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

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CASE LAW	
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A House of Lords

Cream Holdings Ltd and others *v* Banerjee and another

[2004] UKHL 44

2004 June 14, 15; Oct 14 — Lord Nicholls of Birkenhead, Lord Woolf CJ, Lord Hoffmann, Lord Scott of Foscote and Baroness Hale of Richmond

Confidential information — Breach of confidence — Injunction — Claimants seeking interim injunction to restrain publication of confidential information supplied by former employee — Whether claimants "likely" to establish that publication should not be allowed — Whether interim injunction to be granted — Human Rights Act 1998 (c 42), s 12(3)

The claimants sought an interim injunction to restrain the publication of confidential information obtained without permission by the first defendant, a former employee of the claimants, who had supplied it to the second defendants, the publishers of a local newspaper with a reputation for investigating stories of local public interest, to support her allegations of financial irregularities. The judge granted an injunction restraining the defendants until trial or further order from publishing, disclosing or using certain confidential information as defined in a confidential schedule save to certain specified bodies, on the ground that the claimants had a real prospect of successfully establishing at trial that publication should not be allowed. The defendants appealed on the ground that when considering whether the claimant was "likely", within the meaning of section 12(3) of the Human Rights Act 1998[1], to establish at trial that publication should not be allowed, the judge had erred in applying the test of "a real prospect of success" rather than the test of "more likely than not". The Court of Appeal held that the judge had applied the correct test and by a majority dismissed the appeal.

On the defendants' appeal—

Held, (1) that the principal purpose for which section 12(3) was enacted was to buttress the protection afforded to freedom of speech at the interlocutory stage by setting a higher threshold for the grant of interlocutory injunctions against the media than the previous test of a real prospect of succeeding at trial in the claim for a permanent injunction; but that to construe "likely" in the subsection as meaning "more likely than not" in all situations would be to set the test too high; that there could be no single rigid standard governing all applications for interim restraint orders and some flexibility was essential; that Parliament's intention was that "likely" should have an extended meaning which set as a normal pre-requisite to the grant of an interlocutory injunction a likelihood of success at trial which was higher than the previous test but which permitted the court to dispense with that higher test where particular circumstances made it necessary; that on its proper construction the effect of section 12(3) was that the court should not make an interim restraint order unless it was satisfied that the applicant's prospects of success at trial were sufficiently favourable to justify the order being made in the light of all the other circumstances of the case; that in general the threshold that the applicant had to cross before the court embarked on exercising its discretion was to satisfy the court that he would probably succeed at the trial; but that there could be cases where it was necessary for the court to depart from that general approach and a lesser degree of likelihood would suffice as a prerequisite; that the weight to be given to the likelihood of success at trial when deciding whether to grant the application depended on all the other circumstances and that approach gave effect to the parliamentary intention that the courts should have particular regard to the importance of the right to freedom of

[1] Human Rights Act 1998, s 12(3): see post, para 1.

expression and at the same time was sufficiently flexible to give effect to countervailing Convention rights (post, paras 15, 16, 20–23, 27–30).

(2) Allowing the appeal, that from the content of the confidential information contained in the private judgments of the courts below it was clear that the judge had misdirected himself in a material respect when exercising his discretion, and since the Court of Appeal had not exercised its discretion afresh it fell to their Lordships to do so; that, given that the disclosures the defendants wished to publish were clearly matters of serious public interest, the claimants' prospects of success at trial were not sufficiently likely to justify making an interim restraint order; and that, accordingly, the injunction was discharged so far as it related to the information already supplied by the first defendant to the second defendants (post, paras 24, 25, 27–30).

Decision of the Court of Appeal [2003] EWCA Civ 103; [2003] Ch 650; [2003] 3 WLR 999; [2003] 2 All ER 318 reversed.

The following cases are referred to in the opinions of their Lordships:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)
H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)
Harris Simons Construction Ltd, In re [1989] 1 WLR 368
Primalaks (UK) Ltd, In re [1989] BCLC 734

The following additional cases were cited in argument:

Attorney General v Parry [2002] EWHC 3201 (Ch); [2004] EMLR 223
Bladet Tromsø v Norway (1999) 29 EHRR 125
Bonnard v Perryman [1891] 2 Ch 269, CA
Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)
Douglas v Hello! Ltd [2001] QB 967; [2001 2 WLR 992, [2001] 2 All ER 289, CA
Imutran Ltd v Uncaged Campaigns Ltd [2001] 2 All ER 385
Observer, The, and The Guardian v United Kingdom (1991) 14 EHRR 153
Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Millett) granted on 20 May 2003, the defendants, Chumki Banerjee and The Liverpool Daily Post and Echo Ltd, appealed from a decision of the Court of Appeal (Simon Brown, Sedley and Arden LJJ) on 13 February 2003 dismissing the defendants' appeal from a decision of Lloyd J on 5 July 2002 granting an application by the claimants, Cream Holdings Ltd, Chadmead Ltd, Cream Liverpool Ltd, CI Events Ltd, Cream Events Ltd, Gridstone Ltd and Harvey Recordings Ltd, for an injunction restraining the defendants, until trial or further order, from publishing, disclosing or using certain confidential information as defined in a confidential schedule save to certain specified bodies.

The facts are stated in the opinion of Lord Nicholls of Birkenhead.

Richard Spearman QC and *Catrin Evans* for the defendants. The legislative intention underlying section 12 of the Human Rights Act 1998 is to enhance or buttress the Convention right to freedom of expression. In particular the legislative intention of section 12(3) is to raise the threshold for the grant of prior restraint against publication and/or to make the grant

A of relief before trial more difficult in cases where it might affect the exercise of the Convention right to freedom of expression than in other cases. The use of the word "publication" shows that the section applies to, but is not restricted to, the media.

The legislative intention is met by giving the word "likely" in section 12(3) its primary meaning of "probable" or "more likely than not". That intention would not be met and on the contrary would be thwarted by giving the word B "likely" the meaning of "real prospect of success". There is no compelling reason why "likely" should be read down to mean "real prospect of success".

The pre-Human Rights Act case law does not suggest that free speech enjoys automatic priority over all other rights. That case law makes clear that the test for granting an injunction is higher than the test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and that it is a test of necessity. C Even if the Court of Appeal's construction of section 12(3) requires the court, when evaluating whether a claimant has a real prospect of success, to undertake some fuller evaluation than the *American Cyanamid* approach, that does not reflect any enhancement or buttressing of the Convention right to freedom of expression in comparison to the pre-Human Rights Act state of the law. The effect of the Court of Appeal's approach is to lower rather than to raise the threshold for the interim restraint on freedom of speech in D comparison to the pre-Human Rights Act state of the law. That approach renders section 12(3) nugatory. [Reference was made to *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Douglas v Hello! Ltd* [2001] QB 967; *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385; *Attorney General v Parry* [2004] EMLR 223; *Campbell v MGN Ltd* [2004] 2 AC 457 and *In re Harris Simons Construction Ltd* [1989] 1 WLR 368.]

E The judge accepted that on the evidence there was a breach of confidence and a defrauding of the revenue. In deciding whether a given interference with freedom of expression is necessary in a democratic society the court is faced with the principle of freedom of expression which is subject to exceptions which must be narrowly interpreted. In a case involving the media, the court must take into account the essential function that the press fulfils in a democratic society to inform the public of matters of genuine F public interest. The press performs a very different role from that undertaken by regulatory bodies and the police. The press should not be an arm of the law or government and is entitled to communicate directly with the public. If the only function of the press were to investigate and pass on its findings to the relevant authorities, the vital role of the press as the public watchdog would be undermined and the public interest would be damaged.

G Any interference with the freedom of the press has to be justified, even when there is no public interest in publication, because it inevitably has some effect on the ability of the press to perform its role in society. The existence of a free press is in itself desirable and prima facie the court should not interfere with publication. The existence of a public interest in publication strengthens the case for not granting an injunction. Whether a public figure has courted publicity or not, he may be the legitimate subject of public H attention. Moreover, where the image projected is untrue or incomplete the media is generally entitled to set the record straight (*Campbell v MGN Ltd* [2004] 2 AC 457). Although the appellants are entitled to succeed on their other arguments without relying on the contention that the respondents have deliberately fostered a false public image such that there is a public interest

in it being corrected, in fact the appellants are entitled to rely upon that point as well, because that is what the respondents did. A

It is an important right and function of the press to express criticism of companies such as the claimants where that is warranted by their conduct. There is a strong public interest in members of society obeying the law and being publicly exposed if they do not. While the right to confidence is a recognised exception to article 10(1) of the Convention the onus of proving that freedom of expression must be restricted is on the applicant seeking the relief. B

Edward Bartley Jones QC and *Kelly Pennifer* for the claimants. Section 12 was formulated as a threshold clause and section 12(3) has to be construed as a threshold clause. Section 12(3) involves two elements. First, the court must be "satisfied" of a postulate. Second, the postulate of which the court must be satisfied is that the applicant is "likely" to establish that publication should not be allowed. As to the first element, the court can only be satisfied on a balance of probabilities. Anything less does not involve satisfaction. If therefore a balance of probabilities is introduced into the first element it is difficult to see why "likely" should mean "more likely than not" in the second. The reality must be that "likely" does not mean "more likely than not". Although section 12(3) looks forward to what will occur at trial, the court will no doubt carefully scrutinise and consider, at the interim stage, all relevant factors, including the importance of the rights under article 10(1) of the Convention to freedom of expression. C D

The primary remedy for breach of confidence should be an injunction. The 1998 Act is a constitutional instrument and must be given a generous and purposive interpretation, suitable to give individuals the full measure of the fundamental rights and freedoms guaranteed by the Convention. A generous and purposive approach to the true construction of the 1988 Act would involve recognition and justification of all Convention rights and not merely article 10(1) as interpreted by the Strasbourg jurisprudence. Overly concentrating on the pre-1998 Act cases is of little use. Some of the earlier cases have to be reassessed. Freedom of expression is only a qualified right and is subject to judicial control. In performing the balancing exercise the court must look at the distinction between the public interest and what interests the public. There is nothing in the Strasbourg jurisprudence which supports the interpretation of section 12(3) as contended for by the defendants. [Reference was made to *Bladet Tromsø and Stensaas v Norway* (1999) 29 EHRR and *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153.] E F G

The rule in *Bonnard v Perryman* [1891] 2 Ch 269 applies to trade libel, injurious falsehood and related claims but does not apply to other causes of action, in particular breach of confidence. The rule itself is in no way in conflict with section 12(3) and simply affords an additional reason why interim relief should be refused. The rule does not require section 12(3) to be construed as the defendants contend. "Likely" means "a real prospect of success". H

There are no grounds for discharging the interim injunction granted by the judge or for reversing the decision of the Court of Appeal. The judge adequately took into account the question whether damages would be an

A adequate remedy for either side and what the consequences would be to either side were he to grant or refuse the interim injunctive relief sought.

If it is held that the judge misdirected himself as to the interpretation of "likely" in section 12(3) then the discretion becomes available for the appellate court to exercise.

The documents taken from the claimants and handed to the newspaper were obviously confidential documents and hence there was, prima facie, a B major breach of confidence by an employee who had a high level of duty of confidence. The issue for the court when deciding whether to grant an injunction was whether the employee, in the role of a whistle blower, was acting in good faith. The employee never went to the Custom and Excise or to the revenue authorities, and any suggestion of wrongdoing after the employee left is pure speculation. All dealings between the claimants and C the revenue were confidential. If the claimants are entitled to confidentiality as against the Revenue they must be entitled to a duty of confidentiality as against their employee. The mere fact that a claimant is a public company does not mean that all its affairs are matters of public interest.

Spearman QC replied.

D Their Lordships took time for consideration.

14 October. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, the Human Rights Act 1998 introduced into the law of this country the concept of Convention rights. Section 12 made special provision regarding one of these rights: the right to freedom of expression. When considering whether to grant relief which, if granted, might affect the E exercise of the Convention right to freedom of expression the court must have particular regard to the importance of this right: section 12(4). Additionally, section 12(2) set out a prerequisite to the grant of relief against a person who is neither present nor represented. The court must be satisfied the applicant has taken all practicable steps to notify the respondent or that there are compelling reasons why the respondent should not be notified. F Further, section 12(3) imposed a threshold test which has to be satisfied before a court may grant interlocutory injunctive relief:

> "No such relief [which might affect the exercise of the Convention right to freedom of expression] 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."

G

2 On this appeal your Lordships' House is concerned with the meaning and application of the word "likely" in this provision.

The factual context

3 The context in which this question arises on this appeal is as follows. The plaintiffs in this action are the Cream group of companies. These H companies began as the Cream nightclub in Liverpool in 1992 and then expanded and diversified their business. They opened other clubs elsewhere and began to stage large events such as dance festivals. Now they also carry on a substantial business franchising their brand name and logo and merchandising clothes and other items. They are an important business in

Liverpool featuring both on general news pages and financial pages of newspapers.

4 The first defendant, Chumki Banerjee, is a chartered accountant. She was the financial controller of one of the companies in the Cream group for three years from February 1998 to January 2001. Before then Ms Banerjee worked for a firm of accountants and was responsible for dealing with the Cream group's financial affairs between 1996 and 1998. The second defendant, which I shall refer to simply as the "Echo", is the publisher of Merseyside's two long-established and leading daily newspapers, the "Daily Post" and the "Liverpool Echo".

5 In January 2001 Cream dismissed Ms Banerjee. When she left she took with her copies of documents she claims show illegal and improper activity by the Cream group. She passed these to the "Echo" with additional information. She received no payments for this. On 13 and 14 June 2002 the "Echo" published articles about alleged corruption involving one director of the Cream group and a local council official. On 18 June 2002 the Cream group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms Banerjee.

The proceedings

6 The defendants admitted the information was confidential. Their defence was that disclosure was in the public interest. Lloyd J held there were seriously arguable issues both ways on whether this defence would succeed. Cream had established the "necessary likelihood" of a permanent injunction for the purposes of section 12(3): "I do not say it is more likely than not, but there is certainly a real prospect of success." The balance of convenience test favoured the grant of an interim injunction. Cream was likely to suffer irreparable loss of an unquantifiable nature if the story were published. Restraint of publication would delay the "Echo's" story but not necessarily preclude its publication altogether. Given the undoubted obligation of confidentiality inherent in Ms Banerjee's employment contract, the disputes of fact on some matters, and the possibility that Ms Banerjee's complaints of defaults by the Cream group might be met adequately by disclosure to certain regulatory authorities as distinct from publication at large by the press, the right course was to freeze the position and direct a speedy trial if desired. On 5 July 2002 Lloyd J granted an interlocutory injunction prohibiting the defendants until trial from publishing, disclosing or using information defined as confidential information in a confidential schedule. In order to prevent the immediate loss of confidentiality Lloyd J set out part of his judgment in a private appendix.

7 The defendants appealed. The judge, they said, had applied the wrong test under section 12(3), that of a "real prospect of success" rather than "more likely than not". Further, on the basis of his factual conclusions the judge erred in deciding Cream was likely to succeed at the trial.

8 The Court of Appeal, comprising Simon Brown, Sedley and Arden LJJ, dismissed the appeal: [2003] Ch 650. Sedley LJ dissented. Again, in order to maintain privacy for the information separate confidential judgments were delivered by two members of the court.

9 All three Lords Justices agreed the judge was correct in his interpretation of "likely" in section 12(3), although they differed in their reasoning. As to the facts, Simon Brown LJ held the judge was entitled to

A conclude Cream has a real prospect of success at the trial. The judge was also entitled to decide that in all the circumstances he should exercise his discretion in favour of making an order involving prior restraint. Simon Brown LJ, however, expressed reservations about the latter point. Not every judge would necessarily have reached the same conclusion as Lloyd J, and he himself might well not have done so. Arden LJ was also lukewarm in her view of the judge's decision, noting that in all the circumstances it could not B be said to be perverse.

10 On this point Sedley LJ dissented. Lloyd J erred in his conclusion that there is likely to be no public interest justification for the disclosure of the story which Miss Banerjee gave the "Echo" and the "Echo" wishes to publish. The principal matter the "Echo" wishes to publish is "incontestably" a matter of serious public interest. The essential story was C one which, whatever its source, no court could properly suppress.

11 Ms Banerjee and the "Echo" appealed to your Lordships' House, raising arguments along the same lines as those they presented to the Court of Appeal.

Section 12(3) and "likely"

D **12** As with most ordinary English words "likely" has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from "more likely than not" to "may well". In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as "very likely" or "quite likely". In section 12(3) the context is that of a E statutory threshold for the grant of interim relief by a court.

13 The legal background against which this statutory provision has to be interpreted is familiar. In the 1960s the approach adopted by the courts to the grant of interlocutory injunctions was that the applicant had to establish a prima facie case. He had to establish this before questions of the so-called "balance of convenience" fell to be considered. A prima facie case was understood, at least in the Chancery Division, as meaning the applicant F must establish that as the evidence currently stood on the balance of probability he would succeed at the trial.

14 The courts were freed from this fetter by the decision of your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Lord Diplock said, at pp 407–408, that the court must be satisfied the claim "is not frivolous or vexatious; in other words, that there is a serious question G to be tried". But it is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Unless the applicant fails to show he has "any real prospect of succeeding in his claim for a permanent injunction at the trial", the court should proceed to consider where the balance of convenience lies. As to that, where other H factors appear to be evenly balanced "it is a counsel of prudence" for the court to take "such measures as are calculated to preserve the status quo".

15 When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to

which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a "serious question to be tried" or a "real prospect" of success at the trial.

16 Against this background I turn to consider whether, as the "Echo" submits, "likely" in section 12(3) bears the meaning of "more likely than not" or "probably". This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think "likely" can bear this meaning in section 12(3). Section 12(3) applies the "likely" criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of "more likely than not" in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure.

17 Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.

18 What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the "Echo" agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the "Echo" not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

A **19** The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, B the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a "probability of success" test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the C disputed issue of fact can be resolved at the trial.

20 These considerations indicate that "likely" in section 12(3) cannot have been intended to mean "more likely than not" in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that "likely" should have an extended meaning which sets as a normal D prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of "real prospect" but permits the court to dispense with this higher standard where particular circumstances make this necessary.

21 Similar problems have arisen with other statutory provisions imposing a statutory threshold on the grant of relief by a court. Two E instances may be mentioned. A prerequisite to making a care order under section 31 of the Children Act 1989 is that the child in question is suffering or "is likely to suffer" significant harm. Your Lordships' House has held that in this context "likely" is used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: see *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 585. So the degree of likelihood differed F according to the circumstances of the case. Again, a prerequisite to making an administration order under section 8(1) of the Insolvency Act 1986 is that the court considers making such an order "would be likely to achieve" one of the statutory purposes. Following the lead given by Hoffmann J in *In re Harris Simons Construction Ltd* [1989] 1 WLR 368, in *In re Primlaks (UK) Ltd* [1989] BCLC 734, 742, Vinelott J held this required the court to be G satisfied there is a "prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order".

22 In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no H single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what

degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

23 This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant.

The instant appeal

24 In the instant case it is not necessary or helpful to analyse the judge's careful judgment line by line to see whether in substance his interpretation of section 12(3) differed from that set out above. This is so because I am satisfied that in one particular respect the judge fell into error in any event. The error was identified by Sedley LJ and sufficiently explained by him at para 88 of his judgment [2003] Ch 650, 677, and para 1 of his "private" judgment. I agree with him that the principal happenings the "Echo" wishes to publish are clearly matters of serious public interest. The graduated protection afforded to "whistleblowers" by sections 43A to 43L of the Employment Rights Act 1996, inserted by the Public Interest Disclosure Act 1998, section 1, does not militate against this appraisal. Authorities such as the Inland Revenue owe duties of confidentiality regarding the affairs of those with whom they are dealing. The "whistleblower" provisions were intended to give additional protection to employees, not to cut down the circumstances where the public interest may justify private information being published at large.

25 Since Lloyd J misdirected himself in a material respect when exercising his discretion and the Court of Appeal did not exercise this discretion afresh, it falls to your Lordships' House to do so. I would allow this appeal. Given the public interest mentioned above I am firmly of the view that the Cream group's prospects of success at trial are not sufficiently

likely to justify making an interim restraint order in this case. On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance. I would discharge the judge's injunction so far as it relates to information already supplied by Ms Banerjee to the "Echo". The defendants were content that the injunction should otherwise remain in force.

26 I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt the "Echo's" publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the "Echo" or Ms Banerjee in respect of matters the Echo may decide to publish.

LORD WOOLF CJ

27 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

28 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD SCOTT OF FOSCOTE

29 My Lords, the issue raised by this appeal, namely, the proper judicial approach to section 12(3) of the Human Rights Act 1998, is one of great importance. This is particularly so for cases like this in which the disclosure which is sought to be prevented is, if the information in question is true, disclosure of iniquity by any standards. I have, however, had the advantage of reading in advance the opinion of my noble and learned friend, Lord Nicholls of Birkenhead, and am in complete agreement with the guidance he has given in para 22 of his opinion and with the reasons he has given for concluding that this appeal should be allowed. I, too, would make the order he has suggested.

BARONESS HALE OF RICHMOND

30 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

Appeal allowed with costs.

Solicitors: Brabners Chaffe Street, Liverpool; Wacks Caller, Manchester.

S H

Court of Appeal

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

[2019] EWCA Civ 515

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

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

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

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

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

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

APPEAL from Morgan J

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

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

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

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

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

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

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

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

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

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

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

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

The claimants

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

The defendants

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

6 The second defendant is described as:

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

7 The third defendant is described as:

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

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

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

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

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

The judgment

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

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

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

13 The judge then commented, at para 21:

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

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

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

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

This appeal

17 Permission to appeal has been granted on three grounds:

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

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

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

Persons unknown: the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

> "Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell*, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.

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

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

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

34 I would tentatively frame those requirements in the following way: (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

Application of the law to this case

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

Width and clarity of the injunctions granted by the judge

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

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

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

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

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

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the

order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

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

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

Geographical and temporal limits

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

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> "(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
>
> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

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

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

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

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

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

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

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

Disposal

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

Conclusion

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

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

Court of Appeal

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

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5

Sir Terence Etherton MR, David Richards, Coulson LJJ

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

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

On the claimants' appeal—

Held, dismissing the appeal, (1) that since service was the act by which a defendant was subjected to the court's jurisdiction, the court had to be satisfied that the method used for service either had put the defendant in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time; that given that sending the claim form by e-mail to the

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

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

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

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

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

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

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

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

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

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

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

(ii) Private law remedies are not well suited to the task of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. What are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Powers conferred by Parliament on local authorities, for example, to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression and to carry out extensive consultation. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it (post, para 93).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following additional cases were cited in argument:

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

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

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

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

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

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

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

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

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

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

APPEAL from Nicklin J

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

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

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

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

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

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration.

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

1 This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests.

2 The first appellant, Canada Goose UK Retail Ltd ("Canada Goose"), is the United Kingdom trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in

A London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

3 The first respondents ("the Unknown Persons respondents"), who are the first defendants in the proceedings, were described in the claim form as: B "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]." The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation ("PETA").

4 This is an appeal from the order of Nicklin J of 20 September 2019 by C which he dismissed the application of the claimants for summary judgment for injunctive relief against the defendants and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney QC (sitting as a judge of the Queen's Bench Division) on 15 December 2017.

Factual background

D

5 From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose's use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J's judgment at paras 132–134. The following is a brief summary.

E 6 A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been co-ordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have F joined the on-going protest as individuals who were not part of any wider group.

7 The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose's G employees.

8 A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2017, the front doors of the store were vandalised with "Don't shop here" and "We sell cruelty" painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, 300, and 100, respectively) had a serious impact on the operation of the H store. The police were present on each of those occasions. On one occasion five arrests were made. On 18 November 2017 the police closed one lane of the carriageway on Regent Street. There is also evidence of criminal offences by certain individual protestors, including an offence of violence reported to the police during the large protest on 18 November 2017.

The proceedings

9 Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

10 They are described in paragraph 6 of the particulars of claim as including "all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign". The "Campaign" was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.

11 The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:

(1) Assaulting, molesting, or threatening the protected persons (defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards protected persons;

(3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the protected persons;

(4) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the protected persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the first claimant's retail business to or with employees by telephone, e-mail or letter;

(7) Entering the Store;

(8) Blocking or otherwise obstructing the entrances to the Store;

(9) Demonstrating at the Stores within the inner exclusion zone;

(10) Demonstrating at the Stores within the outer exclusion zone save that no more than three protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a loudhailer within the inner exclusion zone and outer exclusion zone or otherwise within 50 metres of the building line of the Store.

12 On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:

> "(1) Assaulting, molesting, or threatening the protected persons [defined as including Canada Goose's employees, security personnel working at the store, customers and any other person visiting or seeking to visit the store];

A "(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of 'protected persons';

"(3) Intentionally photographing or filming the protected persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of animal
B products;

"(4) Making in any way whatsoever any abusive or threatening electronic communication to the protected persons;

"(5) Entering the Store;

"(6) Blocking or otherwise obstructing the entrance to the Store;

"(7) Banging on the windows of the Store;

C "(8) Painting, spraying and/or affixing things to the outside of the Store;

"(9) Projecting images on the outside of the Store;

"(10) Demonstrating at the Store within the inner exclusion zone;

"(11) Demonstrating at the Store within the outer exclusion zone A, save that no more than three protestors may at any one time demonstrate and hand out leaflets within the outer exclusion zone A (but not within
D the inner exclusion zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

"(12) Demonstrating at the Store within the outer exclusion zone B [as defined in the order] save that no more than five protestors may at any one time demonstrate and hand out leaflets within outer exclusion zone B (but not within the inner exclusion zone) provided that no obstruction occurs
E other than that which is implicit in handing out leaflets;

"(13) Using at any time a loudhailer [as defined] within the inner exclusion zone and outer exclusion zones or otherwise within ten metres of the building line of the Store;

"(14) Using a loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

F **13** A plan attached to the order showed the inner and outer exclusion zones. Essentially those zones (with a combined width of 7·5 metres) covered roughly a 180-degree radius around the entrance to the store. The inner exclusion zone extended out from the store front for 2·5 metres. The outer exclusion zone extended a further five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent
G Street) and zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined exclusion zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

H **14** The order permitted the claimant to serve the order on

"any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order."

It provided for alternative service of the order, stating that "the claimants shall serve this order by the following alternative method namely by serving the same by e-mail to 'contact@surgeactivism.com' and 'info@peta.org.uk' ".

15 The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16 The order was sent on 29 November 2017 to the two e-mail addresses mentioned in the order, "contact@surgeactivism.com" and "info@peta.org.uk". The claim form and the particulars of claim were also sent to those e-mail addresses.

17 On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J's order.

18 On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney sitting as a judge of the Queen's Bench Division added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.

19 At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") and to freedom of assembly under article 12 of the ECHR.

20 Judge Moloney continued the interim injunction but varied it by amalgamating zones A and B in the outer exclusion zone and increasing the number of protestors permitted within the outer exclusion zone to 12 people. He also varied paragraph (14) of Teare J's order, substituting a prohibition on:

> "using at any time a loudhailer within the inner exclusion zone and outer exclusion zone . . . [and] using a loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2 p m and 8 p m a single loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

21 Judge Moloney's order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22 Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred

before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23 On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Pt 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the restrictions applicable to the zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

> "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Ltd and are involved in any of the acts prohibited by the terms of this order ('Protestors')."

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

25 Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Hussain (Motor Insurers' Bureau intervening)* [2019] 1 WLR 1471, and *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further sets of written submissions on behalf of Canada Goose.

26 Bearing in mind that only one party was represented before him, Nicklin J's judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.

27 The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue as to the substance of the application for summary judgment.

28 Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR r 6.5, and there had been no order permitting alternative service under CPR r 6.15. Teare J's order only permitted alternative service of his order. Nicklin J declined to amend Teare J's order under the "slip rule" in CPR r 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR r 6.16 without a proper application before him.

29 Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protestors who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30 He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37

protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31 Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protestors, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.

32 Nicklin J said the following (at para 163) in conclusion on the form of the proposed final injunction:

> "For the reasons I have addressed above, it is not impossible to name the persons against whom relief is sought and, more importantly, the terms of the injunction would impose restrictions on otherwise lawful conduct. Further, the interim injunction (and in particular the size and location of the exclusion zones) practically limits the number of people who can demonstrate outside the Store to 12. This figure is arbitrary; not justified by any evidence; disproportionate (in the sense there is no evidence that permitting a larger group would not achieve the same object); assumes that all demonstrators share the same objectives and so could be 'represented' by 12 people; and wrong in principle . . . Who is to decide who should be one of the permitted 12 demonstrators? Is it 'first-come-first-served'? What if other protestors do not agree with the message being advanced by the 12 'authorised' protestors?"

33 His conclusions on whether the respondents had a real prospect of defending the claim were stated as follows:

> "164. The second defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the second defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> "165. In relation to the first defendants, and those for whom the second defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the claimants have demonstrated that the defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of 'persons unknown' who have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

A 34 For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said (at para 167):

"I am also satisfied that, applying the principles from *Cameron* [2019] B 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the claimants need to address regarding the validity of the claim form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not C a claim can be properly maintained against 'persons unknown' for particular civil wrongs (e g trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the particulars of claim and any interim injunction granted against 'persons unknown' must comply with the D requirements suggested in *Ineos*."

The grounds of appeal

35 The grounds of appeal are as follows.

"Ground 1 (Service of the Claim Form): In relation to the service of the E claim form, the judge:

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

"Erred in failing to consider, alternatively in refusing to order, that the steps taken by the claimants in compliance with the undertaking given to F Teare J on 29 November 2017 constituted alternative good service under CPR r 6.15(2); alternatively

"Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form under CPR r 6.16, alternatively erred in law in refusing to exercise that power of dispensation.

"Ground 2 (Description of First Respondents): The judge erred in law G in holding that the claimants' proposed reformulation of the description of the first respondents was an impermissible one.

"Ground 3 (Approach to Summary Judgment): In determining whether summary judgment should be granted for a final prohibitory quia timet injunction against the first respondents (as described in accordance with the proposed reformulation) the judge erred in law in the approach he H took. In particular, and without derogating from the generality of this, the judge:

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

"Erred in concluding that the claimants were bound to differentiate, for the purposes of the description of the first respondents, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or

"Erred in concluding that evidence of wrongdoing of some individuals within the potential class of the first respondents could not form the basis for a case for injunctive relief against the class as a whole.

"Ground 4 (Approach to and assessment of the evidence): The judge erred in his approach to alternatively his assessment of the evidence before him, reaching conclusions which he was not permitted to reach."

36 In a "supplemental note" Canada Goose asks that, if the appeal is allowed, the summary judgment application be remitted.

Discussion

Appeal ground 1: service

37 The order of Teare J dated 29 November 2017 directed pursuant to CPR r 6.15 that his order for an interim injunction be served by the alternative method of service by e-mail to two e-mail addresses, one for Surge (contact@surgeactivism.com) and one for PETA (info@peta.org.uk). There was no provision for alternative service of the claim form and the particulars of claim or of any other document, other than the order itself. In fact, the claim form and the particulars of claim were sent to the same e-mail addresses as were specified in Teare J's order for alternative service of the order itself.

38 Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect e-mail service as provided below of the order, the claim form and particulars of claim and application notice and evidence in support".

39 Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR r 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.

40 Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR r 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.

41 In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR r 6.16.

42 We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.

43 CPR r 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that

this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] RPC 45.

44 We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR r 40.12.

45 Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR r 6.15(2) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* [2019] 1 WLR 1471, para 14, the general rule is that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and (at para 17): "It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."

46 Lord Sumption, having observed (at para 20) that CPR r 6.3 considerably broadens the permissible methods of service, said that the object of all of them was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time. He went on to say (at para 21) with reference to the provision for alternative service in CPR r 6.15, that:

> "subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant."

47 Sending the claim form to Surge's e-mail address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.

48 The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR r 6.16 to

dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR r 6.16.

49 Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.

50 Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protestors and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

51 Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protestor than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.

52 We have already mentioned, by reference to Lord Sumption's comments in *Cameron* [2019] 1 WLR 1471, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protestors who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to be joined as a party, can justify using the power under CPR r 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protestors to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR r 6.16.

53 In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was

A plainly the case, that service of the claim form by sending it to PETA's e-mail address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR r 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR r 6.16 dispensing with service on PETA.

B **54** Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality C about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR r 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J D as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

E **55** For those reasons we dismiss appeal ground 1.

Appeal ground 2 and appeal ground 3: interim and final injunctions

56 It is convenient to take both these grounds of appeal together. Ground 3 is explicitly related to Nicklin J's dismissal of Canada Goose's application for summary judgment. Appeal ground 2 appears to be directed F at, or at least is capable of applying to, both the dismissal of the summary judgment application and also Nicklin J's discharge of the interim injunction originally granted on 29 November 2017 and continued by the order of Judge Moloney of 15 December 2017. We shall consider, first, the interim injunction, and then the application for a final injunction.

G Interim relief against "persons unknown"

57 It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* [2019] 1 WLR 1471 and put into effect by the Court of Appeal in the context of protestors in *Ineos* [2019] 4 WLR 100 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29.

H **58** In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving

vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013." The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59 Lord Sumption, referred (at para 9) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR r 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at para 10) that English judges had allowed some exceptions to the general rule, he said (at para 11) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protestors, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance [2017] EWHC 2945 (Ch).

60 Lord Sumption identified (at para 13) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61 That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.

62 Lord Sumption said (at para 15) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR r 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR Pt 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at para 26) such a person cannot be sued under a pseudonym or description.

63 It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a quia timet injunction is sought. He did, however, refer (at para 15) with approval to *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the

A grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

64 Lord Sumption also referred (at para 11) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of B protestors, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65 The claimants in *Ineos* [2019] 4 WLR 100 were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protestors. Each of the first five defendants was a group C of persons described as "Persons unknown" followed by an unlawful activity, such as "Entering or remaining without the consent of the claimant(s) on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass . . . over private access roads", or "interfering with the right of way enjoyed by the claimants . . . over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 11 D of the [relevant] order with the intention set out in paragraph 11 of the [relevant] order". The first instance judge made interim injunctions, as requested, apart from one relating to harassment.

66 One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgment, E with which the other two members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at para 29) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only F come into existence in the future. Longmore LJ concluded (at para 30) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67 Longmore LJ said (at para 31) that a court should be inherently cautious about granting injunctions against unknown persons since the G reach of such an injunction is necessarily difficult to assess in advance. He also referred (para 33) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that H publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at

para 34) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

68 Applying those requirements to the order of the first instance judge, Longmore LJ said that there was no difficulty with the first three requirements. He considered, however, against the background of the right to freedom of peaceful assembly guaranteed by both the common law and article 11 of the ECHR, that the order was both too wide and insufficiently clear in, for example, restraining the fifth defendants from combining together to commit the act or offence of obstructing free passage along the public highway (or to access to or from a public highway) by slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

69 Longmore LJ said (at para 40) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at para 40) that it was unsatisfactory that the injunctions contained no temporal limit.

70 The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.

71 *Cuadrilla* [2020] 4 WLR 29 was another case concerning injunctions restraining the unlawful actions of fracking protestors. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful

A interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72 The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising B the jurisdiction to grant a quia timet interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth C *Ineos* requirements required some qualification.

73 Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] QB D 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74 Although the point did not arise for decision in *Cuadrilla*, the point E is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited demonstrating within the inner exclusion zone and limited the number of protestors at any one time and their actions within the outer exclusion zone.

75 In *Hubbard v Pitt* [1976] QB 142 the issue was whether the first F instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp 187–188) that the injunction was not wider than was necessary for the G purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p 190):

> "Mr Turner-Samuels, however, also advanced an alternative argument that, even if he was wrong in his submission that no interlocutory relief should have been granted, the terms of the injunction were too wide in that it would prevent the defendants from doing that which, as he claimed H and as I am for the present purposes prepared to accept, it was not unlawful for them to do, namely, to assemble outside the plaintiffs' premises for the sole purpose of imparting or receiving information. I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but

I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76 In *Burris* [1995] 1 WLR 1372 the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp 1377 and 1380–1381):

"It would not seem to me to be a valid objection to the making of an 'exclusion zone' order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest.

"Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest—and also, but indirectly, the defendant's—a wider measure of restraint is called for."

77 Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

78 It is open to us, as suggested by the Court of Appeal in *Cuadrilla* [2020] 4 WLR 29, to qualify the fourth *Ineos* requirement in the light of *Hubbard* [1976] QB 142 and *Burris* [1995] 1 WLR 1372, as neither of those cases was cited in *Ineos* [2019] 4 WLR 100. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a

A potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.

79 The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* [2020] 4 WLR 29 was the fifth requirement—
B that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such
C references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance . . . with a view to slowing down or stopping the traffic" "with the intention of causing inconvenience or delay to the claimants".

80 Leggatt LJ said (at para 65) that he could not accept that there is anything objectionable in principle about including a requirement of
D intention in an injunction. He acknowledged (at para 67) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at para 68) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's
E reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at para 74) that there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

F 81 We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by
G reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

H 82 Building on *Cameron* [2019] 1 WLR 1471 and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one:

(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the

proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".

(2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

83 Applying those principles to the present proceedings, it is clear that the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible.

84 As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as: "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR."

85 This description is impermissibly wide. As Nicklin J said (at paras 23(iii) and 146) it is capable of applying to a person who has never been at the store and has no intention of ever going there. It would, as the judge pointedly observed, include a peaceful protestor in Penzance.

86 The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by

the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the inner zone or the outer zone, using a loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to ground 1 above) by the specified method of e-mailing the order to the respective e-mail addresses of Surge and PETA. The order of Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87 Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary judgment by 1 December 2018, the claim would stand dismissed and the injunction discharged without further order.

88 Nicklin J was bound to dismiss Canada Goose's application for summary judgment, both because of non-service of the proceedings and for the further reasons we set out below. For the reasons we have given above, he was correct at the same time to discharge the interim injunctions granted by Teare J and Judge Moloney.

Final order against "persons unknown"

89 A final injunction cannot be granted in a protestor case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd (No 3)* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471, para 17 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90 In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 (Marcus Smith J) is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 and the decision of the Supreme Court in *Cameron*. Furthermore, there was no

reference in *Vastint* to the confirmation in *Attorney General v Times Newspapers (No 3)* of the usual principle that a final injunction operates only between the parties to the proceedings.

91 That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at para 159) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

92 In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93 As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, *Dulgheriu v Ealing London Borough Council* [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.

94 In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

95 In all those circumstances, Nicklin J having concluded (at paras 145 and 164) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

Appeal Ground 4: Evidence

96 This ground of appeal was not developed by Mr Bhose in his oral submissions. In any event, in the light of our conclusions on the other grounds of appeal, it is not necessary for us to address it.

Conclusion

97 For all those reasons, we dismiss this appeal.

Appeal dismissed.
No order as to costs.

SUSAN DENNY, Barrister

Court of Appeal

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

[2020] EWCA Civ 9

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

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

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

On the appeal—

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

avoided restraining conduct that was lawful; that in so far as it created difficulty of proof, that was a difficulty for the claimant and not for a person accused of breaching the injunction—for whom the need to prove the specified intention provided an additional protection; and that, accordingly, although the inclusion of multiple references to intention risked introducing an undesirable degree of complexity, there was no reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the injunction in the present case provided a reason not to enforce it by committal (post, paras 57–60, 65, 69, 74, 110, 111, 112).

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

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

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

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

Pursuant to an application by Cuadrilla Bowland Ltd and others for an injunction to prevent trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant, Judge Pelling QC, sitting as a judge of the High Court granted an injunction on 11 July 2018 to run until 1 June 2020 against persons unknown.

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

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

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

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

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

The court took time for consideration.

23 January 2020. The following judgments were handed down.

LEGGATT LJ

Introduction

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

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

Background

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

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

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

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

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

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

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

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

The Injunction

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

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

Paragraph 2: trespass

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

Paragraph 4: nuisance

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

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

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

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

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

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

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

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

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

Paragraph 7: unlawful means conspiracy

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

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

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

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

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

The breaches of the Injunction

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

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

The incident on 24 July 2018

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

The incident on 3 August 2018

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

The other breaches of the Injunction

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

The findings of contempt of court

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

The legal test for contempt

25 It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) at [20]. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.

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

Knowledge of the Injunction

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

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

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

The intentions proved

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

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

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

The committal order

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

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

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

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

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

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

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

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

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

Variation of the Injunction

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

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

The right to protest

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

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

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

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

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

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

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

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

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

The Ineos case

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

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

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

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

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

> "(1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

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

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

This appeal

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

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

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

(1) Was the Injunction unclear?

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

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

The references to intention in the Injunction

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

Types of unclarity

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

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

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

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

The concept of intention

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

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

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

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

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

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

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

Dicta in the Ineos case

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

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

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

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

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

The Hampshire Waste case

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

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

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

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

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

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

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

The width of the Injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Were the sanctions too harsh?

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

The standard of review on appeal

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

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

Sentencing protestors

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

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

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

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

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

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

Were custodial sentences wrong in principle?

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

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

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

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

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

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

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

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

Civil disobedience

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

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

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

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

The judge's approach

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

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

Reference to the Sentencing Council guideline

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

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

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

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

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

Sanction for the first incident

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

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

Sanction for the second incident

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

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

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

Conclusion

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

DAVID RICHARDS LJ

111 I agree.

UNDERHILL LJ

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

Appeal dismissed in part.
Variation of committal order.

ALISON SYLVESTER, Barrister

Court of Appeal

Barking and Dagenham London Borough Council and others *v* Persons Unknown and others

[2022] EWCA Civ 13

2021 Nov 30; Dec 1, 2;
2022 Jan 13

Sir Geoffrey Vos MR, Lewison, Elisabeth Laing LJJ

Injunction — Final — Persons unknown — Local authorities obtaining final injunctions against persons unknown to restrain unauthorised encampments on land — Judge calling in injunctions for reconsideration in light of subsequent legal developments — Whether court having power to grant final injunctions against persons unknown — Whether procedure adopted by judge appropriate — Whether limits on court's power to grant injunctions against world — Senior Courts Act 1981 (c 54), s 37[1] — Town and Country Planning Act 1990 (c 8), s 187B[2]

In claims brought under CPR Pt 8, a number of local authorities obtained a series of injunctions which were aimed at the gypsy and traveller community and targeted unauthorised encampment or use of land. All of the injunctions were against "persons unknown" although most also included varying numbers of named defendants. In some cases only interim injunctions were granted and in others final injunctions were also made. A judge took the view that a series of subsequent decisions of the Supreme Court and Court of Appeal had changed the law relating to injunctions against persons unknown, with the consequence that many of the injunctions might need to be discharged. Accordingly, with the concurrence of the President of the Queen's Bench Division and the judge in charge of the Queen's Bench Civil List, he made an order effectively calling in the final injunctions for reconsideration. Following a hearing the judge discharged some of the injunctions, holding that the court could not grant final injunctions that prevented persons who were unknown and unidentified at the date of the order from occupying and trespassing on local authority land, because final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final injuction sought.

On appeal by some of the local authorities—

Held, allowing the appeals, that section 37 of the Senior Courts Act 1981, which was a broad provision, gave the court power to grant a final injunction that bound individuals who were not parties to the proceedings at the date when the injunction was granted; that, in particular, there was no difference in jurisdictional terms between an interim and a final injunction, particularly in the context of those granted against persons unknown; that, rather, where an injunction was granted, whether on an interim or a final basis, the court retained the right to supervise and enforce it, including bringing before it parties violating it who thereby made themselves parties to the proceedings, which were not at an end until the injunction had been discharged; that, therefore, the court had power under section 37 of the 1981 Act to grant a final injunction that prevented persons who were unknown and unidentified at the date of the injunction from occupying and trespassing on local authority land; that it followed that the judge had been wrong to hold that the court could not grant a local authority's application for a final injunction against unauthorised encampment that prevented newcomers from occupying and trespassing on the land;

[1] Senior Courts Act 1981, s 37: see post, para 72.
[2] Town and Country Planning Act 1990, s 187B: see post, para 114.

A and that, accordingly, the judge's orders discharging the final injunctions obtained by the local authorities would be set aside (post, paras 7, 71–77, 81–82, 86, 89, 91–93, 98–99, 101, 125, 126).

Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA, *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, CA and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, CA applied.

Canada Goose UK Retail Ltd v Persons Unknown [2020] 1 WLR 2802, CA not
B applied.

Cameron v Hussain [2019] 1 WLR 1471, SC(E) and *Venables v News Group Newspapers Ltd* [2001] Fam 430, CA considered.

Per curiam. (i) The procedure adopted by the judge was unorthodox and highly unusual in so far as it sought to call in final orders of the court for revision in the light of subsequent legal developments. The circumstances which would justify varying or revoking a final order under CPR r 3.1(7) would be very rare given the importance of
C finality. However no harm has been done in that the parties did not object to the judge's procedure at the time and it has enabled a comprehensive review of the law applicable in an important field. In any event, most of the orders provided for review or gave permission to apply (post, paras 7, 110–112, 125, 126).

Terry v BCS Corporate Acceptances [2018] EWCA Civ 2422, CA applied.

(ii) Section 37 of the 1981 Act and section 187B of the Town and Country Planning Act 1990 impose the same procedural limitations on applications for
D injunctions against persons unknown. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. CPR PD 8A, para 20 seems to have been drafted with the objective of providing, so far as possible,
E procedural coherence and consistency rather than separate procedures for different kinds of cases (post, paras 7, 117, 125, 126).

(iii) The court cannot and should not limit in advance the types of injunction that might in future cases be held appropriate to be made against the world under section 37 of the 1981 Act. It is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37, which might tie the hands of a future court in types of case that cannot
F now be predicted. Injunctions against the world have been granted to restrain the publication of information which would put a person at risk of serious injury or death, to prevent unauthorised encampment and to prohibit the tortious actions of protesters. No further limitations are appropriate since although such cases are exceptional, other categories may in future be shown to be proportionate and justified (post, paras 7, 72, 119–121, 125, 126).

(iv) Each member of the gypsy and traveller community has a right under article 8
G of the Convention for the Protection of Human Rights and Fundamental Freedoms to pursue a traditional nomadic lifestyle. Accordingly, when a member of that community makes themselves party to an unauthorised encampment injunction they have the opportunity to apply to the court to set aside the injunction praying in aid that right. Then the court can test whether the injunction interferes with that person's article 8 rights, the extent of that interference and whether the injunction is proportionate, balancing their article 8 rights against the public interest. It is
H incorrect to say that the gypsy and traveller community has article 8 rights, since Convention rights are individual. Nonetheless, local authorities should engage in a process of dialogue and communication with travelling communities and should respect their culture, traditions and practices. Persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review (post, paras 105–107, 125, 126).

(v) This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. Plain language should be used in place of Latin (post, paras 8, 125, 126).

Decision of Nicklin J [2021] EWHC 1201 (QB) reversed.

The following cases are referred to in the judgment of Sir Geoffrey Vos MR:

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

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

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

Birmingham City Council v Afsar [2019] EWHC 3217 (QB); [2020] 4 WLR 168; [2020] 3 All ER 756

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

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

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

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

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

Canary Wharf Investments Ltd v Brewer [2018] EWHC 1760 (QB)

Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)

Chelsea FC plc v Brewer [2018] EWHC 1424 (Ch)

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

Davis v Tonbridge and Malling Borough Council [2004] EWCA Civ 194; The Times, 5 March 2004, CA

Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 4507, CA

Enfield London Borough Council v Persons Unknown [2020] EWHC 2717 (QB)

Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9

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

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

Jacobson v Frachon (1927) 138 LT 386, CA

Manchester City Council v Pinnock [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)

Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)

South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)

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

South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280, CA

Speedier Logistics Co Ltd v Aadvark Digital Ltd [2012] EWHC 2276 (Comm)

Starmark Enterprises Ltd v CPL Distribution Ltd [2001] EWCA Civ 1252; [2002] Ch 306; [2002] 2 WLR 1009; [2002] 4 All ER 264, CA
Terry v BCS Corporate Acceptances [2018] EWCA Civ 2422, CA
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA

The following additional cases were cited in argument:

Attorney General v Harris [1960] 1 QB 31; [1959] 3 WLR 205
Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira (Practice Note) [2011] EWCA Civ 241; [2011] 1 WLR 2391; [2011] 3 All ER 392, CA
Birmingham City Council v Sharif [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176, CA
Bromsgrove District Council v Carthy (1975) 30 P & CR 34, DC
Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd [2021] EWCA Civ 1173, CA
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83
Iveson v Harris (1802) 7 Ves Jun 251
Newbury District Council v Secretary of State for the Environment [1978] 1 WLR 1241; [1979] 1 All ER 243, CA
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358, HL(E)
R (Youngsam) v Parole Board [2019] EWCA Civ 229; [2020] QB 387; [2019] 3 WLR 33; [2019] 3 All ER 954, CA
Rickards v Rickards [1990] Fam 194; [1989] 3 WLR 748; [1989] 3 All ER 193, CA
Roult v North West Strategic Health Authority [2009] EWCA Civ 444; [2010] 1 WLR 487, CA
Serious Organised Crime Agency v O'Docherty [2013] EWCA Civ 518; [2013] CP Rep 35, CA
Test Valley Investments Ltd v Tanner (1963) 15 P & CR 279, DC
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46; [2014] AC 160; [2013] 3 WLR 299; [2013] 4 All ER 715, SC(E)
X (formerly Bell) v O'Brien [2003] EWHC 1101 (Fam); [2003] EMLR 37

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

Akerman v Richmond upon Thames London Borough Council [2017] EWHC 84 (Admin); [2017] PTSR 351, DC
Ashford Borough Council v Cork [2021] EWHC 476 (QB)
Attorney General v Harris [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Attorney General v Premier Line Ltd [1932] 1 Ch 303
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)
Basingstoke and Deane Borough Council v Eastwood [2018] EWHC 179 (QB)
Basingstoke and Deane Borough Council v Thompson [2018] EWHC 11 (QB)
Bensaid v United Kingdom (Application No 44599/98) (2001) 33 EHRR 10, ECtHR

Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA
British Broadcasting Corpn, In re [2009] UKHL 34; [2010] 1 AC 145; [2009] 3 WLR 142; [2010] 1 All ER 235, HL(E)
Broadmoor Special Hospital Authority v Robinson [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Cadder v HM Advocate [2010] UKSC 43; [2010] 1 WLR 2601, SC(Sc)
Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)
City of London Corpn v Bovis Construction Ltd (No 2) [1992] 3 All ER 697, CA
City of London Corpn v Persons Unknown [2021] EWHC 1378 (QB)
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E)
Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423
Hatton v United Kingdom (Application No 36022/97) (2003) 37 EHRR 28, ECtHR (GC)
Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2004] UKPC 26; [2005] 1 AC 190; [2004] 3 WLR 611; [2005] 1 All ER 499, PC
Lambeth Overseers v London County Council [1897] AC 625, HL(E)
Local Authority, A v W [2005] EWHC 1564 (Fam); [2006] 1 FLR 1
Lopez Ostra v Spain (Application No 16798/90) (1994) 20 EHRR 277, ECtHR
Marengo v Daily Sketch [1948] 1 All ER 406
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All ER (Comm) 1099, CA
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Mileva v Bulgaria (Application Nos 43449/02 and 21475/04) (2010) 61 EHRR 41, ECtHR
Moreno Gómez v Spain (Application No 4143/02) (2004) 41 EHRR 40, ECtHR
R v Hatton (Jonathan) [2005] EWCA Crim 2951; [2006] 1 Cr App Rep 16, CA
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
Scott v Scott [1913] AC 417, HL(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (The Siskina) [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] Ch 1; [1983] 3 WLR 78; [1983] 2 All ER 787, CA
Tewkesbury Borough Council v Smith [2016] EWHC 1883 (QB)
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
Von Hannover v Germany (Application No 59320/00) (2004) 40 EHRR 1, ECtHR
Wellesley v Duke of Beaufort (1827) 2 Russ 1
Wokingham Borough Council v Scott [2017] EWHC 294 (QB)
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X and Y v Netherlands (Application No 8978/80) (1985) 8 EHRR 235, ECtHR

APPEALS from Nicklin J

Using the modified CPR Pt 8 procedure provided by CPR r 65.43 Walsall Metropolitan Borough Council applied for a traveller injunction against Brenda Bridges and 17 other named defendants and persons unknown. An interim injunction without notice was granted on 23 September 2016. A final injunction was granted on 21 October 2016 until further order of the court.

By a claim form issued on 10 March 2017 Barking and Dagenham London Borough Council applied for a borough-wide injunction against Tommy Stokes and 63 other named defendants and persons unknown, being members of the traveller community who had unlawfully encamped within the borough of Barking and Dagenham. On 29 March 2017 an interim injunction was granted prohibiting trespass on land by named defendants and persons unknown ("a traveller injunction"). On 30 October 2017 a final injunction was granted until further order against 23 named defendants and persons unknown, containing permission to apply to the defendants or "anyone notified of this order" to vary or discharge the order on 72 hours' written notice.

By a claim form issued on 21 December 2017 Rochdale Metropolitan Borough Council applied for a traveller injunction against Shane Heron and 88 other named defendants and persons unknown, being members of the travelling community who had unlawfully encamped within the borough of Rochdale. An interim injunction was granted on 9 February 2018 with a power of arrest.

By a claim form issued on 26 April 2018 Redbridge London Borough Council applied for an injunction against Martin Stokes and 99 other named defendants and persons unknown forming or intending to form unauthorised encampments in the London Borough of Redbridge. On 4 June 2018 an interim injunction was granted against 70 named defendants and persons unknown with a power of arrest. A final injunction was granted on 12 November 2018 until 21 November 2021 against 69 named defendants and persons unknown. The final injunction contained a permission to apply to the defendants "and anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 28 June 2018 Wolverhampton City Council applied for a traveller injunction against persons unknown. An injunction contra mundum with a power of arrest was granted on 2 October 2018. The order provided for a review hearing to take place on the first available date after 1 October 2019. A further injunction order was granted on 5 December 2019, contra mundum and with a power of arrest. The order provided for a further review hearing to take place on 20 July 2020, following which an order was made dated 29 July 2020 continuing the injunction.

By a claim form issued on 2 July 2018 Basingstoke and Deane Borough Council and Hampshire County Council applied for a traveller injunction against Henry Loveridge and 114 other named defendants and persons unknown, the owner and/or occupiers of land at various addresses set out in a schedule attached to the claim form. On 30 July 2018 an interim injunction was granted with a power of arrest. A final injunction was granted on 26 April 2019 until 3 April 2024 or further order against 115 named defendants and persons unknown with a power of arrest. The final injunction contained a permission to apply to the defendants or "anyone notified of this order" to vary or discharge on 72 hours' written notice.

By a claim form issued on 22 February 2019 Nuneaton and Bedworth Borough Council and Warwickshire County Council applied for a traveller injunction against Thomas Corcoran and 52 other named defendants and persons unknown forming unauthorised encampments within the borough of Nuneaton and Bedworth. On 19 March 2019 an interim injunction was granted with a power of arrest.

By a claim form issued on 6 March 2019 Richmond-upon-Thames London Borough Council applied for a traveller injunction against persons unknown possessing or occupying land and persons unknown depositing waste or flytipping on land. By an order of 10 May 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. An interim injunction without notice was granted on 14 August 2018 and continued on 24 August 2018. Both contained powers of arrest.

By a claim form issued on 29 March 2019 Hillingdon London Borough Council applied for an injunction against persons unknown occupying land and persons unknown depositing waste or flytipping on land. On 12 June 2019 an interim traveller injunction without notice was granted with a power of arrest. By an order of 17 June 2019 the final hearing of the claim was adjourned until the decision of the Court of Appeal in the case of *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043.

By a claim form issued on 31 July 2019 Havering London Borough Council, applied for a traveller injunction against William Stokes and 104 other named defendants and persons unknown. On 11 September 2019 an interim traveller injunction was granted pending the final injunction hearing with a power of arrest.

By a claim form issued on 31 July 2019 Thurrock Council applied for a traveller injunction against Martin Stokes and 106 other named defendants and persons unknown. An interim injunction was granted on 3 September 2019 with a power of arrest.

By a claim form issued on 18 June 2020 Test Valley Borough Council applied for a traveller injunction against Albert Bowers and 88 other named defendants and persons unknown forming unauthorised encampments within the borough of Test Valley. An interim injunction was granted on 28 July 2020 with a power of arrest.

On 16 October 2020 Nicklin J made an order of his own motion, but with the concurrence of Dame Victoria Sharp P and Stewart J (the judge in charge of the Queen's Bench Civil List), ordering each claimant in 38 sets of proceedings, including those detailed above, to complete a questionnaire in the form set out in a schedule to the order with a view to identifying those local authorities with existing "traveller injunctions" who wished to maintain such injunctions (possibly with modification), and those who wished to discontinue their claims and/or discharge the current traveller injunction granted in their favour. On 27 and 28 January 2021, as a consequence of local authorities having completed the questionnaire, Nicklin J conducted a hearing in which he considered the injunctions granted in those proceedings. By a judgment handed down on 12 May 2021 Nicklin J [2021] EWHC 1201 (QB) held that the court could not grant final injunctions which prevented persons who were unknown and unidentified at the date of the order from occuping and trespassing on local authority land. By an order dated 24 May

2021 Nicklin J discharged certain of the injunctions that the local authorities had obtained.

By appellants' notices filed on or about 7 June 2021 and with permission of the judge the local authorities detailed above appealed on the following grounds. (1) The judge had erred in law in finding that the court had jurisdiction to vary and/or discharge final injunction orders where no application had been made by a person affected by those final orders to vary or discharge them. (2) The judge had been wrong to hold that the injunction order bound only the parties to the proceedings at the date of the order and did not bind "newcomers" where the injunction was granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided a statutory power to grant an injunction against persons unknown at the interim and final stages. The judge had failed to take into account the court's entitlement to grant an injunction that bound newcomers pursuant to section 222 of the Local Government Act 1972, in particular where the local authorities' enforcement powers pursuant to sections 77 and 78 of the Criminal Justice and Public Order Act 1994 had proved to be ineffective. (3) The judge had been wrong to hold that final injunction orders sought and obtained pursuant to section 222 of the 1972 Act could not, in principle, bind newcomers who were not party to the litigation. Such injunctions could be granted on a contra mundum basis where there was evidence of widespread impact on the article 8 rights of the inhabitants of the local authority area. One of the claimants in the court below, Basildon Borough Council, did not appeal but was given permission to intervene by written submissions only. The following bodies were granted permission to intervene: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd; and Basildon Borough Council.

The facts are stated in the judgment of Sir Geoffrey Vos MR, post, paras 9–17.

Caroline Bolton and *Natalie Pratt* (instructed by *Sharpe Pritchard LLP* and *Legal Services, Barking and Dagenham London Borough Council*) for Barking and Dagenham, Havering, Redbridge, Basingstoke and Deane, Hampshire, Nuneaton and Bedworth, Warwickshire, Rochdale, Test Valley and Thurrock.

Ranjit Bhose QC and *Steven Woolf* (instructed by *South London Legal Partnership*) for Hillingdon and Richmond-upon-Thames.

Nigel Giffin QC and *Simon Birks* (instructed by *Walsall Metropolitan Borough Council Legal Services*) for Walsall.

Mark Anderson QC and *Michelle Caney* (instructed by *Wolverhampton City Council Legal Services*) for Wolverhampton.

Marc Willers QC, Tessa Buchanan and *Owen Greenhall* (instructed by *Community Law Partnership, Birmingham*) for London Gypsies and Travellers, Friends, Families and Travellers and Derbyshire Gypsy Liaison Group, intervening.

Richard Kimblin QC (instructed by *Eversheds Sutherland (International) LLP*) for High Speed Two (HS2) Ltd, intervening.

Tristan Jones (instructed by *Attorney General*) as advocate to the court.

Wayne Beglan (instructed by *Basildon Borough Council Legal Services*) for Basildon Borough Council, intervening by written submissions only.

The court took time for consideration.

13 January 2022. The following judgments were handed down.

SIR GEOFFREY VOS MR

Introduction

1 This case arises in the context of a number of cases in which local authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gipsies, Irish Travellers and New Travellers.

2 The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land. The judge, Nicklin J, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ("*Canada Goose*") and the Supreme Court's decision in *Cameron v Hussain* [2019] 1 WLR 1471 ("*Cameron*"). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3 The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong[1*], and that, even if that is what the Court of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 ("*Gammell*"), *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ("*Ineos*"), and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043 ("*Bromley*").

4 The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5 In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 ("section 187B") to restrain an actual or apprehended breach of planning control validates the

* *Reporter's note*. The superior figures in the text refer to notes which can be found at the end of the judgment of Sir Geoffrey Vos MR, on p 982.

A orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6 I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

B **7** I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders C provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 ("section 37") and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

D **8** This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

E *The essential factual and procedural background*

9 There were five groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council ("Walsall"), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council ("Wolverhampton"), represented by Mr Mark Anderson QC. The third group was led F by Hillingdon London Borough Council ("Hillingdon"), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by Barking and Dagenham London Borough Council ("Barking") and Havering London Borough Council ("Havering"), represented by Ms Caroline Bolton. The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

G **10** The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

H **11** It is important to note at the outset that these claims were all started under the procedure laid down by CPR Pt 8, which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (CPR r 8.1(2)(a)). Whilst CPR r 8.2A(1) contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such

practice direction has been made (see *Cameron* at para 9). Moreover, CPR r 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR r 8.1(5)). Nonetheless, CPR r 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12 These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *Enfield London Borough Council v Persons Unknown* [2020] EWHC 2717 (QB) ("*Enfield*"), and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the "PQBD") about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the court for reconsideration". He reported that the PQBD's current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against persons unknown [had] transformed since the interim and final orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 ("*Cuadrilla*"), and *Canada Goose*.

13 Nicklin J concluded at para 32 in *Enfield* that, in the light of the decision in *Speedier Logistics Co Ltd v Aadvark Digital Ltd* [2012] EWHC 2276 (Comm) ("*Speedier*"), there was "a duty on a party, such as the claimant in this case who (i) has obtained an injunction against persons unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14 At paras 42–44, Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the court granted would be more effective and more extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15 On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order ("the 16 October order") recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or

A discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing traveller injunctions who [wished] to maintain such injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current traveller injunction granted in their favour".

B **16** Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that C had been made in favour of Wolverhampton by three other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633 ("*Bloomsbury*") and *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280 ("*South Cambridgeshire*"), that it was appropriate for the D application to be made against persons unknown.

17 The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

E **18** Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

(i) Claims against persons unknown should be subject to stated safeguards.

(ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and F imminent risk of a tort being committed by the respondents.

(iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

(iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to G amend the claim form to add named defendants.

(v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within category 1 persons unknown[2], to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR r 38.2(2)(a), (b) otherwise, as against the category 1 persons unknown defendants, to apply for (i) default judgment[3]; or H (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance, that the claim be struck out and the interim injunction against persons unknown discharged.

(vi) Final orders must not be drafted in terms that would capture newcomers.

19 I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton.

The main authorities preceding the judge's decision

20 It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only $4\frac{1}{2}$ years ago.

Bloomsbury: judgment 23 May 2003

21 The persons unknown in *Bloomsbury* [2003] 1 WLR 1633 had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt V-C continued orders against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case (para 4) described the defendants' conduct and was held to be sufficient to identify them (paras 16–21). Sir Andrew was assisted by an advocate to the court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "The overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance": para 19. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site [2004] Env LR 9 ("Hampshire Waste"): judgment 8 July 2003

22 *Hampshire Waste* was a protester case, in which Sir Andrew Morritt V-C granted a without notice injunction against unidentified "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites . . . in connection with the 'Global Day of Action Against Incinerators' ". Sir Andrew accepted at paras 6–10 that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23 In *South Cambridgeshire* [2004] EWCA Civ 1280 the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

A **24** At paras 8–11, Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

B *Gammell: judgment 31 October 2005*

25 In *Gammell* [2006] 1 WLR 658, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v Maughan*) ("*Maughan*") was an order made C until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26 Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v Porter* D [2003] 2 AC 558 ("*Porter*") applied to cases where injunctions were granted against newcomers (para 6). He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act E 1998 ("the 1998 Act") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

27 Sir Anthony noted at para 10 that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham of Cornhill at para 20) approved paras 38–42 of Simon Brown LJ's judgment, which suggested that injunctive relief was always discretionary and ought to be proportionate. That meant F that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought—here the safeguarding of the environment—but also that it does not impose an excessive burden on the individual whose private interests—here the gypsy's private life and home and the retention of his ethnic identity—are at stake". He cited what Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v Tonbridge and Malling* G *Borough Council* [2004] EWCA Civ 194 ("*Davis*") at para 34 to the additional effect that it was "questionable whether article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at para 37 in *Davis* had explained that *Porter* recognised two stages: first, to look at the planning merits of the matter, H according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell* [2006] 1 WLR 658 at para 12, was whether those principles applied to the cases in question.

28 At paras 28–29, Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at paras 30–31 that the court would have regard to statements in *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460 ("*Brown*") (Lord Phillips MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at para 32 in *Gammell*, namely:

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

29 In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at para 33 including the following: (i) *Porter* applied when the court was considering granting an injunction against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, ex hypothesi, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it was not possible for the applicant to identify the persons concerned or likely to be concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30 These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31 There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically

A under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780 ("Meier"): judgment 1 December 2009

32 In *Meier*, the Forestry Commission sought an injunction against
B travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger of Earlsferry JSC made some general comments at paras 1–2 which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt V-C had
C overcome the procedural problems in *Bloomsbury* [2003] 1 WLR 1633 and *Hampshire Waste* [2004] Env LR 9. Referring to *South Cambridgeshire* [2004] EWCA Civ 1280, he cited with approval Brooke LJ's statement that "there was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule"[4].

D

Cameron: Judgment 20 February 2019

33 In *Cameron* [2019] 1 WLR 1471, an injured motorist applied to amend her claim to join "the person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

E **34** Lord Sumption said at para 1 that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at para 11 that, since *Bloomsbury*, the jurisdiction had been regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of
F an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

G **35** After commenting at para 12 that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that actions against unnamed parties were permissible only against trespassers (see CPR r 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at para 13 between two kinds of case in which the defendant cannot be named: (i) anonymous defendants
H who are identifiable but whose names are unknown (e g squatters), and (ii) defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

36 At para 14, Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 at para 8. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme Court): *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523 per Bingham LJ. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR r 6.15, which was why proceedings against anonymous trespassers under CPR r 55.3(4) had to be effected in accordance with CPR r 55.6 by placing them in a prominent place on the land. In *Bloomsbury* [2003] 1 WLR 1633, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. Lord Sumption then referred to *Gammell* [2006] 1 WLR 658 as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "in the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37 Accordingly, pausing there, Lord Sumption seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell*, make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38 Lord Sumption proceeded to explain at para 16 that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at para 17 was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard[5].

39 Pausing once again, one can see that, assuming these statements were part of the essential decision in *Cameron*, they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they

would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see para 32 in *Gammell*).

40 At para 19, Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR rr 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at para 21 that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At para 25, Lord Sumption commented that the power in CPR r 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. He concluded at para 26 that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

41 *Ineos* [2019] 4 WLR 100 was argued just two weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right to grant the injunctions against persons unknown (including, of course, newcomers).

42 Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at para 13 in *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43 Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at paras 29–30, holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to para 11 in *Cameron*). Lord Sumption had, according to Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "he appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a 'hit and run' driver" was not infringed (see my analysis above). Lord Sumption's para 15 in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44 Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45 In *Bromley* [2020] PTSR 1043, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At para 29, however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at para 34 in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46 At paras 31–34, Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gypsy and traveller community". Relying on article 6 of the Convention, *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Jacobson v Frachon* (1927) 138 LT 386, Coulson LJ said that "the principle that the court should

A hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47 Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter* [2003] 2 AC 558, before referring at para 44 to *Chapman v United Kingdom* (2001) 33 EHRR 18 ("*Chapman*") at para 73, where the European Court of Human Rights ("ECtHR") had said that the occupation of a caravan by a member of the
B gypsy and traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also because it affected her ability to maintain her identity as a gypsy. Other cases decided by the ECtHR were also mentioned.

48 After rejecting the proportionality appeal, Coulson LJ gave wider
C guidance starting at para 100 by saying that he thought there was an inescapable tension between the "article 8 rights of the gypsy and traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49 At paras 102–108, Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were
D thought to be the only way forward, then engagement was still of the utmost importance: "welfare assessments should be carried out, particularly in relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities'
E culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide sufficient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the *Wolverhampton* case (now before this court), and
F (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "An injunction which
G prevents them from stopping at all in a defined part of the UK comprised a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise."

50 It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

H

Cuadrilla: judgment 23 January 2020

51 In *Cuadrilla* [2020] 4 WLR 29 the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking.

The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed (para 48). After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at para 50 that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52 The first paragraph of the judgment of the court in *Canada Goose* [2020] 1 WLR 2802 (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service under CPR r 6.16(1). The first defendants were named as persons unknown who were protestors against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53 The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at paras 37–55. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54 The court in *Canada Goose* set out at para 60 Lord Sumption's two categories from para 13 of *Cameron*, before saying at para 61 that that distinction was critical to the possibility of service: "Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional": para 14. This citation may have sown the seeds of what was said at paras 89–92, to which I will come in a moment.

55 At paras 62–88 in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron*, *Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372. At para 82, the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in

protester cases like the one before that court. The court at paras 83–88 applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56 It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at para 82 as follows:

"(1) The 'persons unknown' defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The 'persons unknown' defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.

"(2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

"(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief.

"(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

"(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

"(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

57 The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention

of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the proceedings and for the further reasons . . . set out below".

58 It is the further reasons "set out below" at paras 89–92 that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

> "89. A final injunction cannot be granted in a protester case against 'persons unknown' who are not parties at the date of the final order, that is to say newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the 'persons unknown' and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at para 17) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard."
>
> "91. That does not mean to say that there is no scope for making 'persons unknown' subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at para 159) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].
>
> "92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against 'persons unknown', it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also 'persons unknown' who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the

A trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that."

The reasons given by the judge

59 The judge began his judgment at paras 2–5 by setting out the background to unauthorised encampment injunctions derived mainly from
B Coulson LJ's judgment in *Bromley* [2020] PTSR 1043. At para 6, the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* [2020] 1 WLR 2802 held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether
C an assumed general principle derived from *Attorney General v Times Newspapers Ltd (No 3)* ("*Spycatcher*") [1992] 1 AC 191 or *Cameron* [2019] 1 WLR 1471 applied to final injunctions against persons unknown (which if it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

D **60** At paras 10–25, the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

61 At paras 26–113, the judge dealt in detail with what he called the cohort claims under 9 headings: assembling the cohort claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR r 8.2A, the (mainly
E statutory) basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the grant of an interim injunction, particular cohort claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

F **62** On the first issue before him (what I have described at para 4 above as the secondary question before us), the judge stated his conclusion at para 120 to the effect that the court retained jurisdiction to consider the terms of the final injunctions. At para 136, he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would
G be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR r 40.9, which provided that "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied".

63 On the second and main issue (the primary issue before us), the judge stated his conclusion at para 124 that the injunctions granted in the cohort
H claims were subject to the *Spycatcher* principle (derived from p 224 of the speech of Lord Oliver of Aylmerton) and applied in *Canada Goose* that a final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at paras 161–189.

64 On the third issue before him (but part of the main issue before us), the judge concluded at para 125 that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final order was granted, then that order bound nobody.

65 The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables v News Group Newspapers Ltd* [2001] Fam 430 ("*Venables*")). The correct starting point was to recognise the fundamental difference between interim and final injunctions. It was well-established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell* [2006] 1 WLR 658, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At para 173, the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66 At para 174, the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "it is fundamental to our process of civil litigation that the court cannot grant a final order against someone who is not party to the claim". Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on para 92 in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67 At paras 175–176, the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At para 180 the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68 The judge then rejected at para 186 the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a

A rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there B were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69 The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants C before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i e those who were anonymous and could not be identified.

70 Between paras 190–241, Nicklin J considered whether final injunctions could ever be granted against the world in these types of case. D He decided they could not, and discharged those that had been granted against persons unknown. At paras 244–246, the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see para 17 above).

The main issue: Was the judge right to hold that the court cannot grant final E *injunctions that prevent persons, who are unknown and unidentified at the date of the order (i e newcomers), from occupying and trespassing on local authority land?*

Introduction to the main issue

71 The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to grant an F injunction that bound non-parties to proceedings. He referred to *Venables* [2001] Fam 430 as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts should seek to close the categories of case in which a final injunction against all the world might G be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72 Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do H so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73 The judge in this case seems to me to have built upon paras 89–92 of *Canada Goose* to elevate some of what was said into general principles that go beyond what it was necessary to decide either in *Canada Goose* or this case.

74 First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75 Secondly, the judge said at para 174 that it was "fundamental to our process of civil litigation that the court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as consistent with the fundamental principle in *Cameron* (at para 17) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard, but that was said without disapproving the mechanism explained by Sir Anthony Clarke MR in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76 Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77 Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78 With that introduction, I turn to consider whether the statements made in paras 89–92 of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at para 88 as being further reasons for it.

Para 89 of Canada Goose

79 The first sentence of para 89 said that "a final injunction cannot be granted in a protester case against 'persons unknown' who are not parties at the date of the final order, that is to say newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the 'persons unknown' and who have not been served with the claim form". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the

A local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80 *Canada Goose* then referred at para 89 to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be
B appropriate in such cases.

81 *Canada Goose* then said at para 89, as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at para 17. That passage was, in my judgment, a misunderstanding of para 17 of *Cameron*. As explained above, para 17 of
C *Cameron* did not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made, and made themselves parties to the proceedings by violating them (see para 32 in *Gammell*). Moreover at para 63 in *Canada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people
D who will or are highly likely in the future to commit an unlawful civil wrong (i e newcomers), and (ii) Lord Sumption had referred at para 15 with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a
E final order and one made on an interim basis.

82 There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason
F why the court cannot devise procedures, when making longer term persons unknown injunctions, to deal with the situation in which persons violate the injunction and makes themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in
G *Gammell* had just such an opportunity, even though they were held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

Para 90 of Canada Goose

H **83** In my judgment both the judge at para 90 and the Court of Appeal in *Canada Goose* at para 90 were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 ("*Vastint*") was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal

raves). At paras 19–25, Marcus Smith J explained his reasoning relying on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945 (Ch)). At para 24, he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "until an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party." Any person affected by the order could apply to set it aside under CPR r 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

Para 91 of Canada Goose

84 In the first two sentences of para 91, *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.

85 The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of para 91 are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron*.

86 In the third sentence of para 91, the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87 The court in *Canada Goose* then approved Nicklin J at para 159 in his judgment in *Canada Goose*, where he said this:

> "158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the final order permitting any newcomers to apply to vary or discharge the final order.
>
> "159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55–60 above. Unknown individuals, without notice of the proceedings, would have judgment and a final injunction granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the 'final order' at future

protests, the court could be faced with an unknown number of applications by individuals seeking to 'vary' this 'final order' and possible multiple trials. This is the antithesis of finality to litigation."

88 This passage too ignores the essential decision in *Gammell*.

89 As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end. A person who is not a party but who is directly affected by an order may apply under CPR r 40.9. In addition, in the case of a third party costs order, CPR r 46.2 requires the non-party to be made party to the proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose*, the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR r 70.4 says that an order made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR r 83.8A. Where a judgment is to be enforced by charging order CPR r 73.10 allows "any person" to object and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90 The decision of Warby J in *Birmingham City Council v Afsar* [2020] 4 WLR 168 at para 132 provides no further substantive reasoning beyond para 159 of Nicklin J.

Para 92 of Canada Goose

91 The reasoning in para 92 is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought

normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92 It was illogical for the court at para 92 in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "once the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93 In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at paras 31 and 44 above. It would have been wrong to do so.

94 The judge, as it seems to me, went too far when he said at para 174 that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at para 92 as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95 I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e g *Canary Wharf Investments Ltd v Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC plc v Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96 As I have explained, in my judgment, the judge ought not to have applied paras 89–92 of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos*. *Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97 We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did

A not mandate the conclusions reached by the judge and paras 89–92 of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

98 In *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 ("*Young*"), three exceptions to the rule that the Court of Appeal is bound by its previous
B decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99 In my judgment, it is clear that *Gammell* [2006] 1 WLR 658 decided,
C and *Ineos* [2019] 4 WLR 100 accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron* [2019] 1 WLR 1471, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was
D that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, paras 89–92 of *Canada Goose* [2020] 1 WLR 2802 were inconsistent with *Ineos* and *Gammell*. Moreover, those paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at para 89 above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell*
E and *Canada Goose* it should follow, and it is not bound to follow the reasons given at paras 89–92 of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

100 This analysis is applicable even if paras 89–92 of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim
F injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that paras 89–92 of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] Ch 306 at paras 65–67 and 97).

Conclusion on the main issue

G **101** For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

The guidance given in Bromley and Canada Goose and in this case by Nicklin J

H **102** We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at para 82 of *Canada Goose* (see para 56 above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment cases at paras 99–109 in *Bromley* [2020] PTSR 1043 (see para 49 above). It

would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103 First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104 Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the gypsy and traveller community and the common law of trespass, and (ii) the cases made plain that the gypsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105 On the first point, it is not right to say that either "the gypsy and traveller community" or any other community has article 8 rights. Article 8 provides that "everyone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* [2003] 2 AC 558 (and unlike in *Manchester City Council v Pinnock* [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* 33 EHRR 18 decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the Human Rights Act 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 to the First Protocol to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106 Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the gypsy and traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The

court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

107 Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108 It will already be clear that the guidance given by the judge in this case at para 248 (see para 18 above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at paras 104–106 above), and those mentioned below at para 117. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption at para 13 in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109 In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110 In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the basis that the law had changed. We heard considerable argument based on the court's power under CPR r 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v BCS Corporate Acceptances* [2018] EWCA Civ 2422 at [75]).

111 As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such

provisions, the orders in question would, as I have already explained, be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112 In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113 The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114 Section 187B provides that:

"(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

"(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

"(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

"(4) In this section 'the court' means the High Court or the county court."

115 CPR PD 8A provides at paras 20.1–20.6 in part as follows:

"20.1 This paragraph relates to applications under— (1) [section 187B]; . . .

"20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant . . .

"20.4 In the claim form, the applicant must describe the defendant by reference to— (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence.

"20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place.)

"20.6 The application must be accompanied by a witness statement. The witness statement must state— (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide."

116 In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties

A sought to draw between section 37 and section 187B applications are of far less significance to this case.

117 In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served B with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment case under section 187B as they are to one sought in such a case to restrain apprehended trespass or C nuisance. Indeed, CPR PD 8, para 20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118 There is, therefore, no need for me to say any more about section 187B.

Can the court in any circumstances like those in the present case make final D *orders against all the world?*

119 As I have said, Nicklin J decided at paras 190–241 that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

120 I have already explained the circumstances in which such E injunctions can be granted at paras 102–108. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate in some protester cases as is demonstrated by the authorities I have already F referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

121 I conclude that the court cannot and should not limit in advance the G types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122 The parties agreed four issues for determination in terms that I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with. H

123 I have concluded, as I indicated at para 7 above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was unorthodox and unusual in that he called in final orders for revision, no harm

has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124 I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Notes

1. There were 38 local authorities before the judge.

2. This was a reference to the two categories set out by Lord Sumption at para 13 in *Cameron*, as to which see para 35.

3. As I have noted above, default judgment is not available in Part 8 cases.

4. Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605.

5. See *Jacobson v Frachon* (1927) 138 LT 386, 392 per Atkin LJ ("*Jacobson*").

LEWISON LJ

125 I agree.

ELISABETH LAING LJ

126 I also agree.

Appeals allowed.
Judge's order set aside.
Injunctions obtained by Havering, Nuneaton and Bedworth, Rochdale, Test Valley and Wolverhampton restored subject to review hearing.
Interim injunctions obtained by Hillingdon and Richmond-upon-Thames restored subject to applications for review on terms.
Permission to appeal refused.

SUSAN DENNY, Barrister

Queen's Bench Division

Director of Public Prosecutions *v* Cuciurean

[2022] EWHC 736 (Admin)

2022 March 23; 30 Lord Burnett of Maldon CJ, Holgate J

Human rights — Freedom of expression and assembly — Interference with — Defendant trespassing on land with intention of obstructing or disrupting construction of railway — Defendant charged with aggravated trespass — Whether court required to be satisfied that defendant's conviction proportionate interference with his Convention rights — Criminal Justice and Public Order Act 1994 (c 33), s 68 — Human Rights Act 1998 (c 42), ss 3, 6, Sch 1, Pt I, arts 10, 11, Pt II, art 1

The defendant was charged with aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994[1], the prosecution case being that he had trespassed on land and dug and occupied a tunnel there with the intention of obstructing or disrupting a lawful activity, namely the construction of the HS2 high speed railway. The deputy district judge acquitted the defendant, finding that the prosecution had failed to prove to the requisite standard that a conviction was a proportionate interference with the defendant's rights to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The prosecution appealed by way of case stated on the ground that, if the defendant's prosecution did engage his rights under articles 10 and 11, a conviction for the offence of aggravated trespass was intrinsically a justified and proportionate interference with those rights, without the need for a separate consideration of proportionality in the defendant's individual case.

On the appeal—

Held, allowing the appeal, that there was no general principle in criminal law, nor did section 6 of the Human Rights Act 1998 require, that where a defendant was being tried for a non-violent offence which engaged his or her rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms the court would always have to be satisfied that a conviction for that offence would be a proportionate interference with those rights; that, rather, the court would only have to be so satisfied where proportionality was an ingredient of the offence, which would depend on the proper interpretation of the offence in question; that if the offence were one where proportionality was satisfied by proof of the very ingredients of that offence, there would be no need for the court to consider the proportionality of a conviction in an individual case; that proportionality was not an ingredient of the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, which was compatible with articles 10 and 11 of the Convention without having to read in a proportionality ingredient pursuant to section 3 of the 1998 Act; that, in particular, (i) section 68 of the 1994 Act had the legitimate aim of protecting property rights in accordance with article 1 of the First Protocol to the Convention and, moreover, protected the use of land by a landowner or occupier for lawful activities and helped to preserve public order and prevent breaches of the peace, (ii) a protest which was carried out for the purposes of

[1] Criminal Justice and Public Order Act 1994, s 68: see post, para 10.
[2] Human Rights Act 1998, s 3: see post, para 29.
S 6: see post, para 30.
Sch 1, Pt I, art 10: see post, para 26.
Art 11: see post, para 27.
Pt II, art 1: see post, para 28.

A obstructing or disrupting a lawful activity, contrary to section 68, would not lie at the core of articles 10 and 11, even if carried out on publicly accessible land and (iii) articles 10 and 11 did not bestow any "freedom of forum" to justify trespass on land; that, therefore, proof of the ingredients of the offence of aggravated trespass set out in section 68 of the 1994 Act ensured that a conviction was proportionate to any article 10 and 11 rights which might be engaged; that it followed that it had not been open to the deputy district judge to acquit the defendant on the basis that the B prosecution had not satisfied her that the defendant's conviction of an offence of aggravated trespass contrary to section 68 was a proportionate interference with the defendant's rights under articles 10 and 11; and that, accordingly, the defendant's case would be remitted to the magistrates' court with a direction to convict (post, paras 57–58, 65–69, 73–81, 89–90).

Bauer v Director of Public Prosecutions [2013] 1 WLR 3617, DC, dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3, C 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 D prepared to go is that, where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, it would not exclude the possibility of a state being obliged to protect those rights by regulating property rights. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the rights protected by articles 10 and 11 would be destroyed. Legitimate protest can take E many other forms (post, paras 45–46, 50).

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

Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21; [2013] EMLR 28, ECtHR (GC)

Annenkov v Russia (Application No 31475/10) (unreported) 25 July 2017, ECtHR

Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR F

Barraco v France (Application No 31684/05) (unreported) 5 March 2009, ECtHR

Bauer v Director of Public Prosecutions [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC

Blumberga v Latvia (Application No 70930/01) (unreported) 14 October 2008, ECtHR

Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

G *City of London Corpn v Samede* [2012] EWHC 34 (QB); [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin); 169 JP 581

Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)

Ezelin v France (Application No 11800/85) (1991) 14 EHRR 362, ECtHR

H *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin), DC

Gifford v HM Advocate [2011] HCJAC 101; 2011 SCCR 751

Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC

Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)

James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lambeth London Borough Council v Grant [2021] EWHC 1962 (QB)
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA
R v E [2018] EWCA Crim 2426; [2019] Crim LR 151, CA
R v R (Practice Note) [2015] EWCA Crim 1941; [2016] 1 WLR 1872; [2016] 1 Cr App R 20, CA
R (AB) v Secretary of State for Justice [2021] UKSC 28; [2022] AC 487; [2021] 3 WLR 494; [2021] 4 All ER 777, SC(E)
R (Leigh) v Comr of Police of the Metropolis [2022] EWHC 527 (Admin); [2022] 1 WLR 3141, DC
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
Richardson v Director of Public Prosecutions [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20; [2014] 1 Cr App R 29, SC(E)
Taranenko v Russia (Application No 19554/05) (2014) 37 BHRC 285, ECtHR

The following additional cases were cited in argument:

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Director of Public Prosecutions v Barnard [2000] Crim LR 371, DC
Lashmankin v Russia (Application Nos 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12 and 37038/13) (2017) 68 EHRR 1, ECtHR
Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch)
National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
RMC LH Co Ltd v Persons Unknown [2015] EWHC 4274 (Ch)
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Whitehead v Haines [1965] 1 QB 200; [1964] 3 WLR 197; [1964] 2 All ER 530, DC

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

Connolly v Director of Public Prosecutions [2007] EWHC 237 (Admin); [2008] 1 WLR 276; [2007] 2 All ER 1012; [2007] 2 Cr App R 5, DC
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)
Manchester City Council v Pinnock (Nos 1 and 2) [2010] UKSC 45; [2011] 2 AC 104; [2010] 3 WLR 1441; [2011] PTSR 61; [2011] 1 All ER 285, SC(E)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
UK Oil & Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

CASE STATED by Deputy District Judge Evans sitting at City of London Magistrates' Court

On 21 September 2021, after a trial before Deputy District Judge Evans in the City of London Magistrates' Court, the defendant, Elliott Cuciurean, was acquitted of the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. The prosecution

A appealed by way of case stated. The questions for the opinion of the High Court are set out in the judgment of the court, post, para 3.

The facts are stated in the judgment of the court, post, paras 2–9.

Tom Little QC and *James Boyd* (instructed by *Crown Prosecution Service*) for the prosecutor.

B The prosecutor's appeal concerns the question whether, in light of the Supreme Court's judgment in *Director of Public Prosecutions v Ziegler* [2022] AC 408, a fact-specific assessment of the proportionality of a conviction's interference with an individual's rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms is required in any prosecution for offences of trespass committed during a public protest. The C appeal should be allowed on three mutually alternative grounds: (i) the defendant's Convention rights under articles 10 and 11 were not engaged; (ii) alternatively, if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is, inherently and without the need for a separate consideration of proportionality, a justified and proportionate interference with those rights, and so the deputy district judge erred in treating the decision in *Ziegler* as compelling her to undertake an D additional assessment of proportionality; and (iii), alternatively, if a fact-sensitive assessment of proportionality were required, the deputy district judge reached a decision on that assessment which was so unreasonable that no reasonable tribunal would have taken it.

On the preliminary procedural issue as to the jurisdiction of the court to determine grounds (i) and (ii), although, contrary to Crim PR r 35.2(2)(c), E the prosecutor failed to include ground (i) in its application to the magistrates' court for a case to be stated, and accepted before the deputy district judge that the defendant's Convention rights under articles 10 and 11 were engaged, it would nevertheless not be right for the court to decline to determine a pure point of law open on the facts found in the case stated: *Whitehead v Haines* [1965] 1 QB 200. There is uncertainty as to the correct approach to the assessment of proportionality following the decision in F *Ziegler* which is affecting a large number of cases at first instance and which calls for exploration by the higher courts (see dicta of Lord Burnett of Maldon CJ in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, para 29). On account of that uncertainty, the points being advanced now were not obvious to the prosecutor below, and they were not argued, expressly considered or conceded and then discarded on appeal. However, the G substance of the prosecutor's argument remains the same: that conviction was proportionate and it was not open to the deputy district judge to conclude otherwise. Accordingly, despite the breach of the rules, there are compelling and exceptional reasons for a higher court to determine the issue and it is in the interests of justice for the court to so do.

As in ground (i), the issue before the court on ground (ii) is a pure point of law which it would not be right for the court to decline to determine (see H *Whitehead v Haines*) and the same compelling and exceptional reasons for a higher court to determine the issue apply. However, in relation to ground (ii), the prosecution case has always been that it was not open to the deputy district judge to conclude that a conviction for aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994

represented a disproportionate interference with the defendant's Convention rights.

[*Lord Burnett of Maldon CJ*. The court will hear argument on grounds (i) and (ii) de bene esse.]

On ground (i), the Convention rights to freedom of expression contained in article 10 and to peaceful assembly and freedom of association contained in article 11 cover a broad range of opinions and expressions thereof. Opinions such as the one held by the defendant concerning the development of the HS2 high speed railway would be protected by article 10 and he would be entitled to express his opinions in a number of ways, including by participating in public protest, which right is protected by article 11. The jurisprudence of the European Court of Human Rights demonstrates that such expressions may extend to protests impeding activities of which the protestor disapproves: *Steel v United Kingdom* (1998) 28 EHRR 603.

However, both article 10 and article 11 rights are qualified and not without limit. Some individual conduct, by its nature and degree, would mean it could fall outside the scope of protection under article 11. Article 11 of the Convention only protects the right to "peaceful assembly". Therefore, where a protestor is personally involved with violence or intends to commit or incite violent acts, or by some other conduct "rejects the foundations of a democratic society", that conduct would not attract the protection of the Convention; whereas conduct which is intended to be disruptive, such as obstructing traffic on a highway, while not an activity lying at the core of the protected freedom, might not be such as to remove participation in the protest from the scope of protection in article 11: *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 92, 97–98.

Thus, the jurisprudence recognises that there may be conduct which falls outside that protected by a Convention right and conduct which, although protected by the right, does not lie at its core. In respect of the offences of aggravated trespass and criminal damage, there is no relevant jurisprudence to support the proposition that article 10 and 11 rights are engaged. Neither do articles 10 and 11 confer a right of entry to private property (or publicly owned property with no right of access) unless a bar to entry would effectively extinguish the essence of those rights, which will not be the case where alternative options for effective protest exist: *Appleby v United Kingdom* (2003) 37 EHRR 38, para 47. Where deliberate acts of obstruction and inconvenience do not lie at the core of the right but close to the limit of the conduct in scope of the protection of article 11 (as in *Kudrevičius*), trespassing on private land (or publicly owned land over which there is no right of access as in the present case), damaging it by building a tunnel with the intent of preventing the landowner from doing what it is lawfully entitled to do are also likely to be a considerable distance from the core of the right, thus falling outside the scope of Convention protection.

The European court held that the rights in articles 10 and 11 were engaged in *Taranenko v Russia* (2014) 37 BHRC 285 for a protestor who participated in the occupation of an office in the President's administration building, the group having forced their way through security, locked themselves in the office, called for the President's resignation, distributed leaflets from the window, destroyed furniture and equipment and damaged the walls and ceiling. However, that should not be understood as

A establishing that the protestor had any right protected by articles 10 and 11 to trespass and cause damage. The court held that the domestic courts had concluded the protestor's political beliefs were fundamental to the prosecution and had not established that the individual had personally participated in causing any damage. Accordingly, it could be inferred both that the court accepted that, as in *Kudrevičius*, the acts of one protestor could not necessarily be used to justify restricting the rights of another and B that those who actually cause damage or commit violent or otherwise reprehensible acts in the course of a protest can be prosecuted for doing so without engaging Convention rights. That principle should apply in the current case, since trespassing on land and intentionally damaging it is an unacceptable way in which to engage in political debate in a democratic society. The rights under articles 10 and 11 cannot be used to support the C proposition that the defendant was entitled unlawfully to enter private land and purposely to damage it by building a tunnel when there were numerous alternative and effective ways available to him to protest and express his objection to the HS2 high speed railway.

With regard to ground (ii), even if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is inherently, and without need for a separate consideration of proportionality, a justified D and proportionate interference with those rights. In a prosecution, it is not necessary to read words into a criminal offence in order to give effect to the rights of the defendant under articles 10 and 11: *James v Director of Public Prosecutions* [2016] 1 WLR 2118, paras 32–35. In determining how the court should address the interaction of those rights with criminal offences, there are two distinct categories of case. First, where there is available a E statutory defence that the defendant's conduct was "reasonable", article 10 and 11 rights and the qualifications to them and thus the proportionality of any conviction may be expressly considered in an assessment of the facts as part of the defence. Secondly, where, once the specific ingredients have been proved, the defendant's conduct has gone beyond what could be described as reasonable conduct in the exercise of Convention rights, Parliament can be taken to have defined the parameters of lawful conduct as a matter of public F policy and within its margin of appreciation. Thus, a fact-sensitive assessment of the proportionality of any prosecution and conviction would only be relevant where the reasonableness defence is provided for in the statute: *R v Brown (James Hugh)* [2022] 1 Cr App R 18.

Similarly, in *Animal Defenders International v United Kingdom* [2013] EMLR 28, the Grand Chamber of the European court held that the state can, G consistently with the Convention, adopt general rules which apply to pre-defined situations notwithstanding that it might result in some hard cases, provided that the prohibition is necessary in a democratic society and thus proportionate. That principle applies in the present case. Section 68 of the 1994 Act is a general measure which is intrinsically compliant with the Convention, being one which is narrowly drawn and balances the rights of landowners and the rights of protestors, allowing the exculpation of those H who trespass but who can show a justification defence. However, the state is entitled to prevent aggravated trespass as defined in section 68(1) for the prevention of disorder and for the protection of property rights. Article 1 of the First Protocol to the Convention ("A1P1") provides that the landowner has the right to peaceful enjoyment of his property. Although also a

qualified right, the state is under a positive obligation to protect the A1P1 rights of the landowner by law against interference. Where the interference is criminal in nature the authorities are obliged to conduct such criminal investigation and prosecution as appropriate. Section 68(1) strikes a fair and proper balance with the need to protect acts and freedoms of those on private land acting lawfully under A1P1: *Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008. Interference with the article 10 and 11 rights of a protestor who had trespassed with the intention to disrupt the lawful activity of the landowner would not therefore be disproportionate.

Articles 10 and 11 do not provide a defence as a matter of criminal law or confer a right to trespass. Trespass is by definition unlawful and a conviction for the offence of aggravated trespass provides a lawful limitation on the exercise of rights of free expression which Parliament deemed to be a justified sanction: see dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3. Once the elements of the offence of aggravated trespass are made out, there can be no question of a breach of articles 10 or 11: *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617. Accordingly, no fact-sensitive proportionality assessment is required from the court. In that context, any distinction between articles 10 and 11 is of no consequence: see *James* [2016] 1 WLR 2118.

It follows that a conviction for the offence of aggravated trespass under section 68(1) of the 1994 Act inherently constitutes a justified and proportionate interference with the defendant's article 10 and 11 rights without the need for any separate consideration of proportionality, and the decision in *Ziegler* [2022] AC 408 did not create an extra ingredient to the offence of aggravated trespass that the prosecutor had to prove with a need for the judge to undertake a *Ziegler*-style factual analysis.

As to ground (iii), if an assessment of proportionality was required, the deputy district judge reached a decision on that basis at which no reasonable tribunal properly directing itself on all the material considerations could have arrived.

In failing to analyse the nature and degree of the conduct involved in the offence and to recognise that, even if it could fall within the scope of rights protected by articles 10 and 11, it would not lie at the core but rather at the outside edges of those rights, the deputy district judge neglected to consider a material consideration which was highly relevant to the determination of the proportionality of any interference with those rights. Furthermore, the Convention rights of the landowner, specifically protected under A1P1 and therefore a highly relevant consideration, were not acknowledged and thus not appropriately balanced against the defendant's article 10 and 11 rights. In contrast to the situation in *Ziegler*, the land trespassed upon in this case was not land over which the public had a right to assemble. That ought to have been properly weighed in the balance by the deputy district judge since different considerations applied: *Appleby v United Kingdom* 37 EHRR 38.

The deputy district judge's reasoning was further flawed, being based as it was on an irrelevant finding of fact that the land concerned was merely a small part of the HS2 high speed railway project, projected to take up to 20 years to complete at a cost of billions of pounds. Those factors were not relevant in determining whether a conviction for obstructing and disrupting those activities was a proportionate interference with Convention

A rights. Accordingly, the deputy district judge reached a decision which no reasonable tribunal, properly directing itself as to the relevant considerations, could have reached and she was wrong to have acquitted the defendant.

Tim Moloney QC, *Adam Wagner* and *Blinne Ní Ghrálaigh* (instructed by *Robert Lizar Solicitors, Manchester*) for the defendant.

B The appeal should not be allowed for four reasons: (1) the court should not permit grounds (i) and (ii) to proceed since they are procedurally barred; (2) articles 10 and 11 of the Convention are engaged; (3) in a case involving the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of the rights under articles 10 and 11, which will require a fact-sensitive C enquiry; and (4) the deputy district judge's decision to acquit the defendant was reasonable.

On the procedural issue, ground (i) of the prosecutor's appeal was not raised at first instance as required by Crim PR r 35.2(2)(c); moreover, in the original application for permission to appeal, the prosecutor expressly disavowed that ground and expressly stated that articles 10 and 11 were D engaged. For reasons of the interests of justice and to discourage attempts to circumvent the strict time limit in rule 35.2, he should not now be permitted to advance an appeal entirely different from that for which permission was sought in an earlier application or which would be a second bite of the cherry: see *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [31].

Only in very exceptional circumstances should a party be permitted to E renounce its agreement to an approach in which it acquiesced before the judge at first instance and advance a different approach on appeal. Parties are expected to get it right first time: *R v E* [2018] EWCA Crim 2426 at [19]. That will especially be the case where the party is sophisticated and fully represented, as is the prosecutor in the present case: *Food Standards Agency*, para 26. None of the reasons advanced by the prosecutor are exceptional.

F Unlike the situation in *Whitehead v Haines* [1965] 1 QB 200, this is not a case where the prosecutor genuinely was not aware of a new point of law which if taken could prevent conviction for the defendant. The defendant's advocate submitted a skeleton argument before the trial, supported by authority which was served on the court. Therefore the issues in the case were clear. By contrast, according to the case stated, the prosecutor neither submitted a skeleton argument nor made submissions to the effect that the G defendant's article 10 or 11 rights could not be engaged in relation to the offence of aggravated trespass or that the principles in *Director of Public Prosecutions v Ziegler* [2022] AC 408 did not apply. It was therefore accepted by the prosecutor that the defendant's article 10 and 11 rights were engaged and not disputed that the prosecution was required to prove that interference with those rights was proportionate.

H Insofar as the decision in *Ziegler* has caused uncertainty as to the legal position, there is nothing exceptional in a legally significant decision of the higher courts causing some uncertainty in the lower courts. It would undermine the principle in *Food Standards Agency* that parties should get it right first time if an argument that resolution of an important point of law, in existence and obvious during the proceedings at first instance, be permitted

to amount to a sufficiently exceptional reason as to allow it to be raised on appeal when not raised at first instance. Accordingly, none of the reasons advanced by the prosecutor are exceptional and the court should not permit grounds (i) and (ii) to proceed.

Wagner following.

In any event, the prosecution did engage the defendant's article 10 and 11 Convention rights. The right to freedom of assembly in article 11 is a fundamental right in a democratic society and, like the right to freedom of expression in article 10, one of the foundations of such a society: *Kudrevičius v Lithuania* (2015) 62 EHRR 34. It is an established principle in the jurisprudence of the European Court of Human Rights that the scope of those rights should not be interpreted restrictively. That principle was recently reaffirmed by the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408, paras 69–70, 89.

All forms of peaceful, i e non-violent, assembly engage article 11, unless they otherwise reject the foundations of a democratic society when the actions of protestors may take them outside of the protection of Convention rights so that the question of proportionality does not arise: *Ziegler*, para 69. The only three categories of case in which direct action protest would fall outside of the scope of articles 10 and 11 are as set out in *Kudrevičius*: where organisers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society. The guarantees of article 11 therefore apply to all other gatherings: *Ziegler*. The jurisprudence of the European court shows that even protests which are intentionally disruptive are capable of falling within the scope of article 10: see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241. Article 11 has been found to remain engaged even in relation to demonstrations where protests have involved aspects of violence, showing that the actions of one protestor cannot necessarily be used to restrict the rights of another: *Kudrevičius*.

There is no authority to support the proposition that committing trespass or digging a tunnel as part of a protest render it not peaceful and therefore falling outwith the protection of article 11. Whilst it is right that articles 10 and 11 do not provide a right to trespass, the jurisprudence of the European court demonstrates that the court should ask first whether the right is engaged and then consider proportionality. Creation of a bright line rule that articles 10 and 11 are not engaged where an otherwise peaceful protestor has trespassed on private property would run counter to the established jurisprudence where any exclusionary category has been construed very narrowly. Individuals from the Occupy Movement who had been trespassing for three months on public land by setting up a protest camp were held to have engaged rights to articles 10 and 11: *City of London Corpn v Samede* [2012] PTSR 1624, para 49. Similarly, in *Appleby v United Kingdom* (2003) 37 EHRR 38 the court considered that the article 10 and 11 rights of protestors who were prevented from setting up a stand and distributing leaflets concerning their opposition to the development plans of the local authority were engaged, albeit no violation of those rights was found to have occurred. The removal and subsequent conviction of protestors in *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017 were held to constitute an unjustified interference with the article 11 rights of the protestors, notwithstanding their conduct in taking

A possession of privately held land, impeding access to the land by its lawful owners and committing acts of violence against private security guards.

By analogy, in cases involving civil injunctions and contempt, the article 10 and 11 rights of individuals accused of trespass and nuisance and conduct causing considerable economic damage were found to be relevant: see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), B where a *Ziegler*-style analysis was undertaken. Similarly, the article 10 and 11 rights of individuals who had trespassed were found to be engaged in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29; and considered to be factors to be weighed in the balance in *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) and *RMC LH Co Ltd v Persons Unknown* [2015] EWHC 4274 (Ch).

C In the present case, the deputy district judge made no finding of damage or intentional damage caused to the land by the defendant. It is therefore not open to the prosecutor to now invite the court to reach a finding of fact in that regard. Accordingly, the prosecution's argument that the defendant trespassed and intentionally damaged land and that that therefore puts him outside the scope of protection which would be afforded to his Convention D rights under articles 10 and 11 has no basis in fact and is wrong. Moreover, the jurisprudence of the European court also provides that protests involving damage still fall within the scope of article 10: see e g *Taranenko v Russia* (2014) 37 BHRR 285, para 10. Were trespass and damage to property to be interpreted as violence or reprehensible acts, it would be an overly restrictive interpretation.

Conduct which might not be considered to be at the core of the rights under E articles 10 and 11 still requires careful evaluation and is not determinative of proportionality: *Ziegler* [2022] AC 408, para 67. Any reprehensible behaviour would be considered in the proportionality assessment but not as a barrier to engagement of the rights. The focus would be on the conduct of the individual concerned. In the present case, the conduct of the defendant was targeted at disrupting the activity of the HS2 high speed railway, i e those at F whom the protest was targeted. Accordingly, it ought to be closer to the core of the rights protected under article 11 than the conduct of protestors in *Ziegler*, whose protest seriously disrupted the everyday activities of others. The protest organiser should retain autonomy in deciding where, when and how the protest should take place and it is recognised that the purpose of an assembly is often linked to a certain location: *Lashmankin v Russia* (2017) G 68 EHRR 1, para 405 and *Ziegler*, para 72. Although the jurisdictions differ, it would be illogical if trespassing protestors disrupting the activities of people not connected to the protest object retained the protection of article 11 when, as in the present case, a trespassing individual protesting at the precise location of the environmental damage being caused by the high speed railway but only disrupting the activity of the protest object was not so protected.

H The section 68 offence requires, in addition to trespass, an additional act of intimidation, obstruction or disruption: *Director of Public Prosecutions v Barnard* [2000] Crim LR 371. It is to that additional act that the question of whether articles 10 or 11 are engaged applies, rather than whether or not the protestor is trespassing.

In a case involving the offence of aggravated trespass contrary to section 68 of the 1994 Act, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of rights under articles 10 and 11, which will require a fact-sensitive enquiry. Although the Supreme Court judgment in *Ziegler* [2022] AC 408 was concerned with obstruction of the highway, the principles apply in any potential conviction which would be a restriction on article 10 and 11 rights. The jurisprudence of the European Court of Human Rights clearly shows that a conviction is a restriction which represents a distinct interference with article 10 and 11 rights: see e g *Kudrevičius* 62 EHRR 34, para 101. That distinct interference requires justification separately from any which might be required due to any interference caused to those rights by arrest or disposal of a protest because different considerations may apply: *Ziegler*, paras 57, 60. In order to determine the proportionality of an interference with Convention rights, a fact-sensitive enquiry will be required to evaluate the circumstances in the individual case. Any restriction on the exercise of article 10 and 11 rights, including a criminal conviction, must be (1) prescribed by law, (2) in pursuit of a legitimate aim and (3) necessary in a democratic society.

Accordingly, section 68 of the 1994 Act cannot predetermine what is inherently a fact-sensitive consideration of proportionality. The issue is not whether section is 68 is a proportionate restriction generally but whether what happens to an individual when section 68 is applied is proportionate having regard to all the circumstances. The interference with an accused's rights under articles 10 and 11 would be different at the stages of arrest, prosecution decision and conviction and, thus, the proportionality assessments would require separate fact-specific enquiries: *Ziegler*. In addition, in making those decisions, each public authority has its own duty under section 6 of the Human Rights Act 1998 not to act in way which is incompatible with Convention rights. The wide impact of articles 10 and 11 on public order offences was emphasised by Lady Arden JSC at para 92 of *Ziegler*, citing Lord Bingham of Cornhill's observation in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 34 that giving effect to those rights under the 1998 Act represented a "constitutional shift".

The court, when considering an offence of aggravated trespass or other public order offence, is obliged by section 3 of the Human Rights Act 1998 to read and, so far as it is possible to do so, give effect to the relevant statutory provisions in a way which is compatible with the Convention rights. Where it is not possible to do so, the court may make a declaration of incompatibility under section 4 of the 1998 Act. Accordingly, as in the present case, where a statutory provision is likely to interfere with article 10 and 11 rights but on its face contains no element which would make it compatible with those Convention rights, the court is required to read in that proportionality element to give effect to them. Thus, no bright line distinction exists or is required between convictions for an offence which includes a lawful excuse defence and those which do not.

Section 68 of the 1994 Act was enacted before the 1998 Act came into force. That distinguishes the situation in the present case from that in *Animal Defenders International v United Kingdom* [2013] EMLR 28 on which the prosecutor relies as authority for the principle that the state can

A adopt general measures which apply to predefined situations regardless of the individual facts of each case. In *Animal Defenders*, the legislative provision concerned had been debated in Parliament with full reference to Convention rights, whereas section 68 of the 1994 Act was not. Therefore, the intentions of Parliament in enacting it are of little relevance in the current case. In any event, the case does not provide authority for the proposition that in the context of a protest the proportionality of a restriction on
B Convention rights, in this case a conviction, can be predetermined through a statutory provision without the need for a fact-specific assessment in each case.

Section 68 of the 1994 Act is listed as a public order offence aimed at disruptive protests which involve trespass. The gravamen of the offence requires an element of intimidation, obstruction or disruption in addition to
C trespass. Thus, the Convention rights of the landowner under article 1 of the First Protocol to the Convention ("A1P1") become less relevant to the exercise of assessing the proportionality of any interference with the article 10 and 11 rights of the defendant. Indeed, any interference with the A1P1 rights of the landowner are also subject to a proportionality assessment to balance any competing rights and freedoms of other people. If the prosecutor's argument that priority should be given in advance to the
D A1P1 rights of the landowner were successful, engagement of the rights under articles 10 and 11 would effectively be excluded altogether. In so far as the rights under A1P1 are capable of outweighing those under articles 10 and 11, it remains the case that a fact-sensitive balancing exercise is required to determine the issue.

Moloney QC

E The deputy district judge's decision to acquit was plainly reasonable in that it was open to her to make. Although another judge might have reasonably reached another conclusion on the facts, there is no flaw of reasoning which undermines the cogency of the conclusion reached. The judge applied the non-exhaustive list of factors set out in *Ziegler* [2022] AC 408, finding that the protest was peaceful, there was no disorder and the
F defendant had committed no other criminal offences, his actions were carefully targeted to impact on the particular part of the development to which he objected, the protest related to a matter of general concern and was one which the defendant had a long-standing commitment to opposing, the delay to the project was relatively short and it was unclear whether there was a complaint about his conduct. In the circumstances, it was plainly open for the deputy district judge to acquit.

G Although it is correct that the deputy district judge made no direct reference to the A1P1 rights of the landowner, it can reasonably be inferred that those rights were in her mind when finding "no inconvenience to the general public or interference with the rights of anyone other than HS2". Furthermore, whereas in civil injunction cases the A1P1 rights of a claimant landowner are directly balanced against the article 10 and 11 rights of those
H who wish to protest on or around the land, in a criminal case the parties are the Crown and the defendant, which makes it unclear whether or to what extent the A1P1 rights of the landowner need to be balanced.

Moreover, the deputy district judge was entitled to take into account the relative impact of the cost and disruption of a protest to a development project. In doing so, it was necessary to make reference to the total

estimated time and cost of the project and reasonable to conclude that, overall, the relative impact of the protest was minor. In the context of a fact-sensitive proportionality exercise it was an entirely appropriate consideration.

The appeal should therefore be dismissed.

The court took time for consideration.

30 March 2022. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2 The defendant was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The deputy district judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the defendant that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11". In short, the judge accepted that there was a new ingredient of the offence to that effect.

3 Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the defendant's article 10 and 11 rights were engaged, to acquit the defendant on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's article 10 and 11 rights applying the principles in *Ziegler*?
>
> "2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4 The prosecution appeal against the acquittal on three grounds:

(1) The prosecution did not engage articles 10 and 11 rights;

(2) If the defendant's prosecution did engage those rights, a conviction for the offence of aggravated trespass is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights. The decision in *Ziegler* did

not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

(3) In any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5 Before the judge, the prosecution accepted that the defendant's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the defendant suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither ground 1 nor ground 2 was advanced before the judge.

6 The defendant contends that it should not be open to the prosecution to raise grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that ground 1 is being pursued; and that although ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7 Crim PR r 35.2(2)(c) relating to an application to state a case requires: "The application must— . . . (c) indicate the proposed grounds of appeal . . ."

8 The prosecution did not include what is now ground 1 of the grounds of appeal in its application to the magistrates' court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9 Applying well-established principles set out in *R v R (Practice Note)* [2016] 1 WLR 1872 at paras 53–54, *R v E* [2018] EWCA Crim 2426 at [17]–[27] and *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [25]–[31], we are prepared to deal with ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the defendant, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10 Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."

"(2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

"(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

"(4) [Repealed.]

"(5) In this section 'land' does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of land in subsection (9) of that section; or (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11 Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12 The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity; (iii) the defendant must do an act on the land; (iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13 Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual background

14 The defendant was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15 The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London – West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

16 The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

A **17** Protesters against the HS2 project had occupied the Land and the defendant had dug a tunnel there before 2 March 2021. The defendant occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18 The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed B from trees on the site. On the same day the team found the defendant in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The defendant went back into the tunnel.

19 The HS2 team instructed health and safety experts to help with the C eviction of the defendant and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The defendant left the Land voluntarily at about 14.00 on 18 March 2021.

20 The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21 HS2 contractors were unable to go onto the Land until it was D completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The proceedings in the magistrates' court

22 On 18 March 2021 the defendant was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not E guilty. The trial took place on 21 September 2021.

23 At the trial the defendant was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions:

(i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 [of the F Convention]. It is of general applicability. It is not limited to offences of obstructing the highway";

(ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

(a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at G para 12). Accordingly, in determining a criminal charge where issues under articles 10 and 11 of the Convention are raised, the court is obliged to take account of those rights;

(b) Second, violence is the dividing line between cases where articles 10 and 11 apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest in assessing whether a criminal offence has taken place. Section 68 does not H require the prosecution to show that a defendant was violent and, on the facts of this case, the defendant was not violent;

(iii) Accordingly, before the court could find the defendant guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate

interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at paras 71–78, 80–83 and 85–86). This required a fact-sensitive assessment.

24 The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the defendant's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see para 10 of the case stated).

25 The judge made the following findings:

"1. The tunnel was on land owned by HS2.

"2. Albeit that the defendant had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

"3. The act of defendant taking up occupation of the tunnel on 15 March, sleeping overnight and retreating into the tunnel having been served with the notice to vacate was an act which obstructed the lawful activity of HS2. This was his intention.

"4. The defendant's article 10 and 11 rights were engaged and the principles in *Ziegler* were to be considered.

"5. The defendant was a lone protester only occupying a small part of the land.

"6. He did not act violently.

"7. The views of the defendant giving rise to protest related to important issues.

"8. The defendant believed the views he was expressing.

"9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

"10. The land specifically related to the HS2 project.

"11. HS2 were aware of the protesters were on site before they acquired the land.

"12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of £billions.

"13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195,000, I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the defendant's article 10 and 11 rights."

Convention rights

26 Article 10 of the Convention provides:

"*Freedom of expression*

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27 Article 11 of the Convention provides:

"*Freedom of assembly and association*

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

28 Because section 68 is concerned with trespass, it is also relevant to refer to article 1 of the First Protocol to the Convention ("A1P1"):

"*Protection of property*

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

29 Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

30 Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court (section 6(3)).

31 In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v France* (1991) 14 EHRR 362 at para 37).

32 The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevičius v Lithuania* (2015) 62 EHRR 34 at para 91). A

33 Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevičius*, the Grand Chamber of the European Court of Human Rights ("the Strasbourg court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" (para 92). B

34 The defendant submits, relying on the Supreme Court judgment in *Ziegler* [2022] AC 408 at para 70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the defendant's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality. C

35 Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see eg *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 at para 44, cited in *City of London Corpn v Samede* [2012] PTSR 1624 at para 43; *Kudrevičius* at paras 150 and 155). D

36 The defendant relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (eg *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 at para 28). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevičius* at para 97). E

37 Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevičius* at paras 149 and 172–174; *Ezelin* at para 53; *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009 at paras 43–44 and 47–48). F

38 In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights. G H

39 *Barraco* and *Kudrevičius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no

A right of access at all. The defendant submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (para 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the defendant's B argument (e g *Samede* [2012] PTSR 1624 at para 5 and see Lindblom J (as he then was) in *Samede* [2012] EWHC 34 (QB) at [12] and [136]–[143]; *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth London Borough Council v Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40 Instead, we gain much assistance from *Appleby v United Kingdom* C (2003) 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg court decided that the landowner's A1P1 rights were engaged (para 43). It also observed that a shopping centre of this kind may assume the characteristics of D a traditional town centre (para 44). Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41 Instead, the court stated at para 47:

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic E and technological developments are changing the ways in which people move around and come into contact with each other, the court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise F of freedom of expression or it can be said that the essence of the right has been destroyed, the court would not exclude that a positive obligation could arise for the state to protect the enjoyment of the Convention rights by regulating property rights. The corporate town, where the entire municipality is controlled by a private body, might be an example (see *Marsh v Alabama* [(1946) 326 US 501], cited at para 26 above)."

G The court indicated that the same analysis applies to article 11 (see para 52).

42 The example given by the court at the end of that passage in para 47 shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the H applicants did have alternative methods by which they could express their views to members of the public (para 48).

43 Likewise, *Taranenko v Russia* (2014) 37 BHRC 285 does not assist the defendant. At para 78 the court restated the principles laid down in *Appleby* at para 47. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public

building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks (paras 25, 61 and 79). The qualified public access was an important factor.

44 The defendant also relied upon *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business people protested by occupying the market at night. The Strasbourg court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

45 We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at paras 47 and 52). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights.

46 The approach taken by the Strasbourg court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47 We now return to *Richardson* [2014] AC 635 and the important statement made by Lord Hughes JSC at para 3:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an

injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

48 *Richardson* was a case concerned with the meaning of "lawful activity", the second of the four ingredients of section 68 identified by Lord Hughes JSC (see para 12 above). Accordingly, it is common ground between the parties (and we accept) that the statement was obiter. Nonetheless, all members of the Supreme Court agreed with the judgment of Lord Hughes JSC. The dictum should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

49 The proposition which the defendant has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg court". It is clear from the line of authority which begins with *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20 and has recently been summarised by Lord Reed PSC in *R (AB) v Secretary of State for Justice* [2022] AC 487 at paras 54–59, that this is not the function of a domestic court.

50 For the reasons we gave in para 8 above, we do not determine ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case.

Ground 2

51 The defendant's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* [2022] AC 408 had decided that in any criminal trial involving an offence which has the effect of restricting the exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in question did not have a "lawful excuse". If that submission is accepted, ground 2 would fail.

52 Secondly, if that first contention is rejected, the defendant submits that the court cannot allow the appeal under ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it

is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53 On this second part of ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54 In *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617, the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at para 4). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Kenneth Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do so (paras 27–36). One reason for this was to avoid the risk of inhibiting legitimate participation in protests (para 27). It was in that context that Liberty had intervened (para 37).

55 Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 (para 37). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly, he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass (para 38). It was in this context that he said at para 39:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56 Moses LJ then went on to say that his earlier judgment in *Dehal v Crown Prosecution Service* (2005) 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is

A nothing more to prove, including proportionality, to convict of that offence (para 40).

57 In *James v Director of Public Prosecutions* [2016] 1 WLR 2118, the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any B restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate (paras 31–34). Offences falling into that first category were the subject of the decisions in *Norwood v Director of Public Prosecutions* [2003] Crim LR 888, *Hammond v Director of Public Prosecutions* (2004) 168 JP 601 C and *Dehal*.

58 The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado." Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see D Ouseley J at para 35).

59 The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required (paras 37–38).

60 *James* concerned an offence of failing to comply with a condition E imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a F direction imposing conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. G There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 (paras 38–43). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61 There are also some instances under the common law where proof H of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 of the Convention. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the

community. In *Gifford v HM Advocate* 2011 SCCR 751, the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" (para 15). Lord Reed added at para 17:

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under articles 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

62 Similarly, in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, the appellant rightly accepted that articles 10 and 11 of the Convention do not provide a defence to the offence of public nuisance as a matter of substantive criminal law (para 37). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights (paras 24–39).

63 *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James*. Indeed, in *Ziegler* [2020] QB 253 at paras 87–91, the Divisional Court referred to the analysis in *James*.

64 The second question certified for the Supreme Court in *Ziegler* [2022] AC 408 related to the "lawful excuse" defence in section 137 of the Highways Act (paras 7, 55–56 and 98–99). Lord Hamblen and Lord Stephens JJSC referred at para 16 to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65 The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way sub silentio suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* [2013] 1 WLR 3617 or offences such as section 68. That was unnecessary to resolve the issues before the court.

66 Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the

A statement in *Richardson* [2014] AC 635 at para 3 or to cases such as *Appleby* 37 EHRR 38.

67 For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those B rights.

68 The passages in *Ziegler* upon which the defendant relies have been wrenched completely out of context. For example, the statements in para 57 about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application C whenever a criminal offence engages articles 10 and 11. The same goes for the references in paras 39–60 to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paras 62–70 are entitled "Deliberate obstruction with more than a de minimis impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

D **69** We are unable to accept the defendant's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends E on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70 Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to F be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration G of incompatibility under section 4 of the 1998 Act would arise. If granted, it would remain a matter for Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71 Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory H offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well established that such measures are permissible (see e g *Animal Defenders International v United Kingdom* [2013] EMLR 28).

72 It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.

73 The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.

74 First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the state to ensure sufficient protection for such rights in its legal system (*Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008).

75 Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

76 Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

77 Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

78 Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

79 Sixthly, the Supreme Court in *Richardson* [2014] AC 635 regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies a fortiori to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.

80 We gain no assistance from para 80 of the judgment in *R (Leigh) v Comr of Police of the Metropolis* [2022] 1 WLR 3141, relied upon by Mr Moloney. The legislation considered in that case was enacted to address

A public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81 It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision B of the Supreme Court in *Ziegler* [2022] AC 408 nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on ground 2.

Ground 3

C **82** In view of our decision on ground 2, we will give our conclusions on ground 3 briefly.

83 In our judgment the prosecution also succeeds under ground 3.

84 The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention D rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the E national interest. One object of section 68 is to discourage disruption of the kind committed by the defendant, which, according to the will of Parliament, is against the public interest. The defendant (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg court has often observed F that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the common law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.

G **85** The judge accepted arguments advanced by the defendant which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a H proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86 In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the defendant did not act violently. But if the defendant had been violent, his

protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

87 It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to "only" £195,000 and the delay was $2\frac{1}{2}$ days, whereas the project as a whole will take 20 years and cost billions of pounds. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

88 In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89 We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler* [2022] AC 408:

(1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the Convention;

(2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevičius* 62 EHRR 34 and *Barraco* 5 March 2009 are instructive on the correct approach (see para 39 above);

(3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question.

90 The appeal must be allowed. Our answer to both questions in the case stated is "no". The case will be remitted to the magistrates' court with a direction to convict the defendant of the offence charged under section 68(1) of the 1994 Act.

Appeal allowed.
Case remitted to magistrates' court with direction to convict.

Jo Moore, Barrister

Neutral Citation Number: [2022] EWHC 1215 (QB)

Case No: QB-2022-001420

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

SHELL UK OIL PRODUCTS LIMITED	**Claimant**
- and -	
PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION	**Defendants**

- -
- -

Toby Watkin QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Claimant

Hearing date: 13 May 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on 20 May 2022.

Mr Justice Johnson :

1. The claimant sells fossil fuels to those who run Shell branded petrol stations. The defendants are climate and environmental activists who say that the claimant's activities are destroying the planet. They engage in protests to draw attention to the issue and to encourage governmental and societal change.

2. The claimant seeks to maintain an injunction that was granted on an emergency basis by McGowan J on 5 May 2022. It restrains the defendants from undertaking certain activities such as damaging petrol pumps and preventing motorists from entering petrol station forecourts when that is done to prevent the claimant from carrying on its business – see paragraph 20 below. The claimant recognises that the injunction interferes with rights of assembly and expression but contends that the interference is proportionate and justified to protect its rights to trade.

3. The order of McGowan J was necessarily made without notice to the defendants or anybody else. McGowan J made provision for the order to be widely published (including at every Shell filling station in England and Wales, and to over 50 email addresses that are associated with protest groups). McGowan J also required that the order be reconsidered at a public hearing on 13 May 2022 so that the court could reconsider the continuation of the order, and its terms. This provided a specific opportunity for anyone affected by the order to seek to argue that it should be set aside or varied. In the event, nobody did so.

4. Mrs Nancy Friel, who describes herself as an environmental activist, attended the hearing. She asked for the hearing to be adjourned so that she could secure representation and argue that the order should be set aside or varied. I declined the request to adjourn. It was important that this injunction, which was granted without notice to the defendants and which impacts on their rights of assembly and expression, was considered by a court at a public hearing without further delay. Continuing with the hearing does not prejudice any application that Mrs Friel (or anybody else) might wish to make to vary the order or to set it aside: the terms of the order itself permit such an application to be made (and see also rule 40.9 of the Civil Procedure Rules).

5. Mrs Friel was concerned that the terms of the order require that any person who wishes to apply to vary or discharge the order must first apply to be joined as a named defendant. She did not consider that was appropriate, because she is not taking part in any unlawful activity and does not therefore come within the scope of the description of the defendants. There are two answers to that concern. First, the description of the "unknown" defendants does not prevent Mrs Friel from being added as a second defendant to the proceedings; she may be affected by the order – and may be entitled to be joined as a party – even if she does not come within that description. Second, if she otherwise has a right to apply to set aside the order without being joined as a party then she may do so under CPR 40.9, notwithstanding the terms of the order (see *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) *per* Bennathan J at [20]-[22] and *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [89]).

6. It is not, however, appropriate to vary the terms of the order to give a general right to anyone (beyond that recognised by CPR 40.9) to apply to vary the order without first applying to be a party. That would risk going beyond the ambit of CPR 40.9: although

that provision is stated in wide terms, in practice the circumstances in which a non-party may successfully apply to vary an order are more limited (see the commentary to CPR 40.9 in the 2022 White Book). There is therefore a risk of creating an unjustified advantage for such an applicant (for example, as regards costs) or an unjustified disadvantage for the claimant, without first considering the particular circumstances of the application. The question of whether it is necessary for a person to be joined as a party is best addressed (if and when the issue arises) as and when any application is made, and on the facts of the particular application.

Factual background

7. Benjamin Austin is the claimant's Health, Safety and Security Manager. He has provided two witness statements, supported with extensive exhibits. I take the account of events from his statements and exhibits.

The claimant

8. The claimant is part of a group of companies that are ultimately owned and controlled by Shell plc. It markets and sells fuels to retail customers in England and Wales through a network of 1,062 "Shell-branded" petrol stations ("Shell petrol stations"). The stations are operated by third party contractors, but the fuel is supplied by the claimant. In some cases, the claimant has an interest in the land where the Shell petrol station is located.

Insulate Britain, Just Stop Oil and Extinction Rebellion

9. Insulate Britain, Just Stop Oil and Extinction Rebellion are environmental protest groups that seek to influence government policy in respect of the fossil fuel industry, so as to mitigate climate change. These groups say that they are not violent. I was not shown any evidence to suggest that they have resorted to physical violence against others. They are, however, committed to protesting in ways that are unlawful, short of physical violence to the person. Their public websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time". The activities of their supporters also demonstrate this, as explained below.

The protests

10. In autumn 2021 a number of protests took place. These involved blocking major roads in the UK, including the M25, including by activists gluing themselves to roads, immovable objects, or each other. Injunctions to restrain such activities were made by the court on the application of National Highways Limited. There were many breaches of those injunctions. Committal proceedings were brought. Initially, the defendants to those proceedings evinced an intention to carry on with the protests in defiance of court orders. Orders for immediate imprisonment for contempt of court were imposed - see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB). Thereafter, unlawful protests in this form came to an end. In subsequent committal hearings, the respondents were unrepentant. They maintained that they were justified in their conduct because of the very great dangers of climate change. However, they did not demonstrate an intention to commit further breaches of court orders. Many indicated that they would find other, lawful, ways to draw attention to the climate crisis and to seek to influence government policy. The court responded by imposing orders of imprisonment for contempt of court that were suspended, subject to compliance with conditions imposed

by the court – *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) (*per* Dingemans LJ at [57]) and *National Highways Ltd v Springorum* [2022] EWHC 205 (QB) (*per* William Davis LJ at [65]).

11. In spring 2022, protests involving similar tactics re-commenced, but directed at the fossil fuel industry rather than the road network. Reports include cases of protesters climbing onto fuel delivery lorries, cutting the air brake cables so that the lorries cannot move, tunnelling under roadways to seek to make them impassable to lorries, climbing onto equipment used for storage of fuels, and tampering with safety equipment, such as valves. One of these protests was at a terminal owned by the Shell Group.

12. On 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, Clacket Lane and Cobham. Protestors arrived at around 7am. Video, photographic and written evidence (largely deriving from the websites and media releases of protest groups) show that:

    (1) The entrance to the forecourts were blocked.

    (2) The display screens of fuel pumps were smashed with hammers.

    (3) The display screens of fuel pumps were obscured with spray paint.

    (4) The kiosks were "sabotaged… to stop the flow of petrol".

    (5) Protestors variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other.

13. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed. Five people were arrested and charged with offences, including criminal damage. They are subject to bail conditions. The claimant has not sought to join them as individual named defendants to this claim because (in the case of four of them) it considers that, in the light of the bail conditions, there is not now a significant risk that they will carry out further similar activities, and (in the case of the fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the injunction.

14. In April 2022 there were protests at an oil storage depot in Warwickshire, which is partly owned by the claimant. These involved the digging of a tunnel under a tanker route, to stop oil tankers leaving the terminal and distributing fuel. An injunction was granted on an application made by the local authority. Protests at the depot have continued. On 9 May 2022 drones were flown over the depot and along its external fence. The claimant thinks this may have been a form of reconnaissance by a group of protestors.

15. On 3 May 2022 more than 50 protestors from Just Stop Oil attended the Nustar Clydebank Oil Depot in Glasgow. They climbed on top of tankers, locked themselves to the entrance of the terminal and climbed onto pipework at height. Their actions halted operations at the depot.

16. The campaign orchestrated by these (and other) groups of environmental activists continues. Just Stop Oil's website says that the disruption will continue "until the government makes a statement that it will end new oil and gas projects in the UK."

17. The claimant says that there is thus an ongoing risk of further incidents of a similar nature to those seen on 28 April 2022.

The risks at petrol stations

18. Aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on the claimant (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on "Storing petrol safely" and "Dispensing petrol as a fuel: health and safety guidance for employees", and non-statutory guidance, "Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions."

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: "Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion."). The evidence shows that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.

The injunction

20. The operative paragraphs of the injunction are:

> "2. For the period until 4pm on 12 May 2023, and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> 3. The acts referred to in paragraph 2 of this order are:

> 3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;
>
> 3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> 3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station.
>
> 3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> 3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> 3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> 3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ("depositing… any substance on… any part of a Shell Petrol Station" would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are "damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, with the intention of disrupting the sale or supply of fuel to or from the said station." So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken "in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station."

22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see paragraph 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure.

The legal controls on the grant of an injunction

23. The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The claimant must demonstrate:

(1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 *per* Lord Diplock at 407G.

(2) Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid per* Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 *per* Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 *per* Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 *per* Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: *Canada Goose* at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].

(7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998.

24. Section 12 Human Rights Act 1998 (see paragraphs 23(11) and (12) above) states:

> "**12 Freedom of expression.**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (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)."

(1) Serious issue to be tried

25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations.

26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ("conspiracy to injure"). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 [2020] 4 WLR 29 *per* Leggatt LJ at [18]: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.

27. As I have explained, the claimant has a strong case that the defendants have acted unlawfully. To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19 [2008] 1 AC 1174 *per* Lord Walker at [94] and Lord Hope at [44]. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300 [2021] Ch 233 *per* Arnold LJ at [155].

28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14)* [2018] UKSC 19 [2020] AC 727. Lord Sumption and Lord Lloyd-Jones observed, at [15], that the issue was complex, not least because it might – in the case of a breach of statutory duty – depend on the purpose and scope of the underlying statute and whether that is consistent "with its deployment as an element in the tort of conspiracy."

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

therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act.

30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel.

31. I am therefore satisfied that there is a serious issue to be tried.

32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim.

(2) Adequacy of damages

33. The claimant asserts that damages are not an adequate remedy because they could not be quantified. It is difficult to see why that should be so. Any losses ought to be capable of assessment. For example, loss of sales can be assessed by (broadly) identifying the time period when sales were affected, and comparing the sales made during that period with the sales made during the equivalent period the previous week. The possible difficulties in calculation are not a convincing reason for concluding that damages are an inadequate remedy.

34. There is, though, no evidence that the defendants have the financial means to satisfy an award of damages. It is very possible that any award of damages would not, practically, be enforceable. Further, the defendants' conduct gives rise to potential health and safety risks. If such risks materialise then they could not adequately be remedied by way of an award of damages to the claimant.

35. For these reasons, damages are not an adequate remedy for the claimant.

36. Conversely, if any defendant sustains loss as a result of the injunction, then the claimant undertakes to pay any damages which the court considers ought to be paid. It has the means to satisfy any such order. The injunction interferes with rights of expression and assembly, but it does not impact on the core of those rights. It does not prevent the defendants from congregating and expressing their opposition to the claimant's conduct (including in a loud or disruptive fashion, in a location close to Shell petrol stations), so long as it is not done in a way which involves the unlawful conduct prohibited by

paragraphs 2 and 3 of the injunction. To the extent that there is an interference with rights of assembly and expression then (if a court subsequently finds that to be unjustified) that can be met by the cross-undertaking: interferences with such rights to assembly and expression can be remedied by an award of damages, even where the loss is not monetary in nature (see section 8 of the Human Rights Act 1998).

37. So, while damages are not an adequate remedy for the claimant, the cross-undertaking in damages is an adequate remedy for the defendants.

(3) Balance of convenience

38. The fact that damages are not an adequate remedy for the claimant but that the cross-undertaking is adequate protection for the defendants means that it may not be necessary separately to consider the balance of convenience.

39. In any event, the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions. It will only run for a maximum of a year before having to be reconsidered by a court. It only applies to Shell petrol stations (not other places where the claimant does business).

(4) Real and imminent risk of harm

40. Harm has already occurred as a result of the protests on 28 April 2022. The risk of repetition is demonstrated by the further protests that have occurred since then, and the public statements that have been made by protest groups as to their determination to continue with similar activities.

41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.

42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm.

(5) Prohibited acts to correspond to the threatened tort

43. The acts that are prohibited by the injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure. The structure and terms of the injunction have been drafted to achieve that.

44. It would be permissible for an injunction to prohibit behaviour which is otherwise lawful (or which is not actionable by the claimant) if there are no other proportionate means of protecting the claimant's rights. The claimant does not contend that is the case here, because an order that closely corresponds to the threatened tort will afford adequate protection. I agree.

(6) Terms sufficiently clear and precise

45. The terms of the injunction (see paragraph 20 above) are in clear and simple language that avoids technical legal expression.

46. It is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. The drafting of paragraph 3 satisfies that criterion. There is an element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") but that is unavoidable because of the nature of the tort of conspiracy to injure. It is the inevitable price to be paid for closely tracking the tort. The alternative would be to leave out the subjective element and focus only on the objective conduct. That would give wider protection than is necessary or proportionate. It is also necessary to introduce the language of intention to avoid some of the prohibitions having a much broader effect than could ever be justified (for example, the sweet wrapper example at paragraph 21 above).

(7) Clear geographical and temporal limits

47. There are clear geographical limits to the order: it applies only to Shell petrol stations.

48. It is convenient, at this point, to address the question of whether those geographical limits can be justified as being no more than is necessary and proportionate to protect the claimant's interests (so as to ensure compatibility with articles 10 and 11 ECHR – see paragraphs 55-62 below). The only Shell petrol station where acts of conspiracy to injure have occurred so far is on the M25. It is perhaps unsurprising that petrol stations of that profile (large, and on the London orbital motorway) have been targeted. It would be possible to grant an injunction that only applied to the station that has been targeted, but that would leave many other petrol stations vulnerable. The claimant's interests would not be sufficiently protected. It would be possible to fashion an injunction that only targeted certain types of petrol station (for example, those on motorways, or those on trunk roads). Again, that would not properly protect the claimant's interests because there would be plenty of other available targets. It is possible to envisage that the risk at some individual Shell petrol stations is very low, but it is not practical to draft the order in a way that excludes such petrol stations: that would be self-defeating because any excluded station would then be at a heightened risk. I have concluded that the ambit of coverage is justified as being necessary and proportionate to protect the claimant's interests.

49. There is also a clear temporal limit. It will not last for longer than 12 months, without a further order of the court. *Canada Goose*, on one view, might suggest (and at first instance in the cases that led to *Barking and Dagenham* was taken as suggesting) that interim orders should not last for as long as this, that there is an obligation to progress litigation to a final hearing, and that an interim order should only be imposed for so long as is necessary for the case to be progressed to a final hearing. However, the notion that there is a fundamental difference between what can be justified by an interim order, and what can be justified by a final order, was dispelled in *Barking and Dagenham*. In that case, Sir Geoffrey Vos MR made it clear that both interim and final orders should be time-limited, and that it is good practice to provide for a review. Sir Geoffrey Vos MR agreed with the suggestion of Coulson LJ in *Canada Goose* that "persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review." I do not consider it appropriate to grant this interim injunction for longer than a year. But I consider that a year can be justified (bearing in mind the right to apply to vary or set aside at any earlier point). The pattern of protest activity is unpredictable. Providing a much shorter time period might mean that the court will be in no better position then than it is now to predict what is necessary to protect the claimant's interests. Moreover, the period of a year will allow the claimant to progress the litigation so that if continued restraint is necessary after the current order expires the court may have the option of making a final order (albeit, as *Barking and Dagenham* shows, that too will have to be time-limited).

(8) Persons unknown are unidentified but could, in principle, be identified and served

50. Five of those who took part in the protests on 28 April 2022 have been identified. For the reasons explained at paragraph 13 above, the claimant does not seek injunctive relief against them. Others who were involved on 28 April 2022, and others who may undertake such activities in the future, have not been identified. In principle, as and when they take part in such protests, they could be identified and could then be personally served with court documents.

51. In the interim, the issue as to how service should take place was the subject of careful consideration by McGowan J and is reflected in the order that was made on 5 May 2022. That provides on the face of the order that the matter would be considered by the court on 13 May 2022. It also provides that the claimant must send a copy of the order to more than 50 email addresses that are linked with the protest groups. That was done. It also provides that a copy should be made available on the claimant's website "shell.co.uk". Again, that was done. The frontpage of the website contains a link, with the text "Notice of injunction", from which the court documents, including the order of 5 May 2022, can be downloaded. The order also requires that the claimant use all reasonable endeavours to display notices at the entrances of every Shell Petrol station (and also elsewhere within the station) that identify a point of contact from which the order can be requested and identify a website where it can be downloaded. At the time of the hearing, the claimant had done this in respect of well over 50% of Shell petrol stations.

52. As to the future, there is good reason to make slight adjustments to the order that was made by McGowan J. That order was designed only to cover the short period between 5 May 2022 and 13 May 2022. The injunction will (subject to any further order) now remain in place for a longer period of time. It is appropriate therefore to require the claimant not just to take steps to ensure that the notices are displayed at the Shell petrol

stations, but also now to take steps to ensure that those notices remain in place. On the other hand, the order made by McGowan J required a degree of saturation (notices on every entrance to the petrol station, and on every upright steel structure forming part of the canopy infrastructure, and every entrance door to every retail establishment at the petrol station). That was appropriate to ensure initial notification of the existence of the order, but it is logistically difficult to maintain in the long term. It remains necessary for there to be clear notices at every Shell petrol station that draw attention to the injunction, but I do not consider that it remains necessary for these to be displayed on every single upright steel structure. It is also possible to make the order a little more flexible. That will ensure that notices are clearly visible but that the precise mechanism by which this is done can be tailored to the circumstances of individual petrol stations. I will adjust the order accordingly. This means that it is practically unlikely that a defendant could embark on conduct that would be in breach of the injunction without knowing of its existence.

53. By these means I am satisfied that effective service on the defendants can continue to take place.

(9) Persons unknown are identified by reference to their conduct

54. The persons unknown are described in the claim form, and in the injunction, in the way set out in the heading to this judgment. That description is in clear and simple language and relates to their conduct. It is usually desirable that such descriptions should, so far as possible, be based on objective conduct rather than subjective intention. The description that has been used does that. There is an element of subjective intention ("with the intention of disrupting the sale or supply of fuel to or from the said station") but (as with the terms of the injunction) that is unavoidable because of the nature of the tort of conspiracy to injure.

(10) Is the injunction necessary for and proportionate to the need to protect the claimant's rights?

55. The injunction interferes with the defendants' rights to assemble and express their opposition to the fossil fuel industry.

56. Unless such interference can be justified, it is incompatible with the defendants' rights under articles 10 and 11 ECHR and may not therefore be granted (see sections 1 and 6 of the Human Rights Act 1998). Articles 10 and 11 ECHR are not absolute rights. Interferences with those rights can be justified where they are necessary and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) ECHR. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2021] UKSC 23 [2022] AC 408 *per* Lord Sales JSC at [125].

57. Here, the aim is to protect the claimant's right to carry on its business. On the other hand, the defendants are motivated by matters of the greatest importance. The defendants might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is

thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison. This is not, however, "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" – *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039 *per* Lord Neuberger at [41]. It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants' actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the injunction is therefore sufficiently important to justify interferences with the defendants' rights of assembly and expression: cf *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 *per* Morgan J at [105] and *Cuadrilla per* Leggatt LJ at [45] and [50].

58. There is a rational connection between the terms of the injunction and the aim that it seeks to achieve. As explained at paragraphs 43-44 above, the terms are constructed so as only to prohibit activity that would amount to the tort of conspiracy to injure. That also means that the terms are no more intrusive than necessary to achieve the aim of the injunction. For the reasons given above (at paragraphs 47-49) the territorial and temporal provisions within the injunction are no more than is necessary to achieve its aim.

59. The injunction also strikes a fair balance between the important rights of the defendants to assembly and expression, and the rights of the claimant. It protects the latter so far as it is necessary to do so, but no further. It does not remove the rights of the defendants to assemble and express their opposition to the fossil fuel industry. It does not prevent them from expressing their views (including in a way that is noisy and/or otherwise disruptive) in close proximity to places where that industry takes place (including Shell petrol stations). It does not therefore prevent activities that are "at the core of these Convention rights" or which form "the essence" of such rights – see *DPP v Cuciurean* [2022] EWHC 736 *per* Lord Burnet of Maldon CJ at [31], [36] and [46]. Although the defendants' activities come within the scope of articles 10 and 11, they are right at the margin of what is protected.

60. All that is prohibited is specified deliberate tortious conduct (in one sense deliberate doubly tortious conduct, because of the nature of conspiracy to injure) that is carried out as part of an agreement and with the intention of harming the claimant's lawful business interests. It would not strike a fair balance between the competing rights simply to leave matters to the police to enforce the criminal law. Such enforcement could only, practicably, take place after the event, meaning that loss to the claimant is inevitable. Moreover, some of the activities that the injunction seeks to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions.

61. In *Cuadrilla* Leggatt LJ said (at [94]-[95]):

> "… 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.
>
> Where… individuals not only resort to compulsion to try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect their conscientious motives will insulate them from the sanction of imprisonment." [original emphasis]

62. The context was different (the case was concerned with an appeal against an order for committal), but the same essential distinction applies to the fair balance question. Here, the injunction restrains protests which have as their aim (rather than as a side-effect) intentional unlawful interference with the claimant's activities.

(11) Notification of defendants

63. Section 12(2) of the Human Rights Act 1998 (see paragraph 24 above) requires that the claimant has taken all practical steps to notify the defendants of its application, or else that there are compelling reasons not to notify the defendants.

64. The identity of the defendants is unknown. It was thus impossible to serve them personally with the application. As explained at paragraph 51 above, McGowan J made extensive directions in respect of the service of the injunction (which contains details of the return date).

65. By these means, I am satisfied that the claimant has taken all practical steps to notify the defendants of its application (and I note that Mrs Friel was aware of the application, because she attended the hearing).

(12) Does the order restrain "publication"?

66. The injunction affects the exercise of the Convention right to freedom of expression. Section 12(3) of the Human Rights Act 1998 (see paragraph 24 above) provides that "[n]o 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."

67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Limited v Banerjee* [2004] UKHL 44 [2005] 1 AC 253 (at [15]). There was concern that the

incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at common law. The policy motivation that gave rise to section 12(3) has no application here.

69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].

70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication.

71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

72. I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context.

73. It is, though, necessary to address the decisions in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945. That case concerned an injunction that appears to have been similar in scope to the injunction in the present case. At first instance, Morgan J held (a) that section 12(3) applied (at [86]) and (b) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). As to the applicability of section 12(3), Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given.

74. On appeal ([2019] EWCA Civ 515 [2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applies. The Court of Appeal did not therefore consider or rule on that question. It did not need to do so because it was not in issue. The only issue in relation to section 12(3) was whether (on the assumed basis that it applied) the judge was wrong to approach the statutory test without subjecting the claimants' evidence to critical scrutiny. In that respect, the court accepted the "submissions of principle" and remitted the case for the judge to reconsider "whether interim relief should be granted in the light of section 12(3) HRA."

75. The Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, but (because it was assumed rather than determined that section 12(3) applied) I do not consider that it is authority that section 12(3) applies in the circumstances of the present case: *Re Hetherington* [1990] Ch 1 *per* Sir Nicholas Lord Browne Wilkinson VC at 10, *R (Khadim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 *per* Buxton LJ at [33] and [38].

76. *Ineos* does not therefore determine that section 12(3) applies to a case such as the present where there is no question of restraining the defendants from publishing anything. *Ineos* does not mandate a finding in this case that section 12(3) applies. I have concluded that section 12(3) does not apply. If I am wrong, then I have, anyway, found that the claimant is likely to succeed at a final trial (see paragraph 32 above).

Outcome

77. The claimant succeeds in securing the continuation of the order made by McGowan J so as to restrain, for a period of up to a year, at any Shell petrol station, the specified acts of the defendants (set out at paragraph 20 above) that amount to a conspiracy to injure the claimant.

Neutral Citation Number: [2022] EWHC 2664 (KB)

Case No: QB-2022-002577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st October 2022

Before :

HHJ Lickley KC sitting as a Judge of the High Court

- -

Between :

ESSO PETROLEUM COMPANY, LIMITED	**Claimant**
- and –	
(1) SCOTT BREEN **(2) PERSONS UNKNOWN WHO ARE DESCRIBED IN ANNEX 1 TO THE CLAIM FORM DATED 10TH AUGUST 2022**	**Defendants**
(1) JANE SUZANNE EVEREST **(2) HANNAH SHELLEY**	**Interested Persons**

- -

- -

Mr Timothy Morshead KC and Yaaser Vanderman (instructed by **Eversheds**) for the **Claimant**
Mr Owen Greenhall (instructed by **Hodge, Jones and Allen Solicitors**) for the **Interested Persons**

Hearing date: 5th October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on 21st October by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Lickley QC sitting as a Judge of the High Court:

1. This is the return date for an order made by Eyre J on 15th August 2022 (order sealed on 16th August 2022) and amended by order of Ritchie J on 8th September 2022 granting Claimant Esso Petroleum Company Ltd an interim injunction. The order concerns the unlawful disruption of and potential for more unlawful disruption of the Claimant's undertaking of works to install a new oil pipeline running some 105kms across southern England from Southampton to Heathrow airport. I am not concerned with the rights and wrongs of the pipeline works or the wider issue of the use of fossil fuels. My function is to decide if the Claimant is properly entitled to the injunction they seek.

2. I have heard submissions from counsel for the Claimant and the Interested Persons. I have read papers, skeleton arguments submitted and evidence served.

The facts

3. The history is set out in the witness statement of Jon Anstee De Mas (10th August 2022) and is not challenged. In summary the Claimants are engaged in the installation of a new oil pipeline known as the Southampton to London pipeline (SLP). The Claimant owns and operates a network of pipelines from its refinery in Fawley Southampton to terminals across England. One such pipeline conveys aviation jet fuel to the Claimant's West London terminal at London Heathrow Airport. The old pipeline was installed and operated from 1972. The pipeline runs for 105 kms. The initial 10kms of the pipeline was replaced in 2001. The remaining 95 kms of pipeline was considered to be in need of replacement. The new section of pipeline comprises 90 km of underground pipeline. The route is indicated clearly on the plans submitted.

4. The works are designated as a Nationally Significant Infrastructure Project under the Planning Act 2008. The consent for the works is called a Development Consent Order (DCO). As part of the planning process a wide ranging consultation exercise was undertaken from 2017 including Local Authorities and a public consultation. The public consultation exercise included asking for views on a preferred route within the corridor of the existing pipeline. Part of that exercise included indications of potential environmental impacts. Other consultations and assessments were carried out.

5. In June 2019 the Claimant's application for a DCO was accepted by the Planning Inspectorate for examination. The DCO was granted on 7th October 2020. The DCO authorises the pipeline to be laid within the limits of deviation shown on the works plans. The area in which works are authorised, including the pipeline itself, are confined by the terms of the DCO to a strip of land of varying width (often 30m wide) known as the 'Order Limits'. The area concerned will be wider than the pipeline itself to accommodate the space needed along the route of the pipeline which is required for working and for storage compounds etc. No issue is taken as to the planning process, consultations undertaken, working methods or other aspects of the project.

6. Jon Anstee De Mas (witness statement 10th August 2022) provides the detail of the operational parameters and how the majority of the works are undertaken on third party land, some of which is subject to public and private rights of way, and the remainder are street works within the public highway. When operating on the land of third parties the Claimant is doing so by way of Option Agreements with landowners, Deeds of

Easement or under Compulsory Acquisition Powers contained in the DCO. Some Crown land is also included.

7. The ownership of machinery, plant and other materials including sections of pipe belongs to third parties such as contractors until ownership is transferred to the Claimant. The Claimant also owns some items. The works are expected to be completed during 2023.

8. Part of the pipe laying process requires that segments of pipe are left above ground described as 'stringing out'. Segments are welded together above ground and lowered into a trench. Other techniques are used. The effect is that large amounts of pipeline are on display to the public together with heavy plant and machinery at multiple sites throughout the length of the works within the Order Limits. The DCO requires the Claimant to erect temporary fencing to mark construction sites to keep the public away from dangerous operations. The type of fencing used varies and is not designed to be fully secure.

9. Jon Anstee De Mas has set out and described the incidents that affected the SLP project. In total he described 15 incidents at various sites from 19th December 2021 to 1st August 2022. I need not set out the full facts of each as part of this judgement. Incidents of note however are:

   (i) 19th December 2021 Alton compound. Protestors cut through the compound fence, damaged vehicles and attempted to damage the security system. A message was sent indicating an intention to stop the SLP on 1/1/22 from a Twitter account for a group called 'Stop Exxon SLP'. The message referred back to the events of the 19th December 2021 at the compound. The government's failure to act to avert the climate crisis was said to be a reason to '*please halt all new fossil fuel infrastructure'*. Photographs of the damage have been produced.

   (ii) 2nd February 2022 Queen Elizabeth Park Farnborough. A number of protesters, with banners, attended the car park within the Order Limits and formed a blockade across the entrance. Work was stopped for the day that was intended to involve surveys and the clearing of trees. Messages claiming responsibility from the 'XR Group' were posted later with photographs.

   (iii) 15th February 2022 Queen Elizabeth Park Farnborough. This was similar to the event on 2nd February 2022 however the works were not disrupted.

   (iv) 4th May 2022 Hartland Lodge Farnborough. Overnight protestors tampered with security fences. Barbed wire was removed from the top of a fence and a hole was cut in a second fence.

   (v) 17th June 2022 Halebourne Lane compound. Damage was caused by protestors to plant belonging to Flannery Plant hire with repair costs of £11,000. A protest group 'Pipe Busters' claimed responsibility on 22nd June 2022.

   (vi) 17th June 2022 Blind Lane Surrey Heath. Protestors gained access to the site and damaged a section of pipe that was above ground including spraying it with

slogans including '*No SLP'*. The repairs necessary cost £8000. 'Pipe Busters' claimed responsibility on 22nd June 2022 with a message and photographs showing someone using an angle grinder to damage the pipe. The message was that peaceful action was taken to halt expansion of the pipeline.

(vii) 25th June 2022 Naishes Lane Church Crookham. Protestors gained access, said to be unlawful, by unbolting Heras fencing panels and conducted a staged funeral with a child sized coffin that was laid into a pipeline trench. The protest was within the Order Limits. A local XR group later claimed responsibility.

(viii) 4th July 2022 Flannery Plant hire. Contractors engaged in the works were visited by protestors at their head office in Wembley. Posters were put up and the main entrance door locks were glued. Messages were posted by 'Pipe Busters' warning the company to stop working on the SLP or '*we will find you complicit in ecocide and will take steps to ensure your equipment cannot cause any further harm'*.

(ix) 9th July 2022. Excavators belonging to Flannery Plant hire were damaged at sites near Fleet Hampshire within the Order Limits. The repair costs were estimated to be £5000.

(x) 31st July 2022 a protestor Scott Breen (First Defendant) dug a pit at land east of Pannells Farm. The land is owned by Runnymede BC and is within the Order Limits. On 1st August 2022 Scott Breen released a press statement through Facebook and later a video stating his purpose was to disrupt the pipeline and to stop the expansion of the pipe by direct action. The Police attended the site and maintained contact with Scott Breen. I note that the Police, who attended the site, informed the Claimant's staff that it was the landowner or Claimant's responsibility to obtain and enforce a possession order from the Civil Courts. They stated that they did not consider that the offence of aggravated trespass needed consideration at that stage. This has a bearing on the submission of Mr Greenhall for the Interested Persons who submitted that an injunction was not necessary in this case because the police were available to intervene and act as necessary. Scott Breen was subsequently committed to prison for contempt on 6th September 2022 by Ritchie J having breached the earlier order. Another contempt hearing is listed in November for an individual said to have assisted Scott Breen.

(xi) 1st August 2022 Sandgates Encampment. This encampment was set up to support Scott Breen. Despite the order being made on the 15th August 2022 Scott Breen remained within the pit and the DCO Order Limits.

(xii) A plan has been produced showing the wide geographical range of the protests (ex.JA16 p.915).

10. Scott Breen left the site on 2nd September 2022. Therefore action had taken place from 31st July 2022 at the Chertsey site. Work was disrupted as a consequence of his activities.

11. The interested persons are Hannah Shelley (witness statement 5th September 2022) and Jane Everest (witness statement 5th September 2022). Both have taken part in the protests against the SLP. These took place on the 2nd February 2022, 12th February 2022, and 25th June 2022 (see above). Hannah Shelley was present at all three. Jane Everest was present for the last two. They describe the protests as peaceful. Hannah Shelley describes the protests as 'lawful'. Both wish to continue to protest against the building of the pipeline. They give their reasons namely that flying and the use of aviation fuel has a detrimental impact on the environment. They have concerns that their actions may breach the order. In summary they say: peaceful protest is prevented by the order, the maps are not clear to show what land is covered, if they are asked to stop they might not know the person making the request is authorised to do so and they are worried about being arrested for the reasons given.

12. Jon Anstee de Mars (witness statement 29th September 2022) has said that the protests that the Interested Persons were involved in on 12th May 2021 and 25th June 2022 would have breached the order if it had been in place. First, because the protestors' actions deliberately blocked workers access to the SLP and second, because they traversed the Heras fencing intending to prevent or impede construction. On 15th February 2022 although the protest took place within the DCO Order Limits, the protesters did not act in any way that was prohibited in the order.

13. Jon Anstee de Mars has set out why the injunction is still required namely to prevent further action and disruption. He says an unknown number of individuals have taken part in the protests who were supported by known organisations, the campaign against the SLP is longstanding and is designed to stop the pipeline construction, protests against the fossil fuel industry remain active across the UK and the Interested Persons themselves have said they wish to continue protesting. It has been said in argument that the injunction has worked as no other disruptive protest action has been reported since the order was made.

14. The original injunction order was amended by Ritchie J on 8th September 2022 in accordance with the slip rule given the error in paragraph 4(8). Annex 1 to the order describes the description of persons unknown who, by their conduct, are or who may become defendants to the proceedings. Appended to the order are the plans showing the entire route and the order limits. Save for a few limited exceptions, public rights of way within the DCO order limits remain open and closed only temporarily to facilitate the installation of pipeline across the right of way (Anstee de Mars witness statement 29th September 2022).

15. The order (the relevant parts) provided:

3. Until trial or further order, the First and Second Defendants must not do any of the acts listed in paragraph 4 of this order in express or implied agreement with any other person, and with the intention of preventing or impeding construction of the Southampton to London Pipeline Project.
4. The acts referred to in paragraph 3 of this order are:
(1) within the DCO order limits, damaging anything which is used or to be used in or in the course of the construction of the SLPP;

(2) within the DCO order limits, traversing any fence surrounding (or other physical demarcation of) any area of land which is used or to be used in or in the course of the construction of the SLPP;
(3) within the DCO order limits, digging any excavation or affixing or locking themselves to anything or any person;
(4) within the DCO order limits, erecting any structure;
(5) within the DCO order limits, spraying, painting, pouring, depositing or writing any substance on to anything which is used or to be used in or in the course of the construction of the SLPP;
(6) within the DCO order limits, obstructing construction of the SLPP by their presence or activities after having been requested by or on behalf of the Claimant or the police to cease and desist from such obstruction;
(7) whether within or without the DCO order limits, blocking or impeding access to any land within the DCO order limits.
(8) assisting any other person do any of the acts referred to in subparagraphs 4.1 to 4.7.
A Defendant who is ordered not to do something must not: (A) do it himself/herself/themselves or in any other way. (B) do it by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

16. Mr Greenhall for the Interested Persons takes no issue with paragraph 4(1) to (5) and (8) of the order above. No issue is taken concerning the service of orders. The order provides from paragraph 10 the process to be complied with. Certificates of service have been produced. Service of further documents was to be effected in accordance with paragraph 14 of the order. The evidence of Nawaz Allybokus (witness statement dated 29th September 2022) provides the evidence to support the effective service of the amended order of Ritchie J.

The law

17. The various tests and requirements to be considered and met before an order for an interim injunction can be made, and renewed, in protest cases are helpfully set out by Johnson J in *Shell Oil Products Ltd v Person Unknown [2022] EWHC 1215 (QB)*. He said at [23]:

> "The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The Claimant must demonstrate:"
>
> (1) There is a serious question to be tried: American Cyanamid v Ethicon [1975] AC 396 per Lord Diplock at 407G.
>
> (2) Damages would not be an adequate remedy for the Claimant, but a cross undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: American Cyanamid per Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: Islington London Borough Council v Elliott [2012] EWCA Civ 56 per Patten LJ at [28], Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515 [2019] 4 WLR 100 per Longmore LJ at [34], Canada Goose UK Retail Limited v Persons Unknown [2020] EWCA Civ 303 [2020] 1 WLR 2802 per Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights: Canada Goose at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: Canada Goose at [82(6)].

(7) The injunction has clear geographical and temporal limits: Canada Goose at [82(7)] (as refined and explained in Barking and Dagenham LBC v Persons Unknown [2022] EWCA Civ 13 per Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: Canada Goose at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: Canada Goose at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the Claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the Claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998."

18. For the purposes of this judgment, and with the greatest of respect to Johnson J, I will merge the S.12(3) Human Rights Act 1998 issue (12) with '*serious question to be tried'* (1) given the link between the two points and merge '*interference with the rights of*

defendants' (10) with '*the balance of convenience'* (3) given what I regard as the considerable connection and overlap between the two issues.

19. Subject to the above I take those points in turn:

(1) Serious issue to be tried - Unlawful means conspiracy:

20. The claim is brought alleging 'the tort of conspiracy by unlawful means' [Particulars of Claim p.19]. The Claimant has chosen to allege this tort because it does not have a sufficient degree of control or possession of the whole of the land where works are taking place to enable them to plead trespass to land or nuisance against the individuals concerned. Neither does it have necessary ownership of all of the items targeted and damaged to allege trespass to goods. There are however areas of land and items of property that the Claimant does own. A 'tapestry' of varying owners and rights over property is said to feature over the 90km of the pipeline. To avoid attempting a very detailed and complex exercise in identifying all possible cases, a conspiracy is alleged. The downside for the Claimant is that the actions of an individual acting alone who commits unlawful acts would not be caught. It is said the chosen tort is practical and proportionate.

21. The essential ingredients of the tort are set out in *Cuadrilla Bowland Ltd and others v Person Unknown and others [2020] EWCA Civ 9* per Leggatt LJ at [18]. The ingredients to be proved to establish liability are (i) an unlawful act by the defendant (ii) done with the intention of injuring the Claimant (iii) pursuant to an agreement (whether express or tacit) with one or more persons and (iv) which actually does injure the Claimant. See also Johnson J in *Shell UK Oil Products Limited v Persons unknown [2022] EWHC 1215 (QB)* at [26].

22. The Interested Persons challenge the availability of the tort selected. An issue arises concerning whether the Claimant can pursue such a cause of action if the unlawful act (this may take many different forms) is not actionable by the Claimant itself. It is important to remember however the need for an intention to injure the Claimant is a key ingredient of the tort. In passing one can envisage a number of factual scenarios where there is a conspiracy to commit a tort or to damage the property of a person that will have a direct and intended consequence to injure and damage another. Johnson J in *Shell* considered this point and concluded that '*..it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the Claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the Claimant)'* [27] and at [32].

23. In *Revenue and Customs Commissioners v Total Network SL [2008] 1 AC 1174* the issue was considered. Lord Hope and Lord Walker saw no requirement for an actionable tort at the hands of the Claimant to be necessary. Lord Hope at [44] said:

> "The situation that is contemplated is that of loss caused by an unlawful act directed at the Claimants themselves. The conspirators cannot, on the commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not

> accept that the commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. ….These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the Claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious."

24. Lord Walker at [94] said:

> "From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the Claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy emerging into some other tort, but I need not go far into those."

25. Finally, in *Ineos Upstream Limited v Persons Unknown [2017] EWHC 2945 (Ch),* a case concerning protests at sites used for shale gas extraction (fracking), Morgan J did not disapprove of the Claimant's choice of unlawful act conspiracy given the facts at [59]. He said:

> "The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimant's point of view is that it enables them to claim a remedy on a civil court for breach of a criminal statutes where the conduct in question does not, absent a conspiracy, lead to civil liability."

26. On the facts set out in the witness statements, the Claimant has a strong case given the incidents that have occurred which included and involved trespass to land and trespass to goods including causing significant damage to property. Criminal offences have been committed in some instances. The intention of those participating can thus be demonstrated from the facts themselves to be to stop or interrupt the work and thereby

cause damage to the Claimant. In addition, if more proof of intention were needed, the social media messages and photos that follow the events demonstrate not only who is responsible but the aims and thereby the intentions of those taking such action.

27. The weight of authority strongly supports the proposition that the unlawful means need not be actionable at the suit of the Claimant. Accordingly, the chosen cause of action is available to the Claimant. Given the facts, in my judgement, they are likely to succeed. On any view, there is a serious issue to be tried. I deal with S.12.(3) Human Rights Act 1998 below.

S.12(3) Human Rights Act 1998:

28. It is accepted that ECHR articles 10 (freedom of expression) and 11 (freedom of peaceful assembly) are engaged in this case. Both rights are qualified.

29. The caveat to the '*serious issue to be tried'* test arises if S.12(3) of the Human Rights Act 1998 is engaged. The section relates to '*Freedom of expression'* and S.12(1) states *'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'*.

30. If the relief sought might affect the said Convention right, the test to be applied per S.12(3) becomes '*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'*. In *Cream Holdings v Banerjee [2005] AC 245* Lord Nicholls said that in a breach of confidence case, the test was stricter than the '*serious issue to be tried'* test, however a degree of flexibility was noted in certain situations at [22]. In *Ineos Upstream*, Morgan J said at [86] that '*likely'* in this context meant '*more likely than not'*.

31. It is said the section applies to the acts of protesters in this case. It is said the injunction is too wide in that it prohibits the past and planned future actions of people such as the Interested Persons who have not been violent or destructive and who have carried out peaceful demonstrations. They have however gained unauthorised access to the areas designated as the DCO Order Limits and have deliberately interrupted pipeline work, albeit for relatively short periods of time. It has been submitted on behalf of the Interested Persons that such acts of protest carried out and envisaged by them is a form of communication in the sense that, to those who can see and hear what they are doing, they are communicating a message concerning the use of fossil fuels and the impact on the environment. It is said by the Claimant that, in some instances, such acts would be actionable given the intention of the participants despite the peaceful nature of them. The addition of the word *'publication'* to S.12(3) is an important qualification and potentially narrows '*freedom of expression'*. The question is therefore what is the 'publication' in protest cases?

32. The submission made by the Interested Parsons is that S.12(3) applies to their protests following the decision in *Birmingham City Council v Afsar [2019] EWHC 1560* per Warby J (as he then was). That case concerned parents who were protesting outside a primary school against aspects of the teaching at the school. Part of the original order prohibited the printing and distribution of leaflets (Appendix A). The original order was discharged because of a breach of the duty of full and frank disclosure on the part of

the applicants and because there was a failure to identify the threshold for granting an injunction as set out in S.12(3) in the submissions made as part of the ex parte hearing. Accordingly, the judge was not informed of the potential for the '*likely to succeed*' test to be applicable. Warby J stated that '*publication*' within the section did not have a limited meaning restricted for example to commercial publication. He did say at [60] '*Section 12(3) applies to any form of communication that falls within article 10 of the Convention'*. I note that at that point, the Judge was considering comment via social media as opposed to commercial publication hence, it would appear, his reference to the law of defamation.

33. In *Lachaux v Independent Print Ltd [2019] UKSC 27,* Lord Sumption at [18] said '*publication does not mean commercial publication, but communication to a reader or hearer other than the Claimant'*.

34. The order made in this case does not restrain *'publication'* in the strict sense. There is no bar to pictures, videos, comment or other messaging being used. Additionally, there is no bar to leaflets, banners or placards, chanting or singing. Therefore '*communication'* in that way is not prohibited or restrained. In that sense there is no bar to '*publication*'.

35. In *Ineos Upstream,* Morgan J was satisfied that S.12(3) applied to the facts of that case. He did so because at [86] '*...the order I am being asked to make 'might' affect the exercise of the convention right to freedom of expression'*.

36. In *High Speed Two (HS2) Limited v Persons Unknown [2022] EWCA 2360 (KB*), Julian Knowles J considered the point in the context of widespread protests against the HS2 rail project and said at [97-98] that S.12(3) applied. That was however because the Claimant accepted the fact of applicability and conceded the point. It was not therefore argued and analysed further.

37. Protests may take many different forms. In *Shell,* protestors went to Shell filling stations and damaged fuel pumps. Other activity at oil depots included digging tunnels under tanker routes and climbing on top of tankers. In *National Highways Ltd v Persons Unknown [2021] EWHC 3081*, protests included the blocking of motorways.

38. The facts of the present case are clearly similar and the objectives of the protesters the same as in *Shell* and *National Highways Ltd*. Lavender J in *National Highways Ltd* said, without saying more, at [41] '*Indeed although S.12(3) of the Human Rights Act 1998 is not applicable, I consider that the test which it imposes is met….'*

39. Johnson J in *Shell* said on this point at [70-72]:

> "The meaning set out by Lord Sumption in Lachaux is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication."

> Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".
>
> I therefore respectfully agree with the observation of Lavender J in National Highways Limited v Persons Unknown [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context."

40. In my judgement, the acts of protest in this case involving trespass and, in some instances, criminal damage are not acts of publication. S.12 is concerned with freedom of expression i.e. communication and not freedom of assembly. Aspects of a protest may involve the expression of opinions and aspects which do not and are not primarily about communication namely the damaging of property causing considerable loss to a third party intending to cause additional loss to another. I agree with Johnson J and his analysis, namely that acts of trespass etc. in the course of a protest while publicising the protestor's views do not amount to '*publication'*. Accordingly S.12(3) does not apply. In any event I am satisfied, given the clear evidence in this case, that the test in S.12(3) is met. The Claimant is '*likely'* to succeed in its claim to prevent such activity.

(2) Damages as an adequate alternate remedy:

41. The Claimant seeks an injunction. The losses to the wider public from disruption to the pipeline may be capable of quantification or they may not. It is said the activities of protestors risk injury to themselves, pipeline workers, emergency workers and the public as works are taking place where they have access. There is no evidence that any defendant has the means to satisfy any judgement.

42. Conversely the granting of an injunction would not cause any injury or loss to a protester and, even if it did the Claimant, as a large multi-national oil company, would be able to compensate. Hence the usual cross-undertaking is offered.

(3) The balance of convenience and proportionality:

43. This question turns on the human rights analysis applied to the particular facts of the case. Articles 10 and 11 are fundamental rights and are central to a democratic society. Both rights permit a degree of disruption and the expression of unpopular views however both are qualified. The right under Article 11 is '*to freedom of peaceful assembly'*. That is not the case where protesters have violent or criminal intentions. There may be instances where some protest peacefully and others, at the same time, act independently and are not peaceful and act unlawfully. Where the line is to be drawn is a matter of fact and degree. A judge is required to undertake a proportionality

assessment balancing the competing interests and the degree to which rights and freedoms of individuals can be legitimately restricted by law.

44. In *DPP v Ziegler [2021] UKSC 23*, the court considered and approved the Divisional Court's assessment of the questions relevant to the proportionality assessment at [16] and [58] (the court was concerned with offences of wilful obstruction of the highway – S.137 Highways Act 1980 namely a single 90 minute peaceful blockage of a road leading to an arms fair causing limited disruption and no disorder). The court at [16] citing from the decision of the lower court stated that questions are as follows:

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

45. The court provided commentary as to the relevant factors for a court to consider when evaluating proportionality. These include the duration of any protest, the degree to which land is occupied and the actual interference the protest causes to the rights of others, whether the views giving rise to the protest relate to *very important issues* and if the protesters believed in the views they were expressing [72]. In addition, I note:

    (i) The extent to which the protest was targeted at the object of the protest. Meaning was there a direct connection with the object of the protest, namely the government's failure to reduce carbon emissions and the blocking of pipeline work? At [75].
    (ii) The extent to which the continuation of the protest would breach domestic law '*so whilst there is autonomy to choose the manner and form of a protest an*

evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law' at [77].

(iii) Prior notification and co-operation with the police, especially if the protest is likely to be contentious and provoke disorder at [78].

46. The court however noted in relation to deliberate disruption at [67]:

> "The ECtHR in Kudrevičius at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, …". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). …….. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality. "

47. Following that theme, Lord Burnett of Maldon LCJ in *DPP v Cuciurean [2022] EWHC 736 (Admin)* said at [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."

And at [45] in relation to protests on private land:

> "…. there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see Appleby at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights."

48. Leggatt LJ (as he then was) in *Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9* said at [94]:

> "It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the Kudrevičius case – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire."

49. In the present case, the sort of behaviour described above as '*involving the 'intentional disruption of the activities of others'* has, given the evidence, taken place. As a consequence, Articles 10 and 11 do not attach significant weight to such activities because they are not at the core of these rights.

50. I turn to the applicable questions at [44] above:

    (i) Those restrained by the terms of the injunction from obstructing access to land within the DCO order limits from the public highway or other land that the public has a right of access are conceded by the Claimant to arguably be exercising their rights under Articles 10 and 11. That, I assume for present purposes, is correct although some of their activities are not at the core of the rights as I have pointed out.

    (ii) The injunction would interfere with the exercise of those rights.

    (iii) If the injunction is ordered, such interference with rights will be prescribed by law i.e. it will be a lawful order of the court.

    (iv) The interference is, in my judgement, in pursuit of a legitimate aim in that the proposed injunction seeks to protect the rights of others, namely the Claimant to pursue its lawful activities in installing the new pipeline.

51. The final issue concerns the remaining question '*is the interference necessary in a democratic society to achieve the legitimate aim'*? The four sub-questions or rather the answers to them determine if the potential interference is '*proportionate*'. The terms of the order are to be noted as specifically limiting activity within the DCO Order Limits, save for (7) which prevents whether within or without the DCO Order Limits blocking or impeding access to any land within the DCO Order Limits. I have noted that only (6) (being told to move) and (7) are the subject of criticism by counsel for the Interested Persons.

52. In this case I note from the evidence:

(i) The protests in this case have been peaceful in that there has been no widespread public disorder.
(ii) The protesters have a belief in the cause they are pursuing.
(iii) Trespass onto the land of others has undoubtedly taken place. Trespass to goods has occurred. Criminal offences have been committed, namely criminal damage to property that has, in some instances, cost many thousands of pounds to repair.
(iv) The protests are targeted against the Claimant and those engaged by the Claimant in the construction of the pipeline to slow or stop the works as a means of demonstrating the need for the government to give greater emphasis to reducing fossil fuel use and in particular aviation fuel. That said, the environmental policy of the government is the main target of the protesters and not the pipeline itself.
(v) The protests were widespread and over a large geographical area.
(vi) The protests were organised and planned.
(vii) The protests were not notified to the Claimant or police in advance.
(viii) The acts of Scott Breen disrupted works for a considerable time. He was assisted by others to do that.
(ix) A clear intention has been demonstrated to continue the protests and the disruption, which has the potential to be significant, of the pipeline works. That would include further acts of trespass, and damage.

53. The questions are:

(i) *Sufficiently important to justify interference with a fundamental right*? The pipeline works are a major piece of engineering infrastructure that will serve the UK for many years. The Claimant submits that the aim of restricting the activities of protesters permits the Claimant to conduct its lawful business, prevents harm to others and permits aviation fuel to be transported to London Heathrow airport and thereby the airport can operate. Disruption has a potential significance to UK trade and the transportation of people and goods. The aim is therefore sufficiently important to justify interference with the rights of protestors in my judgement.
(ii) *A rational connection between means and aim*? The connection between the means chosen and the aim is rational because it is limited to the area where the pipeline is to be constructed and prevents disruption. The means chosen allow the Claimant to fulfil its contractual obligations. The terms are worded to prohibit activity that would amount to the conspiracy alleged. There is a rational connection.
(iii) *Is there less restrictive alternative means to achieve the aim*? A claim for damages will not prevent disruption. Damages may be impossible to calculate or an award impossible to satisfy by the protestors. The terms of the order are specifically limited to the DCO Order Limits which is, in many areas, a strip of land approximately 30m wide. The injunction is and will be limited in time. An application may be made to vary or discharge the order. In my judgement there is no less restrictive means to permit the construction of the pipeline.

(iv) *Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?* In my judgement taking into account all of the factors which I have identified, the injunction granted by Eyre J strikes a fair balance between the rights of the protestors, the Claimant, the contractors and the general public. Importantly, in my judgement, the order does not prohibit protesters from entering the DCO Order Limits as it might because the Claimant has accepted that is too broad. What the order does is control what they do within the DCO Order Limits. In addition, there are areas very close to the DCO Order Limits, for example paths and rights of way, where protest is not restricted by the order. As a consequence, there is no need to climb fences and get close to potentially hazardous machinery, tools and deep trenches to demonstrate. Having considered the issues and the evidence, the balancing exercise I have performed comes down very clearly in the Claimant's favour given the importance of the works and the threat posed by the protestors to disrupt and cause damage against the protesters' rights under Articles 10 and 11.

(4) A real and imminent risk of harm to justify a precautionary injunction:

54. Given the facts, harm has occurred as a result of the protests. The risk of repetition is evident from that past conduct and accompanying messages posted on social media indicating a plan to continue and disrupt into the future. Those who protest against the use of fossil fuels continue to protest. The Interested Persons have stated that they wish to continue to protest. They appreciate they risk breaching the order should they enter the DCO Order Limits if their intention is to cause damage to the Claimant.

55. The Interested Persons argue that there is no risk to areas where there is no plan for works at present. That ignores the reality of such protests that may target any part of the works that cover a large area at any time. The alternative would be for the Claimant to seek injunctions as and when works were going to start in any given area. That is inherently impractical, cumbersome and costly. Finally given that the route is clearly set out and plotted on the plans absent an order the protesters may 'plan in advance' and select an area to be the subject of works in the future and act to prevent work from starting for example by tunnelling or placing obstructions across a wide area designated as the path of the pipeline. I have to consider the position now. The geographical spread of the action thus far demonstrates the need for the whole of the pipeline route to be protected from what I consider to be a real and imminent risk of harm. On the evidence, I find that the protestors will engage in essentially the same activities in areas not covered by the inunction if it does not cover those areas.

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights:

56. The proposed injunction focuses on specific conduct within the DCO order limits save for part (7) concerning access to the area of the DCO order limits. So far as the order may prohibit lawful conduct, a person may theoretically climb a compound fence on public land and thereby commit no wrong assuming they do nothing more, or a person may be on public land and their mere presence may obstruct construction. On private

land such acts would constitute a trespass absent consent from the landowner. These examples are not caught by the terms of the injunction. The order specifically prohibits activity by more than one person intending to damage the Claimant hence the tort of conspiracy pleaded.

57. Where lawful activity on the highway might be caught by the order, Articles 10 and 11 are engaged and thereby any restriction must be proportionate. A distinction must however be drawn, as I have set out, between lawful activity which would give rise to no cause of action and, for example, the unlawful obstruction of the highway which is designed and intended to cause the disruption of the activities of others as being not '*at the core*' of the rights under consideration. Persuasion is very different to attempting by the use of obstruction to compel others to act in a way desired i.e. to stop work - see *Ziegler* at [94]. I have already given my conclusions regarding the overall balancing test concerning the infringement of the rights of protestors and those of the Claimant. Specifically in this regard and for the same reasons where potentially lawful conduct might be restrained by the order, the balance comes down firmly in favour of the Claimant given the strategic importance of the pipeline project and the potential to protest peacefully without obstruction of the highway.

(6) The terms are of the injunction are sufficiently clear:

58. The terms of the order have been the subject of challenge. The tort requires an intention to damage. In *Cuadrilla*, Leggatt LJ at [69] said that to make the terms of the order correspond with the tort alleged and given that future conduct is the subject of the injunction and that may prohibit conduct that is lawful '*it is necessary to include a requirement that the defendant's conduct was intended to cause damage to the Claimant'*.

59. The order refers at 3. to not doing acts listed '*with any other person with the intention of preventing or impeding construction of the Southampton to London pipeline'*. To meet the requirements of the tort an intention to damage requirement is needed. An intention to cause damage might be implied in the wording chosen, however to avoid confusion and to add clarity the following amendment is necessary: '*with the intention of causing damage to the Claimant by preventing or impeding the construction of the Southampton to London pipeline'*.

60. In addition, it is accepted by the Claimant that paragraph 5.(B) which provides '*or by another person acting with his/her/their encouragement'* is open to misinterpretation given the many ways in which encouragement might be construed. I agree and that part of paragraph 5.(B) is to be deleted. That is consistent with an earlier deletion by Eyre J of a phrase including the word '*encouragement*'.

61. Objection is raised as to the request to the *'cease and desist'* requirement at 4(6). It is said to be unclear who may make such a request and the basis of so doing and as such confers powers on others. The wording is sufficiently clear in my judgement. The protestor would have to be within the DCO Order Limits and obstructing construction of the SLP. It would not be difficult to understand why a person was being asked to move in such a location and the person making the request is unlikely to be unconnected with the works. Any potential breach of the order would not lead to committal unless

an agreement with another, intention to cause damage etc, actual obstruction and a request made by or on behalf of the Claimant or police were proved.

62. Finally, objection is raised as to paragraph 7. '*whether within or without the DCO order limits blocking or impeding access to any land within the DCO order limits'*. I do not see how that can be misinterpreted or misunderstood. The order prevents blocking access to the working areas that would be unlawful if done by for example, obstructing the highway or trespassing onto land intending to case damage to the Claimant. The order is clear in that the acts of an individual are not caught by the order. More than one person must be part of the conspiracy alleged with the requisite intent. The blocking and impeding of access has the potential to cause not only delay but loss. The Claimant is entitled to carry on with the works unhindered by such action.

(7) The injunction has clear geographical and temporal limits:

63. *Geographical limits:* The works are taking place over a large distance and are due to be completed in 2023. The work requires storage of materials and pipes at compounds surrounded by fencing and the work will move as is necessary along the designated route. The works are carefully programmed and take into account matters such as sensitive flora and fauna. The fences have not prevented access to the compounds and working areas. It would be impractical to identify areas within the DCO order limits where items are located or work was to be undertaken from time to time. To leave an area unprotected by an injunction risks exposing that area to disruption. A patchwork of orders changing from time to time will not provide sufficient protection to the Claimant in my judgement. The entire pipeline requires protection. The order is limited to DCO Order Limits identified by the DCO.

64. *Temporal limits*: The Claimant has requested that the order continue until December 2023 to enable the works to be completed. That would in effect be a final order. This is an application for an interim injunction and a shorter period is necessary. The issues that arise require resolution at trial. I will extend the order for 4 months from the date of this decision. I will invite the parties to make representations as to a timetable for preparation and listing of the trial. At that stage, the justification and need for any continuation of the order will be determined.

(8) and (9) Defendants have not been identified but are, in principle, capable of being identified and served with the order or can be identified in the Claim form (and the injunction) by reference to their conduct:

65. Save for Scott Breen, Anthony Green and Roz Aroo being the two people who are said to have assisted Scott Breen, no other persons have been identified as being capable of being properly named as defendants and they cannot be served as a result.

66. The order contains in Annex 1 a comprehensive and detailed list of activities headed '*description of persons unknown who are or who may become defendants to these proceedings'*. The prohibited acts contained within the order are set out. Following my decision, amendment will be necessary as set out above.

Result:

67. The Claimant succeeds in its application to continue the order of Eyre J for a period of 4 months so as to restrain the specified acts of the defendants (set out at paragraph 15 above) as amended in relation to the SLP and the DCO Order Limits.

68. I give the parties 7 days to agree directions regarding the future conduct of the case and setting the case down for trial. Failing agreement, the parties have 14 days to submit written submissions including the issue of costs. These issues to be dealt with on the papers unless there is good reason to do otherwise.