonable use of the highway by members of the public will not constitute unlawful interference with the adjoining landowner's right to access the highway.

92. It was submitted by the Claimants that the decision of Julian Knowles J in *High Speed Two (HS2) Limited v Four Categories of Persons Unknown & Monaghan & Others* [2022] EWHC 2360 (KB) at [196] suggests that no balancing act is to be applied between the right to access the highway and the Article 10 and 11 rights of the defendants, because in a claim under this cause of action much, if not all, of the relevant protest is taking place on private land. I do not take Julian Knowles J to be going so far in [196]. Rather he simply put forward the fact that in the case before him much if not all of the protests had taken place on private land as being the first of three reasons why there was no unlawful interference with Articles 10 and 11 on the facts before him. Further, here, the Claimants rely on the obstruction of the highway, such as by protestors mounting and affixing themselves to vehicles on it, as future acts that would breach their right to access the highway, and that acts are not taking place on private land.

93. However, as set out below, I consider that the apprehended actions would amount to a violation of the Claimants' right to access the highway whether or not such a balancing act is to be applied. Therefore, I do not consider it necessary to consider further the question of whether such a balancing act needs to be applied.

Test for a precautionary injunction against named defendants

94. The test for a precautionary injunction against named defendants is as set out by Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 at [31], as applied in

Koninklijke Philips NV v Guandong Oppo Mobile Telecommunications Corp Ltd [2022] EWHC 1703 (Pat) (*Koninklijke*') and approved by the Court of Appeal in *London Borough of Barking and Dagenham & Ors v Persons Unknown & Ors* [2022] EWCA Civ 13 at [83]. That requires the following two questions to be asked and answered in the affirmative:

i) Is there a strong probability that unless restrained by injunction the defendant will act in breach of the claimant's rights?

ii) 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 in damages would be inadequate?

95. If those questions are answered in the affirmative, the Court will consider whether it is just and convenient to make the order as envisaged by section 37(1) of the Senior Courts Act 1981.

Test for an injunction against persons unknown

96. The Claimants submit that the test laid down in *Wolverhampton* has helpfully been summarised by Sir Anthony Mann in his recent decision in *Jockey Club Racecourses Limited v Persons Unknown* [2024] EWHC 1786 at [17]-[19], which also concerned Animal Rising. I agree and set out those paragraphs:

> "*17. That case [Wolverhampton] involved Travellers, but while that context informed some of the requirements that the court indicated should be fulfilled before an injunction is granted, most of its requirements are equally applicable to other types of cases such as protest cases like the present (of which there now a number):*
>
> > *"167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:*
> > *(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.*
> > *(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima*

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

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

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

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

18. Later in the judgment the court returned to procedural safeguards to give effect to those matters of principle, and set out the following procedural and other matters. I omit some points that are relevant to Traveller cases and which have no counterpart in this case, and adjust others by omitting specific Traveller references and by making the wording applicable to the present (and similar) cases.

i) Any applicant for an injunction against newcomers must satisfy the court by detailed evidence that there is a compelling justification for the order sought. There must be a strong possibility that a tort is to be committed and that that will cause real harm. The threat must be real and imminent. See paragraphs 188 and 218. "Imminent" in this context means "not premature" – Hooper v Rogers [1975] Ch 43 at 49E.

ii) The applicant must show that all reasonable alternatives to an injunction have been exhausted, including negotiation – paragraph 189.

iii) It must be demonstrated that the claimant has taken all other appropriate steps to control the wrong complained of – paragraph 189.

iv) If byelaws are available to control the behaviour complained of then consideration must be given to them as a relevant means of control in place of an injunction. However, the court seemed to consider that in an appropriate case it should be recognised that byelaws may not be an adequate means of control. See paragraphs 216 and 217.

v) There is a vital duty of full disclosure on the applicant, extending to "full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application." – paragraph 219. Although this is couched in terms of the local authority's obligations, that is because that was the party seeking the injunction in that case. In my view it plainly applies to any claimant seeking a newcomer injunction. It is a duty derived from normal without notice applications, of which a claim against newcomers is, by definition, one.

vi) The court made it clear that the evidence must therefore err on the side of caution, and the court, not the applicant should be the judge of relevance – paragraph 220.

vii) "The actual or intended respondents to the application must be identified as precisely as possible." – paragraph 221.

viii) The injunction must spell out clearly, and in everyday terms, the full extent of the acts it prohibits, and should extend no further than the minimum necessary to achieve its proper purpose – paragraph 222.

ix) There must be strict temporal and territorial limits – paragraph 225. The court doubted if more than a year would be justified in Traveller cases – paragraph 125 again. In my view that particular period does not necessarily apply in all cases, or in the present one, because they do not involve local authorities and Travellers.

x) Injunctions of this kind should be reviewed periodically – paragraph 225. "This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made."

xi) Where possible, the claimant must take reasonable steps to draw the application to the attention of those likely to be affected – paragraph 226.

xii) Effective notice of the order must be given, and the court must disclose to the court all steps intended to achieve that – paragraphs 230ff.

xiii) The order must contain a generous liberty to apply – paragraph 232.

xiv) The court will need to consider whether a cross-undertaking in damages is appropriate even though the application is not technically one for an interim injunction where such undertakings are generally required.

19. The court recognised that not all the general requirements laid down will be applicable in protester, as opposed to Traveller, cases. I have borne that in mind, and have, as I have indicated, omitted reference to some of the matters which do not seem to me to be likely to apply in protester cases."

97. As comes through clearly from the above extracts, an injunction against persons unknown, who I shall refer to as "newcomers" as in *Wolverhampton*, is a novel exercise of an equitable discretionary power and therefore its limits and requirements must be carefully articulated and observed.

Applying the law to the facts

Precautionary injunction against named defendants

98. In my judgment, there is a strong probability that unless restrained by an injunction the 40th Defendant will act in breach of the Claimants' rights, and it is just and convenient that an injunction be ordered in the terms applied for by the Claimants.

99. I shall:

(1) start with the question of whether there is a strong probability that the 40th defendant will be involved in action in the future against the Claimants if not restrained by injunction, then

(2) consider whether such action would be in breach of the Claimants' rights, and

(3) then consider whether it is just and convenient to grant an injunction.

100. The cumulative reasons why I consider that question (1) should be answered in the affirmative are as follows:

(a) The 40th Defendant was involved in the action against Arla on 8 September 2022.

(b) Further, she was willing to trespass on the Claimant's land to do so.

(c) On the basis of the video evidence before me, I consider that she was filming the incident for Animal Rebellion, including for example the damaging of HGV tyres, and infer that her involvement with their cause therefore did not end immediately at the end of the action on the 8th September 2022.

(d) She appears to me to have left the scene before she could be arrested. This is what the video evidence before me suggests and Ms Savage explains that it appears that she is the third protestor that the Hertfordshire Constabulary believe fled the scene. The other two were arrested in the days following the incident. Therefore, at present she has not faced any sanction that I am aware of for her past actions that would deter her from future action.

(e) The mission statement of Animal Rebellion stated that the acts in September 2022 were "*the beginning of a long term civil resistance project*". This ties in with their stated desire to bring about a transition from reliance on the dairy industry by 2025, which has not yet from their perspective been achieved.

(f) These views are plainly strongly held by those participating, and I have no reason to doubt that this includes the 40th Defendant.

(g) Arla, as producer of 40% of the milk in the UK, is an obvious target for Animal Rising.

(h) While there have not been direct acts against the Claimants since the September 2022 incidents, in my judgment there is a strong probability that this is because of the injunctions in place. Refusing to order a final injunction would immediately come to the notice of Animal Rising, who the Claimants' solicitors have been corresponding with over the consent orders, and therefore in my judgment there is a strong probability that this would be regarded as removing an important impediment to taking direct action against Arla. It is true that the September 2022 incidents occurred despite the injunction, but they were considerably smaller than one would have taken from the plan on the website in August 2022, so it appears to me very likely that the injunction had some deterrent effect.

101. I have considered specifically whether the absence of acts against Arla since September 2022 suggests that further incidents of direct action against Arla are unlikely, or at least means that there is not a strong probability of them in the event of me declining to grant the injunction.

102. However, I consider that the features above, taken in combination, suggest that there is a strong probability.

103. I do not consider that the change to the website shortly before the hearing affects this. It does not indicate a shift in the views of Animal Rising towards the dairy industry, one would not expect such a shift, and Animal Rising knew of the impending Court date at the time the website was changed so I am reluctant to regard it as indicating a significant shift in their intended plans. Further, the first route stated in the current version of the website for achieving change is "*[b]y generating a national conversation on the need to transform our food system with bold and impactful campaigns*", which wording seems to me to encompass direct action to disrupt the supply of dairy and food that is reliant on animals.

104. I have also taken into account in this regard that the Leeds Site has not been the subject of action to date.

105. I consider that these anticipated actions would be in breach of the Claimants' rights.

106. Some of the past action occurred in the Sites themselves, and therefore amounted to trespass, and I would expect that to be repeated in the future.

107. As far as public nuisance is concerned:

(1) The past acts deliberately obstructed the relevant parts of the highway to a significant degree in a way that was designed to, and did, disrupt the Claimants'

business, albeit temporarily, to a significant extent and caused them significant financial loss, together with affecting members of the public who needed or wished to use the highway and other surrounding roads that could be blocked through its obstruction. A good example of this is the blocking of College Road during the incident at the Aylesbury Site on 4 September, when protestors climbed aboard and occupied vehicles on the road. Therefore, Articles 10 and 11 aside, it would constitute a public nuisance and this is the type of action that would likely be repeated absent an injunction because it is part of disrupting the passage of vehicles to and from the Sites.

(2) I have carefully considered the factors set out in *Ziegler* to be taken into account when assessing proportionality, which I summarised at paragraph 81 above. Taking them in turn:

(a) Future protests of the same type would breach domestic law for the reasons given in relation to trespass, public nuisance and access to the highway set out in this section of my judgment.

(b) The location of the protests is important to the protestors, because their intended aim is to disrupt the supply of milk from the Sites and therefore the obvious location for their action is at and immediately outside the Sites.

(c) The protests were significant in duration, lasting in one case for 24 hours. Unlike in *Ziegler*, they were not a one-off one-hour occurrence, and one cannot expect future incidents to be.

(d) Future protests are likely to involve occupation of and climbing aboard vehicles on the highway.

(e) Their significant duration together with the other features of the action, caused significant financial harm to the Claimants by disrupting their supply of milk. Unlike in *Ziegler* there is not an alternative route of access: the Sites were and could again be completely blocked. Further, the protests are likely to block entire roads, as was the case at the Aylesbury Site in 2021, when the A41 was blocked for most of the 24 hour period, making the road impassable to all. Moreover, the road outside the Sites give immediate access to major roads, or are in close proximity to them, so the obstructions affect the public at large. The other obvious impact of successful action is that this could restrict the amount of milk on supermarket shelves for a period.

(f) The views giving rise to the protest do relate to important issues, namely climate change and animal welfare, both of which are prominent features of current public and political debate.

(g) The protestors plainly believe in their cause and are prepared to risk arrest to take such action.

(3) I also take into account the fact that the past actions, and likely future acts, go beyond attempts to persuade Arla of the correctness of Animal Rising's aims, into seeking to disrupt their business in a way that will assist in bringing about change in the dairy industry. Therefore, the action intends harm to Arla as a necessary

feature of its intended ends, and correspondingly an injunction leaves it open to carry out peaceful protest through acts like standing on the pavement with a placard, making noise or shouting their message loudly through a loud hailer. Rather the order prevents only real and significant harm caused by unlawful acts.

(4) Taken together, I consider that the factors in (2)(a), (c), (d) and (e) and (3) above mean that the past action and similar future action would constitute a public nuisance, and that this is consistent with the 40th Defendant's Article 10 and 11 rights. This was and would in the future be action intended to significantly disrupt Arla's business and the injunction is tailored to prevent that end while allowing future protests within those parameters.

108. I consider that the past actions and the anticipated future actions would also violate the Claimants' rights as adjoining landowners to access the highway. The Claimants were blocked from accessing the highway for a significant period and this would likely be the intended aim of future action. For the reasons set out in relation to public nuisance, in my judgment the Claimants' actions do not constitute a reasonable use of the highway so as to legitimately qualify on the facts the Claimants' rights to access the highway, and this is consistent with the 40th Defendant's Article 10 and 11 rights.

109. Turning to whether it is just and convenient to grant an injunction, I have taken into account the reasons set out in paragraph 107(4) above.

110. Further, future action would cause financial harm to Arla that it would be difficult to redress, given the difficulty in seeking and enforcing effective recompense from the protestors individually. Moreover, climbing onto structures and lorries or entering the highway to stop lorries poses a risk of physical harm to staff or the protestors. The Claimants have taken a number of steps to seek to mitigate the harm, such as investing in future security, but the serious risk of significant future financial loss and the above risk of physical harm remains.

111. Therefore, it would be difficult for the Claimants to undo after the fact harm suffered through future pieces of direct action.

112. For these reasons taken collectively, I consider it just and convenient to grant an injunction in the terms sought.

113. I have considered whether anything in section 12(2) or (3) of the HRA should cause me not to order an injunction. The Claimants properly put this point before me. Section 12 is engaged where the Court is considering whether to grant any relief which might affect the exercise of the ECHR right to freedom of expression. Section 12(2) provides that if the respondent is not present or represented, no such relief should be granted unless the Court is satisfied that the applicant has taken all practicable steps to notify the respondent, or that there are compelling reasons why the respondent should not be notified. Section 12(3) provides that no such relief is to be granted to restrain publication before trial unless the Court is satisfied that the applicant is likely to establish that publication should not be allowed. Taking section 12(2) first, I am satisfied that the applicant has done all practicable to notify the respondent, through trying to ascertain her identity and through the alternative service routes.

114. As for section 12(3), the order does not restrain the 40th Defendant *publishing* her views. Rather restricts *where* she may express her views. Therefore, as in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB), where Johnson J considered the limits of the concept of 'publication' in some detail at [66]-[76], it does not appear to me that section 12(3) is engaged. Further and in any case, (a) this is a final order against the 40th Defendant, so section 12(3) has no application for that reason too, and (b) in any case, in my judgment any interference with "publication" is proportionate and justified for the reasons set out in paragraph 107(4) above.

115. The order sought against the named Defendants is final, so in my judgment no further cross-undertaking in damages should be required.

Injunction against newcomers

116. I have considered carefully and applied the requirements in [167] of *Wolverhampton*, as expanded upon later in the judgment in the way summarised by Sir Anthony Mann in *Jockey Club.* The relevant newcomers in this case are those persons unknown within the classes set out in the description of the first to sixth defendants.

Compelling justification for the remedy

117. I have set out above the strong probability of the future disruption to their business absent an injunction, coupled with the effects on others set out above, from future unlawful acts of trespass, public nuisance and interference with the Claimants' right of access to the highway. As Sir Anthony Mann explained in *Jockey Club* at [18], the threat must be real and imminent, and imminent means in this context "*not premature*" rather than immediate. This chimes with the approach of Julian Knowles J in his *HS2* decision at [176]-[177]. As he explained at [176], "*[a]s 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 am satisfied for the reasons set out above that there is a real and imminent risk if I do not grant an injunction of further direct action occurring.

118. There are a number of reasons why the Claimants have sought an order against persons unknown rather than limit the order to named or otherwise specifically identified defendants, and in my judgment they are compelling ones:

(1) It has not been possible to identify all protestors who might undertake future action.

(2) The evidence before me is that the Animal Rising site continues to recruit new members.

(3) It is an organisation whose membership fluctuates.

(4) While the Claimants known the identity of the group, they do not know the identity of all individuals involved with it.

(5) The Claimants do not have confidence that all those who participated in the earlier acts have been arrested.

119. Similarly, given the difficulty in identifying the membership of Animal Rising, its fluctuating membership and the presence of like-minded protest groups, in my

judgment there is also a compelling reason not to limit the definition of persons unknown to those who are members of Animal Rising.

120. As explained above, the Claimants have put in place significant security measures at their Sites, and sought to improve them after the September 2022 incidents. It is not realistic to suppose these will completely prevent future action, and nor would sensible levels of policing or the use of byelaws.

121. The harm that could be caused by future unlawful acts is serious, consistent with the intended purpose of such action being to significantly disrupt the supply of dairy products.

122. Taking these reasons for relief together with the limits of the restrictions imposed by the injunction explained above, in my judgment there is a compelling justification for the remedy.

123. As in relation to the injunction against identified persons, I have considered whether anything in section 12(2) or (3) of the HRA should cause me not to order such an injunction. In my judgment, there are compelling reasons why the persons unknown cannot be notified before the order is made before the alternative service of the previous documents, such as by posting on the Claimants' site or by notices put at the perimeter of the Sites, as their identity is not known. In any event they will be notified insofar as is practicable through the alternative service routes after the order is made. In my judgment, s.12(3) is not violated for similar reasons to those set out in paragraph 111 above. The order does not restrain what can be published, so section 12(3) is not engaged, and even if it is, the acts apprehended are unlawful and interfere significantly with the rights at others, so I am satisfied that the Claimants are likely to obtain the relief sought at a final hearing (if there was one).

Full and frank disclosure

124. The Claimants have complied with this duty, including drawing to my attention a number of points that may be taken against their position. I have dealt above with the update to the Animal Rising website.

Evidence must err on the side of caution

125. Further, the evidence has satisfied this requirement, and as far I can see has been careful not to overstate the position.

Identifying the respondents to the application as precisely as possible

126. In my judgment the order sought does so. The means of identification are in the same form as the orders previously granted by Bacon J and Fancourt J. As summarised at paragraph 40 above, the qualifying conditions for falling into the category of respondents are clear and precise, and focus on carrying out particular acts of interference with the Sites and access to them, such as affixing themselves or any items to any of the relevant roads for the purpose of disrupting vehicle access to the Sites and protesting, to take one example.

Is the injunction clear in its terms and confined to the minimum necessary to achieve its proper purpose?

127. The Claimants seek orders in the same substantive form as granted previously, subject to the temporal limits set out below. Those orders were, and the present order sought is, clearly drafted. The Claimants have not gone further, despite the breaches of the order, and the order sought allows for peaceful protest in the manner set out in paragraph 107(3) above. Rather it focuses on particular acts that would disrupt the Claimants' operations at the Sites. Therefore, I am satisfied that it does not go beyond the minimum necessary to achieve its purpose.

Is there a strict temporal and territorial limit?

128. As in the *Jockey Club* case, I agree that the one year period that the Supreme Court thought prima facie appropriate in Travellers cases is too short to deal with a campaign such as that of the animal rights activists. That can readily be seen from the fact that incidents have already occurred in 2020, 2021 and 2022. However, given those annual events in my judgment an annual review is more appropriate in case the position changes in the interim, as has been sought by the Claimants, and as was ordered in the *Jockey Club* case. The annual review will allow a continued assessment of whether circumstances have changed so as make the continuation of the injunction appropriate and the five year maximum adds an appropriate end-point. In my judgment, it would not be appropriate to require the Claimants to incur the costs of applying each year for a new or renewed injunction. Rather the review should be of whether the position has developed since the last review.

129. The territorial extent of the order is clearly set out in the maps and plans annexed to it. It is broadly limited to the roads immediately surrounding the sites, and the Claimants have not sought to include the larger roads such as the A41 to which they lead, and some of which were blocked by the earlier actions. Similarly, they have not sought to include their other dairy-related sites beyond the Sites, despite the breaches of the original injunctions order made. Therefore, I am satisfied that there is a strict territorial limit.

Have reasonable steps been taken to bring the application to the attention of those likely affected?

130. In my judgment, it has. The documents in the claim, including notice of this hearing, have been served on the named defendants and persons unknown in accordance with the alternative service orders made. The methods of service have included e-mail, posting on the Claimants' social media pages and notices at the Sites.

Is the proposed notice of the Order likely to be effective?

131. In my judgment it is. There are a number of routes specified in the alternative service provisions of the orders granted to date by Bacon J and Fancourt J, which in my view remain appropriate, including notices at the premises and e-mail.

Have the Claimants provided a generous liberty to apply clause?

132. In my judgment, they have, because the order sought provides for the ability to apply to vary or discharge the Order on 48 hours' notice.

Should a cross-undertaking be required?

133. Given that the order only prohibits acts that are in any event unlawful or highly likely to be unlawful, in my judgment as in *Jockey Club* it is not necessary for the Claimants to provide a cross-undertaking in respect of the injunction against newcomers.

Conclusion

134. I therefore grant the orders sought.

Case No: KB-2024-002361
NCN Number: [2024] EWHC 2224 (KB)

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

Thursday, 25 July 2024

BEFORE:

MR JUSTICE RITCHIE

BETWEEN:

DRAX POWER LTD

Claimant

- and -

PERSONS UNKNOWN

Defendants

Tim Morshead KC instructed by Walker Morris LLP appeared for the Claimant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. This is an application dated 23 July 2024, made ex parte against persons unknown, for an injunction to protect a power station situated within England and for directions relating to alternative service because the Defendants are persons unknown. The claim form was issued on 23 July 2024 to restrain trespass and nuisance on the Claimant's land and land close to it. The Particulars of Claim issued with the claim form set out four classes of unknown persons. All classes were connected with "Reclaim the Power", a protest organisation, or "Axe Drax"", a protest organisation, or other environmental campaigns. The first class of unknown person was a person entering or occupying the land covered by the injunction. I will define that land by reference to the Particulars of Claim in a minute. The second was a class of persons assembling on the verge or footway of two roads near the power station or the footways around and through the power station. The third class of persons was those obstructing or attempting to obstruct access to or egress from the power station by foot, vehicle or rail by the Claimant, their agents, employees, contractors or licensees. The fourth was a class of persons flying drones above the power station.

The pleading

2. It was pleaded that the Claimant owns the power station and I have been provided with a helpful map to show that they own quite a lot of land around the power station, the boundaries of which are well beyond the boundaries of the proposed injunction. They have leased out a substation within the boundaries of the power station and they also own a pumping station some distance from the power station. It was pleaded that the level of risk to the land owned by the Claimant, on which the power station and the pumping station sit, had risen in the last few months. It was pleaded that the Claimant has concerns that protests on the footpaths around the power station may mask fence penetration by protesters, and the Claimant seeks a buffer zone encompassing those footpaths adjoining the power station. Indeed, one footpath goes through the precincts of the power station, albeit fenced off.
3. In relation to the rail infrastructure, although it was pleaded that it was private and on the Claimant's land, it was asserted that the Claimant fears that obstruction would interfere with their operations. In relation to the highways nearby, it was feared that obstruction of access and egress would likewise interfere with their operations, and in relation to drones it was pleaded that the Claimant has concerns that use of drones by protesters would be to scope out how to disrupt by direct action or by dropping things onto the

power station and its equipment. The threats to the Claimant's power station were pleaded. The first organisation was “Reclaim the Power”, RTP for short, who have advertised the setting up of a mass direct action camp targeting the Drax Power Station "to crash Drax's profits". It is pleaded that the action is scheduled to occur between 8th and 13th August 2024, and that the RTP website threatens or promises direct action. The causes of action pleaded against the Defendants are trespass and nuisance. It is pleaded that the protesters have no consent from the Claimant to enter the power station or the pumping station or the private railway line.

4. In relation to third-party land, which is identified as the lease to the national power substation within the perimeter of the power station, the footpaths around the power station and alongside the highway that runs along the east side of the power station, it was pleaded that it would be necessary and proportionate to give effect to the injunction covering the Claimant’s land for the injunction to cover that third-party land by way of a buffer zone. It was pleaded that a specific area of land adjoining the power station and a public highway had been set up by the Claimant with agreement by the local police for permitted protest between 6th and 15th August 2024. In relation to potential defences, it is pleaded that no persons unknown have the right to enter the Claimant’s land and in relation to public land, it is pleaded that the injunction covering the public footpaths adjoining the power station is a necessary and proportionate intrusion on the public's right of passage, to protect the validity and efficacy of the injunction.

The evidence

5. In support of the claim and the application, there are two witness statements, the first from Martin Sloan, dated 23 July 2024, and the second from Nicholas McQueen, dated 23 July 2024. Martin Sloan is the security director at the Drax power station. He gives evidence that coal ceased to be used in March 2023. Nowadays this power station generates four per cent of the UK's electricity and eight per cent of the UK's renewable energy. Mr Sloan asserts that any interruption may threaten the continuity of power supply in the United Kingdom. He sets out that Drax has annual revenue of £6,790 million and that the fuel currently used in the power station is old wood and agricultural products delivered by road and rail, daily.

6. Turning to the history of direct action, by which I understand him to mean physical action

interfering with the Claimant's land, equipment, staff or business, he refers to activities in August 2006 where a camp was set up aiming for mass trespass to close the power station. An interim injunction was obtained against named and unnamed Defendants covering the power station and paths adjoining it. 600 marchers attended and 38 were arrested for criminal damage, aggravated trespass and assault on the police. The next historical direct action listed by Mr Sloan was taken by a group called "Earth First", who hijacked a train carrying coal to the power station for 16 hours, causing delays on network rail. An injunction was obtained. The next direct action evidenced by Mr Sloan was in July 2019, when RTP invaded a coal mine involving mass trespass. They halted operations there. I should say that it is not suggested in the statement that the Claimant owned the coal mine. The next direct action was in July 2019, so the same month, and involved protesters chaining themselves to railings in central London. They thought the building outside which the railings were situated was the headquarters of the Claimant. However, they were mistaken because it was the wrong building. In addition RTP climbed upon and occupied a crane at Keadby 2 Gas Power Station in Lincolnshire, stopping construction for 15 hours and they also blockaded the entrance. Mr Sloan set out that on 12 November 2021 "Axe Drax" put on their website that the disruption of the Claimant company was one of their guiding objectives. Karen Wildin, of Extinction Rebellion, in that month climbed onto a train carrying biomass to the power station. She was subsequently convicted and fined £3,000. Five months later, on 27 April 2022, "Axe Drax" carried out a direct-action attack by painting orange paint on the Government Department of Energy building in London. Coming forwards two years in April 2024, "Axe Drax" disrupted the AGM of the Claimant, crowding the entrances with protesters and banners.

7. In relation to his assertion that there is a real and immediate threat, Mr Sloan gave evidence that there is a planned protest camp for 8th to 13th August 2024 near the power station and that RTP and "Axe Drax" had issued open invitations, on their websites, to protesters to attend the camp. They did not then and have not now announced the location. Mr Sloan gave his opinion that he considered it likely that the protesters would commit direct action before 8th August 2024. He relied upon information talks set up and provided by RTP which took place on 24 February, 1 June and 29 June 2024 around the country, announcing blockades and occupations of the infrastructure and supply chains of the Claimant and the setting up of an action-focused camp. In addition, on the

websites of these two organisations, they proudly boast that they make interventions with their bodies. This is so stated in one of their principles documents. Further, a video was issued on 20 April 2024, aiming to stop the biomass power station, showing videos of trespass upon a cooling tower and trespassing upon a delivery lorry.

8. Mr Sloan set out his concerns, which he asserted were real, of protesters from the camp cutting fences and locking on and hiding their activities of cutting fences by assembling on the footpaths adjoining the power station and also by blocking access by road and rail. He set out six named persons associated with "Axe Drax", who were Karen Wildin, Meredith Dickinson, Joseph Irwin, Diane Warne, Fergus Eakin and Molly Griffiths-Jones. Mr Sloan had received police information that drones are used to assess where security is on site with a view to assisting direct action and to dropping things on the site.

9. In relation to the potential harm, Mr Sloan set out that there are a lot of moving parts in a power station, including moving vehicles and rail vehicles, which would cause a risk to staff and protesters if interfered with. He also set out PPE areas where personal protective equipment is required to protect staff and visitors, which no doubt protesters would not wear. He informed the Court that there are large volumes of oil and diesel fuel stored on the site, which would be dangerous if interfered with. He stated that the cooling water system and overhead power cables (carrying 400,000 volts) would be a source of danger to protesters and staff if interfered with and mentioned that the biomass domes contain nitrogen, which cannot be breathed by human beings safely. He also pointed out risk of climbing onto equipment and of falling off it. He set out the disruption that would be caused if supply was interfered with and the potential environmental damage caused by the release of noxious gases. He set out that the financial implications of having to stop generation of power if protesters invaded certain sensitive areas would be huge. He set out the Claimant's measures to protect themselves, which involve mainly high-specification fencing, gatehouses and security around their private railway. He informed the Court that British Transport Police had asked the Claimant to extend the requested injunction that they might obtain along the line towards or out of the power station. He stated that to self-protect, the Claimant would close the general permission for use, by the public, of the orange part of the pathway to the South and West of the power station between 6th and 15th August, and he gave his opinion that there is a compelling need for the injunction because of previous targeting by direct action;

announcements of the protest camp focused on direct action; protesters willing to break the criminal law; injunctions being effective deterrents; damages not being an adequate remedy: because of the danger from a health and safety perspective to staff; disruption of national power supply; harm to the environment; financial losses and protestors being unable to pay damages. There are many exhibits to his witness statement, which I have read and rely upon, but are too numerous to list in this ex-tempore judgment.

10. The second witness, Nicholas McQueen, is a partner in Walker Morris LLP. He describes the geographical area of the injunction shown in plans 1 and 2 and specifically that the land shaded blue is within the power station and that the land shaded red is adjoining it but within the buffer zone that the Claimant sought to include in the scope of the injunction to protect attacks directly into the power station through the fencing.

11. He set out further evidence about RTP, which he asserted was formed in 2012 and had carried out historical actions by occupation of West Burton power station. He set out evidence about "Axe Drax", who expressly state on their publications that they oppose Drax's operations and aim to disrupt their activities, which they regard as a crucial part of their purpose. On the website, "Axe Drax" assert they have raised 99 per cent of the crowd funding necessary for their direct action and on 4 April 2024 boasted that they will take mass direct action against the Claimant; on 10 May 2024 boasted that they consistently pull off radical direct action and on 10 July 2024 stated that the camp at Drax will take direct action to "crash Drax's profits". I stop here to say that there is no pleading by the Claimant that there has been or will be a conspiracy to interfere with their valid business activities, so no economic torts have been pleaded, therefore I restrict my approach to this case to consideration of trespass and nuisance.

12. As to previous injunctions Mr McQueen sets out eight sets of proceedings for injunctions to protect fossil fuel extractors and processers, namely Valero, Esso, Exxon, Essar, Stanlow, Infranorth, Navigator, Exolum and Shell. He asserted that injunctions granted in the past protecting the commercial premises of these organisations were effective and he was unaware of any breaches. He also set out applications for injunctions by North Warwickshire and Thurrock Councils and by HS2, which likewise he stated were effective. I should say that this evidence clashes with my own judicial knowledge that in HS2 approximately eight protesters breached the injunctions, and I imprisoned two or

three of them.

13. Continuing, the names of the potential future tortfeasors are not known to Drax, according to Mr McQueen, but he did set out that there are individuals publicly associated with "Axe Drax" who would be notified of the injunction, if obtained. He asserted that it was appropriate to make the application ex parte because of the Claimant's tipping-off concern, which is a concern that if the organisations are notified of the application, they would move forwards their direct action to defeat any injunction. He also set out, by way of hearsay, his worries feeding off the back of the concerns of the Claimant's witness. He asserted that full and frank disclosure had taken place and fulfilled that in part by referring to the *Public Order Act 2023*, section 7. He asserted that within his knowledge the *Public Order Act* had not been a deterrent so far, but I take that with a pinch of salt because one solicitor cannot be capable of a 360 view of what protesters up and down the country are doing or have decided to do as a result of the passing of the 2023 Act. He then referred to events to support that assertion, which occurred in relation to Valero in 2022, which are not relevant because they occurred before the passing of the *Public Order Act*. He referred to Just Stop Oil events in September 2023, which involved a publication on social media by a member of Just Stop Oil accepting that injunctions make protests impossible. He opined that criminal charges only arise after the event and would take a long time to go to trial and so are not as much of a deterrent as the Claimant would hope for. He also opined that the maximum punishment for some offences of interfering with the national infrastructure is only one year of imprisonment and he referred to a Daily Mail report that JSO protesters actively compete for the title of protestor with the most arrests. That article was published in October 2023.

14. In relation to alternative service, he suggested that his solicitors firm's website should be used. I shall return to that in a minute. I do not consider that alternative service or notification should take place at a solicitors firm's website. It seems to me that that responsibility is carried by the party, namely the Claimant and it should be on Drax Enterprises' website, not a solicitors firm's website. He also set out a suggestion that notices on stakes should be posted around the power station and emails should be sent to the two protest organisations.

The Law

15. I turn to the law in relation to the granting of ex parte injunctions. The Civil Procedure Rules at Rule 25.1 confirm the Court's power to grant interim injunctions or even quasi-interim or quasi-final injunctions, depending on how one wishes to term injunctions against persons unknown and the *Supreme Courts Act 1981* provides that power.

16. Turning to the case law, I will summarise firstly the general case law and then turn to the more specific case law in relation to persons unknown. I will start the story, if I may, with the unlimited power and where that has been identified. It was nicely summarised in *Broad Idea International Ltd v Convoy Collateral Ltd* [1991] PC 24 as being an equitable power exercised where it is just and equitable so to do, Per Lord Leggatt. Despite this being a Privy Council authority, it is a ruling that is more than just persuasive, as was confirmed by the Court of Appeal in *Re G* [2022] EWCA Civ 1312 at paragraphs 54 through 58 and 61. Injunctions are usually only ordered if they accord with an existing practice, as was noted in *Wolverhampton v London Gypsies* [2023] UKSC 47.

17. So, what is the existing practice that has built up and how is it relevant to this application for an injunction against PUs? The classic test was set out in *American Cyanamid v Ethicon* [1975] UKHL 1. It had seven sub-factors which included: whether there is a serious question to be tried, thereby excluding frivolous questions; noting that interim injunctions are generally temporary; taking into account that where there are contested facts at the interim stage the facts are generally assumed in the applicant's favour; imposing a balance of convenience test (although what I put in parenthesis here, as I shall explain later, that is not the test in persons unknown cases); that balance of convenience test involving balancing the injustice or harm caused by (a) granting or (b) not granting; then for quia timet injunctions, which ae injunctions where the Claimant fears something will happen which will cause harm, the Claimant must prove a real and immediate risk that unless restrained, the Defendants will cause damage by tortious or criminal activity. The reference for this last test historically is *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 and the judgment of Smith J. The next factor that is taken into account is that a Claimant should put before the Court evidence to show that damages would not be an adequate remedy and hence the injunction is required. Finally, cases where the injunction will affect the potential Defendants' freedom of speech or assembly, contained

in Articles 10 or Articles 11 of the *European Convention on Human Rights* [ECHR] require the Court to assess the necessity and proportionality of the injunction sought before considering granting it where it affects those matters.

18. The jurisdiction in relation to persons unknown has developed more recently and could be described in the following ways. Persons unknown injunctions appear neither to be interim nor final. I call them quasi-final. They are, by definition, against people who the Claimant cannot identify and so, because they cannot be identified, they cannot be served, or not served in traditional ways. Such injunctions are often made without prior notice but by subsequent advertisement, publication and hence notice. The importance of considering the ECHR rights is greatly increased because the persons unknown [PU] are not before the Court, and it is recognised that PU injunctions based on a quia timet (what we fear) basis are akin to a form of enforcement of established rights rather than enforcement of rights pending the trial of asserted but disputed rights. So, they are less designed to enhance or protect Court proceedings and more designed to protect established, indisputable rights.

19. Protester or PU injunctions were considered in *Ineos v Persons Unknown* [2019] EWCA Civ 515, and Longmore LJ set out six rough requirements for them. The first was there had to be a real imminent risk of tort. The second was that it had to be impossible to name the PUs. That is in effect inherent within the title "injunctions against PUs", but it has within it the requirement that, if it is possible to name Defendants then they should be named. The third is that the Court should be alive to construct or require effective after the event notice of the injunction, and I shall come back to that in a bit. The fourth is that the injunction must be in clear terms (that means non-legal terms) and must correspond to the torts claimed. The fifth is that there must be clear geographical and temporal limits, and the sixth must be that the prohibition wording should be non-legal, and that folds neatly into the fourth.

20. Feeding on that, in 2020 the Court of Appeal in *Cuadrilla v Persons Unknown* [2020] EWCA Civ 9, considered PU injunctions and Leggatt LJ reinforced the need for clear terms in the wording of the injunction and that the boundaries of the injunction should be carefully defined and considered if they impinged on lawful conduct. Specifically, at paragraph 50, Leggatt LJ gave some guidance that lawful conduct may be affected by

such an injunction protecting established rights but only if necessary to afford effective protection to the core injunction to restrain the unlawful conduct. What is and what is not necessary to provide effective protection has not been well or deeply examined by the Courts since 2020. It is something I am going to think about a little in this judgment.

21. I also take into account the following cases: *Shell v Persons Unknown* [2022] EWHC 1215 (QB); *DPP v Cuciurean* [2022] EWHC 736 (Admin); *Wolverhampton v London Gypsies* [2023] UKSC 47; and my own judgment in *Valero v Persons Unknown* [2024] EWHC 134 (KB) at paragraph 58 and the 15 factors set out therein. I wish to highlight one of those factors here before I turn to considering them. That is the fact that the third-party land which impinges on the factor set out by Longmore LJ and was considered by Leggatt LJ in relation to the justification for an injunction seeping over into prohibiting or interfering with lawful activity. Injunctions which impinge directly on Article 10 and Article 11 rights, raise a sensitive area which I remind myself I must be alive to in such applications. It is difficult, I have got to say, when examining this area, to do so in the absence of somebody representing the unknown persons. The Court is always assisted by at least two advocates, one for the Claimant and one for the Defendant, and so it is an onerous task for the Claimant's advocate to predict and argue against his own client, but Mr Morshead has fulfilled that with his usual elegance and professionalism. Even in discussion it is quite tricky to know the boundaries of that. For instance, in this case I do not know who uses the public footpath on the East side of the power station and the public footpaths, one of which is permissive and the other of which is a right of way, on the West side of the power station. It could be twitchers (bird watchers), it could be dog walkers, it could be running clubs, it could be a wide range of members of the public, and I do not know whose rights might be interfered with by any injunction that is granted, and it is for that reason that I am going to look very carefully at the wording of the injunction, if I permit it to cover these public areas, such that no person will be interfered with inappropriately or disproportionately. I take into account that members of the public who carry out normal, lawful activities do not want to come to Court to review or set aside an injunction that happens by chance to have prevented them doing something which is perfectly lawful. It is easy for lawyers to say that they can and should, but it is difficult for members of the public actually to do it. They have their lives to lead, and they may not be well-funded enough to want to do it.

Ex Parte

22. In any event, coming to the factors in this case, firstly I do consider that this ex parte application is justified within the rules governing the making ex parte applications. I am going to explain later that I consider there is a real imminent threat of direct action which could have very substantial consequences and which has been publicised. I consider that persons unknown are likely to answer the call and take direct action soon, very soon, at the Claimant's power station and I consider that the fear of tipping off these organisations by giving notification to them so that they could have attended, is a real fear. It would be so much better, in my judgment, if these organisations could publicise that, were their targets to wish to obtain injunctions, they wish to know and that they would undertake not to take any direct action until the applications had been heard. They would then have the right to come and make their submissions and they might succeed in them, but they do not and they have not done so. Instead, they have made threats in this case. Those threats imply a desire to get round criminal law and to crash the profits of the Claimant and to do that through trespass and nuisance. So I am satisfied that the ex-parte application is justified.

Cause of action

23. Secondly, as to the causes of action pleaded, they are trespass and nuisance, which are well known in tort. The ownership of the land has been proven to my satisfaction and this criteria is therefore satisfied.

Full and Frank

24. Thirdly, as to full and frank disclosure, I consider that the Claimant have done the best they can to set out the alternative remedies available to them, and I will come to those under compelling justification. They have also satisfied the need to provide their own self-protection mechanisms through CCTV, which I shall come to under compelling justification. They have made reasonable submissions on the *Public Order Act* alternative remedies, which I shall come to under compelling justification. I also consider that they have done their best to disclose to me matters which occurred in Parliament in 2006 and subsequently which could be seen as contrary to their own interests because they argued in favour of a new criminal law to protect them so that they did not have to bring actions for injunctions, and I did think carefully about whether, in view of that, I should say, well, this Claimant should rely on the criminal law. There

may come a time in the next few years, as the *Public Order Act 2023* settles in and the effects of criminal sentencing are acknowledged by protesters, that full and frank disclosure will show that there is no compelling justification for an injunction, but I do not think that tipping point has been reached on the evidence before me.

Evidence

25. I have looked at the fourth factor, the evidence to prove the claim, the ownership and the history of direct action and the quia timet threat. I am satisfied on ownership and I will come to the compelling justification to deal with the direct-action history and the threat later.

No realistic defence

26. As for the "no realistic defence" ground, I do not consider that any of the protesters have a realistic defence in relation to the Claimant's land, which interestingly is far larger than that over which they seek an injunction, and they have carefully restrained themselves to a smaller area for the injunction geographically, being within their power station boundaries and the pumping station boundary, with a small buffer zone around the outside. As for the buffer zone, I do not consider that the protesters have much of a realistic defence, because their stated aim is not to walk up and down the pavement with banners, avoiding direct action, which would probably be lawful, but is to camp on an unknown area and take direct action, which by definition is unlawful, and I do not consider that they have a realistic defence to unlawful acts, namely torts or trespass and nuisance, and, worse, no defence to criminal damage of the Claimant's fencing or any equipment or matter inside the boundaries of the power station or the pumping station.

Compelling justification

27. Factor six, compelling justification: as I have set out before, this is far trickier to prove than balance of convenience, for a Claimant. The balance is against granting the injunction unless there is a compelling reason. I have set out the evidence of the history of direct action by various protest groups, which goes back a long way to 2006, when the power station was invaded. Also I have set out the serious direct threats of direct action by these two organisations, which are now only three weeks away. I have taken into account that the Claimant has set up a specific protest zone marked out for the protesters, near to the power station, which they can occupy to carry out their lawful protests.

28. I have considered section 7 of the *Public Order Act 2023* and the other sections, which provide new criminal law protection and is being put into practice by the police who, for instance, have arrested the organisers of the M25 protests and have arrested those who intended to protest at airports. I am as yet unable to say how much of a deterrent effect that Act has had on future protesters. Certainly, it has not prevented protesters from threatening direct action at the Claimant's power station or at airports or at oil terminals, and so it is difficult to judge whether that, as an alternative remedy to an injunction, makes the need for an injunction uncompelling. What is for sure is that the criminal law does not provide the evidenced prospective protection that injunctions have provided over the last ten years or so. Although the evidence before me is a bit slim, namely one quote from Just Stop Oil, it is a bit wider or stronger when one looks at the paucity of applications for committal for contempt of PU injunctions. I say paucity because there have been some.

29. I consider that the CCTV and self-guarding which the Claimant has put in place is useful but it has its limits. The Claimant would need a large number of protective security guards, who could go out and investigate assemblies on the footpaths around the power station, to see whether the people in between the CCTV camera and the dark area behind were using bolt cutters to get through fences, and I am not sure that that is practical, nor is it a full proof protection. What the CCTV does is raise an alarm, but whether it provides protection in this case for the one week when the protesters are likely to be in camp and starting their direct action in groups, is unknown, particularly if the protesters carry out false moves or decoy moves. Thus, I have come to the conclusion that the alternative remedies are not sufficient to provide adequate protection for the threats. I consider that there is a compelling justification for injunctive protection for the power station the workers in the power station, the suppliers to the power station and the railways and lorry drivers who go in and out of the power station and the licensees.

Damages adequacy

30. I then come to the question of whether the damages are an adequate remedy. I have got to look at the harm which could be caused at the power station. This is set out well in evidence by Mr Sloan. I am concerned about the risk of explosion. I am concerned about the risk of stopping electricity production. I am concerned about the risk of stopping biomass being delivered to the power station so that the power station does not have the

fuel necessary to create electricity. I am concerned about deadly gas. I am concerned about traffic accidents and climbing onto vehicles stuffed with biomass and/or explosive oil or diesel. I am concerned about the protesters climbing water towers or breaking into electricity substations, which are dangerous places. This sort of harm, not only to the protesters but also to the staff, is not properly compensatable just by money. Human beings would much rather keep their facial skin, hands, arms, legs or ability to do sport or live family life, than have a lump sum of money given to them, having lost those matters. Secondly, there is no indication that the crowdfunding for the camp, which is publicised at £5,100, has had a part set aside to provide compensation to anyone injured or disadvantaged by the direct action. In addition, as yet, there is no historic way of justifying the assertion that unknown persons will have sufficient money to pay for the damage that they intend to cause because they are unknown persons. So, it seems to me, not only would damages not be an adequate remedy but there would not be any adequate damages.

Clear terms

31. Coming then to the terms of the injunction, I am going to deal with those with counsel if I grant the injunction, but I am going to ensure that they are absolutely clear and simple and are tied to the trespass and nuisance cause of action. I am going to make sure for the next factor that the prohibitions match the claim. I am going to make sure for the next factor that the geographical boundaries are absolutely clear in relation to the Claimant's land and any third-party land covered.

ECHR and other lawful rights

32. I should now then deal with the third-party land at the buffer zone. I was troubled by the whole idea of having a buffer zone, because it seems to me to be the thin end of the wedge and might lead to application creep covering more and more public land, but the fact here is all this land is owned by the Claimant except for the pavement that runs along the side of the road on the East side of the power station, so in fact it is mainly mission creep in relation to the Claimant’s own land and it only affects, firstly, a permissive footpath, which the Claimant is going to withdraw permission from for a week or two, and then a right-of-way footpath, which leads only around the North and the West side of the power station . Also, as I have said, it covers a verge and pavement on the East side of the power station. I do consider that to make the injunction (which I intend to

grant because there is compelling justification for it) effective, it is necessary to keep the protesters away from a small piece of land all around the fence, and that is delineated by the red shading on plans one and two. I think that is necessary. I think it is proportionate within paragraph 50 of *Cuadrilla.* I do not think it is unnecessary or disproportionate, and it seems to me, on the evidence, that the Claimant has thought carefully about keeping matters proportionate when asking for the buffer zone. I do consider that it is a sensible, proportionate and reasonable addition to the scope of the injunction

Notification

33. Coming to notification and service, I consider that the need for past service can be dispensed with in this case, because it is a bit of a fiction saying that knowing that the persons unknown has not been served, we will pretend that they have been served by giving them notification in arrears. It seems to me the more straightforward way is to dispense with service but to ensure tight notification and publication provisions after the order is made. Coming then to what is proposed, I have already trailed that I do not consider that the solicitors' website is the right place for notification. It should be made public via the Judicial Press Office website via the Judicial Press Office, via the Claimant's website, by notification to the two protest organisations and by stakes in the ground around the power station.

END

This transcript has been approved by the judge

Neutral Citation Number: [2024] EWHC 2254 (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: 6 September 2024

Before :

HHJ Emma Kelly sitting as a Judge of the High Court

- -

Between :

NORTH WARWICKSHIRE BOROUGH COUNCIL	**Claimant**
- and –	
THE DEFENDANTS LISTED AT SCHEDULE A TO THIS JUDGMENT	**Defendants**

- -
- -

Mr Jonathan Manning and Ms Charlotte Crocombe (instructed by **North Warwickshire Borough Council, Legal Services**) for the **Claimant.**

Ms Alison Lee (8th Defendant), **Ms Joanna Hindley** (78th Defendant) and **Ms Chloe Naldrett** (115th Defendant) in person and who participated in the hearing.

Mr Timothy Hewes (4th Defendant), **Mr Stephen Pritchard** (9th Defendant), **Mr Paul Raithby** (11th Defendant), **Mr Marcus Bailie** (25th Defendant), **Mr David Robert Barkshire** (32nd Defendant), **Ms Molly Berry** (33rd Defendant), **Ms Kate Bramfitt** (37th Defendant), **Ms Zoe Cohen** (49th Defendant), **Ms Ruth Jarman** (84th Defendant), **Mr Charles Laurie** (91st Defendant), **Ms Victoria Lindsell** (93rd Defendant), **Mr Christian Murray-Leslie** (113th Defendant), **Ms Stephanie Pride** (125th Defendant), **Ms Vivienne Shah** (135th Defendant), **Ms Sarah Webb** (150th Defendant) in person but who observed the hearing only.

Ms Caroline Cattermole (46th Defendant), **Ms Diana Martin** (98th Defendant), **Mr Nicolas Onley** (121st Defendant) and **Mr Daniel Shaw** (137th Defendant) in person by remote link but who observed the hearing only.

Hearing dates: 11-12 June 2024.
Judgment handed down: 6 September 2024

- -

APPROVED JUDGMENT

HHJ Emma Kelly:

Introduction

1. This is a claim for an injunction to restrict protests inside and in the locality of an inland oil terminal known as Kingsbury Oil Terminal ("the Terminal") in Kingsbury, Warwickshire. The claim is brought by North Warwickshire Borough Council ("the Council"). The Terminal is situated within the geographical area for which the Council has responsibility.

2. The claim arises from protest activities undertaken at and around the Terminal by individuals associated with the action group known as Just Stop Oil. Just Stop Oil is a civil resistance group whose aims are to end all new licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The named defendants are individuals said to have engaged in protest activities at the Terminal. The Council also pursues four categories of persons unknown defendants.

Background

3. From around 31 March 2022 to 10 April 2022 there were a series of protests at the Terminal by individuals associated with Just Stop Oil. I shall address the details of those protests in due course but they included both trespass onto the Terminal site and protests on land adjacent to the Terminal, including on the public highway.

4. In response to the protests, on 13 April 2022 the Council issued an application for a without notice interim injunction and power of arrest against 18 named defendants who had been arrested at a protest at the Terminal and a further unnamed defendant defined 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."

5. By order dated 14 April 2022 Sweeting J granted a without notice interim injunction. In summary, the order prohibited any protest against the production or use of fossil fuels at the Terminal within an area demarcated on a plan attached to the injunction or within a 'buffer zone' of five metres of those boundaries. The order further prohibited certain types of conduct in connection with any such protest taking place anywhere within the wider 'locality' of the Terminal. The prohibited conduct was detailed in eleven sub-paragraphs and included activities such as obstructing the entrance of the Terminal, climbing onto or otherwise damaging or interfering with vehicles or objects, damaging pipes and equipment, and tunnelling under land. A power of arrest was attached to the order.

6. Following the grant of the interim order, there was further protest activity at the Terminal and the police exercised the power of arrest against various individuals said to fall within the definition of the persons unknown defendant. Again, I will revert to the detail of those ongoing protests in due course.

7. On 5 May 2022 Sweeting J heard the on notice return date of the interim injunction and an application by a Mr Jake Handling (73rd defendant and a protestor arrested for alleged breach of the interim order) and a Ms Jessica Branch (claiming to be an interested party) to discharge the interim injunction. The Council sought continuation of the interim injunction to trial but no longer required a five metre buffer zone around the perimeter of the Terminal. Sweeting J continued the interim injunction in an amended form and the power of arrest until the hearing of the claim. He gave reasons for his decision in a judgment handed down on 14 July 2023: [2023] EWHC 1719 (KB). The terms of the amended interim injunction are as follows:

> "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 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."

8. Protest activity continued. Between April 2022 and September 2022 the police exercised the power of arrest attached to the interim order on a large number of occasions. In that period findings of contempt were made against some 72 individuals, including some who were found to have breached the injunction on two, three or four occasions.

9. By order dated 31 March 2023 Sweeting J granted the Council's application to add a further 139 named defendants to the claim, being individuals who had been arrested at or in the locality of the Terminal in relation to protest activity after the interim injunction was granted and whose identities were now known. Case management directions were given to trial. The trial of the claim was due to take place in July 2023 but was adjourned on several occasions to await the decision of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 ("*Wolverhampton*").

10. By order dated 6 December 2023 Soole J extended the time for any defendant, or person who wished to be heard at the final hearing, to file and serve an acknowledgment of service to 4pm on 27 December 2023. His order provided that any defendant or person failing to comply with the same would not be permitted to defend or take any further role in these proceedings without further order of the court. No defendant or any other person filed an acknowledgment of service whether by 27 December 2023 or otherwise.

11. As the claim has progressed, a number of the defendants offered undertakings that were acceptable to the Council. At a hearing before Mould J on 22 May 2024, the Court accepted those undertakings and the interim injunction and power of arrest were discharged against those defendants. A further defendant, Mr Alex White (152nd defendant) was not able to attend the hearing on 22 May to proffer his undertaking but did so on 11 June 2024 and the interim relief against him was similarly discharged. A number of other defendants offered undertakings but the Council declined to accept them, largely on the basis that such individuals had been arrested at the Terminal after the interim injunction was granted on 14 April 2022 and the lack of ability to attach a power of arrest to an undertaking troubled the Council. As a result of the various undertakings, the number of defendants against whom the claim proceeds has reduced. Schedule A to this judgment sets out the defendants against whom there remains a live claim.

12. On the first day of the trial on 11 June 2024, a number of unrepresented defendants attended the hearing. Of those attending, the majority simply wanted to observe the proceedings. However three defendants, Ms Alison Lee (8th defendant), Ms Joanna Hindley (78th defendant) and Ms Chloe Naldrett (115th

defendant) wished to address the court. I explained the effect of the order of Soole J and indicated that any defendant wishing to apply to participate in the hearing would be required to file an application for relief from sanctions. Each of the three defendants filed written applications for relief from sanctions, which I heard on the afternoon of the first day of trial. The three defendants did not seek to cross-examine the Council's witnesses or call any evidence of their own. They simply wanted a short opportunity to address the court by way of closing submissions. I granted each of their applications for relief from sanctions limited to permitting each to address the court in closing for 10 minutes on condition of serving a short document setting out the bullet point issues they wished to cover. Each defendant complied with those directions.

13. At the start of the trial, the Council applied to amend the definition of the persons unknown defendant to address concerns expressed by Sweeting J in his judgment on the interim order that the current definition did not provide sufficient particularity as to the conduct alleged to be unlawful. The Council's primary position was that, following the decision of the Supreme Court in *Wolverhampton*, there was no longer a need to amend the definition. If however the Court disagreed, the Council sought to amend the definition to include particulars of conduct in four new categories of persons unknown. For the reasons given in an ex tempore judgment on 11 June 2024, I concluded that the definition remained inadequate but granted permission for the Council to amend the claim to include what have become defendants 19A, 19B, 19C and 19D. The detail of those descriptions appears in Schedule A to this judgment.

The evidence

14. The factual evidence relied on by the Council was unchallenged. The only witness to give oral evidence was Mr Steven Maxey, the Council's Chief Executive. Mr Maxey adopted the contents of five witness statements he had made during the course of the proceedings and dated 13 April 2022, 3 May 2022, 18 January 2024, 20 February 2024 and 5 June 2024.

15. In addition, the Council relied on written evidence from the following individuals who were not called to give oral evidence:

    i) Mr David Smith, Temporary Assistant Chief Constable for Warwickshire Police, dated 10 April 2022.

    ii) Mr Jeff Morris, Delivery Lead for Warwickshire County Council County Highway Services, dated 12 April 2022.

    iii) Mr Stephen Brown, Distribution Operations Manager for Shell International Petroleum Company Limited, dated 13 April 2022.

16. The Council concluded it was not proportionate to call the aforementioned three witnesses in circumstances where no defendant had elected to acknowledge service and defend the claim. Mr Smith's witness statement has been prepared in a form that complies with s.9 of the Criminal Justice Act 1967 rather than containing a statement of truth in the wording required by Civil Procedure Rule Practice Direction 22 para. 2.2. Mr Smith exhibits to his statement a number of

statements from various police officers involved in policing protests at the Terminal in April 2022. Those statements are also in s.9 form and have signed declarations as to the truth of the contents of the statements. The lack of statements of truth in a CPR PD 22 compliant form does not, in my judgment, detract from the cogency of the written evidence in light of the otherwise formal manner in which the statements have been prepared with signed declarations of truth.

17. The Council's evidence provides a detailed picture of the Terminal and protest activity that has occurred both within and in the locality of the Terminal. The salient points of the evidence are set out below.

The Terminal

18. The Terminal is a series of inland oil terminals with 50 storage tanks and storage capacity for around 405 million litres of flammable liquids. It comprises four separate but neighbouring oil terminal sites which are located on the edge of the village of Kingsbury. The sites comprising the Terminal are operated by Shell UK Ltd, United Kingdom Oil Pipelines Ltd, Warwickshire Oil Storage Ltd and Valero Energy Ltd. Those companies have formed the Kingsbury Common User Group which enables the management of specific shared assets such as fire-fighting systems and allows operators to discuss common issues.

19. The Terminal is an 'Upper Tier' site for the purposes of the Control of Major Accident Hazards Regulations 2015 ("COMAHR") by virtue of the large quantities of dangerous substances that are present on site. It is said to be one of the largest oil terminals in the country.

20. The Terminal is a multi-fuel site, storing and distributing petrol and diesel (both standard and V-power), heating oils and aviation fuel. Most of the fuel, save for additives or biofuels which are imported by road, is fed into the Terminal by pipeline from the United Kingdom Oil Pipeline system. The products are then distributed from the Terminal using road tankers. Hundreds of vehicles enter and exit the Terminal each day. The Terminal is described as a critically important supply point for the Midlands. In addition to distributing fuel to petrol station forecourts, it supplies major airports in the region including Birmingham International and East Midlands airports.

21. There are various security measures at the Terminal. For example, the part of the Terminal operated by Shell UK Ltd is surrounded by six foot high palisade fencing or six foot high chain link fencing. Pedestrian access is via turn-style gates and vehicular access via locked gates. Only visitors or employees with a designated pass can gain access. All vehicles entering the site have to be registered on Shell UK Ltd's internal system and have vehicle and driver accreditations. There is a 24 hour, 7 day a week security presence with high-definition CCTV and security guards working day and night. Operational plans for the Terminal include a requirement that "all controlled items (mobile phones, cigarettes, lighters, paging units, matches etc) should be handed over at the Terminal Control Room…due to potential presence of explosive atmospheres."

The surrounding area

22. The Terminal lies to the east of the village of Kingsbury and to the south-west of the smaller village of Piccadilly. The villages of Kingsbury and Piccadilly have approximately 8000 residents with some of the residential areas being no more than a few hundred metres from the Terminal. A railway line abuts parts of the Terminal on the Kingsbury side of the site and other nearby land is used by the Ministry of Defence as rifle ranges. The area is well connected to the motorway network with a junction of the M42 being nearby.

23. Kingsbury lies on the River Tame which has a catchment area spanning Birmingham, Solihull, Sandwell, Walsall, Tamworth, Nuneaton and Hinckley. Locally there are 8 sites of special scientific interest, 7 local nature reserves and 27 non-statutory sites of local importance.

The protest activity

24. On 31 March 2022 to 1 April 2022 around 40 protestors attended the Terminal in possession of glue and devices to lock themselves onto objects. Some of the protestors stopped and then climbed onto oil tankers which were trying to access or egress the Terminal. Other protestors glued themselves to the road and sat in the roadway to the main entrance to the Terminal. The police stopped a Ford Transit van which contained a large quantity of timber, climbing ropes, food stuffs and devices for locking on. The occupants of the van freely admitted that the contents of the van were for building a tree house and encampment. Distribution operations at the Terminal were suspended and the police made 42 arrests.

25. At around 1930 hrs on 2 April 2022 approximately 40 protestors attended the Terminal and blocked the main entrance to the Terminal. Some glued themselves to the carriageway and others appeared to be using a long tube to chain themselves together. Others climbed on top of oil tankers. The activity continued throughout the night and into 3 April. Operations at the Terminal were suspended. It partially reopened at 1730hrs with protesters remaining on site until midnight. The police made various arrests throughout the day and, taken with the arrests of the previous day, the total number of arrests increased to 68.

26. At around 0730 hrs on 5 April 2022 around 20 protesters attended the Terminal and again blocked the main entrance, locking onto each other and gluing themselves to the carriageway. Two others climbed on top of an oil tanker holding a 'save the oil' sign. Their presence prevented the tanker from moving. Operations at the Terminal were again suspended, only resuming at around 1100hrs. However, at around 1130 hrs a second group of protesters targeted motorway junctions 9 and 10 of the M42, climbing onto oil tankers servicing the Terminal as those vehicles moved slowly off the slip roads. Operations at the Terminal were again suspended and traffic built up onto the motorway. The protesters were removed and the roads reopened at 1430hrs.

27. At around 0030 hrs on 7 April 2022 protesters approached the main entrance to the Terminal and attempted to glue themselves to the carriageway. As the police

were attending to those individuals, another group of around 40 protesters approached the rear of the Terminal across fields. They sawed through an exterior gate and scaled a fence to gain access to the Terminal. Once within the perimeter fencing, the protesters dispersed to a number of different locations. Some climbed on top of three large fuel storage tanks containing unleaded petrol, diesel and fuel additives. Two others entered insecure cabs of fuel tankers and secured themselves inside using a lock on device. Others climbed on top of two fuel tankers, onto the floating roof of a large fuel storage tank and into a half-constructed fuel storage tank. The protestors used a variety of lock on devices to secure themselves to those structures. A complex police operation was initiated, utilising a variety of specialist teams, who worked alongside staff from the Terminal and fire service. The Terminal was not cleared of protesters until approximately 1700 hrs.

28. On 9 April 2022 further protest activity took place. At around 1050 hrs four protesters arrived at the main entrance to the Terminal and attempted to glue themselves to the carriageway. A short time later another protester was arrested trying to abseil from a road bridge over Trinity Road to the north of the Terminal. At around 1530 hrs a caravan was deposited at the side of the road on Piccadilly Way to the south of the Terminal. Some 20 protesters glued themselves to the sides and top of the caravan. It was later discovered that occupants within the caravan were attempting to dig, via a false caravan floor, a tunnel under the road. The police entered the caravan at around 0200 hrs on 10 April 2022 and the six occupants were arrested. Activity continued into 10 April with protestors scaling oil tankers and gluing themselves to the carriageway.

29. Between the 31 March and 10 April 2022 the police made approximately 180 arrests at or in the locality of the Terminal in relation to protest related activity. A common feature of many of the arrests is that the detainees were passively resistant, going limp and thus requiring the police officers to carry the individual into custody. Much of the protest activity was publicised on Just Stop Oil's website, which included videos and photographs of the protest activity. A video clip featuring an individual identified as John 'aka' Sean Jordan shows Mr Jordan on top of the caravan stating "…I am here with Just Stop Oil, we are currently on the tenth day of our campaign having started on 1st April…" The protests commonly featured orange Just Stop Oil livery on placards or banners and protestors wearing orange high-viz vests. On 12 April 2022 Just Stop Oil published a press release on their website stating: "We find ourselves, as others have done through history, having to do what is unpopular, to break the law to prevent a much greater harm taking place … While Just Stop Oil supporters have their liberty the disruption will continue."

30. Following the granting of the without notice interim injunction on 14 April 2022 the protest activity at the Terminal reduced but did not cease. Between the 14 April and 14 September 2022 there were a further 14 protests resulting in over 120 arrests. The Council brought successful contempt applications against 72 protestors for 109 separate breaches of the interim injunction. In the various contempt proceedings, none of those arrested sought to challenge the claimant's

factual case that the protests were in relation to the production and/or use of fossil fuels.

31. At just before 0800 hrs on 26 April 2022 16 individuals gathered on a grass verge outside the main entrance to the Terminal. A peaceful protest, with various signs and banners, lasted for approximately two hours. By around 1000 hrs a number of the protesters spread out across the carriageway and sat down obstructing access to and egress from the Terminal. The protestors were arrested for breaching the interim injunction.

32. At just after 1600 hrs on 27 April 2022 a group of 10 individuals gathered on a grass verge to the side of the main entrance to the Terminal to protest against the production and use of fossil fuels. The protest was peaceful but inside the five metre buffer zone imposed by the original without notice injunction. The protesters were arrested and successful contempt proceedings followed.

33. At around 1135 hrs on 28 April 2022 a group of eight protesters, including some of those arrested on 27 April, engaged in a further peaceful protest adjacent to the external fencing to the terminal within the five metre buffer zone. The protesters were arrested

34. At approximately 1400 hrs on 4 May 2022 a group of 11 protestors attended the Terminal. They stood on a grass verge to the side of the entrance to the Terminal with placards and banners before moving to walking across the road outside the Terminal. The protest was peaceful but again inside the buffer zone. Some of those attending the protest on 4 May 2022 did so in defiance of a court order requiring them to attend court that day to face contempt proceedings in respect of events on 27 April. The protesters on 4 May 2022 were arrested and successful contempt proceedings followed.

35. At around 1400 hrs on 12 May 2022 a group of eight protestors attended the Terminal. A number of group sat down in the middle of the access road to the Terminal entrance blocking access.

36. On 24 August 2022 three protesters occupied a tunnel that had been dug alongside and under Piccadilly Way, some 400 metres from the Terminal. The incident was publicised by Just Stop Oil on its social media platforms, which posted details of the protestors' support of Just Stop Oil's aims together with video footage and video stills taken inside the tunnel. Contempt proceedings against two of the protesters failed for want of service of the interim injunction and the proceedings against the third succeeded only in respect of his occupation of the tunnel for a limited period of time following service of the order after entry into the tunnel. The existence of the tunnel and its occupation in conjunction with a protest in the locality of the Terminal nonetheless occurred.

37. At approximately 1130 hrs on 14 September 2022, 51 protesters were arrested in connection with a protest on the private access road to the entrance to the Terminal. The protest was peaceful but its location blocked access and egress to the Terminal with many of the protestors sitting across the carriageway. Some held Just Stop Oil banners and others wore orange high viz vests featuring the Just Stop Oil logo.

38. There have been no protests at the Terminal since September 2022. Mr Maxey's evidence is however that the Council has since been targeted by protestors associated with Just Stop Oil.

    i) In August and September 2023 various councillors received emails from named defendants including Sarah Webb, Catherine Rennie-Nash, Bill White, Karen Wildin and Clare Walters. Each defendant was critical of the Council's action in pursuing this claim.

    ii) On 21 September 2023 protestors attended the Council's offices with banners and positioned themselves near to one of the entrances.

    iii) On 27 September 2023 protestors interrupted a Council meeting, refused the Mayor's request for order and refused to leave the Council chamber causing the meeting to be suspended. The matter was only resolved following intervention by the police.

    iv) Mr Maxey subsequently met with some of the protestors to hear their complaints. He states that the protestors informed him that they took the view that the Council should not have obtained the interim injunction as it was preventing their protests from causing the disruption which they thought was necessary given their concerns about climate change.

The impact of the protest activity

39. The protests caused significant disruption to the operation of the Terminal, at times causing operations to be suspended. The disruption impacted on the companies operating from the Terminal, individual staff members working at the Terminal and others, such as tanker drivers, who were required to visit the Terminal as part of their work.

40. There is also evidence of the protests causing more widespread harm and risk of harm. Mr Smith, Temporary Assistant Chief Constable for Warwickshire Police, provides evidence as to the impact of the protests on police resources. He describes the policing operation as being one of the most significant he has experienced in his career. Large numbers of officers were deployed from across the force to the Terminal day and night. This caused non-emergency policing services to be reduced and, although core policing services were maintained, the protests impacted on the quality and level of policing available during that period. Officers who would otherwise have been policing communities, roads or supporting victims of crime were taken away from those duties to police the protests. The scale and sophistication of the protests meant that Warwickshire Police had to bring in additional police officers from other regional forces, in addition to specialist policing teams such as the working at heights teams and protest removal teams. Mr Smith reports this coming at significant additional financial cost to the police force.

41. The protests had an impact on the local community and beyond. A number of public highways around the Terminal had to be closed causing inconvenience to members of the public. The protest activity extended to disruption on the M42 motorway. Mr Smith considers that the significant police presence during the

protests created a level of fear and anxiety in the local community. He acknowledged the community had been disturbed by the large policing operation which had extended into unsociable hours and occasioned regular essential overnight use of the noisy police helicopter. The impact of the protests extended beyond the immediate community and across the wider West Midlands region, with fuel shortages occurring at some petrol station forecourts.

42. The protests also impacted Warwickshire County Council. Mr Morris, of County Highways Service, explains that the digging of the tunnel under the road on 9 and 10 April 2022 resulted in County Highways Engineers attending out of hours, a manual operative attending from Balfour Beatty, the emergency closing of the road and remedial works being required. He understands the cost to the taxpayer of his department's involvement to be in the region of £3189.95.

43. A number of the Council's witnesses comment on their concerns for public safety should protest activity at the Terminal cause a fire or explosion. Mr Smith considers the same would likely have catastrophic implications for the local community including the risk of widespread pollution to the ground, waterways and air. He notes that the protesters had no regard to the extremely hazardous nature of the site or for the safety of either themselves or others when using mobile phones at the Terminal, scaling and locking themselves onto very volatile fuel storage tanks, tunnelling in close proximity to high-pressure fuel pipelines and causing the forced stopping and scaling of fuel tankers on the public highway. Mr Smith states that such actions not only cause unacceptable levels of risk to the protestors themselves but also to the public and members of the emergency services attending any incidents.

The parties' positions

44. The Council seeks a final injunction in broadly the same terms as the interim order as amended at the hearing on 5 May 2022. The Council has set out the detail of its position in its skeleton argument of 5 June 2024 and in closing submissions. I shall return to the detail of those submissions in due course.

45. No defendant has filed an acknowledgment of service, defence or any witness evidence in response to the claim. Three of the defendants only have made closing submissions, each opposing the granting of an injunction notwithstanding that none of them have filed an acknowledgment of service or defence. Each of the three defendants stated that they had no intention of breaking any injunction in respect the Terminal in the future.

46. Ms Lee (8th defendant) submitted that no injunction is required in circumstances where, the since the making of the interim injunction, wider powers now exist under the criminal law providing a deterrent to protestors, as well as making it easier for the police to act in the event of a protest. She referred to the increased maximum sentence for the offence of wilful obstruction of the highway, increased in May 2022 to a 6-month term of imprisonment by virtue of the Police, Crime, Sentencing and Courts Act 2022. She also relied on a variety of new offences under the Public Order Act 2023, which introduced offences relating to protest activity of 'locking on', tunnelling, obstructing major transport works and interfering with major infrastructure. Ms Lee submitted that

the threat to the Terminal no longer exists as Just Stop Oil's tactics have changed and they have since turned their attention to more 'media friendly' protests. She argued that the proposed injunction is not a deterrent and amounts to an unlawful restriction of the rights of environmental defenders to protest.

47. Ms Hindley (78th defendant) told the court of her stress and worry since being named as a defendant following her arrest on three occasions in connection with the protests at the Terminal in 2022. She does not believe an injunction is proportionate and expressed concern that the Council is passing on the cost of the litigation to local residents. Ms Hindley submitted that the court should take into account what she described as malice and racism that she said prioritised local interests over the environmental devastation of the livelihoods of vulnerable brown and black people across the world.

48. Ms Naldrett (115th defendant) told the court that she was dismayed to discover that the conclusion of the contempt proceedings did not absolve those involved from remaining as named defendants to the claim for an injunction. She told the court she had no intention of returning to the Terminal and risking triggering her suspended sentence. She submitted that the claim for an injunction was not a good use of the court's time and that no injunction was required in light of the increased criminal powers under the Public Order Act 2023. She asked the court to prioritise the rights of ordinary people over those of oil companies.

The issues

49. It is useful at this juncture to summarise the key issues that require determination:

(1) Does the Council have the standing to bring these proceedings and, if so, can it establish the causes of action relied upon?

(2) Do the facts of this case justify restriction of the Article 10 and 11 rights of the protesters and, if so, to what extent?

(3) If it is appropriate to grant relief to restrict protest activity, is it appropriate to grant injunctive relief against (a) the named defendants and/or (b) 'newcomer' persons unknown taking into account the requirements outlined in *Wolverhampton*?

(4) If an injunction is to be granted, what are the appropriate terms thereof, and should a power of arrest be attached?

The Legal Framework

Standing of a local authority to bring proceedings and the underlying causes of action

50. The Council seeks to rely on a number of statutory provisions as bases for bringing the claim for injunctive relief. The principal power relied on is s.222(1) of the Local Government Act 1972 which states:

> "(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 …"

51. Whether it is 'expedient' for the purposes of s.222 to bring legal proceedings is for the local authority to decide subject to such decision being compatible with usual principles of judicial review. In *Stoke on Trent Council v B & Q Ltd* [1984] 1 Ch 1 Lawton LJ at 23A held as follows:

> "…[The local authority] must safeguard their resources and avoid the waste of their ratepayers money. It is in everyone's interest, and particular so in urban areas, that a local authority should do what it can within its powers to establish and maintain an ambiance of a law abiding community; and what should be done for this purpose is for the local authority to decide."

52. The Council puts its case on the basis that that the granting of an injunction "is appropriate and expedient for the promotion or protection of the interests of the inhabitants of their area, and in the exercise of the Court's discretion, that the defendants be restrained, by way of injunction, from committing tortious and criminal acts and, in particular acts amounting to a public nuisance and to breaches of the criminal law that the criminal law is unable to prevent." [Para. 56 of the Council's skeleton argument dated 5 June 2024.]

53. Subject to meeting the 'expediency' requirement, s.222 empowers local authorities to bring actions for injunctive relief to restrain public nuisance and criminal offending. In *Nottingham City Council v Zain* [2001] EWCA Civ 1248 the local authority sought to restrain a defendant alleged to have been involved in drug dealing on the grounds that his actions constituted a public nuisance. Schiemann LJ, at para. 8-13, held:

> "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."

> 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…
>
> 13. …In my judgement it is within the proper sphere of a local authority's activities to try and put an end to all public nuisances in its area provided always that it considers that it is expedient for the promotion or protection of the interests of the inhabitants of its area to do so in a particular case. Certainly my experience over the last 40 years tells me that authorities regularly do this and so far as I know this has never attracted adverse judicial comment. I consider that an authority would not be acting beyond its powers if it spent time and money in trying to persuade those who were creating a public nuisance to desist. Thus in my judgement the County Council in *PYA* was not acting beyond its powers in seeking the Attorney General's fiat in trying to put a stop to the nuisance by dust in that case and thus exposing itself to potential liability in costs. It follows that, provided that an authority considers it expedient for the promotion and protection of the interests of the inhabitants of its area, it can institute proceedings in its own name with a view to putting a stop to public nuisance."

54. Keene LJ, agreeing with the judgment of Schiemann LJ, added the following observations at para. 27:

> "… 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…"

55. As Sweeting J observed when considering the application for an interim injunction in this case ([2023] EWHC 1719 (KB) at para. 78), the terms of an injunction can extend to prohibiting lawful as well as unlawful conduct.

> "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."

56. Sweeting J, at para. 81 of his judgment, noted that the previous common law criminal offence of public nuisance has been abolished and replaced by a statutory offence of public nuisance under s.78 of the Police, Crime, Sentencing and Courts Act 2022 in the following terms:

> "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.
>
> (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.
>
> (4) A person guilty of an offence under subsection (1) is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding [the general limit in a magistrates' court] , to a fine or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.
>
> (5) In relation to an offence committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 (increase in magistrates' court power to impose imprisonment) the reference in subsection (4)(a) to [the general limit in a magistrates' court]1 is to be read as a reference to 6 months.
>
> (6) The common law offence of public nuisance is abolished.
>
> …
>
> (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).”

57. In addition to s.222, the Council also relies on powers under the Localism Act 2011 and under the Highways Act 1980.

i) Section 1(1) of the Localism Act 2011 confers on a local authority the “power to do anything that individuals [of full capacity] may generally do.” By section 1(5): “the generality of the power conferred by subsection (1) (“the general power”) is not limited by the existence of any other power the authority which (to any extent) overlaps the general power.”

ii) By section 130(2) of the Highways Act 1980 “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." By section 130(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."

58. The court has the ability to attach a power of arrest to an injunction in the circumstances provided by section 27 of the Police and Justice Act 2006:

> "(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…
>
> (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."

The applicability of the Human Rights Act 1998

59. The Council accepts that this claim engages s.12 of the Human Rights Act 1998 and Articles 10 and 11 of the European Convention on Human Rights.

60. Article 10, freedom of expression, 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 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."

61. Article 11, freedom of assembly and association, provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"

62. The engagement of Article 10 requires consideration of s.12 of the Human Rights Act 1998. The relevant parts of that Act are as follows:

> "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.
>
> …
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression …"

63. Articles 10 and 11 are qualified rights and thus can be restricted in the circumstances set out in paragraph 2 of each article. The approach to determining a whether a restriction of those rights is lawful was considered by Warby J (as he then was) in *Birmingham City Council v Afsar and others* [2019] EWHC 3217 (QB) in the context of a claim for injunctive relief by a local education authority to prevent protest activity within an exclusion zone around a school. At para. 102 Warby J held as follows:

> "102. The jurisprudence shows that Article 10 protects speech which causes irritation or annoyance, and information or ideas that "offend, shock or disturb" can fall within its scope: see, eg, *Sánchez v Spain* (2012) 54 EHRR 24 [53], *Couderc v France* [2016] EMLR 19 [88]. … Article 11 "protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote*": Lashmankin* [145]. But the rights engaged in this case have outer limits. … Article 11(1) does not protect violent or disorderly protest; the primary right is one of "peaceful" assembly. Further,

> whilst the right to education is unqualified, the rights guaranteed by Articles 8, 9, 10 and 11 are all qualified. Paragraph (2) of each Article makes clear that interference with the primary right may be legitimate if (but only if) two conditions are satisfied. It must be not only in accordance with or prescribed by law (a matter I have dealt with above) but also "necessary in a democratic society" in pursuit of one or more legitimate aims. Paragraph (2) of each Article identifies "the interests of … public safety ……or the protection of the rights and freedoms of others." Another legitimate aim identified in each Article is "the prevention of public disorder" or, in the case of Article 9(2), "the protection of public order", which would appear to be synonymous."

64. The application of Articles 10 and 11 in relation to criminal proceedings brought for wilful obstruction of the highway arising from protest activity was considered by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23. At para. 16 the Supreme Court adopted the explanation given by the Divisional Court in the same case as to the enquiry that needs to be undertaken under the Human Rights Act 1998.

> "63…It requires consideration of the following 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, for example the protection of the rights of others?
>
> (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
>
> 64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> (1) Is the aim sufficiently important to justify interference with a fundamental right?
>
> (2) Is there a rational connection between the means chosen and the aim in view?
>
> (3) Are there less restrictive alternative means available to achieve that aim?
>
> (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

65. The Council accepts that when determining whether a restriction on any Article 10 or 11 right is justified, "it is not enough to assert that the decision was taken was a reasonable one" and "a close and penetrating examination of the factual justification for the restriction is needed." [*R (Gaunt) v Office of Communications (Liberty Intervening)* [2011] EWCA Civ 692 at para. 33.]

Injunctions against persons unknown

66. During the period in which the final hearing in this matter was adjourned, the Supreme Court handed down judgment in *Wolverhampton.* That case concerned applications for injunctions to prevent travellers from establishing unauthorised encampments in local authority areas. The Supreme Court reviewed the development of the law in relation to injunctions against 'newcomer' persons unknown, namely persons who, at the time of the grant of the injunction, are not identifiable and who cannot be shown to have committed any conduct which is sought to be prohibited or indeed to have any intention to do so in the future. At para. 167 the Supreme Court held:

> "167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:
>
> > (i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.
> >
> > (ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226-231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

> (iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.
>
> (iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.
>
> (v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries."

67. The Supreme Court recognised, at para 171, that "the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para. 167 above…" When considering question (i), namely whether there is a compelling need for the remedy, the Supreme Court considered the availability of alternative powers available to the local authority by means such as public spaces protection orders, criminal offences and byelaws. [Paras. 204-216 of the judgment.]

68. At para. 235 of the judgment, the Supreme Court recognised the relevance of newcomer injunctions to protestor cases and noted:

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

Discussion

Does the Council have standing to bring proceedings for injunctive relief and, if so, can it establish the causes of action relied upon?

69. The effect of decisions such as *Nottingham City Council v Zain* is that it is settled law that a local authority can rely on s.222 of the Local Government Act 1972 to bring proceedings to restrain actual or threatened public nuisance or

breach of the criminal law where the local authority considers "it expedient for the promotion or protection of the interests of the inhabitants of the area."

70. The Council argues that it is expedient to bring these proceedings for the promotion and protection of the interests of the inhabitants of North Warwickshire when one takes into account the desirability of establishing and maintaining a law-abiding community; the need to protect inhabitants and visitors of North Warwickshire from serious threats to their safety, health, property and peaceful existence; the need to ensure that businesses of North Warwickshire can go about their lawful operations without disruption, and the need to protect emergency service staff and resources.

71. When considering whether it is expedient to act under s.222, the Council has to take into account any particular responsibilities it has. In this case, s.17 of the Crime and Disorder Act 1998 imposes a duty on the Council "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 (a) crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); and …(c) re-offending in its area…" The Council also has the ability as a non-highway authority council under s.130(2) of the Highways Act 1980 to "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…"

72. The Council relies on underlying causes of action in public nuisance and breach or threatened breach of the criminal law. This is not one of those claims, as discussed by Keene LJ at para. 27 of *Zain*, where the injunction is brought to restrain only breaches of the criminal law such that a local authority may have to demonstrate it has some particular responsibility. As it happens, on the facts of this case, the Council does in any event have such a responsibility by virtue of s.17 of the Crime and Disorder Act 1998.

73. The Council's decision as to whether it was expedient to bring proceedings to promote or protect the interests of its inhabitants took into account multiple factors including the aforementioned statutory responsibilities, the high risks associated with storing very large volumes of flammable products at an 'Upper Tier' site adjacent to residential areas, and the significant scale and extent of disruption caused by protest activity occurring both inside and in the locality of the Terminal. In my judgment, those matters clearly justify the Council utilising its power under s.222.

74. The unchallenged evidence relied on by the Council establishes the commission of the tort of public nuisance and the threat of further such torts being committed. The actions of the protestors materially affected the reasonable comfort and convenience of those trying to go about their lives in North Warwickshire and the wider Midlands. Those affected included locals unable to use roads closed due to protest activity; businesses based at and those associated with the Terminal unable to operate fully due to operations at the Terminal being suspended; oil tanker drivers unable to go about their work when their vehicles were requisitioned by protestors; vehicle users finding they could not obtain fuel from forecourts suffering fuel shortages; local residents inconvenienced by the

scale and noise of required police operations, and individuals affected by the disruption to usual policing caused by additional police resources being diverted to policing the protests. Furthermore, the evidence demonstrates a risk of substantial public nuisance should an explosion or fire occur. The evidence of widespread use of mobile phones by the protesters in close proximity to highly flammable fuels, and the digging of tunnels without regard to the location of underground oil pipework, clearly creates a very significant risk to life, property and the environment. It was more by good luck rather than good judgement that the actions of some of the protesters did not result in a fire or explosion.

75. In light of my finding that the Council has established the commission of the tort of public nuisance, it is unnecessary to consider whether the same facts gave rise to any criminal offences that were in force at that time. The existence of the criminal law as a possible alternative remedy will however be relevant when considering whether it is appropriate for the court to exercise its discretion to grant injunctive relief.

The restriction of Article 10 and 11 rights

76. The Council accepts that the claim engages s.12 of the Human Rights Act 1998 given that the relief sought may affect the protestors' rights to freedom of expression. Some of the named defendants, and necessarily the persons unknown defendants, were neither present nor represented at the trial. By s.12(2) no relief is to be granted unless the court is satisfied that the Council has taken all practicable steps to notify the defendants. The question of service of the order of Soole J dated 6 December 2023 and of the Notice of Hearing was the subject of consideration at the start of the hearing on 11 June 2024. For the reasons given in an ex tempore judgment that day, and as embodied in my order of 12 June 2024, I was satisfied that proper notice had been given to the defendants that have chosen not to acknowledge or defend the claim or attend the trial.

77. It is not in dispute that Articles 10 and 11 are engaged. The issue is whether it is appropriate to interfere with those qualified rights. The Council encourages the court to adopt the approach adopted by Sweeting J at para. 133-136 of his judgment granting the interim injunction in this case. Whilst many of the considerations will be the same, in my judgment it is important to reconsider the appropriate framework of questions posed by the Supreme Court in *Ziegler* afresh, having now heard the evidence and the submissions of the three defendants.

78. The answers to the first four questions posed at para. 63 of *Ziegler* can be answered in fairly short order.

(1) The protesters actions in gathering with others to protest against the granting of licences for the production and use of fossil fuels was an exercise of their Article 10 and 11 rights.

(2) The Council's seeking of an injunction to restrict the rights to protest clearly interferes with the protestors' Article 10 and 11 rights as it would prevent much of the activity that has previously occurred.

(3) The interference is however prescribed by law in that the court has a discretion to grant an injunction under s.37 of the Senior Courts Act 1981 and the Council has the standing to bring a claim for injunctive relief pursuant to s.222 of the Local Government Act 1972.

(4) The interference is in pursuit of a legitimate aim namely the prevention of disorder or crime, the protection of health and the protection of rights of others.

79. The more complex question is that posed at para. 63(5) of *Ziegler* namely whether the interference is 'necessary in a democratic society' to achieve that legitimate aim? That involves consideration of the four further questions identified by the Supreme Court in para. 64(1) – (4).

80. The Council's primary concern is to protect the local community and environment from the risks associated with extreme forms of protesting in close proximity to highly flammable fuels. Given the potential ramifications of any fire or explosion at or in the locality of the Terminal, the stated aims to prevent crime and disorder, protect the health of the community and the rights of others are sufficiently important to justify interference with the Article 10 and 11 rights. The Council can therefore satisfy the question posed by para. 64(1).

81. The terms of the proposed injunction seek to prohibit protests inside the Terminal (ie on private land to which the defendants have no right to enter anyway) and to restrict certain specified acts in the locality of the Terminal. The Council does not seek to prohibit all protest activity in the locality of the Terminal but only more extreme form of protest activity, such as blocking entrances, climbing on structures, locking on, digging or tunnelling and abseiling. For the purposes of the question posed by para. 64(2), there is thus a rational connection between the terms of the injunction sought and the aims of preventing crime and disorder and protecting the health of the community and rights of others.

82. It is then necessary to consider whether there are less restrictive means available to achieve the Council's aims. (Para. 64(3) of *Ziegler*.) The defendants' submissions to the effect that an injunction is unnecessary in light of expanded criminal law powers can be viewed as a request that the court adopt a less restrictive approach and allow the position to be governed by existing laws.

83. The main alternative remedies to be considered as potential means of achieving the Council's aims are (a) a Public Spaces Protection Order ('PSPO'), (b) byelaws and (c) the existing criminal law. The evidence of Mr Maxey (witness statement 5 June 2024 at paras. 7-9) sets out his views on the suitability of a PSPO and byelaws. Mr Smith (witness statement 10 April 2022 at page 4) comments on the attempted use of criminal law to control the protest activity.

84. The Supreme Court in *Wolverhampton* (at para. 204) discussed the availability of PSPOs in the context of considering whether there was a compelling justification for a newcomer injunction against persons unknown. It was noted that a PSPO is directed at behaviour and activities carried on or in a public place which have a detrimental effect on the quality of life of those in the area. A

number of the disadvantages of a PSPO identified by Mr Maxey are valid concerns. The level of protection provided by a PSPO is restricted by virtue of the Council not having jurisdiction to impose such an order on private land. Any order could not therefore extend to the Terminal itself and would be limited to any public land adjacent thereto. The evidence in this case is that some of the protest activity, including some of the more extreme activity in locking onto fuel tanks, occurred inside the perimeter fencing. A PSPO would not therefore address the aim of protecting the local community from the health implications of a fire or explosion caused by a protest within the Terminal. Furthermore, the maximum sanction for breach of a PSPO is a level 3 fine (up to £1000) giving rise to concern that such an order would not have the same deterrent effect as an injunction, breach of which gives rise to a maximum penalty for contempt of two years' imprisonment. Additionally, breach of a PSPO is not an arrestable offence meaning that the police would not be able to remove with immediate effect a protester whose actions were putting at risk the local community. That limits the utility of a PSPO. In my judgement, a PSPO is not a viable less restrictive means of achieving the Council's aims.

85. Byelaws suffer many of the same shortfalls as seen with PSPOs. Breach of a byelaw gives rise to a maximum fine of £500 and is not an arrestable offence. The Council cannot unilaterally make a byelaw and the process requires assessment, consultation, application and approval of the scheme by the Secretary of State and further consultation. It is not therefore an agile solution either in terms of speed of implementation or in terms of the ability to vary the byelaw should circumstances change. It is not therefore a viable less restrictive means of achieving the Council's aims.

86. Since the making of the interim order by Sweeting J in May 2022, the range and seriousness of criminal offences relevant to protest activity have increased. From 12 May 2022, the sentence for the offence of wilful obstruction of the highway has increased from a fine to a maximum of 6 months' imprisonment. (s.80 of the Police, Crime, Sentencing and Courts Act 2022 amending s.137 of the Highways Act 1980.) The Public Order Act 2023 ("the 2023 Act") introduced a range of new offences with effect from 3 May 2023. Those offences include an offence of locking on (s.1), being equipped for locking on (s.2), causing serious disruption by tunnelling (s.3), causing serious disruption by being present in a tunnel (s.4), being equipped for tunnelling (s.5) and interfering with the use or operation of key national infrastructure including downstream oil infrastructure (s.7). There are differing maximum sentences for each of those offences but, other than the 'being equipped' offences which attract fines, the remainder can attract sentences of imprisonment. Section 10 and 11 of the 2023 Act extend police powers of stop and search to a number of the offences. The prosecution can apply for a serious disruption prevention order (s.20) subject to various conditions being met. Those conditions include a requirement that a defendant has committed another protest -related offence or a protest -related breach of an injunction within the five years ending on the day of conviction for the current offence. Certain individuals, such as the chief constable, can apply for a serious disruption prevention order on application (s.21). A local authority such as the Council does not however have standing to make such an application.

87. Ms Lee's submission is that the enhanced criminal powers provide a deterrent to protesters and give increased powers of arrest to the police such that an injunction is no longer required. The Council does not accept the increased criminal powers obviate the need for an injunction. Mr Manning submits that the object of the proceedings is defeated if the local community has to wait until criminal offences occur before action is taken. He submits that the evidence from the police suggests that the criminal justice system is not well equipped to prevent protesters returning to the site because individuals arrested are not typically remanded in custody and offences take time to progress through the criminal courts. It is said that it can also be a matter of circumstance whether an individual protester is prosecuted as that is subject to the view taken by the prosecuting authorities rather than the Council. Mr Manning submits that there is no evidence of the deterrent effect of the increased criminal penalties and new offences in circumstances where public nuisance was already a common law offence in 2022 and did not deter the protestors from acting. In short, the Council submits that the criminal law does not provide a systematic means of protecting the local area from the harm that the authorities are concerned about.

88. It is not helpful that the police evidence relied on by the Council has not been updated to reflect any effects of the introduction of new criminal offences and increased sentencing powers. However, the existence of relevant criminal offences does not, of itself, mean it is inappropriate to grant an injunction to restrain public nuisance nor, particularly in cases where a local authority has a particular responsibility for enforcement, to restrain breaches of acts which would amount to other criminal offences. Indeed, in *Zain,* serious criminal offences existed in respect of the alleged illegal drug activity but it was nonetheless appropriate to grant injunctive relief. The criminal justice system does not, in my judgment, achieve the Council's aims in as comprehensive a manner as injunctive relief could. Firstly, I am not persuaded that new criminal offences and increased sentencing powers have the same deterrent effect as an injunction and power of arrest. The common law offence of public nuisance existed when the protests occurred in 2022 and, as a common law offence, technically had a maximum sentence of life imprisonment. That did nothing to deter the protesters. The increased sentence for wilful obstruction of the highway and many of the offences under the 2023 Act have lower maximum sentences than the 2 years' maximum imprisonment for contempt of court. Secondly, the mechanism by which a protester is brought before the civil courts following arrest is expeditious in that it requires production before a court within 24 hours. It therefore provides both a significant deterrent to a would-be unlawful protester who risks immediate incarceration, and immediate respite to the local community. Thirdly, an injunction hands control of the pursuit of contempt proceedings against protestors to the local authority. By contrast, with criminal proceedings it is for the criminal prosecuting authority to determine whether to pursue a matter. The Council is likely better placed to assess whether contempt proceedings further the Council's aims in preventing crime and disorder in its area and protecting the health of its residents. Moreover, the Council has a positive duty under s.17 of the Crime and Disorder Act 1998 to exercise its 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 (including anti-social and other behaviour adversely

affecting the local environment) and to prevent re-offending. Permitting the Council rather than prosecuting authorities to take action to prevent unlawful protest activity is consistent with the Council's obligation to do all it reasonably can to prevent crime and disorder. Fourthly, an injunction is designed to be preventative in nature as opposed to the criminal law which reacts to events that have already occurred. In seeking to prevent crime and disorder and protecting the health and rights of others, it is little comfort that the criminal law will swing into action only after the damage has been done. I do not therefore conclude that reliance on the existing criminal law is an adequate less restrictive means of achieving the Council's aims.

89. The final question in determining whether an interference with a qualified convention right is proportionate requires consideration of whether there is a fair balance between the rights of the individual and the general interest of the community, including the rights of others. (Para. 64(4) of *Ziegler*.) The proposed injunction does not prohibit all protests in the locality of the Terminal but only those which involve more extreme forms of protest activity which put the community at risk. By permitting some protest activity, the proposed injunction strikes a fair balance between the rights of the protestors and the general interest of the local community.

Is it appropriate to grant injunctive relief against the named defendants?

90. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 the Court of Appeal guidance at para. 82(1) was to the effect that if an individual is "known and has been identified, they must be joined as individual defendants to the proceedings." The decision in *Wolverhampton* does not affect that proposition. Of named defendants appearing at Schedule A to the judgment, those numbered up to and including the 17th defendant were the original named defendants to the claim having been arrested at or in the locality of the Terminal in relation to protest activity taking place between 31 March and 10 April 2022. The defendants numbered 20th onwards were added as named defendants following their arrest at or in the locality of the Terminal in relation to protest activity after the initial interim injunction was granted on 14 April 2022.

91. Mr Maxey recognises in his evidence that "the Council has no means of knowing definitively whether every one of the named defendants has continued to be involved in this type of protesting, as we do not have access to the records of the criminal courts or the police national computer…It seems to me that the only realistic course that the Council can therefore take is to proceed on the basis that the defendants may well still participate in such conduct." [Para. 16(iii) of his statement of 5 June 2024.]

92. In my judgment it is appropriate to grant injunctive relief in principle against each of the named defendants appearing in in Schedule A. None of the defendants have filed a defence and thus have not sought to challenge the claimant's case that each defendant has been arrested for relevant protest activity at the Terminal and is affiliated with Just Stop Oil and its aims. Indeed, when making their submissions the 8th, 78th and 115th defendants did not seek to dispute their involvement in protest activity at the Terminal nor seek to disavow their support of the aims of Just Stop Oil. Whilst there has been no

protest activity at the Terminal since September 2022, the evidence establishes that Just Stop Oil has continued in disruptive protest activity in other locations. [Para. 8(c) of the statement of Mr Maxey dated 18 January 2024.] In her submissions, the 8th defendant acknowledged an ongoing intention of Just Stop Oil to protest but with a focus on more 'media friendly' opportunities. By that she was referring to protest activity that prompts maximum media attention. The opportunity for headline-making is only too obvious if a fire or explosion occurred at the Terminal. The behaviour of a number of the defendants during the various contempt proceedings also evidences the defendants' collective intention to cause disruption in aid of their cause. Such conduct included many defendants refusing to accept the jurisdiction of the court and some variously telling the court they would not attend future hearings if bailed, refusing to come out of cells to attend court, climbing on dock furniture, gluing body parts to the dock, and removing their clothes when in the dock. There is a clearly a risk that unless restrained the named defendants may engage in future protest activity at or in the locality of the Terminal that endangers the local community.

Is it appropriate to grant injunctive relief against 'newcomer' persons unknown taking into account the requirements outlined in *Wolverhampton*?

93. Any newcomer injunction is a form of without notice injunction and, as recognised by the Supreme Court in *Wolverhampton* at para. 167, only likely to be justified as "a novel exercise of discretionary power" if certain conditions are met.

Compelling need not adequately met by any other measures

94. There is however a compelling need for injunctive relief to protect the inhabitants of North Warwickshire and those who work in or travel through or otherwise visit the area from the more extreme types of protest activity at and in the locality of the Terminal that amount to public nuisance and/or criminal offences. For the reasons discussed in paragraphs 82 to 88 of this judgment, the required protection cannot be met by other measures available to the Council. The ongoing nature of Just Stop Oil's protest activity is such that there is a real risk of future incidences of public nuisance occurring and/or of criminal offences being committed at or in the locality of the Terminal.

Procedural protections

95. Any newcomer injunction must ensure that there are sufficient procedural protections to safeguard the newcomers against draconian nature of a without notice order. The persons unknown defendants have been given notice of this claim, the interim injunctions and the progression of the proceedings to the trial dates by various methods of alternative service. Those steps have included physical signage at the Terminal, use of the Council's website and social media accounts, and direct communications with Just Stop Oil through their email addresses and social media accounts. Persons unknown have therefore already had ample opportunity to participate in these proceedings but have elected not to. Any final injunction against newcomers can also be the subject of stringent alternative service provisions to ensure persons potentially affected are given full information as to the terms and scope of the order, any power of arrest and

the trial papers before the court. The Council has provided details of the steps it proposes to take to publicise an order, power of arrest and documents contained in the trial bundles. Those steps involve making use of signage along the boundary of and at the entrances to the Terminal, posting documents on its website, publicising through the Council's social media, asking local police to publicise through their social media and communicating directly with Just Stop Oil through known email addresses and social media. Such an approach will ensure effective notice can be given to newcomers. Mindful of its obligations to ensure procedural fairness, the Council concedes that any order should have a generous liberty to apply provision enabling any person served with the order or affected by it to apply to the court to vary or discharge the order on 48 hours' notice to the Council. This will ensure any newcomer has the ability to raise any objection even though they have not participated in the trial.

Disclosure duty

96. The Council acknowledges its obligation to comply with its disclosure duty on seeking a remedy against newcomer persons unknown. The Council's skeleton argument, at paragraphs 68 to 73, addresses the Council's duty and considers what arguments defendants might wish to pursue. It has also ensured that the court has before it the interim injunction judgment of Sweeting J at [2023] EWHC 1719 (KB) which discusses the arguments raised by the 73rd defendant and Ms Hardy at the interim hearing. Mr Manning's closing submissions included taking the court through the various new criminal offences introduced by the 2023 Act, and the increased sentencing powers for wilful obstruction of the highway, to ensure full consideration could be given to possible less restrictive alternative measures. I am therefore persuaded that the Council is both alive to its disclosure duty and has complied with the same in putting its case and counter-arguments as fairly as possible.

Territorial and temporal limits

97. The terms of the draft order limit the geographical scope of the injunction to two areas. The first area is defined in paragraph 1 of the draft order as covering the Terminal itself. That area is privately owned land upon which the defendants have no right to access without the permission of the land owner. The land is identifiable in the draft order by reference to boundaries edged in red on a colour plan attached to the order. The plan is drawn to a scale of 1:5000. The geographical limit is thus clear to see. The second area is defined in paragraph 2 of the draft order as being "anywhere in the locality of the Terminal…" The Council acknowledges that the term "locality" is a flexible concept but submits it is one which has the necessary clarity having been endorsed as appropriate for use in injunctive orders by the Court of Appeal in *Manchester City Council v Lawler* [1998] 31 HLR 119. Butler-Sloss LJ (as she then was) noted that "in the locality" was a term adopted by parliament and considered it would be "a question of fact for the judge whether the place in which the conduct occurred was or was not within the locality." I considered the construction of the term in contempt proceedings within this claim (*NWBC v Aylett, Goode & Jordan* [2022] EWHC 2458 (KB) at para. 94-100). I maintain my conclusion that the expression is not unreasonably vague such that it may be susceptible to more than one interpretation. It is an expression adopted by parliament and endorsed

for use in injunctions by the Court of Appeal. Furthermore, a defendant facing contempt proceedings has the additional procedural safeguard arising from the requirement on the Council to establish to the criminal standard of proof that a given place is ”within the locality.”

98. Any newcomer injunction must also be subject to strict temporal limits. The Council seeks an injunction for a period of three years from trial with annual hearings to review its operation. The interim injunction has itself been in force for over two years, which is longer than anticipated when the claim was first issued. In the context of gypsy or traveller newcomer injunctions, the Supreme Court in *Wolverhampton* (at para. 225) took the view that such injunctions “ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than one year unless an application is made for their renewal.” Slightly different considerations apply where an injunction limits only certain types of protest behaviour as the consequences of an order are less draconian than for a gypsy or traveller being deprived of somewhere to site the vehicle in which they live. In *Valero Energy Ltd & others v Persons Unknown* [2024] EWHC 134 (KB) (“*Valero Energy*”) Ritchie J granted a newcomer injunction against protestors for a period of five years subject to annual reviews. The claimants in *Valero* owned or had a right to possession of eight oil refinery or oil terminal sites in England and Wales which had been targeted by protest groups including Just Stop Oil. Whilst an annual review is essential to ensure ongoing consideration of the appropriateness of an injunction remaining in force, a term of three years is within appropriate temporal limits. The sustained duration of protest activity between March and September 2022 and the regular ongoing protest activity of Just Stop Oil at other locations demonstrates the need for the term of any order to extend to three years.

Just and convenient

99. The Council seek to protect their inhabitants from unlawful activity in the form of public nuisance and/or the commission of criminal offences. The highly flammable nature of the products stored on and transported to and from the Terminal means that some of the protest activity seen at this location has risked fire or explosion. The balance of convenience falls in favour of granting injunctive relief to protect the local population whilst still permitting the defendants to engage in protest activity in the locality of the Terminal.

100. The terms of the final injunction in *Valero Energy* already provides some protection to the local community as it covers part of the Terminal that is within the control of one of the four operators of the Terminal. I do not take the view that the *Valero Energy* order renders it inappropriate to grant the Council relief. Firstly, the Council does not hold the benefit of that order and would not be able to enforce it. Secondly, the claimants to the *Valero Energy* claim are not local authorities and thus could not rely on s. 27 of the Police and Justice Act 2006 so as to seek a power of arrest. Thirdly, the order does not cover the Terminal as a whole nor the locality of the Terminal.

101. I am therefore persuaded it is appropriate for the court to exercise its discretion to grant injunctive relief against the newcomer defendants.

The terms of the injunction and whether a power of arrest should be attached.

102. For the reasons aforementioned, it is appropriate for an injunction to be granted against all the defendants listed in schedule A for a term of three years from the trial with annual review hearings. The substance of the draft order will be adopted but the court will hear submissions on the detail of the required order after the judgment has been handed down.

103. The Council seeks that a power of arrest be attached to the injunction pursuant to s.27 of the Police and Justice Act 2006. The application of s.27 to the facts of this case was considered by Sweeting J when granting the interim injunction: [2023] EWHC 1719 (KB) at paras. 108 to 115. That analysis is still applicable following the hearing of the evidence. The decision in *Wolverhampton* does not undermine the ability of the court to attach a power of arrest to an injunction against persons unknown. The substance of the injunction will prohibit conduct which is capable of causing nuisance or annoyance to the inhabitants of the Council's area. It remains the case that there is a significant risk of harm for the purposes of s.27(3)(b) given the extreme forms of protest seen at the Terminal, the ongoing protest activity of Just Stop Oil generally and the implications of a fire or explosion at the Terminal. I am therefore satisfied that the Council meets the threshold test imposed by s.27(2) and (3). Whether to then attach a power of arrest becomes an exercise of discretion. As was the position at the interim stage of this case, there remain cogent reasons why a power of arrest is appropriate, indeed an imperative. Firstly, a power of arrest will enable the police to immediately remove a protestor from the scene and thereby reduce or extinguish the risk to others. Secondly, a power of arrest ensures that the Council can take effective enforcement action. A protestor would be arrested, detained, identified and brought before a court within 24 hours. Without such a power, the Council would find it impossible or at least extremely difficult in many cases to ascertain the names and addresses of the perpetrators so as to bring a paper contempt application. That in turn would diminish the desired deterrent effect of the injunction. A power of arrest will therefore be attached to the order.

Required form of order

104. I will hear submissions on the detail of the required order on the handing down of judgment but make the following provisional comments on the latest version of the draft order as supplied by the Council at trial:

i) The description of the protests covered should be extended to mirror the definition adopted in the description of defendants 19A to 19D, namely a protest "against the production of fossil fuels and/or the use of fossil fuels and/or the grant of licences to extract fossil fuels."

ii) The order will cover the Terminal and the locality of the Terminal.

iii) The order will prohibit all protest activity within the Terminal itself but, in respect of the locality of the Terminal, the prohibited activity will be limited to defined actions as particularised in draft paragraph 1(b)(i) to (xi).

iv) The alternative service provisions in Schedule 3 in respect of the persons unknown defendants and those defendants for whom the Council has no contact details requires amendment to ensure that (a) it is clear that all alternative service steps must be undertaken, (b) the relevant documents are publicised widely including signposting from the Council's website landing page and (c) there is no ambiguity as to the size and number of physical signs that will be required.

v) Further case management directions need to be made in respect of the first review hearing.

HHJ Emma Kelly

SCHEDULE A

SCHEDULE OF DEFENDANTS

(2) THOMAS BARBER
(3) MICHELLE CADET-ROSE
(4) TIMOTHY HEWES
(5) JOHN HOWLETT
(6) JOHN JORDAN
(7) CARMEN LEAN
(8) ALYSON LEE
(9) AMY PRITCHARD
(10) STEPHEN PRITCHARD
(11) PAUL RAITHBY
(14) JOHN SMITH
(15) BEN TAYLOR
(17) ANTHONY WHITEHOUSE
(19A) PERSONS UNKNOWN WHO, OR WHO INTEND TO, PARTICIPATE IN PROTESTS WITHIN THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA (THE "TERMINAL") AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS, AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS;
(19B) PERSONS UNKNOWN WHO, OR WHO INTEND TO, PARTICIPATE IN PROTESTS IN THE LOCALITY OF THE TERMINAL, AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS, AND WHO, IN CONNECTION WITH ANY SUCH PROTEST, DO, OR INTEND TO DO, OR INSTRUCT ASSIST OR ENCOURAGE ANY OTHER PERSON TO DO, ANY OF THE FOLLOWING: (A) ENTER OR ATTEMPT TO ENTER THE TERMINAL; (B) CONGREGATE AT ANY ENTRANCE TO THE TERMINAL; (C) OBSTRUCT ANY ENTRANCE TO THE TERMINAL; (D) CLIMB ON TO OR OTHERWISE DAMAGE OR INTERFERE WITH ANY VEHICLE OR ANY OBJECT ON LAND (INCLUDING BUILDINGS, STRUCTURES, CARAVANS, TREES AND ROCKS);

(E) DAMAGE 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; (F) AFFIX THEMSELVES TO ANY OTHER PERSON OR OBJECT OR LAND (INCLUDING ROADS, STRUCTURES, BUILDINGS, CARAVANS, TREES OR ROCKS); (G) ERECT ANY STRUCTURE; (H) ABANDON ANY VEHICLE WHICH BLOCKS ANY ROAD OR IMPEDES THE PASSAGE OF ANY OTHER VEHICLE ON A ROAD OR ACCESS TO THE TERMINAL; (I) DIG ANY HOLES IN OR TUNNEL UNDER (OR USE OR OCCUPY EXISTING HOLES IN OR TUNNELS UNDER) LAND, INCLUDING ROADS; OR (J) ABSEIL FROM BRIDGES OR FROM ANY OTHER BUILDING, STRUCTURE OR TREE ON LAND.
(19C) PERSONS UNKNOWN WHO, OR WHO INTEND TO, ORGANISE, PUBLICISE OR PROMOTE ANY PROTEST WITHIN THE TERMINAL AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS.
(19D) PERSONS UNKNOWN WHO, OR WHO INTEND TO, ORGANISE, PUBLICISE OR PROMOTE ANY PROTEST IN THE LOCALITY OF THE TERMINAL, AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS, AT WHICH PROTEST THEY INTEND OR FORESEE OR OUGHT TO FORESEE THAT ANY OF THE ACTS DESCRIBED AS PART OF THE DESCRIPTION OF DEFENDANT 19B WILL BE CARRIED OUT.
(20) JOHN JORDAN
(22) MARY ADAMS
(23) COLLIN ARIES
(24) STEPHANIE AYLETT
(25) MARCUS BAILIE
(28) PAUL BELL
(29) PAUL BELL
(30) SARAH BENN
(31) RYAN BENTLEY
(32) DAVID ROBERT BARKSHIRE
(33) MOLLY BERRY

(34) GILLIAN BIRD
(36) PAUL BOWERS
(37) KATE BRAMFITT
(38) SCOTT BREEN
(40) EMILY BROCKLEBANK
(42) TEZ BURNS
(43) GEORGE BURROW
(44) JADE CALLAND
(46) CAROLINE CATTERMOLE
(48) MICHELLE CHARLESWORTH
(49) ZOE COHEN
(50) JONATHAN COLEMAN
(53) JEANINIE DONALD-MCKIM
(55) JANINE EAGLING
(56) STEPHEN EECKELAERS
(58) HOLLY JUNE EXLEY
(59) CAMERON FORD
(60) WILLIAM THOMAS GARRATT-WRIGHT
(61) ELIZABETH GARRATT-WRIGHT
(62) ALASDAIR GIBSON
(64) STEPHEN GINGELL
(65) CALLUM GOODE
(68) JOANNE GROUNDS
(69) ALAN GUTHRIE
(70) DAVID GWYNE
(71) SCOTT HADFIELD
(72) SUSAN HAMPTON
(73) JAKE HANDLING
(75) GWEN HARRISON
(76) DIANA HEKT
(77) ELI HILL
(78) JOANNA HINDLEY
(79) ANNA HOLLAND
(81) JOE HOWLETT

(82) ERIC HOYLAND
(83) REUBEN JAMES
(84) RUTH JARMAN
(85) STEPHEN JARVIS
(86) SAMUEL JOHNSON
(87) INEZ JONES
(88) CHARLOTTE KIRIN
(90) JERRARD MARK LATIMER
(91) CHARLES LAURIE
(92) PETER LAY
(93) VICTORIA LINDSELL
(94) EL LITTEN
(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
(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
(127) SIMON REDING
(128) MARGARET REID
(129) CATHERINE RENNIE-NASH
(130) ISABEL ROCK
(131) CATERINE SCOTHORNE
(133) GREGORY SCULTHORPE
(135) VIVIENNE SHAH
(136) SHEILA SHATFORD
(137) DANIEL SHAW
(138) PAUL SHEEKY
(139) SUSAN SIDEY
(141) JOSHUA SMITH
(142) KAI SPRINGORUM
(145) HANNAH TORRANCE BRIGHT
(146) JANE TOUIL
(150) SARAH WEBB
(151) IAN WEBB
(153) WILLIAM WHITE
(155) LUCIA WHITTAKER-DE-ABREU
(156) EDRED WHITTINGHAM
(157) CAREN WILDEN
(158) MEREDITH WILLIAMS

Neutral Citation Number: [2024] EWHC 2576 (KB)

Case No: QB-2022-001317

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

(1) THURROCK COUNCIL	**Claimants**
(2) ESSEX COUNTY COUNCIL	
- and -	
(1) MADELEINE ADAMS	**Defendants**
(2)-(222) OTHER NAMED DEFENDANTS AS LISTED AT SCHEDULE 1 TO THE CLAIM FORM	
(223) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH THE FREE FLOW OF TRAFFIC ON TO, OFF OR ALONG THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM	
(224) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES OR AFFIXING ANY ITEM TO ANY VEHICLE TRAVELLING ON TO, OFF, ALONG OR WHICH IS ACCESSING	

OR EXITING THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM

(225) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH VEHICULAR ACCESS TO, INTO OR OFF ANY PETROL STATION OR ITS FORECOURT WITHIN THE ADMINISTRATIVE AREA OF THURROCK (AS MARKED ON THE MAP AT ANNEXE 2 TO THE CLAIM FORM)

(226) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, CAUSING THE BLOCKING, ENDANGERING, SLOWING DOWN, OBSTRUCTING, PREVENTING OR OTHERWISE INTERFERING WITH VEHICULAR ACCESS TO OR FROM ANY PETROL STATION OR ITS FORECOURT WITHIN THE ADMINISTRATIVE AREA OF ESSEX (AS MARKED ON THE MAP AT ANNEXE 3 TO THE CLAIM FORM)

(227) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, BLOCKING, PREVENTING OR OTHERWISE INTERFERING WITH THE OFFLOADING BY DELIVERY TANKERS OF FUEL SUPPLIES AND/OR THE REFUELLING OF VEHICLES AT ANY PETROL STATION WITHIN THE ADMINISTRATIVE AREA OF THURROCK (AS MARKED ON THE MAP AT ANNEXE 2 TO THE CLAIM FORM)

(228) PERSONS UNKNOWN, WHO ARE FOR THE PURPOSE OF PROTESTING, BLOCKING, PREVENTING OR OTHERWISE INTERFERING WITH THE OFFLOADING BY DELIVERY TANKERS OF FUEL SUPPLIES AND/OR THE REFUELLING OF VEHICLES AT ANY PETROL STATION WITHIN THE ADMINISTRATIVE AREA OF ESSEX (AS MARKED ON THE MAP AT ANNEXE 3 TO THE CLAIM FORM)

(229) PERSONS UNKNOWN WHO ARE TRESPASSING ON, UNDER OR ADJACENT TO THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM BY UNDERTAKING EXCAVATIONS, DIGGING, DRILLING AND/OR TUNNELLING WITHOUT THE PERMISSION OF THE RELEVANT HIGHWAY AUTHORITY

(230)-(229) OTHER NAMED DEFENDANTS AS LISTED AT SCHEDULE 1 TO THE CLAIM FORM

- -
- -

Caroline Bolton and Natalie Pratt (instructed by **Sharpe Pritchard LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: 12 July 2024

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Approved Judgment

This judgment was handed down remotely at 10:30 on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. Following a hearing on 12 July 2024 I granted the continuation of an injunction granted by Foster J on 27 January 2023, and made other orders, against Persons Unknown. Foster J's order was itself the continuation of an injunction initially granted by Ritchie J in April 2022, and then subsequently renewed. These are my reasons.

2. The Claimants did not at the hearing seek a final injunction against the remaining named Defendants. There is to be a hearing in October 2024 in relation to them and the order of Foster J will remain in effect until then pursuant to an order of Collins Rice J dated 19 Aril 2024. There are now in fact only a relatively small number of named Defendants remaining; most have reached settlement with the Claimants by way of undertaking.

Background

Events from April 2022

3. The Claimants bring these claims pursuant to the Local Government Act 1972, s 222 and the Highways Act 1980, s130(5). Thurrock Council (Thurrock) is the Local Highway Authority for the Borough. Essex County Council (ECC) is the Local Highway Authority for the County.

4. The claim is brought in response to protest activity in the administrative area of Thurrock (the Borough) in April 2022 by those associated with the Just Stop Oil group (JSO). As is well-known, JSO is one of a number of groups who protest about environmental concerns and climate change by engaging in direct action, often against infrastructure which it regards as being involved with fossil fuels such as fuel storage facilities, pipelines, and airports. For example, over the summer of 2024 the High Court granted a number of injunctions on the applications of airport operators to prevent apprehended trespass and nuisance at their airports which Just Stop Oil and others had threatened to carry out.

5. The Borough is especially attractive to this group as a venue for protest as it houses several COMAH (Control of Major Hazards) sites, namely fuel/oil terminals. These are:

    a. The Navigator Fuel Terminal, Oliver Road, West Thurrock RM20 3ED. The main entrance to the site is off Burnley Road/Oliver Road in West Thurrock. There is a secondary exit from the site on Oliver Close;

    b. The Esso Fuel Terminal, London Road, Purfleet RM19 1RS. The primary access route to the site is off the A1090, London Road, Purfleet; and

    c. Exolum Storage Ltd, off Askews Farm Lane, London Road, Grays RM17 5YZ.

6. The Oikos fuel terminal is also located nearby in Canvey Island, which is within the administrative area of Essex (the County). As I shall explain, protesters have targeted fuel supplies to these terminals and sought to disrupt them.

7. The injunction sought on this continuation application is the sort of 'newcomer injunction' which have been granted by the courts in protest and other cases in recent years. The evolution of this sort of injunction, and the relevant legal principles, were set out by the Supreme Court in *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2024] 2 WLR 45. I will refer to this as *Wolverhampton Travellers* case.

8. Recent examples of such injunctions are: *Jockey Club Racecourses Ltd v Persons Unknown* [2024] EWHC 1786 (Ch); *Exolum Pipeline System Ltd and others v Persons Unknown* [2024] EWHC 1015 (KB); *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB); *Multiplex Construction Europe Ltd v Persons Unknown* [2024] EWHC 239 (KB); *High Speed 2 (HS2) Limited v Persons Unknown* [2024] EWHC 1277 (KB); *Arla Foods Ltd v Persons Unknown* [2024] EWHC 1952 (Ch), [75]; and *Wolverhampton City Council v Persons Unknown* [2024] EWHC 2273 (KB). The legal basis for newcomer injunctions, and the principles which guide whether they should be granted in a particular case, are therefore now firmly established.

9. The Claimants seek the continuation of the injunction against the seven above-defined categories of Persons Unknown. They rely upon the Third Witness Statement of Adewale Adesina (Senior Emergency Planning and Resilience Officer with Thurrock) dated 26 June 2024 (Adesina 3) and Detective Superintendent Stephen Jennings of Essex Police, dated 23 March 2024 (Jennings), as well as the historic evidence filed in support of the earlier applications. There is also a short updating statement from Adam Rulewski, a lawyer with the London Borough of Barking and Dagenham, concerning events which occurred shortly before the hearing involving Just Stop Oil.

10. The matter first came before the Court on 24 April 2022, when the Claimants made an out of hours and without notice application for interim injunctive relief against (a) the 222 named Defendants set out at Schedule 1 to the Claim Form; and (b) the seven categories of Persons Unknown. The application was granted by Ritchie J (the Injunction Order). This application was made following a first wave of protests in the Borough.

11. The acts of protest experienced by the Borough are set out in detail in the First and Second Witness Statements of Adewale Adesina and Temporary Detective Chief Superintendent Cronin of 23 April 2022 (Cronin). By way of short summary, the protests commenced on 1 April 2022, and events of protest were attended by Essex Police on 1, 2, 3, 4, 5, 6, 8,11 ,13 and 15 April 2022. In that time, there were several hundred arrests made in the Borough alone for offences that are alleged to have been committed in the course of, and incidental to, the protests. The vast majority of those arrests were for obstruction of the highway and interfering and/or tampering with motor vehicles (those vehicles being fuel transport tankers).

12. As T/DCS Cronin explains in his witness statement, the *modus operandi* of the protestors is often to:

    a. sit or lay in highways, and often to glue themselves to the road or other road furniture, and obstruct the highway;

    b. intercept fuel tanker lorries, climb aboard the same, and often glue or affix themselves, again obstructing the highway;

    c. there were at least two instances of tunnelling adjacent to and underneath the highway (I note from the updating evidence, two significant tunnelling incidents occurred during the course of the August 2022 protests, which I will come to).

13. Over the Easter weekend (15-18 April 2022), the focus of the protest movement appeared to shift to central London. The protest groups associated with protest in the Borough announced a moratorium on protest/direct action on 19 April 2022, to last until 25 April 2022, upon which the protestors threatened to escalate their activity to 'phase 2A' (which was understood would include the obstruction of petrol forecourts (Cronin, [67]-[69]), should the Government not meet the protestors' demands. On the basis that the Government had not complied with the protestors' demands, the Claimants apprehended a recommencement and escalation of protest activity/ direct action on 25 April 2022, and sought urgent interim injunctive relief accordingly.

14. Both Mr Adesina and T/DCS Cronin deal at length in their witness statements with the harm caused, and apprehended, as a result of the direct action and protest activity in the Borough throughout April 2022.

15. In summary, Adesina1, dated 23 April 2022, [39]-[54] set out:

    a. The impact that the first wave of protests had on stock levels at fuel forecourts. To that end, fuel levels below 30% are the threshold at which some stock outages are expected (ie. the forecourt pumps will run dry). From 1 April onwards there was a significant drop in stock levels at forecourt pumps – stock levels were at all times under 30%, dropping to as low as 20% at times in London and the South East of England and 19% in the East of England;

    b. The critical services that Thurrock supplies (alongside the emergency services and other services, such as food transportation) which all rely on the availability of fuel, and the ability to move around the network without significant disruption and congestion;

    c. The additional cost of £5,970.22 incurred by Thurrock in the provision of its waste collection services as a result of the disruption on the road network caused by the protestors;

    d. Damage to the highway, and the required remedial works, caused by protestors tunnelling adjacent to, and underneath, the highway. Further, given the urgency of the remedial works, in at least one instance they could

not be carried out to the preferred specification, such that there are long term concerns for the structure of the road;

e. Safety risks caused to both the protestors themselves and the inhabitants of the Borough (especially road users) as a result of the protests.

16. In Cronin, [40]-[64], T/DCS Cronin sets out other impacts and risks caused by the protests including:

a. The significant and unstainable drain caused by the protests on Police resources, specifically: officer rest days have been cancelled, shifts increased from 8 to 12 hours, mutual aid sourced from other Police forces to cover 4152 shifts, other operations have been cancelled and the general business of Essex Police affected;

b. The concerns for the security and safety of the Thurrock Fuel Terminals, especially given the hazardous, flammable and combustible materials stored at the Terminals, and which are also transported to and from the Terminals along the road network. There have been incidents of aggravated trespass associated with the protests, and disruption of the road network jeopardises ordinary operations at the Terminals;

c. The risks associated with, and to which the protestors and inhabitants of the Borough (including other road users) are exposed, by the protestors obstructing the highway by climbing on fuel tankers (which are carrying hazardous, flammable and highly combustible product), and locking themselves on to the same. Such incidents require the attendance of specialist Police Officers. In one extreme incident it took 3 days to remove a protestor from a tanker;

d. The risks associated with, and to which the protestors and inhabitants of the Borough (including other road users) are exposed, by the protestors stepping out onto busy A-roads and obstructing the highway;

e. The closure of Oliver Road, West Thurrock, a site at which tunnelling occurred, impacted 13 business, prevented 300 people travelling to work and cost £555,000 every day for which the road was closed.

17. The Claimants contend that each of these specific examples sit alongside the obvious disruption caused to the day-to-day lives of the inhabitants of the Borough who are impacted by congestion on the road network as a result of road closures, diversions and displaced traffic caused by the protests and the obstructions of the highway complained of.

18. At the return date hearing before His Honour Judge Simon (Sitting as a Deputy High Court Judge) in May 2022, the Claimants sought and obtained the continuation of the Injunction Order, which, in summary:

a. restrained acts of public nuisance (that being the obstruction of the highway) that have occurred in the Borough, and which were apprehended to recommence and escalate following the end of a moratorium on protest; and

b. restrained acts of trespass (and particularly the act of tunnelling under or adjacent to the highway) that have occurred in the Borough, and which were apprehended to recommence and escalate following the end of a moratorium on protest; and

c. restrained apprehended acts of public nuisance (that being the obstruction of the highway) and trespass in the County, which were apprehended to commence following the end of a moratorium on protest.

19. The judge reserved judgment, which was in due course handed down: [2022] EHWC 1324 (QB)**.** The reader is referred to that judgment for further detail.

20. Following the continuation of the Injunction Order, and between 23 August 2022 and 4 September 2022, the Claimants experienced a second wave of protests. This included obstruction of the highway (including protestors gluing themselves to the road) and protestors tunnelling under the highways; the tunnelling incidents were significant, with one tunnel under St Clements Way being occupied by protestors between 23 August and 4 September, causing Thurrock to seek and obtain an order for possession (which was not executed prior to the protestors leaving the tunnel voluntarily). The roads targeted were again the access roads to the oil terminals and adjacent industrial areas.

21. The details of the harm caused by, and the impact of, these protests are set out in Adesina3, [20]-[37], and Jennings, [21]. They cost Essex Police £304,543 (including funding extra officers, specialist officers, and support services); 1181 officers were assigned related duties, completing 12,224 hours of work; officers worked extended duties (increased to 12 hours from eight); and 216 officer rest days were cancelled.

22. There were a number of arrests for breaching the injunction, and committal proceedings followed.

23. As I have said, the injunction was further continued through 2023 and into 2024. Around the same time, the law on 'unknown person' or 'newcomer' injunctions was in a state of flux, which culminated in the Supreme Court's judgment in the *Wolverhampton Travellers* case, which was handed down on 29 November 2023.

Apprehension of future protests

24. The application before me was made because the Claimants apprehended future protests by Persons Unknown, unless the Injunction Order is continued. The reasons for this apprehension are set out in Adesina3, [45]-[51].

25. In summary, JSO announced a summer campaign targeting what they have described as the 'centre of the carbon economy', namely the airports and air travel. The Borough houses two fuel terminals that supply the aviation industry (Shell Haven and the Navigator Fuel Terminal). The Claimants apprehend that the fuel terminals that service the aviation industry will also be at risk of direct-action protest. The County also houses London Stansted Airport, and Southend

Airport is located proximate to the Borough. At the date of the hearing the targeting of airports had already commenced (there having already been an incident at the private airfield at Stansted), and JSO branded the campaign against air travel as its 'most radical action yet'.

26. Mr Adesina says at [47]-[51] of Adesina3:

> "47. I also note from national media coverage that on 20 June 2024, two supporters of Just Stop Oil trespassed onto the airfield at London Stansted airport where private jets are parked, and sprayed an orange paint-like substance over two parked-up private jets.
>
> 48. The incident at London Stansted airport appears to be in keeping with Just Stop Oil's current target, as the group has announced its intention to target what it calls the 'centre of the carbon economy' in the summer of 2024, by gathering at airports. The homepage to the Just Stop Oil website can be found at https://juststopoil.org, on which there is a link to a video that announces this intention, along with a photograph of a small jet plane being sprayed in what appears to be orange paint. I exhibit a PDF of the webpage at AA3/10.
>
> 49. The targeting of airports in the summer of 2024 is especially concerning to the Claimants for two reasons:
>
> i. The Borough houses two fuel terminals that supply the aviation industry (Shell Haven and the Navigator fuel terminals). As the group has stated its intention to target the 'centre of the carbon economy', the Claimants reasonably apprehend that the fuel terminals that service the aviation industry are also at risk of direct-action protest. It is difficult to imagine that significant protest activity at sites as security-sensitive as airports will be tolerated, and those protests may well be displaced to the fuel terminals and surrounding areas, or the fuel terminals may fact themselves be the primary target of protest action. If the aim is to bring the aviation industry to a halt, targeting its fuel supply seems a logical way to achieve that aim; relatedly
>
> ii. The County houses London Stansted airport. More concerning though is that Southend airport is located proximate to the Borough and its fuel terminals. It is entirely possible that displacement of the protestors from the airports could see the protests spill over into the Borough and the County, with a focus on the area around the fuel terminals.
>
> 50. The threat to target airports appears credible, not least because it has already happened at London Stansted.

> Further, I note that Just Stop Oil are holding a specific fundraiser to support the protest: https://chuffed.org/project/just-stop-oil-resisting-against-new-oil-and-gas (I exhibit a PDF of the webpage at AA3/14). The group state that "we're going so big that we can't even tell you the full plan, but know this – Just Stop Oil will be taking our most radical action yet this summer", and have set a fundraising target of £50,000 for this month.
>
> 51. As such, the Claimants reasonably apprehend that the threat to airports is credible and could lead to further protest activity in Thurrock and the County, which would cause further harm. The Claimants are anxious to avoid further protest activity and harm of the kind suffered in 2022."

27. In his statement, Mr Rulewski says:

> "4. I exhibit at AR5/1 a pdf copy of the following webpage from the Just Stop Oil website: https://juststopoil.org/2024/07/10/paint-the-town-orange-just-stop-oil-wins-first-demand/. The webpage appears in the 'press releases' section of the Just Stop Oil website, and is a news article dated 10 July 2024.
>
> 5. In that article, Just Stop Oil details how four of its supporters poured orange paint across three intersections of Parliament Square on the morning of 10 July 2024. According to the article, the action was taken following the election and formation of a Labour government, which has committed to ending oil and gas licensing, that being a core demand of Just Stop Oil (hence the statement that Just Stop Oil has 'won' its demand).
>
> 6. However, the article also goes on to explain that the meeting of the demand for no new oil and gas licensing is not enough; Just Stop Oil now also demand internationally co-ordinated action to phase out fossil fuels and end the extraction and burning of oil, coal and gas by 2030. The article ends with Just Stop Oil pledging keep pursuing direct action until its demands are met, and expressly states:
>
> > 'This summer, areas of key importance to the fossil fuel economy will be declared sites of civil resistance around the world. Sign up to take action at juststopoil.org.'

Need for a Persons Unknown injunction

28. The need for a Persons Unknown injunction is set out in Adesina1, [17] and Adesina3, [52], and Rulewski, [16]. The primary concerns are:

a. It has not yet been possible to identify all those persons who may be defendants to the Claim, despite the significant efforts made in this regard;

b. Given the profile of the protestors and the protest groups associated with the protest in the Borough (including the size of the group, the fluctuation of the group, the fact that both Extinction Rebellion and Just Stop Oil are actively recruiting new members and that the protestors who are known have a profile of being from the length and breadth of the country) it is far more likely than not that people will attend the Borough and County to protest in the manner complained of who have not yet attended, and who would not otherwise be covered by the injunction without a persons unknown order.

29. I accept that in principle, and subject the requirements set out in *Wolverhampton Travellers* being satisfied, that this is an appropriate case for an injunction against Persons Unknown.

Legal principles

Approach on this application

30. The test for continuing the Injunction Order is the same as it is for a new injunction (which I consider below), albeit the review is focussed on the updated position as opposed to reviewing the historic position: *High Speed Two (HS2) Limited & Others v Persons Unknown* [2024] EWHC 1277 (KB)**,** [32]-[33], where Ritchie J said:

> "32. Drawing these authorities together, on a review of an interim injunction against PUs and named Defendants, this Court is not starting *de novo*. The Judges who have previously made the interim injunctions have made findings justifying the interim injunctions. It is not the task of the Court on review to query or undermine those. However, it is vital to understand why they were made, to read and assimilate the findings, to understand the sub-strata of the *quia timet*, the reasons for the fear of unlawful direct action. Then it is necessary to determine, on the evidence, whether anything material has changed. If nothing material has changed, if the risk still exists as before and the claimant remains rightly and justifiably fearful of unlawful attacks, the extension may be granted so long as procedural and legal rigour has been observed and fulfilled.
>
> 33. On the other hand, if material matters have changed, the Court is required to analyse the changes, based on the evidence before it, and in the full light of the past decisions, to determine anew, whether the scope, details and need for the full interim injunction should be altered. To do so, the original thresholds for granting the interim injunction still apply.

Claimants standing and cause of action

31. The Claimants bring these proceedings pursuant to the Local Government Act 1972, s 222, and the Highways Act 1980, s 130(5).

32. The Local Government Act 1972, s222 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, and …

33. The Highways Act 1980, s130(5) in extract provides:

> "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."

34. The Police and Justice Act 2006, s 27, 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 (c.70) (power of a local authority to bring, defend or appeal in proceedings for the promotion or protection of the interests of inhabitants in 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 a 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."

35. The Claimants seek the continuation of the injunction (and associated power of arrest) pursuant to these provisions to prevent further and apprehended acts of

public nuisance on the highway and trespass on the highway, including trespass by tunnelling under and adjacent to the highway.

Precautionary relief

36. The Claimants therefore seek a precautionary injunction (or *quia timet* injunction as they used to be known.)

37. The test for precautionary relief of the type sought by the Claimants is whether there is an imminent and real risk of harm: *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [34(1)] (Court of Appeal) and the first instance decision of Morgan J: [2017] EWHC 2945 (Ch), [88]. See also *High Speed Two (HS2) Limited v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB), [99]-[101]. 'Imminent' in this context simply means 'not premature': *Hooper v Rogers* [1975] Ch 43, 49. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, [82(3)], the Court of Appeal 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 *quia timet* relief."

38. On the basis of the evidence I summarised earlier, and on all of the evidence, I was satisfied that this application was not premature and that, for the reasons I gave earlier, there is more than a real risk of tortious harm.

39. These being *ex parte* applications, the Claimants are under a duty to make full and frank disclosure, which I am satisfied they have fulfilled.

'Newcomer' or 'Persons Unknown' injunctions

40. As I explained earlier, the law in relation to this type of injunction was set out by the Supreme Court in *Wolverhampton Travellers.* In *Valero*, [58], *Multiplex,* [11], and *High Speed 2 (HS2) Limited,* [30], Ritchie J set out a list of factors derived from the Supreme Court's decision to be satisfied in the protest context (albeit in the former case in the context of a summary judgment application).

41. These factors provide a helpful guide and I propose to analyse the Claimants' application by reference to them (taken in particular how they were formulated in *Multiplex*; as Ms Holland pointed out, *Valero* was a summary judgment case and so slightly different).

42. In doing so, I bear firmly mind the overarching consideration that the Claimants must show a 'compelling need', satisfied by evidence, for a precautionary injunction to protect civil rights: *Wolverhampton Travellers*, [167(i)]; [188].

43. *Substantive requirements*: there must be a civil cause of action identified in the claim form and particulars of claim. The causes of action identified in this case are and trespass on the highway and adjoining land (principally by tunnelling) and public nuisance on the highway.

44. *There must be sufficient evidence before the Court to prove the claim*: this means more than the traditional 'serious issue to be tried' *American Cyanamid* test. It requires me to consider the ingredients of the pleaded torts, and then consider the evidence in this case and decide whether the claim has sufficiently strong prospects of success. I bear in mind that the Article 10 and 11 Convention rights of the protesters are engaged in this case (in relation to public nuisance) because what is sought to be injuncted so far as that is concerned involves assembly and protest on public land. (There is no right to protest on private land: see *High Speed 2 (HS2) Limited v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB), [131]-[198]). This means that, *per* s 12(3) of the Human Rights Act 1998, in relation to public nuisance, no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

45. I begin with trespass.

46. Trespass to land is the interference with possession or the right to possession, and includes instances in which a person intrudes upon the land of another without legal justification. It is a strict liability tort and damage is not necessary.

47. The law is clear that even where a person comes onto land with permission, where that person then does something on the land that he has not been given permission to do, he becomes a trespasser: *Jockey Club Racecourse Limited v Persons Unknown* [2019] EWHC 1026 (Ch); *Tomlinson v Congleton Borough Council and others* [2004] 1 AC 46.

48. It is therefore the case that even where the Persons Unknown have a licence to be on the highway, or land adjacent to it, once they exceed that licence by tunnelling, as has happened in the past and is justifiably feared for the future, they become trespassers because they do not have permission or any lawful justification for doing performing that activity.

49. Hence, the 229th Unknown Person Defendants are described thus:

> "PERSONS UNKNOWN WHO ARE TRESPASSING ON, UNDER OR ADJACENT TO THE ROADS LISTED AT ANNEXE 1 TO THE CLAIM FORM BY UNDERTAKING EXCAVATIONS, DIGGING, DRILLING AND/OR TUNNELLING WITHOUT THE PERMISSION OF THE RELEVANT HIGHWAY AUTHORITY"

50. From the evidence I set out earlier I am satisfied that the Claimants have realistic prospects of success and would be likely to obtain an injunction after trial.

51. To the extent the Persons Unknown might argue that their trespass is excused because they are exercising Convention rights protected by Articles 10 and 11, the exercise of those rights cannot normally justify a trespass: *Cuciurean v The Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 359, at [9(1)] to [9(2)] per Warby LJ.

52. I now consider public nuisance.

53. It is well-established law that it is a public nuisance to obstruct or hinder the free passage of the public along the highway: *East Hertfordshire DC v Isobel Hospice Trading Ltd* [2001] JPL 597.

54. Public nuisance caused by way of the obstruction of the highway was considered in *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch) at [42]-[46] and [64]-[65]. At [43-[45] Morgan J said:

> "43. Some obstructions of the highway will amount to a public nuisance. I did not hear detailed submissions as to what amounts to a sufficient obstruction of the highway for the purposes of public nuisance. Instead I heard submissions as to what would amount to an obstruction of the highway for the purposes of the criminal offence created by section 137 of the Highways Act 1980. The parties assumed that the same basic principles applied to the public nuisance and to the criminal offence.
>
> 44. 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) at para. 325 where it is said:
>
> (1) whether an obstruction amounts to a nuisance is a question of fact;
>
> (2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;
>
> (3) generally, it is a nuisance to interfere with any part of the highway; and
>
> (4) 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 notes to para. 325 contain references to cases where the test for obstruction is variously described. Thus, it has been said that any wrongful act or omission upon or near a highway whereby the public is prevented from freely, safely and conveniently passing along the highway is a nuisance. An obstruction is caused where the highway is rendered impassable or more difficult to pass along by reason of some physical obstacle.
>
> 45. In *Harper v G N Haden & Sons* [1933] Ch 298 at 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.’”

55. Obstruction of the highway may also be a criminal offence contrary to s 137(1), Highways Act 1980.

56. Injunction cases have considered public nuisance caused by obstruction and the s 137 offence side-by-side: see eg *Arla Foods Ltd v Persons Unknown* [2024] EWHC 1952 (Ch), [75], where Jonathan Hilliard KC sitting as a Deputy High Court judge said:

> “75. As in *Ineos* (above), the Claimants asked me to proceed on the basis that the same core principles applied to public nuisance and the criminal offence of obstructing the highway under section 137(1) of the Highways Act 1980. I am content to do so, and would expect the two to march hand in hand.”

65. In *Ineos,* [65], Morgan J said that In order for there to be an offence under section 137 of the 1980 Act, it must be shown that:

> “(1) there is an obstruction of the highway which is more than *de minimis*; occupation of a part of a road, thus interfering with people having the use of the whole of the road, is an obstruction: *Nagy v Weston* [1965] 1 All ER 78 at 80 B-C;
>
> (2) the obstruction must be wilful, ie deliberate;
>
> (3) the obstruction must be without lawful authority or excuse; ‘without lawful excuse’ may be the same thing as ‘unreasonably’ or it may be that it must in addition be shown that the obstruction is unreasonable.”

57. In *Harrison v Duke of Rutland* [1893] 1 QB 142 the plaintiff had used the public highway, which crossed the defendant's land, for the sole and deliberate purpose of disrupting grouse-shooting upon the defendant's land, and was forcibly restrained by the defendant's servants from doing so. The plaintiff sued the defendant for assault; and the defendant pleaded justification on the basis that the plaintiff had been trespassing upon the highway. Lord Esher MR held, at p 146:

> “on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the

> purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser."

58. Plainly Lord Esher M.R. contemplated that there may be "reasonable or usual" uses of the highway beyond passing and repassing. He continued, at pp146–147:

> "Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

59. Lopes LJ, by contrast, stated the law in more rigid terms, at p. 154:

> "if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil …"

60. Similarly, Kay LJ stated, at p 158:

> "the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

61. This case, and the question of when and whether assembly on the highway is lawful was revisited by the House of Lords in *DPP v Jones* [1999] 2 AC 240. At pp254G-255A, Lord Irvine LC said (emphasis added):

> "The rigid approach of Lopes and Kay L.JJ. would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.
>
> The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I have set out below in my

judgment it should. *Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a right to peaceful assembly on the public highway."*

62. At p257D, Lord Irvine concluded:

> "I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway."

63. At p280D and p281C, Lord Clyde gave further insight into what will be viewed as unreasonable where he said (emphasis added):

> "So far as the manner of the exercise of the right is concerned, any use of the highway must not be so conducted as to interfere unreasonably with the lawful use by other members of the public for passage along it. *The fundamental element in the right is the use of the highway for undisturbed travel***.** Certain forms of behaviour may of course constitute criminal actings in themselves, such as a breach of the peace. But the necessity also is that travel by the public should not be obstructed. The use of the highway for passage is reflected in all the limitations, whether on extent, purpose or manner. *While the right to use the highway comprises activities within those limits, those activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with that use even if they are not strictly ancillary to it.*
>
> …..
>
> *In my view the argument for the defendants, and indeed the reasoning of the Crown Court, went further than it needed to go in suggesting that any reasonable use of the highway, provided that it was peaceful and not obstructive, was lawful, and so a matter of public right. Such an approach opens a door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway. I do not consider that by using the language which it used Parliament intended to include some distinct right in*

addition to the right to use the road for the purpose of passage."

64. Accordingly, I accept the Claimants' submission that the law in this area is as follows:

a. There is a right to peaceful assembly on the highway, but it must be remembered that the highway is more than just the carriageway. The assembly on the highway in *Jones*, was concerned with the grass verge;

b. That right does not extend so far as to allow the committing of a public nuisance;

c. While the right to use the highway comprises activities such as assembly on the highway, such activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with the primary use of the highway to pass and repass, if a person is deliberately interfering with the primary use to pass and repass, they are obstructing the highway;

d. That public nuisance may arise by the unreasonable obstruction of the highway, such as unreasonably impeding the primary right of the public to pass and repass;

e. Whether an obstruction of the highway is unreasonable is a question of fact, but will generally require that the obstruction is more than de minimis, and must be wilful.

65. I now have to consider two important recent decisions of the Supreme Court in this area, namely *DPP v Ziegler and others* [2022] AC 408 and *Reference by the Attorney General for Northern Ireland-Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] 2 WLR 33 which I refer to as the *Abortion Services* case. In this I have been greatly assisted by the judgment of Mr Hilliard KC in *Arla Foods Ltd.* I agree with his analysis and the following is gratefully adapted from his judgment.

66. In *Ziegler,* 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.

67. 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.

68. 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.

69. 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.

70. At [16] and [58], the Supreme Court endorsed the Divisional Court's formulation of 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?

71. 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?

72. 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."

73. I will need to say more about *Ziegler* later.

74. *Ziegler* was considered by the Supreme Court in *Abortion Services*. Lord Reed said at [22]-[23]:

> "22. Section 137 and the equivalent predecessor provisions have a long and specific history, and have been the subject of a great deal of judicial consideration. The approach adopted to section 137 and its predecessors for over a century prior to *Ziegler* was rooted in authorities which treated the question to be decided under the statute as similar to the question to be decided in civil nuisance cases of an analogous kind. On that basis, it was held that it was necessary for the court to consider whether the activity being carried on in the highway by the defendant was reasonable or not: see, for example, *Lowdens v Keaveney* [1903] 2 IR 82, 87 and 89. That question was treated as one of fact, depending on all the circumstances of the case: *Nagy v Weston* [1965] 1 WLR 280, 284; *Cooper v Metropolitan Police Commissioner* (1985) 82 Cr App R 238, 242 and 244.That approach accorded with the general treatment in the criminal law of assessments of reasonableness as questions of fact. In cases where the activity in question took the form of a protest or demonstration, common law rights of freedom of speech and freedom of assembly were treated as an important factor in the assessment of reasonable user: see, for example, *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143. That approach was approved, obiter, by members of the House of Lords in *Director of Public Prosecutions v Jones* [1999] 2 AC 240 (*Jones*), 258-259 and 290. Lord Irvine of Lairg LC summarised the position at p 255: "the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage". The same approach continued to be followed after the Human Rights Act entered into force: see, for example, *Buchanan v Crown*

Prosecution Service [2018] EWHC 1773 (Admin); [2018] LLR 668.

> 23. That approach was not followed in the case of *Ziegler*. Although the case was argued before the Divisional Court in accordance with the established approach, and it was not suggested that that approach had resulted in an infringement of Convention rights, the Divisional Court embarked upon the exercise of interpreting section 137 in accordance with section 3 of the Human Rights Act: [2019] EWHC 71 (Admin); [2020] QB 253. It did so not only without the benefit of argument, but also without having considered whether the established interpretation of section 137, as stated for example by the Lord Chancellor in *Jones,* would result in a breach of Convention rights, contrary to the guidance given many times by this court (see, for example, *S v L* [2012] UKSC 30; 2013 SC (UKSC) 20; [2012] HRLR 27, para 15, and most recently *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, para 114)."

75. Of the Supreme Court's endorsement of the Divisional Court's approach, Lord Reed said at [26]:

> "26. On the subsequent appeal to this court, the decision of the Divisional Court was reversed. However, it was agreed between the parties, and this court accepted, that section 137 has to be read and given effect, in accordance with section 3 of the Human Rights Act, on the basis that the availability of the defence of lawful excuse, in a case raising issues under articles 10 or 11, depends on a proportionality assessment carried out in accordance with the approach set out by the Divisional Court: see paras 10-12 and 16. As that question is not in issue in the present case, we make no comment upon it."

76. As Lord Reed noted in *Abortion Services,* [27], one of the issues in dispute in the appeal in *Ziegler* was whether there can be a lawful excuse for the purposes of s 137 in respect of deliberate physically obstructive conduct by protesters, where the obstruction prevented, or was capable of preventing, other highway users from passing along the highway. Lord Hamblen and Lord Stephens concluded that there could be (Lord Reed noted that *Jones* was neither cited nor referred to). Lady Arden and Lord Sales expressed agreement in general terms with what they said on this issue.

77. In the course of their discussion, Lord Hamblen and Lord Stephens stated at [59]:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case".

78. Of this passage, Lord Reed said this in *Abortion Services* at [28]-[29]:

> "28. … One might expect that to be the usual position at the trial of offences charged under section 137 in circumstances where articles 9, 10 or 11 are engaged, if the section is interpreted as it was in *Ziegler*; and that was the only situation with which Lord Hamblen and Lord Stephens were concerned. The *dictum* has, however, been widely treated as stating a universal rule; and that was the position adopted by counsel for JUSTICE in the present case.
>
> 29. That view is mistaken. In the first place, questions of proportionality, particularly when they concern the compatibility of a rule or policy with Convention rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case. Domestic examples include *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 AC 287, the nine-judge decision in *R (Nicklinson) v Ministry of State for Justice* [2014] UKSC 38; [2015] AC 657, and the seven-judge decisions in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2017] UKSC 51; [2020] AC 869 and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223."

79. In *Arla Foods Limited*, Mr Hilliard KC summarised the inter-relationship between *Ziegler* and *Abortion Services* (he calls it the *Safe Access Zones Bill Reference* case) as follows, and I agree:

> "82. In the *Safe Access Zones Bill Reference* case, Lord Reed, giving the judgment of the Court, considered that the Divisional Court in *Ziegler* should- before resorting to the special interpretative duty imposed by section 3 of the HRA- have considered whether the established interpretation of section 137, as stated for example by Lord Irvine in *Jones*, would result in a breach of Convention rights: [23]. However, given that the question of the need to apply in the context of section 137 the proportionality test set out in *Ziegler* was not before the Court, Lord Reed made no specific comment on it: [26].
>
> 83. What he did address was the comment in *Ziegler* at [59] that '[d]etermination of the proportionality of an interference with ECHR rights is a fact-sensitive enquiry which requires the evaluation of the circumstances in the individual case' He stated that while this might be the useful position in a criminal trial of offences charged under section 137 where Article 9, 10 or 11 rights were engaged, if the section was interpreted as it was in *Ziegler*, that would not

> universally be the case: [28]-[29]. Questions of proportionality, particularly where they concerned the compatibility of a *rule or policy* with ECHR rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case: [29]. Further, it is possible for a piece of legislation to ensure that its application in individual circumstances will meet the proportionality requirements under the ECHR without any need for evaluation of the circumstances in the individual case: [34].
>
> 84. Therefore, when a defendant relies on Article 9, 10 or 11 in the defence of a protest-related defence, the Court should- if those articles are engaged- consider whether the ingredients of the defence themselves strike the proportionality balance: [55]. If it considers that they do not strike such a balance, the Court's duty under section 6 of the HRA is to consider whether there is a means by which the proportionality of a conviction can be ensured, whether through using the interpretative duty under section 3 in the case of construing the legislation creating a statutory offence or developing the common law where the offence arises at common law: [56]-[61].
>
> 85. In the present case, the Claimants accept, as explained above, that the requirements for public nuisance should be the same as those in section 137 of the Highways Act 1980. Therefore, on the face of it, the proportionality requirements set out in *Ziegler* would apply, and I consider that I should apply them given that Lord Reed made clear in *Safe Access Zones Bill Reference* that he was not specifically considering this point in the context of section 137.
>
> 86. The Claimants submit in relation to the injunction sought against persons unknown that it is not possible to apply the proportionality requirements under the ECHR to *specific individual* protestors because by definition the identity and circumstances of those individuals is not presently known. Rather at one should apply a proportionality test to the restrictions imposed by the draft order sought with future protests in mind. I accept that I should take the latter course."

80. I propose to adopt the same approach. It is, in substance, the approach which I took in *High Speed 2 (HS2) Ltd*, [197], when I considered the *Ziegler* questions in the context of threatened anticipated protests against HS2.

81. In *Ziegler*, Lords Hamblen and Stephens quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160:

“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."

82. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment 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.

83. 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.

84. The context for this application is the evidence about what had already happened in the Claimants' areas from 2022 onwards as set out in the evidence I summarised earlier. The past protests were not peaceful. They involved unlawful activity and arrests ensued, as described by T/DCS Cronin. They have put others at risk, and put themselves at very great risk because of the nature of the protests.

85. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows. Firstly, by committing trespass and nuisance, the Persons Unknown risk obstructing supplies of fuel which are vital to the economy, and risk causing the unnecessary expenditure of large sums of public money as well as other potential harm, all of which crystalised during the protests in 2022. 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. A single person holding a placard will not be caught by the injunction. 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 as described in the evidence.

86. Second, I also accept that there is a rational connection between the means chosen by the Claimants and the aim in view – namely to ensure the continued safe and efficient delivery of fuel. Prohibiting activities which interfere with that work is directly connected to that aim.

87. 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.

88. I have considered the geographical extent of the injunction and am satisfied that it is appropriate and not excessive.

89. 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 not prohibited. Moreover, unlike the protest in *Ziegler*, the protests are not directed at a specific location but at multiple locations. 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 in relation to facilities which are 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.

90. Finally, drawing matters together, I am satisfied that the Claimants have demonstrated the requisite compelling need. They would obtain their injunction after trial.

91. I come back to the remaining *Multiplex* factors which I can deal with quite briefly.

92. *Whether there is a realistic defence*: I do not consider the Persons Unknown defendants would have a viable defence. Any argument based on the Convention would not succeed for the reasons I have given.

93. *The balance of convenience and compelling justification*: there is such a compelling justification for the reasons I have given. The balance of convenience favours the making of an injunction, with scope for review, variation or discharge should it no longer be necessary.

94. *Whether damages are an adequate remedy*: it is quite clear that damages could not be an adequate remedy for severe personal injury were a tanker to catch fire because of the protests. Furthermore, the Persons Unknown would be highly unlikely to satisfy a damages award of the size which would likely be awarded.

95. The terms of the injunction: the prohibitions must be set out in clear words and should not be framed in legal technical terms (like the word "tortious", for instance). This is satisfied both in the description of Persons Unknown and also in the order itself.

96. *Prohibitions must match the pleaded claim*: this is satisfied.

97. *The geographical boundaries must be clear*: this is satisfied. There are plans showing the areas covered.

98. The d*uration of any final injunction should only be such as is proven to be reasonably necessary to protect the Claimants' legal rights in the light of the evidence of past tortious activity and the future feared or quia timet tortious activity*: the injunction is time limited and there are provisions allowing for review, variation or discharge should the position change.

99. *Service*: this is provided for and I am satisfied the provisions are sufficient. This is a continuation of a pre-existing injunction.

100. *The right to set aside or vary*: this is provided for.

101. *Review*: this is provided for.

Conclusion

102. It was for these reasons that I granted the injunction.