HIGH COURT OF JUSTICE **CLAIM NO: KB-2025-000497**
KING BENCH DIVISION
IN THE MATTER OF AN APPLICATION FOR INJUNCTIVE RELIEF
BETWEEN:-

CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE

Claimant

- v -

PERSONS UNKNOWN AS DESCRIBED IN THE CLAIM FORM

Defendants

AUTHORITIES

Drax Power Ltd v Persons Unknown [2024] EWHC 2224	**10.**
North Warwickshire BC v Persons Unknown [2024] EWHC 2254	**11.**
QMUL v Persons Unknown [2024] EWHC 2386	**12.**
London City Airport v Persons Unknown [2024] EWHC 2557	**13.**
University of London v Persons Unknown [2024] EWHC 2895	**14.**
MBR Acres Ltd v Curtin [2025] EWHC 331	**15.**
Order granted in *MBR Acres Ltd v Curtin* [2025] EWHC 331	**16.**
OTHER	
Y Vanderman, *Manual on Protest Injunctions* (v.2, 2024)	**17.**

Human Rights Act 1998 c. 42
s. 6 Acts of public authorities.

Law In Force

Version 2 of 2

1 October 2009 - Present

Subjects
Human rights

Keywords
Declarations of incompatibility; Human rights; Public authorities

6.— Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section *"public authority"* includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[...] [1]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) *"An act"* includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Notes

1 Repealed by Constitutional Reform Act 2005 c. 4 Sch.18(5) para.1 (October 1, 2009)

Public authorities > s. 6 Acts of public authorities.

s. 12 Freedom of expression.

Law In Force

Version 1 of 1

2 October 2000 - Present

Subjects
Human rights

Keywords
Freedom of expression; Human rights; Relief; Treaties

12.— Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (*"the respondent"*) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

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

(a) the extent to which—

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

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

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

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

Schedule 1 THE ARTICLES
para. 1

Law In Force

Version 1 of 1

2 October 2000 - Present

Subjects
Constitutional law; Human rights

Keywords
Constitutional rights; Human rights
RIGHTS AND FREEDOMS

Right to life

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Prohibition of torture

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Prohibition of slavery and forced labour

Article 4

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term *"forced or compulsory labour"* shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Right to liberty and security

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Right to a fair trial

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

No punishment without law

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Right to respect for private and family life

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

Freedom of thought, conscience and religion

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Freedom of expression

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 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.

Freedom of assembly and association

Article 11

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.

Right to marry

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Prohibition of discrimination

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Restrictions on political activity of aliens

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Prohibition of abuse of rights

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Limitation on use of restrictions on rights

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Anti-social Behaviour, Crime and Policing Act 2014 c. 12
s. 59 Power to make public spaces protection orders

Law In Force

Version 2 of 2

28 June 2022 - Present

Subjects
Criminal procedure; Road traffic

Keywords
Anti-social behaviour; Local authorities' powers and duties; Public spaces protection orders

59 Power to make [public spaces protection] [1] orders

(1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.

(2) The first condition is that—

(a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or

(b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.

(3) The second condition is that the effect, or likely effect, of the activities—

(a) is, or is likely to be, of a persistent or continuing nature,

(b) is, or is likely to be, such as to make the activities unreasonable, and

(c) justifies the restrictions imposed by the notice.

(4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ("the restricted area") and—

(a) prohibits specified things being done in the restricted area,

(b) requires specified things to be done by persons carrying on specified activities in that area, or

(c) does both of those things.

(5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order—

(a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or

(b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.

(6) A prohibition or requirement may be framed—

(a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories;

(b) so as to apply at all times, or only at specified times, or at all times except those specified;

(c) so as to apply in all circumstances, or only in specified circumstances, or in all circumstances except those specified.

(7) A public spaces protection order must—

(a) identify the activities referred to in subsection (2);

(b) explain the effect of section 63 (where it applies) and section 67;

(c) specify the period for which the order has effect.

(8) A public spaces protection order must be published in accordance with regulations made by the Secretary of State.

Notes

1 Words inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Sch.7 para.4 (June 28, 2022)

Part 4 Community protection > Chapter 2 Public spaces protection orders and expedited orders > Public spaces protection orders and expedited orders > s. 59 Power to make public spaces protection orders

s. 74 Interpretation of Chapter 2

Law In Force

Version 2 of 2

28 June 2022 - Present

Subjects
Criminal procedure; Road traffic

Keywords
Alcohol; Anti-social behaviour; Expedited orders; Interpretation; Local authorities; Local Health Boards; Public places; Public spaces protection orders; Schools; Statutory definition

74 Interpretation of Chapter 2

(1) In this Chapter—

[

"16 to 19 Academy" has the meaning given by section 1B of the Academies Act 2010;

]1

"alcohol" has the meaning given by section 191 of the Licensing Act 2003;

"community representative" , in relation to a public spaces protection order that a local authority proposes to make or has made, means any individual or body appearing to the authority to represent the views of people who live in, work in or visit the restricted area;

[

"expedited order" has the meaning given by section 59A(1);

]1

"local authority" means—

(a) in relation to England, a district council, a county council for an area for which there is no district council, a London borough council, the Common Council of the City of London (in its capacity as a local authority) or the Council of the Isles of Scilly;

(b) in relation to Wales, a county council or a county borough council;

[

"Local Health Board" means a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006;

"NHS body" has the meaning given in section 275 of the National Health Service Act 2006;

]2

"public place" means any place to which the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission;

[

"restricted area" —

(a) in relation to a public spaces protection order, has the meaning given by section 59(4);

(b) in relation to an expedited order, has the meaning given by section 59A(5);

]3 [

"school" has the meaning given by section 4 of the Education Act 1996.

]1

(2) For the purposes of this Chapter, a public spaces protection order "regulates" an activity if the activity is—

(a) prohibited by virtue of section 59(4)(a), or

(b) subjected to requirements by virtue of section 59(4)(b),

whether or not for all persons and at all times.

[

(3) For the purposes of this Chapter, an expedited order "regulates" an activity if the activity is—

(a) prohibited by virtue of section 59A(5)(a), or

(b) subjected to requirements by virtue of section 59A(5)(b), whether or not for all persons and at all times.

]4

Notes

1 Definition inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Sch.7 para.17(2)(a) (June 28, 2022)
2 Definitions inserted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Sch.7 para.17(2)(a) (June 28, 2022)
3 Definitions substituted by Police, Crime, Sentencing and Courts Act 2022 c. 32 Sch.7 para.17(2)(b) (June 28, 2022)
4 Added by Police, Crime, Sentencing and Courts Act 2022 c. 32 Sch.7 para.17(3) (June 28, 2022)

Queen's Bench Division

Director of Public Prosecutions *v* Cuciurean

[2022] EWHC 736 (Admin)

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

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

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

On the appeal—

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

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

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

Bauer v Director of Public Prosecutions [2013] 1 WLR 3617, DC, dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3, SC(E) and *James v Director of Public Prosecutions* [2016] 1 WLR 2118, DC applied. C

Appleby v United Kingdom (2003) 37 EHRR 38, ECtHR considered.

Director of Public Prosecutions v Ziegler [2022] AC 408, SC(E) distinguished.

Per curiam. It is highly arguable that articles 10 and 11 of the Convention are not engaged at all on the facts of the present case. There is no basis in the jurisprudence of the European Court of Human Rights to support the proposition that articles 10 and 11 include a right to protest on privately owned land or on publicly owned land from which the public are generally excluded. The furthest that that court has been D prepared to go is that, where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, it would not exclude the possibility of a state being obliged to protect those rights by regulating property rights. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the rights protected by articles 10 and 11 would be destroyed. Legitimate protest can take E many other forms (post, paras 45–46, 50).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following additional cases were cited in argument:

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

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

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

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

On 21 September 2021, after a trial before Deputy District Judge Evans in the City of London Magistrates' Court, the defendant, Elliott Cuciurean, was acquitted of the offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994. The prosecution

A appealed by way of case stated. The questions for the opinion of the High Court are set out in the judgment of the court, post, para 3.

The facts are stated in the judgment of the court, post, paras 2–9.

Tom Little QC and *James Boyd* (instructed by *Crown Prosecution Service*) for the prosecutor.

B The prosecutor's appeal concerns the question whether, in light of the Supreme Court's judgment in *Director of Public Prosecutions v Ziegler* [2022] AC 408, a fact-specific assessment of the proportionality of a conviction's interference with an individual's rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms is required in any prosecution for offences of trespass committed during a public protest. The C appeal should be allowed on three mutually alternative grounds: (i) the defendant's Convention rights under articles 10 and 11 were not engaged; (ii) alternatively, if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is, inherently and without the need for a separate consideration of proportionality, a justified and proportionate interference with those rights, and so the deputy district judge erred in treating the decision in *Ziegler* as compelling her to undertake an D additional assessment of proportionality; and (iii), alternatively, if a fact-sensitive assessment of proportionality were required, the deputy district judge reached a decision on that assessment which was so unreasonable that no reasonable tribunal would have taken it.

On the preliminary procedural issue as to the jurisdiction of the court to determine grounds (i) and (ii), although, contrary to Crim PR r 35.2(2)(c), E the prosecutor failed to include ground (i) in its application to the magistrates' court for a case to be stated, and accepted before the deputy district judge that the defendant's Convention rights under articles 10 and 11 were engaged, it would nevertheless not be right for the court to decline to determine a pure point of law open on the facts found in the case stated: *Whitehead v Haines* [1965] 1 QB 200. There is uncertainty as to the correct approach to the assessment of proportionality following the decision in F *Ziegler* which is affecting a large number of cases at first instance and which calls for exploration by the higher courts (see dicta of Lord Burnett of Maldon CJ in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, para 29). On account of that uncertainty, the points being advanced now were not obvious to the prosecutor below, and they were not argued, expressly considered or conceded and then discarded on appeal. However, the G substance of the prosecutor's argument remains the same: that conviction was proportionate and it was not open to the deputy district judge to conclude otherwise. Accordingly, despite the breach of the rules, there are compelling and exceptional reasons for a higher court to determine the issue and it is in the interests of justice for the court to so do.

As in ground (i), the issue before the court on ground (ii) is a pure point of law which it would not be right for the court to decline to determine (see H *Whitehead v Haines*) and the same compelling and exceptional reasons for a higher court to determine the issue apply. However, in relation to ground (ii), the prosecution case has always been that it was not open to the deputy district judge to conclude that a conviction for aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994

represented a disproportionate interference with the defendant's Convention rights.

[*Lord Burnett of Maldon CJ*. The court will hear argument on grounds (i) and (ii) de bene esse.]

On ground (i), the Convention rights to freedom of expression contained in article 10 and to peaceful assembly and freedom of association contained in article 11 cover a broad range of opinions and expressions thereof. Opinions such as the one held by the defendant concerning the development of the HS2 high speed railway would be protected by article 10 and he would be entitled to express his opinions in a number of ways, including by participating in public protest, which right is protected by article 11. The jurisprudence of the European Court of Human Rights demonstrates that such expressions may extend to protests impeding activities of which the protestor disapproves: *Steel v United Kingdom* (1998) 28 EHRR 603.

However, both article 10 and article 11 rights are qualified and not without limit. Some individual conduct, by its nature and degree, would mean it could fall outside the scope of protection under article 11. Article 11 of the Convention only protects the right to "peaceful assembly". Therefore, where a protestor is personally involved with violence or intends to commit or incite violent acts, or by some other conduct "rejects the foundations of a democratic society", that conduct would not attract the protection of the Convention; whereas conduct which is intended to be disruptive, such as obstructing traffic on a highway, while not an activity lying at the core of the protected freedom, might not be such as to remove participation in the protest from the scope of protection in article 11: *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 92, 97–98.

Thus, the jurisprudence recognises that there may be conduct which falls outside that protected by a Convention right and conduct which, although protected by the right, does not lie at its core. In respect of the offences of aggravated trespass and criminal damage, there is no relevant jurisprudence to support the proposition that article 10 and 11 rights are engaged. Neither do articles 10 and 11 confer a right of entry to private property (or publicly owned property with no right of access) unless a bar to entry would effectively extinguish the essence of those rights, which will not be the case where alternative options for effective protest exist: *Appleby v United Kingdom* (2003) 37 EHRR 38, para 47. Where deliberate acts of obstruction and inconvenience do not lie at the core of the right but close to the limit of the conduct in scope of the protection of article 11 (as in *Kudrevičius*), trespassing on private land (or publicly owned land over which there is no right of access as in the present case), damaging it by building a tunnel with the intent of preventing the landowner from doing what it is lawfully entitled to do are also likely to be a considerable distance from the core of the right, thus falling outside the scope of Convention protection.

The European court held that the rights in articles 10 and 11 were engaged in *Taranenko v Russia* (2014) 37 BHRC 285 for a protestor who participated in the occupation of an office in the President's administration building, the group having forced their way through security, locked themselves in the office, called for the President's resignation, distributed leaflets from the window, destroyed furniture and equipment and damaged the walls and ceiling. However, that should not be understood as

A establishing that the protestor had any right protected by articles 10 and 11 to trespass and cause damage. The court held that the domestic courts had concluded the protestor's political beliefs were fundamental to the prosecution and had not established that the individual had personally participated in causing any damage. Accordingly, it could be inferred both that the court accepted that, as in *Kudrevičius*, the acts of one protestor could not necessarily be used to justify restricting the rights of another and B that those who actually cause damage or commit violent or otherwise reprehensible acts in the course of a protest can be prosecuted for doing so without engaging Convention rights. That principle should apply in the current case, since trespassing on land and intentionally damaging it is an unacceptable way in which to engage in political debate in a democratic society. The rights under articles 10 and 11 cannot be used to support the C proposition that the defendant was entitled unlawfully to enter private land and purposely to damage it by building a tunnel when there were numerous alternative and effective ways available to him to protest and express his objection to the HS2 high speed railway.

With regard to ground (ii), even if the rights under articles 10 and 11 were engaged, a conviction for the offence of aggravated trespass is inherently, and without need for a separate consideration of proportionality, a justified D and proportionate interference with those rights. In a prosecution, it is not necessary to read words into a criminal offence in order to give effect to the rights of the defendant under articles 10 and 11: *James v Director of Public Prosecutions* [2016] 1 WLR 2118, paras 32–35. In determining how the court should address the interaction of those rights with criminal offences, there are two distinct categories of case. First, where there is available a E statutory defence that the defendant's conduct was "reasonable", article 10 and 11 rights and the qualifications to them and thus the proportionality of any conviction may be expressly considered in an assessment of the facts as part of the defence. Secondly, where, once the specific ingredients have been proved, the defendant's conduct has gone beyond what could be described as reasonable conduct in the exercise of Convention rights, Parliament can be taken to have defined the parameters of lawful conduct as a matter of public F policy and within its margin of appreciation. Thus, a fact-sensitive assessment of the proportionality of any prosecution and conviction would only be relevant where the reasonableness defence is provided for in the statute: *R v Brown (James Hugh)* [2022] 1 Cr App R 18.

Similarly, in *Animal Defenders International v United Kingdom* [2013] EMLR 28, the Grand Chamber of the European court held that the state can, G consistently with the Convention, adopt general rules which apply to pre-defined situations notwithstanding that it might result in some hard cases, provided that the prohibition is necessary in a democratic society and thus proportionate. That principle applies in the present case. Section 68 of the 1994 Act is a general measure which is intrinsically compliant with the Convention, being one which is narrowly drawn and balances the rights of landowners and the rights of protestors, allowing the exculpation of those H who trespass but who can show a justification defence. However, the state is entitled to prevent aggravated trespass as defined in section 68(1) for the prevention of disorder and for the protection of property rights. Article 1 of the First Protocol to the Convention ("A1P1") provides that the landowner has the right to peaceful enjoyment of his property. Although also a

qualified right, the state is under a positive obligation to protect the A1P1 rights of the landowner by law against interference. Where the interference is criminal in nature the authorities are obliged to conduct such criminal investigation and prosecution as appropriate. Section 68(1) strikes a fair and proper balance with the need to protect acts and freedoms of those on private land acting lawfully under A1P1: *Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008. Interference with the article 10 and 11 rights of a protestor who had trespassed with the intention to disrupt the lawful activity of the landowner would not therefore be disproportionate.

Articles 10 and 11 do not provide a defence as a matter of criminal law or confer a right to trespass. Trespass is by definition unlawful and a conviction for the offence of aggravated trespass provides a lawful limitation on the exercise of rights of free expression which Parliament deemed to be a justified sanction: see dicta of Lord Hughes JSC in *Richardson v Director of Public Prosecutions* [2014] AC 635, para 3. Once the elements of the offence of aggravated trespass are made out, there can be no question of a breach of articles 10 or 11: *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617. Accordingly, no fact-sensitive proportionality assessment is required from the court. In that context, any distinction between articles 10 and 11 is of no consequence: see *James* [2016] 1 WLR 2118.

It follows that a conviction for the offence of aggravated trespass under section 68(1) of the 1994 Act inherently constitutes a justified and proportionate interference with the defendant's article 10 and 11 rights without the need for any separate consideration of proportionality, and the decision in *Ziegler* [2022] AC 408 did not create an extra ingredient to the offence of aggravated trespass that the prosecutor had to prove with a need for the judge to undertake a *Ziegler*-style factual analysis.

As to ground (iii), if an assessment of proportionality was required, the deputy district judge reached a decision on that basis at which no reasonable tribunal properly directing itself on all the material considerations could have arrived.

In failing to analyse the nature and degree of the conduct involved in the offence and to recognise that, even if it could fall within the scope of rights protected by articles 10 and 11, it would not lie at the core but rather at the outside edges of those rights, the deputy district judge neglected to consider a material consideration which was highly relevant to the determination of the proportionality of any interference with those rights. Furthermore, the Convention rights of the landowner, specifically protected under A1P1 and therefore a highly relevant consideration, were not acknowledged and thus not appropriately balanced against the defendant's article 10 and 11 rights. In contrast to the situation in *Ziegler*, the land trespassed upon in this case was not land over which the public had a right to assemble. That ought to have been properly weighed in the balance by the deputy district judge since different considerations applied: *Appleby v United Kingdom* 37 EHRR 38.

The deputy district judge's reasoning was further flawed, being based as it was on an irrelevant finding of fact that the land concerned was merely a small part of the HS2 high speed railway project, projected to take up to 20 years to complete at a cost of billions of pounds. Those factors were not relevant in determining whether a conviction for obstructing and disrupting those activities was a proportionate interference with Convention

A rights. Accordingly, the deputy district judge reached a decision which no reasonable tribunal, properly directing itself as to the relevant considerations, could have reached and she was wrong to have acquitted the defendant.

Tim Moloney QC, *Adam Wagner* and *Blinne Ní Ghrálaigh* (instructed by *Robert Lizar Solicitors, Manchester*) for the defendant.

B The appeal should not be allowed for four reasons: (1) the court should not permit grounds (i) and (ii) to proceed since they are procedurally barred; (2) articles 10 and 11 of the Convention are engaged; (3) in a case involving the offence of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of the rights under articles 10 and 11, which will require a fact-sensitive C enquiry; and (4) the deputy district judge's decision to acquit the defendant was reasonable.

On the procedural issue, ground (i) of the prosecutor's appeal was not raised at first instance as required by Crim PR r 35.2(2)(c); moreover, in the original application for permission to appeal, the prosecutor expressly disavowed that ground and expressly stated that articles 10 and 11 were D engaged. For reasons of the interests of justice and to discourage attempts to circumvent the strict time limit in rule 35.2, he should not now be permitted to advance an appeal entirely different from that for which permission was sought in an earlier application or which would be a second bite of the cherry: see *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [31].

Only in very exceptional circumstances should a party be permitted to E renounce its agreement to an approach in which it acquiesced before the judge at first instance and advance a different approach on appeal. Parties are expected to get it right first time: *R v E* [2018] EWCA Crim 2426 at [19]. That will especially be the case where the party is sophisticated and fully represented, as is the prosecutor in the present case: *Food Standards Agency*, para 26. None of the reasons advanced by the prosecutor are exceptional.

F Unlike the situation in *Whitehead v Haines* [1965] 1 QB 200, this is not a case where the prosecutor genuinely was not aware of a new point of law which if taken could prevent conviction for the defendant. The defendant's advocate submitted a skeleton argument before the trial, supported by authority which was served on the court. Therefore the issues in the case were clear. By contrast, according to the case stated, the prosecutor neither submitted a skeleton argument nor made submissions to the effect that the G defendant's article 10 or 11 rights could not be engaged in relation to the offence of aggravated trespass or that the principles in *Director of Public Prosecutions v Ziegler* [2022] AC 408 did not apply. It was therefore accepted by the prosecutor that the defendant's article 10 and 11 rights were engaged and not disputed that the prosecution was required to prove that interference with those rights was proportionate.

H Insofar as the decision in *Ziegler* has caused uncertainty as to the legal position, there is nothing exceptional in a legally significant decision of the higher courts causing some uncertainty in the lower courts. It would undermine the principle in *Food Standards Agency* that parties should get it right first time if an argument that resolution of an important point of law, in existence and obvious during the proceedings at first instance, be permitted

to amount to a sufficiently exceptional reason as to allow it to be raised on appeal when not raised at first instance. Accordingly, none of the reasons advanced by the prosecutor are exceptional and the court should not permit grounds (i) and (ii) to proceed.

Wagner following.

In any event, the prosecution did engage the defendant's article 10 and 11 Convention rights. The right to freedom of assembly in article 11 is a fundamental right in a democratic society and, like the right to freedom of expression in article 10, one of the foundations of such a society: *Kudrevičius v Lithuania* (2015) 62 EHRR 34. It is an established principle in the jurisprudence of the European Court of Human Rights that the scope of those rights should not be interpreted restrictively. That principle was recently reaffirmed by the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408, paras 69–70, 89.

All forms of peaceful, i e non-violent, assembly engage article 11, unless they otherwise reject the foundations of a democratic society when the actions of protestors may take them outside of the protection of Convention rights so that the question of proportionality does not arise: *Ziegler*, para 69. The only three categories of case in which direct action protest would fall outside of the scope of articles 10 and 11 are as set out in *Kudrevičius*: where organisers and participants have violent intentions, incite violence or otherwise reject the foundations of a democratic society. The guarantees of article 11 therefore apply to all other gatherings: *Ziegler*. The jurisprudence of the European court shows that even protests which are intentionally disruptive are capable of falling within the scope of article 10: see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241. Article 11 has been found to remain engaged even in relation to demonstrations where protests have involved aspects of violence, showing that the actions of one protestor cannot necessarily be used to restrict the rights of another: *Kudrevičius*.

There is no authority to support the proposition that committing trespass or digging a tunnel as part of a protest render it not peaceful and therefore falling outwith the protection of article 11. Whilst it is right that articles 10 and 11 do not provide a right to trespass, the jurisprudence of the European court demonstrates that the court should ask first whether the right is engaged and then consider proportionality. Creation of a bright line rule that articles 10 and 11 are not engaged where an otherwise peaceful protestor has trespassed on private property would run counter to the established jurisprudence where any exclusionary category has been construed very narrowly. Individuals from the Occupy Movement who had been trespassing for three months on public land by setting up a protest camp were held to have engaged rights to articles 10 and 11: *City of London Corpn v Samede* [2012] PTSR 1624, para 49. Similarly, in *Appleby v United Kingdom* (2003) 37 EHRR 38 the court considered that the article 10 and 11 rights of protestors who were prevented from setting up a stand and distributing leaflets concerning their opposition to the development plans of the local authority were engaged, albeit no violation of those rights was found to have occurred. The removal and subsequent conviction of protestors in *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017 were held to constitute an unjustified interference with the article 11 rights of the protestors, notwithstanding their conduct in taking

A possession of privately held land, impeding access to the land by its lawful owners and committing acts of violence against private security guards.

By analogy, in cases involving civil injunctions and contempt, the article 10 and 11 rights of individuals accused of trespass and nuisance and conduct causing considerable economic damage were found to be relevant: see *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), B where a *Ziegler*-style analysis was undertaken. Similarly, the article 10 and 11 rights of individuals who had trespassed were found to be engaged in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29; and considered to be factors to be weighed in the balance in *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch) and *RMC LH Co Ltd v Persons Unknown* [2015] EWHC 4274 (Ch).

C In the present case, the deputy district judge made no finding of damage or intentional damage caused to the land by the defendant. It is therefore not open to the prosecutor to now invite the court to reach a finding of fact in that regard. Accordingly, the prosecution's argument that the defendant trespassed and intentionally damaged land and that that therefore puts him outside the scope of protection which would be afforded to his Convention D rights under articles 10 and 11 has no basis in fact and is wrong. Moreover, the jurisprudence of the European court also provides that protests involving damage still fall within the scope of article 10: see e g *Taranenko v Russia* (2014) 37 BHRR 285, para 10. Were trespass and damage to property to be interpreted as violence or reprehensible acts, it would be an overly restrictive interpretation.

Conduct which might not be considered to be at the core of the rights under E articles 10 and 11 still requires careful evaluation and is not determinative of proportionality: *Ziegler* [2022] AC 408, para 67. Any reprehensible behaviour would be considered in the proportionality assessment but not as a barrier to engagement of the rights. The focus would be on the conduct of the individual concerned. In the present case, the conduct of the defendant was targeted at disrupting the activity of the HS2 high speed railway, i e those at F whom the protest was targeted. Accordingly, it ought to be closer to the core of the rights protected under article 11 than the conduct of protestors in *Ziegler*, whose protest seriously disrupted the everyday activities of others. The protest organiser should retain autonomy in deciding where, when and how the protest should take place and it is recognised that the purpose of an assembly is often linked to a certain location: *Lashmankin v Russia* (2017) G 68 EHRR 1, para 405 and *Ziegler*, para 72. Although the jurisdictions differ, it would be illogical if trespassing protestors disrupting the activities of people not connected to the protest object retained the protection of article 11 when, as in the present case, a trespassing individual protesting at the precise location of the environmental damage being caused by the high speed railway but only disrupting the activity of the protest object was not so protected.

H The section 68 offence requires, in addition to trespass, an additional act of intimidation, obstruction or disruption: *Director of Public Prosecutions v Barnard* [2000] Crim LR 371. It is to that additional act that the question of whether articles 10 or 11 are engaged applies, rather than whether or not the protestor is trespassing.

In a case involving the offence of aggravated trespass contrary to section 68 of the 1994 Act, it will be for the prosecution to prove to the criminal standard that conviction would be proportionate in regard of rights under articles 10 and 11, which will require a fact-sensitive enquiry. Although the Supreme Court judgment in *Ziegler* [2022] AC 408 was concerned with obstruction of the highway, the principles apply in any potential conviction which would be a restriction on article 10 and 11 rights. The jurisprudence of the European Court of Human Rights clearly shows that a conviction is a restriction which represents a distinct interference with article 10 and 11 rights: see e g *Kudrevičius* 62 EHRR 34, para 101. That distinct interference requires justification separately from any which might be required due to any interference caused to those rights by arrest or disposal of a protest because different considerations may apply: *Ziegler*, paras 57, 60. In order to determine the proportionality of an interference with Convention rights, a fact-sensitive enquiry will be required to evaluate the circumstances in the individual case. Any restriction on the exercise of article 10 and 11 rights, including a criminal conviction, must be (1) prescribed by law, (2) in pursuit of a legitimate aim and (3) necessary in a democratic society.

Accordingly, section 68 of the 1994 Act cannot predetermine what is inherently a fact-sensitive consideration of proportionality. The issue is not whether section is 68 is a proportionate restriction generally but whether what happens to an individual when section 68 is applied is proportionate having regard to all the circumstances. The interference with an accused's rights under articles 10 and 11 would be different at the stages of arrest, prosecution decision and conviction and, thus, the proportionality assessments would require separate fact-specific enquiries: *Ziegler*. In addition, in making those decisions, each public authority has its own duty under section 6 of the Human Rights Act 1998 not to act in way which is incompatible with Convention rights. The wide impact of articles 10 and 11 on public order offences was emphasised by Lady Arden JSC at para 92 of *Ziegler*, citing Lord Bingham of Cornhill's observation in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 34 that giving effect to those rights under the 1998 Act represented a "constitutional shift".

The court, when considering an offence of aggravated trespass or other public order offence, is obliged by section 3 of the Human Rights Act 1998 to read and, so far as it is possible to do so, give effect to the relevant statutory provisions in a way which is compatible with the Convention rights. Where it is not possible to do so, the court may make a declaration of incompatibility under section 4 of the 1998 Act. Accordingly, as in the present case, where a statutory provision is likely to interfere with article 10 and 11 rights but on its face contains no element which would make it compatible with those Convention rights, the court is required to read in that proportionality element to give effect to them. Thus, no bright line distinction exists or is required between convictions for an offence which includes a lawful excuse defence and those which do not.

Section 68 of the 1994 Act was enacted before the 1998 Act came into force. That distinguishes the situation in the present case from that in *Animal Defenders International v United Kingdom* [2013] EMLR 28 on which the prosecutor relies as authority for the principle that the state can

A adopt general measures which apply to predefined situations regardless of the individual facts of each case. In *Animal Defenders*, the legislative provision concerned had been debated in Parliament with full reference to Convention rights, whereas section 68 of the 1994 Act was not. Therefore, the intentions of Parliament in enacting it are of little relevance in the current case. In any event, the case does not provide authority for the proposition that in the context of a protest the proportionality of a restriction on
B Convention rights, in this case a conviction, can be predetermined through a statutory provision without the need for a fact-specific assessment in each case.

Section 68 of the 1994 Act is listed as a public order offence aimed at disruptive protests which involve trespass. The gravamen of the offence requires an element of intimidation, obstruction or disruption in addition to
C trespass. Thus, the Convention rights of the landowner under article 1 of the First Protocol to the Convention ("A1P1") become less relevant to the exercise of assessing the proportionality of any interference with the article 10 and 11 rights of the defendant. Indeed, any interference with the A1P1 rights of the landowner are also subject to a proportionality assessment to balance any competing rights and freedoms of other people. If the prosecutor's argument that priority should be given in advance to the
D A1P1 rights of the landowner were successful, engagement of the rights under articles 10 and 11 would effectively be excluded altogether. In so far as the rights under A1P1 are capable of outweighing those under articles 10 and 11, it remains the case that a fact-sensitive balancing exercise is required to determine the issue.

Moloney QC

E The deputy district judge's decision to acquit was plainly reasonable in that it was open to her to make. Although another judge might have reasonably reached another conclusion on the facts, there is no flaw of reasoning which undermines the cogency of the conclusion reached. The judge applied the non-exhaustive list of factors set out in *Ziegler* [2022] AC 408, finding that the protest was peaceful, there was no disorder and the
F defendant had committed no other criminal offences, his actions were carefully targeted to impact on the particular part of the development to which he objected, the protest related to a matter of general concern and was one which the defendant had a long-standing commitment to opposing, the delay to the project was relatively short and it was unclear whether there was a complaint about his conduct. In the circumstances, it was plainly open for the deputy district judge to acquit.

G Although it is correct that the deputy district judge made no direct reference to the A1P1 rights of the landowner, it can reasonably be inferred that those rights were in her mind when finding "no inconvenience to the general public or interference with the rights of anyone other than HS2". Furthermore, whereas in civil injunction cases the A1P1 rights of a claimant landowner are directly balanced against the article 10 and 11 rights of those
H who wish to protest on or around the land, in a criminal case the parties are the Crown and the defendant, which makes it unclear whether or to what extent the A1P1 rights of the landowner need to be balanced.

Moreover, the deputy district judge was entitled to take into account the relative impact of the cost and disruption of a protest to a development project. In doing so, it was necessary to make reference to the total

estimated time and cost of the project and reasonable to conclude that, overall, the relative impact of the protest was minor. In the context of a fact-sensitive proportionality exercise it was an entirely appropriate consideration.

The appeal should therefore be dismissed.

The court took time for consideration.

30 March 2022. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *Director of Public Prosecutions v Ziegler* [2022] AC 408 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2 The defendant was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The deputy district judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the defendant that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11". In short, the judge accepted that there was a new ingredient of the offence to that effect.

3 Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the defendant's article 10 and 11 rights were engaged, to acquit the defendant on the basis that, on the facts found, the claimant had not made me sure that a conviction for the offence under section 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's article 10 and 11 rights applying the principles in *Ziegler*?
>
> "2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4 The prosecution appeal against the acquittal on three grounds:

(1) The prosecution did not engage articles 10 and 11 rights;

(2) If the defendant's prosecution did engage those rights, a conviction for the offence of aggravated trespass is—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights. The decision in *Ziegler* did

not compel the judge to take a contrary view and undertake a *Ziegler*-type fact-sensitive assessment of proportionality; and

(3) In any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5 Before the judge, the prosecution accepted that the defendant's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the defendant suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither ground 1 nor ground 2 was advanced before the judge.

6 The defendant contends that it should not be open to the prosecution to raise grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that ground 1 is being pursued; and that although ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7 Crim PR r 35.2(2)(c) relating to an application to state a case requires: "The application must— . . . (c) indicate the proposed grounds of appeal . . ."

8 The prosecution did not include what is now ground 1 of the grounds of appeal in its application to the magistrates' court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9 Applying well-established principles set out in *R v R (Practice Note)* [2016] 1 WLR 1872 at paras 53–54, *R v E* [2018] EWCA Crim 2426 at [17]–[27] and *Food Standards Agency v Bakers of Nailsea Ltd* [2020] EWHC 3632 (Admin) at [25]–[31], we are prepared to deal with ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the defendant, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10 Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity."

"(2) Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

"(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

"(4) [Repealed.]

"(5) In this section 'land' does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of land in subsection (9) of that section; or (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11 Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12 The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at para 4):

"(i) the defendant must be a trespasser on the land; (ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity; (iii) the defendant must do an act on the land; (iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13 Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual background

14 The defendant was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15 The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London – West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

16 The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

A **17** Protesters against the HS2 project had occupied the Land and the defendant had dug a tunnel there before 2 March 2021. The defendant occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18 The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed
B from trees on the site. On the same day the team found the defendant in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The defendant went back into the tunnel.

19 The HS2 team instructed health and safety experts to help with the
C eviction of the defendant and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The defendant left the Land voluntarily at about 14.00 on 18 March 2021.

20 The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21 HS2 contractors were unable to go onto the Land until it was
D completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The proceedings in the magistrates' court

22 On 18 March 2021 the defendant was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not
E guilty. The trial took place on 21 September 2021.

23 At the trial the defendant was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions:

(i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 [of the
F Convention]. It is of general applicability. It is not limited to offences of obstructing the highway";

(ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

(a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at
G para 12). Accordingly, in determining a criminal charge where issues under articles 10 and 11 of the Convention are raised, the court is obliged to take account of those rights;

(b) Second, violence is the dividing line between cases where articles 10 and 11 apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest
H in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the defendant was not violent;

(iii) Accordingly, before the court could find the defendant guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate

interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at paras 71–78, 80–83 and 85–86). This required a fact-sensitive assessment.

24 The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the defendant's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see para 10 of the case stated).

25 The judge made the following findings:

"1. The tunnel was on land owned by HS2.

"2. Albeit that the defendant had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

"3. The act of defendant taking up occupation of the tunnel on 15 March, sleeping overnight and retreating into the tunnel having been served with the notice to vacate was an act which obstructed the lawful activity of HS2. This was his intention.

"4. The defendant's article 10 and 11 rights were engaged and the principles in *Ziegler* were to be considered.

"5. The defendant was a lone protester only occupying a small part of the land.

"6. He did not act violently.

"7. The views of the defendant giving rise to protest related to important issues.

"8. The defendant believed the views he was expressing.

"9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

"10. The land specifically related to the HS2 project.

"11. HS2 were aware of the protesters were on site before they acquired the land.

"12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of £billions.

"13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195,000, I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the defendant's article 10 and 11 rights."

Convention rights

26 Article 10 of the Convention provides:

"*Freedom of expression*

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of

A frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

"2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial B integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27 Article 11 of the Convention provides:

C "*Freedom of assembly and association*

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic D society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

E **28** Because section 68 is concerned with trespass, it is also relevant to refer to article 1 of the First Protocol to the Convention ("A1P1"):

"*Protection of property*

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the F public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

G **29** Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

30 Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court H (section 6(3)).

31 In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v France* (1991) 14 EHRR 362 at para 37).

32 The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevičius v Lithuania* (2015) 62 EHRR 34 at para 91). A

33 Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevičius*, the Grand Chamber of the European Court of Human Rights ("the Strasbourg court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" (para 92). B

34 The defendant submits, relying on the Supreme Court judgment in *Ziegler* [2022] AC 408 at para 70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the defendant's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality. C

35 Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see eg *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008 at para 44, cited in *City of London Corpn v Samede* [2012] PTSR 1624 at para 43; *Kudrevičius* at paras 150 and 155). D

36 The defendant relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (eg *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 at para 28). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevičius* at para 97). E

37 Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevičius* at paras 149 and 172–174; *Ezelin* at para 53; *Barraco v France* (Application No 31684/05) (unreported) 5 March 2009 at paras 43–44 and 47–48). F

38 In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights. G H

39 *Barraco* and *Kudrevičius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no

A right of access at all. The defendant submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (para 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the defendant's B argument (e g *Samede* [2012] PTSR 1624 at para 5 and see Lindblom J (as he then was) in *Samede* [2012] EWHC 34 (QB) at [12] and [136]–[143]; *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth London Borough Council v Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40 Instead, we gain much assistance from *Appleby v United Kingdom* C (2003) 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg court decided that the landowner's A1P1 rights were engaged (para 43). It also observed that a shopping centre of this kind may assume the characteristics of D a traditional town centre (para 44). Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41 Instead, the court stated at para 47:

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic E and technological developments are changing the ways in which people move around and come into contact with each other, the court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise F of freedom of expression or it can be said that the essence of the right has been destroyed, the court would not exclude that a positive obligation could arise for the state to protect the enjoyment of the Convention rights by regulating property rights. The corporate town, where the entire municipality is controlled by a private body, might be an example (see *Marsh v Alabama* [(1946) 326 US 501], cited at para 26 above)."

G The court indicated that the same analysis applies to article 11 (see para 52).

42 The example given by the court at the end of that passage in para 47 shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the H applicants did have alternative methods by which they could express their views to members of the public (para 48).

43 Likewise, *Taranenko v Russia* (2014) 37 BHRC 285 does not assist the defendant. At para 78 the court restated the principles laid down in *Appleby* at para 47. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public

building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks (paras 25, 61 and 79). The qualified public access was an important factor.

44 The defendant also relied upon *Annenkov v Russia* (Application No 31475/10) (unreported) 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business people protested by occupying the market at night. The Strasbourg court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

45 We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at paras 47 and 52). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights.

46 The approach taken by the Strasbourg court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47 We now return to *Richardson* [2014] AC 635 and the important statement made by Lord Hughes JSC at para 3:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an

A injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the B exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case C concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

48 *Richardson* was a case concerned with the meaning of "lawful activity", the second of the four ingredients of section 68 identified by Lord Hughes JSC (see para 12 above). Accordingly, it is common ground between the parties (and we accept) that the statement was obiter. Nonetheless, D all members of the Supreme Court agreed with the judgment of Lord Hughes JSC. The dictum should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

49 The proposition which the defendant has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg court". It is clear E from the line of authority which begins with *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20 and has recently been summarised by Lord Reed PSC in *R (AB) v Secretary of State for Justice* [2022] AC 487 at paras 54–59, that this is not the function of a domestic court.

50 For the reasons we gave in para 8 above, we do not determine ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg court it is highly arguable F that articles 10 and 11 are not engaged at all on the facts of this case.

Ground 2

51 The defendant's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* [2022] AC 408 had decided that in any criminal trial involving an offence which has the effect of restricting the G exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in H question did not have a "lawful excuse". If that submission is accepted, ground 2 would fail.

52 Secondly, if that first contention is rejected, the defendant submits that the court cannot allow the appeal under ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it

is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53 On this second part of ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54 In *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617, the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at para 4). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Kenneth Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do so (paras 27–36). One reason for this was to avoid the risk of inhibiting legitimate participation in protests (para 27). It was in that context that Liberty had intervened (para 37).

55 Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 (para 37). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly, he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass (para 38). It was in this context that he said at para 39:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56 Moses LJ then went on to say that his earlier judgment in *Dehal v Crown Prosecution Service* (2005) 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is

A nothing more to prove, including proportionality, to convict of that offence (para 40).

57 In *James v Director of Public Prosecutions* [2016] 1 WLR 2118, the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any B restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate (paras 31–34). Offences falling into that first category were the subject of the decisions in *Norwood v Director of Public Prosecutions* [2003] Crim LR 888, *Hammond v Director of Public Prosecutions* (2004) 168 JP 601 C and *Dehal*.

58 The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado." Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see D Ouseley J at para 35).

59 The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required (paras 37–38).

60 *James* concerned an offence of failing to comply with a condition E imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a F direction imposing conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. G There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 (paras 38–43). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61 There are also some instances under the common law where proof H of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 of the Convention. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the

community. In *Gifford v HM Advocate* 2011 SCCR 751, the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" (para 15). Lord Reed added at para 17:

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under articles 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

62 Similarly, in *R v Brown (James Hugh)* [2022] 1 Cr App R 18, the appellant rightly accepted that articles 10 and 11 of the Convention do not provide a defence to the offence of public nuisance as a matter of substantive criminal law (para 37). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights (paras 24–39).

63 *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James*. Indeed, in *Ziegler* [2020] QB 253 at paras 87–91, the Divisional Court referred to the analysis in *James*.

64 The second question certified for the Supreme Court in *Ziegler* [2022] AC 408 related to the "lawful excuse" defence in section 137 of the Highways Act (paras 7, 55–56 and 98–99). Lord Hamblen and Lord Stephens JJSC referred at para 16 to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65 The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way sub silentio suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* [2013] 1 WLR 3617 or offences such as section 68. That was unnecessary to resolve the issues before the court.

66 Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the

A statement in *Richardson* [2014] AC 635 at para 3 or to cases such as *Appleby* 37 EHRR 38.

67 For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those B rights.

68 The passages in *Ziegler* upon which the defendant relies have been wrenched completely out of context. For example, the statements in para 57 about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application C whenever a criminal offence engages articles 10 and 11. The same goes for the references in paras 39–60 to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paras 62–70 are entitled "Deliberate obstruction with more than a de minimis impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

D **69** We are unable to accept the defendant's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends E on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70 Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to F be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration G of incompatibility under section 4 of the 1998 Act would arise. If granted, it would remain a matter for Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71 Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory H offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well established that such measures are permissible (see e g *Animal Defenders International v United Kingdom* [2013] EMLR 28).

72 It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.

73 The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.

74 First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the state to ensure sufficient protection for such rights in its legal system (*Blumberga v Latvia* (Application No 70930/01) (unreported) 14 October 2008).

75 Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

76 Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

77 Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

78 Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

79 Sixthly, the Supreme Court in *Richardson* [2014] AC 635 regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies a fortiori to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.

80 We gain no assistance from para 80 of the judgment in *R (Leigh) v Comr of Police of the Metropolis* [2022] 1 WLR 3141, relied upon by Mr Moloney. The legislation considered in that case was enacted to address

A public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81 It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision B of the Supreme Court in *Ziegler* [2022] AC 408 nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on ground 2.

Ground 3

C **82** In view of our decision on ground 2, we will give our conclusions on ground 3 briefly.

83 In our judgment the prosecution also succeeds under ground 3.

84 The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention D rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the E national interest. One object of section 68 is to discourage disruption of the kind committed by the defendant, which, according to the will of Parliament, is against the public interest. The defendant (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg court has often observed F that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the common law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.

G **85** The judge accepted arguments advanced by the defendant which, in our respectful view led her into further error. She concluded that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a H proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86 In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the defendant did not act violently. But if the defendant had been violent, his

protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

87 It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to "only" £195,000 and the delay was $2\frac{1}{2}$ days, whereas the project as a whole will take 20 years and cost billions of pounds. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

88 In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89 We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler* [2022] AC 408:

(1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the Convention;

(2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevičius* 62 EHRR 34 and *Barraco* 5 March 2009 are instructive on the correct approach (see para 39 above);

(3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question.

90 The appeal must be allowed. Our answer to both questions in the case stated is "no". The case will be remitted to the magistrates' court with a direction to convict the defendant of the offence charged under section 68(1) of the 1994 Act.

Appeal allowed.
Case remitted to magistrates' court with direction to convict.

Jo Moore, Barrister

Neutral Citation Number: [2022] EWHC 2457 (KB)

KB 2022 BHM 000044

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Birmingham Civil Justice Centre
Date: 23 September 2022

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

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

Claimants

- and -

WILLIAM HAREWOOD (18)
RORY HOOPER (31)
ELLIOTT CUCIUREAN (33)
DAVID BUCHAN (61)
LEANNE SWATERIDGE (62)
STEFAN WRIGHT (64)
LIAM WALTERS (65)

Defendants

M. FRY and **BRENDAN BRETT** instructed by **DLA PIPER** Solicitors for the Claimants.
ADAM WAGNER instructed by **ROBERT LAZAR** for the 33rd and 65th Defendants.
HARRIET JOHNSON instructed by **ROBERT LAZAR** for the 18th Defendant.
ADAM GREENHALL instructed by instructed by **ROBERT LAZAR** for the 31st and 62nd Defendants.

Hearing dates: 25 -27th July 2022 and 22 & 23rd September 2022

- -

APPROVED JUDGEMENT

Mr Justice Ritchie:

The Parties

[1] The Claimants are constructing a high speed railway line in England for the benefit of the public in accordance with the will of Parliament.

[2] The Defendants object to the construction of the HS2 railway line and have taken direct action against the construction.

Bundles

[3] For the committal claim which is the subject of this judgment I was provided with: the hearing bundle, an authorities bundle, a supplementary authorities bundle, various cases handed up on paper, various late served witness statements from some, but not all, of the Defendants and some other documents including character references.

[4] After an adjournment for the sanctions decision for D33 I was provided with an expert report from a psychologist and 2 emails from a trainee probation officer.

The Issues

[5] The first issue to be dealt with in this judgment is whether the Defendants breached a mandatory and prohibitory injunction granted by Mr. Justice Cotter on the 11th of April 2022 "the Cotter Injunction" which, in summary, ordered named Defendants and persons unknown to leave the land defined below and not to return. Only sanctions were dealt with because by the time of the start of the hearing all Defendants (save one: D61, who did not attend and D33 who took a technical defence) had admitted the pleaded breaches of the injunction.

[6] The second issue is to determine the appropriate sanctions for any admitted or proven breaches.

This Judgment

[7] This judgment was delivered in Court ex-tempore on 23 September 2022. It relates to all Defendants. I had delivered various decisions in the 4 day July 2022 hearing and also made findings of breach and imposed sanctions on the 6 other Defendants then and given an extempore judgment dealing with all those matters. This judgment brings together the breach and sanctions decisions into one place.

[8] I have attached to this judgment an appendix with the approved transcripts of various of the decisions made in July 2022.

[9] Some of the decisions I made relating to one Defendant (D33) were in two Private hearings relating only to him and only to his private medical information relevant to personal mitigation. The transcripts of those hearings and the judgment I made on the right to privacy relating to that personal information outweighing the need for the

whole hearing to be in open Court will not be released publicly and are subject to reporting restrictions.

The land

[10] This claim concerns the property at Cash's Pit Land which adjoins the A51 at Swinnerton, Staffordshire and is approximately 4 acres in size, rectangular in shape and contains a forest surrounded by farmers' fields, positioned South of Stoke on Trent. It includes a thin strip of land adjoining the northern verge of the A51. I shall refer to this land as "CPL".

Pleadings and chronology of the action

[11] By a notice of application dated the 25th of March 2022 the two Claimants applied for possession of CPL together with a prohibitory and mandatory injunction and declarations and alternative service orders. The application was made against 59 named Defendants and various persons unknown.

[12] The evidence in support of the application was provided in a witness statement of Richard Jordan dated the 23rd of March 2022 and in various other witness statements and affidavits.

[13] By an order made by Mr. Justice Cotter on the 11th of April 2022 at a hearing which was attended by some of the Defendants and both of the Claimants the Judge ordered possession of CPL be granted to the Claimants and granted an injunction which was interlocutory and was to last until the trial or a further order was made in the case or until the 24th of October 2022 (the Cotter Injunction).

[14] By paragraph 4a of the Cotter Injunction the relevant persons were forbidden from entering CPL or remaining there. By paragraph 4b the relevant persons were ordered not to enter CPL, not to interfere with the works at CPL, not to interfere with the fences or gates at CPL, not to damage the property of the Claimants at CPL or of their subcontractors and not to climb onto vehicles or machinery at CPL. By paragraph 4c various persons were ordered to cease tunnelling at CPL and not to encourage or assist tunnelling at CPL.

[15] By paragraph five of the Cotter Injunction it was expressly stated that the Injunction did not prevent the exercise of existing rights of way over CPL or public highways or the rights of the statutory undertakers (service providers). The Cotter Injunction declared that the Claimants were entitled to possession of CPL and alternative service provisions were set out because many of the named Defendants had not provided postal or e-mail addresses or other methods of communication and had not instructed lawyers to accept service on their behalf. The various methods of service were proscribed and included affixing documentation to wooden stakes in the ground at CPL and putting documents to be served in the post box constructed by protesters at CPL and fixing copies of the documents to the entrance at CPL and publishing the

documents on various websites. These various alternative service methods were deemed effective by the Cotter Injunction. In addition anyone affected by the Cotter Injunction was permitted to apply to vary but was required to notify the Claimants' solicitors 48 hours before any hearing of any such application to vary and to provide their names and addresses for service. A directions hearing was provided for to determine the steps required in future.

[16] By a Statement of Case also dated 8th of June 2022 and issued on the same day, the Claimants asserted that five named defendants: D18, 31, 33, 61 and 62 and two proposed Defendants namely D64 and D65 were in breach of the Cotter Injunction. The breaches were laid out extensively in the Statement of Claim together with the evidence in support of the assertions that the Defendants were in contempt of court. The Statement of Claim attached the Cotter Injunction and a plan of the site of CPL.

[17] By notice of application also dated the 8th of June 2022 the Claimants applied for an urgent directions hearing for the future conduct of the claim for committal to prison of the seven Defendants listed above for breaches of the Cotter Injunction.

[18] On the 14th of June 2022 an order was made by this Court which dealt with the directions governing the application for committal to prison of the seven Defendants. In that order I joined D64 and D65 to the proceedings on the Claimants' application. I granted permission to the Claimants to rely on the affidavits set out in paragraph 3 of the order. I granted permission to amend the application notice and Statement of Case. I made orders for alternative service on the Defendants because they had not provided postal addresses or electronic addresses and had not instructed lawyers. The alternative service provisions in paragraph five of that directions order were for postal service, electronic service, service on those thought to be hiding in the tunnels under CPL, service on lawyers and service at websites. I also ordered at paragraph 11 that any Defendant who wished to rely on evidence at the final hearing should serve and file the evidence by the 27th of June 2022. Tying the permission to rely on evidence to the direction I gave at paragraph 8, I ordered that the Defendants had to, by the 20th of June 2022, provide the Court and the Claimants' solicitors with a postal address or an e-mail address at which they could be served with documents relating to the proceedings. I also ordered that no evidence other than evidence filed in compliance with the directions order would be admitted at the hearing save with permission of the Court. An application would have to be made under CPR part 23 for such permission.

[19] The committal hearing was listed for four days starting on the 25th of July 2022 in that directions order. The Defendants were required to attend the hearing in person. The Defendants were warned that if the Court, at the hearing, was satisfied that the Defendants or each of them had been served in accordance with the alternative service provisions in the order then the Court could proceed in the absence of those

Defendants. I also ordered that evidence as set out in the witness statements filed by the parties would stand as evidence in chief at the committal hearing. I ordered the parties to file and serve bundles containing their evidence and any authorities by the 15th of July 2022 and any skeleton arguments by the 21st of July 2022.

[20] On 25th July 2022 at the hearing of the claim for committal to prison of the seven Defendants, D61 David Buchan and D64 Stefan Wright were not represented by solicitors or by barristers and did not attend. The other five Defendants did attend and were represented by solicitors and counsel.

[21] At the hearing Defendants D31 and D62 admitted the pleaded breaches of the Cotter Injunction and apologised to the Court and, through their lawyers, had negotiated undertakings which they offered to give to the Court. Those undertakings were accepted by the Claimants and those two Defendants and all parties recommended to me that those undertakings should be sufficient to deal with the breaches of the Cotter Injunction committed by those Defendants.

[22] I invited but did not require those Defendants to give evidence in addition to hearing their counsel provide mitigation. Both were brave enough to do so. Both impressed me with their commitment to conscientious objection to projects that they, in their own minds, considered were environmentally damaging. I made no findings in relation to their conscientious objections but I did provide, during the course of the hearing, a judgment accepting those undertakings. Both Defendants and their lawyers then left Court. The Appendices hereto contain the approved transcript of that judgment.

Rory Hooper and Leanne Swateridge (Above Ground)

[23] In relation to the undertakings, it may be helpful to those reading this judgment to know that Rory Hooper (who has no "also known as" or AKA as far as I am aware), who was D31, was aged 17 at the time of his breaches of the Cotter Injunction. He was 18 at the time of the hearing. He had no previous relevant antecedents, apologised to the court and gave a two year undertaking not to breach HS2 court orders or interfere with the HS2 construction in future. He accepted that he had wasted a great deal of taxpayers money. His protests were non violent and he did not endanger others. He happens to be the son of Daniel Hooper, a well known environmental objector who goes by the name of "Swampy", but his family history was not relevant to the decision I took to permit his undertakings to be given in exchange for the Court passing no other sanctions for breach of the Cotter Injunction.

[24] In relation to Leanne Swateridge, D62, (AKA Flowery Zerbra) I likewise accepted the parties' suggestion that the undertaking she provided to the Court was sufficient to deal with her breaches of the Cotter Injunction. She likewise gave evidence to this Court, apologised, promised never to breach an injunction relating to the HS2 project again and gave her reasons for her conscientious objections. She accepted that she had

wasted a great deal of taxpayers' money. Her protests were non violent and she did not endanger others.

The evidence in relation to the other 5 Defendants

[25] The hearing of this claim for committal to prison of the other 5 Defendants continued until the 27th of July and that part relating to D33 only was adjourned over to 22 September because D33 applied to submit more evidence in mitigation.

[26] The witness evidence from the Claimants which was accepted by the represented Defendants was as follows -

- An affidavit of James Dobson sworn on the 7th of June 2022;
- An after David of Karl Harrison sworn on the 9th of June 2022;
- An affidavit of Julie Dilcock sworn on the 9th of June 2022;
- An affidavit of Adam Jones sworn on the 12th of June 2022
- An affidavit of Mark Bennett sworn on the 8th of July 2022;
- An affidavit of David Joseph sworn on the 8th of July 2022;
- An affidavit of Vilaime Matakibau sworn on the 8th of July 2022;
- An affidavit of James Dobson sworn on the 11th of July 2022;
- An affidavit of Ian Dent sworn on the 11th of July 2022;
- A witness statement of Julie Dilcock sworn on the 8th of June 2022;
- A witness statement of Robert Shaw sworn on the 11th of July 2022;
- Multiple certificates of service from various witnesses set out at tab 33 of the hearing bundle.

[27] During the hearing I granted applications by D18, 33 and 65 for permission to rely on late served witness statements from those Defendants.

[28] I heard evidence in their own mitigation from the following Defendants: D18, D31, D33, D62 and D65.

[29] I also heard evidence from Ian Dent who was called by the Claimants and dealt with matters relating to the tunnels dug by and occupied by various of the Defendants.

[30] After the adjournment D33 served and filed the following additional evidence:

(1) two emails from D33's trainee probation officer;
(2) an expert Psychologist's report on D33; and
(3) a second witness statement from D33 relating to a private medical matter.

Findings of fact

[31] At the hearing the three remaining attending Defendants (D18, D33, D65) stated through their counsel that they did not dispute the main points of the Claimant's evidence set out in the various witness statements filed and served for the hearing.

[32] The findings I make below are made on the criminal standard so that I am sure as to these findings of fact.

[33] The opposers to the HS2 project consist of a broad range of groups including Extinction Rebellion, HS2 rebellion, Stop HS2 and others. The aims generally of these protesters were to obstruct and cause direct harm to the HS2 project, to increase the costs thereof and to delay it and to stop it.

[34] The HS2 organisation and the Secretary of State for Transport work together to construct the railway from London to the North of England. The whole project is funded by the taxpayer and so any increase in costs or delays are funded by each and every taxpayer in England and Wales.

[35] So far as a general figure for the security costs is concerned for the whole project the amount is approximately £121,000,000 to date.

[36] I find on the evidence that the security costs for the events at CPL alone amount to approximately £8,000,000. The Defendants before me at this hearing and the many other protesters who have attended at or lived at CPL are responsible for the vast majority of that £8 million and I so find as a fact.

[37] The direct action taken by protesters in relation to CPL, which is owned by HS2, included trespass, criminal damage, the construction of wooden living accommodation, the construction of tree houses, the digging of tunnels under the earth and various ancillary acts of obstruction to the works carried out by HS2 and their subcontractors in areas nearby.

[38] The occupants of CPL, or at least some of them, had come over from previous protester camps in Wendover and before that in Euston Square in London. They, or some of them, had been the subject of previous injunctions, whether named or not.

[39] Quite a few previous injunctions have been granted against HS2 protesters. For instance Mr. Justice Holland granted an injunction in 2019 under the reference EWHC 1437. Other injunctions were granted in relation to HS2 protester camps set-up at Harville Road, Hillingdon and at Cubbington in Warwickshire.

[40] The Claimants asserted and Mr. Justice Cotter accepted that there was a distinct risk of further illegal activity from the protestors at CPL. The evidence put before him included interviews by various Defendants posted on Facebook pages and in the national press including one in the Guardian newspaper on the 13th of February 2021. Various Defendants, including D33, asserted publicly that they tunnelled to stop roadbuilding and railway building. The Defendant protestors asserted that they had a "Go Fund Me" page. The protesters published online that in relation to CPL, HS2

would have to spend £4 million evicting them for their multiple trespasses on the land at CPL.

[41] As I have set out above I find that the Defendant protesters' estimate of the costs which they had forced upon the taxpayers in England and Wales were actually double what they estimated they would create through their direct action. None of the Defendant protesters are taxpayers so they are not paying the bill themselves.

[42] HS2 and the Secretary of State for Transport applied for a track wide injunction and that application was heard by Mr. Justice Knowles. Judgment was handed down on 20th September 2022.

[43] The Claimants' evidence, which I find was proven, showed that as a generality the protesters used various methods to force HS2 to incur taxpayers expenses as a result of their direct action. Those included "lock on" devices, tunnels, theft, staff abuse, access obstruction, criminal damage, spiking trees, fly tipping, occupying sites, at height protests and the like.

[44] The protesters established their camp at CPL in approximately March 2021. The protesters called CPL "Bluebell Wood". It is near a work area organised by Balfour Beatty, a subcontractor of HS2. Balfour Beatty obtained an injunction on the 17th of March 2022 against various protesters.

[45] Various structures were built at CPL by protesters including wooden accommodation and tree houses and a post box.

[46] In relation to CPL, James Dobson gave evidence that the Claimants and their staff and subcontractors were able to identify: William Harewood, Elliot Cuciurean, David Buchan, Stefan Wright and Liam Walters at the site. These Defendants were known to James Dobson from the previous sites.

[47] Mr Dobson gave evidence that after the possession order was made by Mr. Justice Cotter the writ of possession was issued and served. Then many verbal warnings were given to the protestors on the site. On the 10th of May 2022 enforcement officers went to the site, issued warnings, took videos and cleared the site of the protestors who were above ground. Those protestors included Rory Hooper, David Buchan, Leanne Swateridge and others.

[48] However I find that 4 Defendants stayed in the tunnel from 10 May 2022 onwards. Those were William Harewood; Elliott Cuciurean; Stefan Wright and Liam Walters. They stayed deliberately and in defiance of the Cotter Injunction and in defiance of the application to commit them to prison for breach of the Injunction. They stayed deliberately in defiance of the directions which I made for the case management of the committal application. They deliberately did not attend the pre-trial review to manage

the final hearing. They breached the directions order requiring them to provide contact details for service. They chose not to take part in the process until day 1 of the hearing and even then two did not attend. They served their evidence late.

[49] Earlier during the hearing I made findings of fact in relation to each Defendant. I was provided with evidence through the Claimants' witness statements and certificates of service which proved to me, so that I was sure, that each of the 7 Defendants had been served with: the Cotter Injunction, the claim for committal to prison for breach, the directions order which I made and all of the evidence in support provided by the Claimants. Reference should be made to those detailed findings which are in the transcript of the hearing. I shall incorporate those decisions into this judgment if the transcripts are made available to me at a later date. It should be said here that the following Defendants admitted that they were properly served with all of the above documents. Those admissions were provided by: William Harewood, Rory Hooper, Elliot Cuciurean, Leanne Swateridge and Liam Walters who are D18, D31, D33, D62 and D65.

[50] In addition, taking each Defendant in turn, earlier in the hearing I made findings of fact on the basis that I was sure in relation to each of the pleaded allegations of breach of the Cotter Injunction which were set out in the Statement of Claim that each was proven. I record here that the following Defendants admitted all of the breaches alleged against them in the Statement of Claim: William Harewood, Rory Hooper, Elliott Cuciurean, Leanne Swateridge and Liam Walters.

[51] As for the two Defendants who failed to attend the hearing, pursuant to the directions order dated 15th June 2022, in which I gave an express warning that I would proceed in the absence of Defendants who failed to engage, I made findings of fact in relation to their breaches of the Cotter Injunction based on the evidence put before the Court by the Claimants. My judgment in relation to those findings of fact was provided verbally during the hearing and will be inserted into the written version of this judgment or an appendix hereto if the transcript is made available to me.

[52] In summary the proven breaches fall into two categories. All seven Defendants were at the CPL site in breach of the Cotter Injunction and failed to leave it. The effects of being at the CPL site were that the taxpayer incurred enormous additional expense on security and other staff who had to deal with the protesters onsite. It also delayed the progress of this taxpayer funded construction.

[53] The second category of breach of the Cotter Injunction concerns the four men who descended into the tunnels under CPL and stayed there after the 10th of May 2022. This direct action was not only a deliberate flouting of the Cotter Injunction but also of the authority of the civil justice system and of Court orders generally. These Defendants knew that they had been ordered off the land and refused to go. These Defendants knew that they were putting the taxpayer through HS2 to very substantial

expense. These Defendants also knew that they were potentially putting the security staff of HS2 and the underground emergency workers at risk if any part of the tunnel system collapsed.

[54] I heard evidence from Ian Dent about the construction of the tunnels. He works with authorised High Court enforcement officers. He is a confined spaces specialist enforcement officer. He has 19 years of experience in removing persons from confined spaces. Some of that was experience gained at Euston Square Gardens in January and February 2021 and at Wendover in October and November 2021, both of which are HS2 sites. He was involved throughout the operation at CPL from 10th of May 2022 onwards.

[55] I find the following facts on the basis that I am sure arising from his evidence. Following the discovery of the main shaft into the tunnels an initial assessment of the spoil which had been removed from the tunnel was carried out.

[56] HS2, with advice from other experts, decided that the risk to emergency workers was too great for them to enter the tunnel and remove the protesters. At that time the four Defendants were not in need of rescue and so they were left in the tunnels. The ground at CPL is made-up of a mixture of sandstone and limestone bedrocks and a conglomeration of pebbles and sandy soils. That conglomerate was of concern because as it dried the risks of breaking up and collapsing would increase.

[57] HS2 provided a hard wired communication system and monitored the air quality of those in the tunnel and purged the air regularly when it became unsafe. This system was used to reduce the risk of drying the walls which would have arisen or been increased by a more regular changing of the air by HS2. Paramedics were brought on site and kept on site 24 hours a day seven days a week just in case any part of the tunnels did collapse. Warnings were issued to the tunnel occupants not only on the 10th of May but many many times thereafter. The four Defendants displayed a blasé attitude to health and safety and to the dangers they had created. They mocked the warnings given to them.

[58] Mr Dent considered that the dangers in the tunnel were quite exceptional. He made verbal and visual contact with the four Defendants on many occasions all of which were videoed or logged. He warned them many times. They laughed in his face many times.

[59] On the 18th of June 2022 Liam Walters left the tunnel. He had occupied it for 39 days.

[60] On the 25th of June 2022 security staff saw the three other Defendants emerge from a hole 4 metres past the fence on land adjoining CPL which was a field. These three

Defendants, William Harewood, Elliot Cuciurean and Stefan Wright had dug a wormhole from the tunnels on CPL to the field and escaped that night.

[61] After all the Defendants had left the tunnels Mr. Dent and his team entered the tunnels and I have seen photographs of the inside of the tunnel system and of the wormhole dug by the Defendants. The tunnel was stuffed with refuse and spoil. In Mr. Dent's opinion the tunnel was poorly shored up. Some sections were completely without shoring. The wormhole had a very tight diameter and was, in Mr. Dent's opinion, very dangerous. Mr. Dent considered the construction of "shaft one" was uniquely dangerous giving rise to a risk of collapse. Mr. Dent discovered that the very top of the tunnel had been capped with a concrete mix. He stated that *"this method of construction meant that any attempts to remove the concrete cap and to remove and or replace the ad hoc shoring with more robust shoring would have released in the region of two tonnes of loose earth upon anyone in shaft one and below*." Overall Mr. Dent's opinion was that the tunnels at CPL were of extremely poor and unsafe construction and were highly unstable. There was a serious risk of collapse at anytime. It was his opinion that the Defendants put themselves and any potential rescuers in danger and *"at risk of serious injury or death*". I accept Mr. Dent's evidence and find that the tunnel construction was very unsafe and put the lives of the four Defendants at risk and potentially the lives of the rescue services. It also put the life of Mr. Dent and his staff at risk of injury or death when clearing out the tunnel after the Defendants left.

[62] It is apparent from the evidence put before me that after the four Defendants left the tunnel various organisations boasted on social media and one Defendant gave an interview to the BBC boasting of this behaviour. I find it difficult to see how it can be a matter of pride for four men to put their lives at risk and to put the lives of emergency workers at potential risk and to waste millions of pounds of taxpayers' money.

The Law

[63] Contempt of Court proceedings have a procedure which is set out in CPR 81. That procedure governs the form of the application and the content of it and the form and content of the evidence. The Claimants in this case have studiously followed the relevant procedures. That procedure entitles but does not require the Defendants to speak before sentence and I gave each Defendant that opportunity and each who was present took it. It also entitles the Court to proceed in the absence of a Defendant which is the route I have had to take in relation to David Buchan (until he turned up) and Stefan Wright.

[64] All of the Defendants before the Court admitted their breaches and the two Defendants who were absent have been found to be in breach as pleaded.

[65] The punishment or sanction available to this Court for contempt of Court includes imprisonment of up to two years, a fine, confiscation of assets or other punishment permitted by law. The maximum sentence of imprisonment is 2 years. Any sentence of imprisonment may be combined with a fine. See the *Contempt of Court Act 1981.* In addition this Court is entitled to suspend any sentence of imprisonment pursuant to its inherent powers. Finally pursuant to the *Criminal Justice Act 2003* section 258 contemnors who are sent to prison are released after serving one half of the sentence.

[66] The factors that this Court should take into account are well known and are set out in the Supreme Court Practice and also in *National Highways Ltd v Ana Heyatawin & Ors* [2021] EWHC 3078. The President of the Queen's Bench Division and Chamberlain J. described the key general principles as follows:

> "(a)T he court has a broad discretion when considering the nature and length of any penalty for civil contempt. It may impose: (i) an immediate or suspended custodial sentence; (ii) an unlimited fine; or (iii) an order for sequestration of assets;
> (b) The discretion should be exercised with a view to achieving the purpose of the contempt jurisdiction, namely (i) punishment for breach; (ii) ensuring future compliance with the court's orders; and (iii) rehabilitation of the contemnor;
> (c) The first step in the analysis is to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order;
> (d) The court should consider all the circumstances, including but not limited to:
> (i) whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy;
> (ii) the extent to which the contemnor has acted under pressure;
> (iii) whether the breach of the order was deliberate or unintentional;
> (iv) the degree of culpability;
> (v) whether the contemnor was placed in breach by reason of the conduct of others;
> (vi) whether he appreciated the seriousness of the breach;
> (vii) whether the contemnor has cooperated, for example by providing information;
> (viii) whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea;
> (ix) whether a sincere apology has been given;
> (x) the contemnor's previous good character and antecedents; and
> (xi) any other personal mitigation;
> (e) Imprisonment is the most serious sanction and can only be imposed where the custody threshold is passed. It is likely to be appropriate where there has been serious contumacious flouting of an order of the court;
> (f) The maximum sentence is 2 years' imprisonment: s. 14(1) of *the Contempt of Court Act 1981*. A person committed to prison for contempt is entitled to

> unconditional release after serving one half of the term for which he was committed: s. 258(2) of the *Criminal Justice Act 2003*;
> (g) Any term of imprisonment should be as short as possible but commensurate with the gravity of the events and the need to achieve the objectives of the court's jurisdiction;
> (h) A sentence of imprisonment may be suspended on any terms which seem appropriate to the court."

[67] When considering sanctions I also take into account the guidance provided in *HS2 v Maxey & Hooper* [2022] EWHC 1010, a decision of Linden J. That decision concerned Daniel Hooper, the father of Rory Hooper, D31 in these proceedings.

[68] I also take into account the decision of the Court of Appeal in *HS2 v Cuciurean* [2022] EWCA Civ 661 in relation to costs awards.

[69] I also take into account the decision of the Court of Appeal in *HS2 v Cuciurean* [2021] EWCA Civ 357 in relation to the ingredients for liability for contempt and the custody threshold. In particular paragraph 81:

> "81. I see no grounds for disagreement with the Judge's conclusion that the custody threshold was crossed in this case. Contrary to the submissions of Ms Williams, there is no precise read-across from the statutory custody threshold in criminal sentencing and the standard that applies in contempt: see [18] above. The Judge cited binding authority on the right approach in the present context, and applied it conscientiously. It is, with respect, untenable to suggest that this case could and should have been dealt with by some lesser sanction. The submission that a mere finding of contempt would have been sufficient pays no heed to the need for deterrence, and the importance of upholding the rule of law. I am not impressed with the submission that in arriving at the period of six months the Judge took too literal an approach to the number of contempts, given that there were several incidents close in time. Again, this is to examine the reasoning under a microscope, when what matters is the overall outcome."

[70] Furthermore I take into account the decision of Marcus Smith J. in *HS2 v Cuciurean* [2020] EWHC 2723 on sanctions for contempt of court. Those listening to and reading this judgment will realise that although there was a different judge that case concerned the same Claimants and D33 to this claim and involved the same solicitors and barristers. That decision on sanctions imposed on Mr. Cuciurean went up to the Court of Appeal and the suspended sentence of imprisonment was reduced from 6 to 3 months.

[71] When imposing the sanctions set out below I take into account the Defendants' Art 10 and 11 rights under the *European Convention on Human Rights* and consider the sanctions to be proportionate and necessary in the light of the facts set out above and

the rights of HS2 and the 2nd Claimant in relation to their land and staff and contractors and the public finances.

Sanctions

[72] The sanctions for all except for D33 were imposed on 27 July 2022 and took effect from that date. This judgment in writing was delivered in Court on 23rd September 2022 after the adjourned sanctions hearing dealing with D33.

David Buchan (Above Ground)

[73] **Lack of co-operation:** You were not in Court for the days 25 and 26 July. You took no part in these proceedings until today. You deliberately choose to flout the Court's Injunction (the Cotter Injunction) and the directions and the process. You arrived this morning.

[74] In evidence you accepted that you had known of the injunction and the committal application against you. I reject your evidence that you were unaware of the court proceedings. You told me that you received the court documents (via Facebook) and chose not to read them. Choosing not to read Court documents is foolish and unwise.

[75] **Breaches:** You entered and stayed in CPL on 4 occasions: 20th and 26th April 2022, 10th May 2022 and 28th May 2022. You ignored the multiple warnings given to you politely and verbally by the HS2 security staff. You were a regular and integral part of the direct action process.

[76] I judge that your breaches of the Cotter Injunction were serious and that you did not care about the orders made by the Court. You do not consider yourself bound by Civil Justice and do not recognise the authority of the Court. You deliberately and contumeliously breached the Court's Injunction.

[77] **Your culpability** is moderate in my judgment. You did not take part in the tunnel protest. You stayed above ground. You put no one's life at risk. You were not violent.

[78] **The harm** that you helped to cause is set out above and includes huge expense to the taxpayers in England and Wales via damage the HS2 project. That harm also involved wasting the time and effort of hundreds of HS2 staff and contractors, of the police and of the emergency services. The limited taxpayers' resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues than on chasing around after you as you played your civil disobedience games in breach of the Cotter Injunction

[79] **Insight:** You have shown very little balance in your insight or understanding of the effects of your actions on society and taxpayers' funds, on the emergency services and on the Court system. You have shown no remorse and made no apology to the Court.

Quite the opposite you said you refused to apologise for the contempt. You asserted that you "don't read Court orders".

[80] You gave evidence to me in mitigation in a cocky and offhand way. You told me that you plan to continue your protests against HS2. Your "thumbs up" over Facebook in answer to the service of Court proceedings was grossly and intentionally unhelpful.

[81] **Mitigation:** you have provided very little. However, I work on the basis that you have no relevant antecedents. I accept you were non violent and non threatening. Having seen you give evidence to me I only just accept (on balance) that you appear to be a conscientious objector. I find as a fact that you are verging more towards being a chaos merchant instead of being a thoughtful protester.

[82] I also take into account that you did not promise to the Court to cease direct action involving breaches of civil law relating to HS2.

[83] **Admission:** You have admitted the breaches in full. I take that into account.

[84] I have taken into account the **Sentencing Guidelines**. I consider that your breaches take you well past the custody threshold.

[85] **Fine:** I consider that you should pay a fine of £1,500 as part of the sanction for your breaches.

[86] **Imprisonment:** I consider that a fine would not be a sufficient punishment for your breaches nor would it have sufficient effect on your thinking to prevent you repeating your contemptuous behaviour against HS2 and the taxpayers funding the project and the Courts in future.

[87] I pass a sentence of imprisonment on you David Buchan for a term of 100 days taking into account your mitigation.

[88] **Suspension:** I have considered suspending the term because this is your first contempt but your utter disregard for the Cotter Injunction and this Court process and your lack of insight and your lack of apology and your future implied threats of more action have prevented me from suspending the term.

[89] You will be entitled to release after serving half the term. You have the right to appeal by notice filed and served 21 days from today.

Stefan Wright (Tunnelling)

[90] You are absent. You failed to appear at this hearing. You have completely and deliberately ignored the Court process.

Breaches

[91] Your breaches consisted of being a tunnel dweller for 46 days in direct and deliberate contravention of the Cotter Injunction which I have found you were served with and knew about.

[92] I consider that your breaches were very serious indeed. They were long lasting. They were contumelious. They were potentially life threatening for you, your mates in the tunnel and the emergency services deployed to help you should the tunnel collapse occur. Your breaches caused real harm to taxpayers and the HS2 project and used up judicial time and resources.

[93] It is clear to me that the tunnel was occupied expressly to frustrate and delay the repossession of CPL in breach of the Cotter Injunction.

[94] **The harm** that you helped to cause is set out above and includes huge expense to the taxpayers in England and Wales and to HS2. That harm also involved wasting the time and effort of hundreds of HS2 staff and contractors, of the police and of the emergency services. The limited taxpayers' resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues than on chasing around after you as you played your civil disobedience games in breach of the Cotter Injunction. The harm you caused also included the need for underground emergency service workers to be present on site throughout the occupation and thereafter to clear the tunnel and make it safe and to repair the ground in the ancient forest you have deliberately scarred and defiled.

[95] **Insight:** You have shown no adult, mature or balanced understanding of the effects of your actions on society and taxpayers funds, on the emergency services and on the Court system. You have shown no remorse and made no apology to the Court.

[96] **Mitigation:** you have provided none. However I work on the basis that you have no relevant antecedents. I accept you were non violent and non threatening.

[97] I have taken into account the **Sentencing Guidelines**. I consider that your breaches take you well past the custody threshold.

[98] **Fine:** I consider that you should pay a fine of **£3,000** as part of the sanction for your breaches.

[99] **Imprisonment:** I consider that a fine would not be a sufficient punishment for your breaches nor would it have sufficient effect on your thinking to prevent you repeating your contemptuous behaviour against the Court, HS2 and the taxpayers.

[100] I pass a sentence of imprisonment on you Stefan Wright for a term of **332 days.** I have calculated this by imposing 7 days for every day you spent under ground.

[101] **Suspension:** I have considered suspending the term because this is your first contempt but the danger you created by your "Heath Robinson" tunnel and your utter disregard for the Cotter Injunction and this Court process and your lack of remorse or insight has prevented me from suspending the term. A bench warrant will be issued for your arrest and detention.

[102] You will be entitled to release after serving half the term. You have the right to appeal by notice filed and served 21 days from today.

William Harewood aka "Satchel Baggins" – (Tunnelling)

[103] You have appeared at this hearing and are present now. You engaged late, ignoring the Cotter Injunction and ignoring my own directions order of 15 June 2022, but since late June 2022 you have engaged and taken part in the Court process.

[104] **Breaches:** Your breaches consisted of being a tunnel dweller for 46 days in direct and deliberate contravention of the Cotter Injunction which I have found you were served with and knew about.

[105] I consider that your breaches were very serious indeed. They were long lasting. They were contumelious. They were potentially life threatening for you, your mates in the tunnel and the emergency services deployed to help you should the tunnel collapse occur. You used up the public emergency resources who were on standby whilst you broke the Injunction sitting in the tunnel.

[106] It is clear to me that the tunnel was occupied by you expressly to frustrate and delay the repossession of CPL.

[107] **The harm** that you helped to cause is set out above and includes huge expense to the taxpayers in England and Wales and to HS2. That harm also involved wasting the time and effort of hundreds of HS2 staff and contractors, of the police and of the emergency services. The limited taxpayers' resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues than on chasing around after you as you played your civil disobedience games in breach of the Cotter Injunction. The harm you caused also includes the need for underground emergency service workers to clear the tunnel and make it safe and to repair the ground in the ancient forest you have deliberately scarred and defiled.

[108] **Insight:** You gave evidence in mitigation and I was impressed. You have shown an understanding of the effects of your actions on society and taxpayers funds, on the emergency services and on the Court system. You have apologised and I judge that you apology really does spring from remorse and an understanding of your responsibilities in society and the adverse effects of your contempt of Court, not

merely a fear of punishment. I am sure of that. You are looking for other ways to pursue your causes and passions and you have a greater understanding now of the lack of a real or positive impact of your tunnel protest.

[109] **Mitigation:** You are an earth protestor. I find that you are a conscientious objector. You have provided character references. I have read them and take them into account. I should mention that without addresses for each witness they lose just a little part of their force, but not all of it.

[110] **Admission:** You have admitted the breaches in full.

[111] **Announcement:** I take into account the public announcement you have made, which was read onto the Court record, that you are going to focus on positive action instead of direct action. You will not be involved in any anti HS2 action in future.

[112] You have no relevant antecedents. I accept you were non violent and non threatening. Your witness statement served late, disclosed your determination to maintain that what you did was the correct way to protest. Court orders are not issued lightly or frivolously. They are issued carefully and within long established legal principles. However having heard your evidence to me I was convinced that you understand the seriousness of your breaches and why Court orders in a civil, organised, caring society are a vital part of the fabric keeping us all safe and secure.

[113] I take into account that you were a chef until Covid struck and that you wish to return to education in September to learn to build sustainable energy equipment.

[114] I take into account your admission of the breaches.

[115] I have taken into account the **Sentencing Guidelines**.

[116] I consider that your breaches take you well past the custody threshold.

[117] **Fine:** I consider that you should pay a fine of **£3,000** as part of the sanction for your breaches.

[118] **Imprisonment:** I consider that a fine would not be a sufficient punishment for your breaches nor would it send out the right message to others who use direct action to protest and seek to dig tunnels or for your contemptuous behaviour against HS2 and the taxpayers and the Courts.

[119] I pass a sentence of imprisonment on you for a term of **332 days.** I have calculated this by imposing 7 days for every day you spent under ground. I reduce that to **184** (46 days x 4) days as a result of the mitigation you have provided through you counsel Ms. Harriett Johnson.

[120] **Suspension:** I have considered suspending the term because this is your first contempt. Because you have gained insight and expressed that clearly. You showed real remorse and apologised sincerely. You engaged with the Court process. You promised to cease fruitless and grossly expensive direct action. You are determined to return to a somewhat more normal life.

[121] Your sentence is suspended for 2 years from today.

Liam Walters (Tunnelling)

[122] **Breaches** You breached the Cotter Injunction by staying in the tunnel at CPL from 10.5.2022 to 11.7.2022: 39 days. Then you climbed out of the entrance and gave yourself up.

[123] You admit that you committed the contempts of Court as set out in the Statement of Claim in paragraphs 54-59 in the full knowledge of the Cotter Injunction and deliberately.

[124] **Aggravating factors** You accept that you did not engage with the Courts or the lawyers for HS2 until after you came out of the tunnel. You did not serve your evidence in accordance with the Court's directions. However from then onwards you did engage, you served a witness statement, you gave evidence to me direct and you provided mitigation.

[125] **Culpability** No one forced you to breach the injunction you take full responsibility for your actions. You flouted a Court's order.

[126] It is clear to me that the tunnel was occupied by you expressly to frustrate and delay the repossession of CPL.

[127] **Aggravating factors:** You made a BBC interview in which you indicated that there was 1 person left in the tunnel. That was to mislead HS2 into waiting even longer before going in to clear it out perhaps. It was obstructive.

[128] **The harm** that you helped to cause is set out above and includes huge expense to the taxpayers in England and Wales and to HS2. That harm also involved wasting the time and effort of hundreds of HS2 staff and contractors, of the police and of the emergency services. The limited taxpayers' resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues than on chasing around after you as you played your civil disobedience games in breach of the Cotter Injunction. The harm you caused also includes the need for underground emergency service workers to clear the tunnel and make it safe and to repair the ground in the ancient forest you have deliberately scarred and defiled.

[129] **Insight:** You gave evidence in mitigation and I was partially impressed. You have shown an understanding of the effects of your actions on society and taxpayers funds, on the emergency services and on the Court system. You have apologised and I judge that your apology sprang from some remorse and some understanding of your responsibilities in society and the adverse effects of your contempt of Court, not merely a fear of punishment. You told me that the HS2 direct action you took in the tunnel was "*a massive waste of resources for the Courts and was not a constructive way of going about things. I do not know if it has achieved our aims"*. I take that into account.

[130] You are looking for other ways to pursue your causes and passions and you have a greater understanding now of the lack of a real or positive impact of your tunnel protest.

[131] **Mitigation:** In mitigation Mr Wagner raised that this was your first contempt, you have no previous relevant contempts and you are young, you are only 24. You admitted the breaches in full. You have apologised.

[132] I have taken into account the **Sentencing Guidelines**.

[133] I consider that your breaches take you well past the custody threshold.

[134] **Fine:** I consider that you should pay a fine of **£2,000** as part of the sanction for your breaches.

[135] **Imprisonment:** I consider that a fine would not be a sufficient punishment for your breaches nor would it send out the right message to others who use direct action to protest and seek to dig tunnels or for your contemptuous behaviour against HS2 and the taxpayers and the Courts.

[136] I pass a sentence of imprisonment on you for a term of **273 days.** I have calculated this by imposing 7 days for every day you spent under ground (39 x 7 = 273). I reduce that to **156 days** (39 days x 4) days as a result of the mitigation you have provided through you counsel.

[137] **Suspension:** I have considered suspending the term because this is your first contempt and you are young, because you have gained some insight and expressed that to me. You showed remorse and you apologised. You engaged with the Court process. You promised to cease fruitless and grossly expensive direct action. You are likely to return to a more productive life.

[138] Your sentence is suspended for 2 years from today.

Elliott Cuciurean, aka "Jellytot" (Tunnelling)

[139] **Breaches** You breached the Cotter Injunction by staying in the tunnel at CPL from 10.5.2022 to 25.6.2022, so for 46 days. Then you burrowed out with others by creating a dangerous worm hole and escaped across a field outside CPL.

[140] You admit that you committed the contempts of Court as set out in the Statement of Claim in paragraphs 35-39 in the full knowledge of the Cotter Injunction and deliberately.

[141] You were present in Court when Mr. Justice Cotter made the injunction.

Culpability

[142] No one forced you to breach the Cotter Injunction, you take full responsibility for your actions. You flouted this Court's order. You did so intentionally. You intended to cause massive expense to HS2, an organisation wholly paid for by the taxpayers in England and Wales. You have protested at other HS2 sites before many times. You have been bound by previous Court injunctions relating to HS2. You have previously been bound by a suspended sentence for contempt of Court orders. Evidence of your approach was posted by you on your own Facebook page on 24 October 2021 where you wrote: "*goodbye suspended sentence, injunction breaking here we come*". I consider such a statement is a reference to the expiry of the suspended sentence imposed by Mr. Justice Marcus Smith. That sentence resulted from you, D33 having been found in contempt of court for 12 separate breaches of an interim injunction, imposed by Mrs. Justice Andrews (as she then was) on 23 March 2020 to prohibit trespass on HS2 land.

[143] I find as a fact that you knew exactly what you were doing and intended to flout the Court's orders despite previous Court warnings relating to the consequences of doing so. You intended to encourage others by your actions. I consider that your culpability is high for these further contempts.

[144] It is clear to me that the tunnel was occupied by you expressly to frustrate and delay the repossession of CPL, to cause disruption to the construction and to cause huge expense and to waste the time of the emergency services. Tunnelling is one step beyond locking on which itself is one step beyond mere trespass when viewed in the scale of intentional obstructions to make removal more difficult for the emergency services and police or the Claimants in this case.

[145] **The harm** that you helped to cause is set out above in this judgment and included huge expense to the taxpayers in England and Wales through HS2. That harm also involved wasting the time and effort of hundreds of HS2 staff and contractors, of the police and of the emergency services. The limited taxpayers' resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues than on chasing and waiting around after you

as you played your underground civil disobedience games in breach of the Cotter Injunction. The harm you caused also included the need for underground emergency service workers to clear the tunnel and make it safe and to repair the ground in the ancient forest you have deliberately scarred and defiled.

[146] **Aggravating factors** You accept that you did not engage with the Courts or the lawyers for HS2 at all until after you came out of the tunnel. You did not attend the pre-trial review about which I am sure that you were aware. You did not raise any evidential or legal issues which would be relevant to the final hearing at the pre-trial review. You did not serve the evidence which you now rely upon in accordance with the Court's directions.

[147] On the other hand from late June onwards you did engage, you instructed lawyers, applied for legal aid and you served your first witness statement, you gave evidence to me direct and you provided mitigation through your counsel. However you did not do so at the main hearing because you did not gather your evidence on time. Instead you sought an adjournment to put in more evidence because you had not prepared the evidence you wished to rely upon before the main hearing. You increased the costs and expenses of HS2 and the Secretary of State as a result.

[148] **Previous contempts:** You were found guilty of contempt by Marcus Smith J. in October 2020. You were sanctioned with a term of imprisonment which was suspended for 1 year on conditions. That suspension ended in October 2021 and despite that a few months later you were in CPL, trespassing, causing trouble and flouting the Cotter Injunction.

[149] **Later suspended sentence:** You also have a previous conviction for aggravated trespass (see *DPP v Cuciurean* [2022] EWHC 736 – March 2022 and the subsequent Magistrates Court decision). That conviction related to a tunnel you dug in 2021 and occupied at Shaw Lane, Staffordshire forming part of HS2 land. You refused to leave despite verbal warnings and an underground team was called to the scene. The costs of the eviction process were £195,000. You were acquitted and involved as Respondent to the appeal from the acquittal in the Magistrates Court. In March 2022 the Divisional Court remitted the case to the Magistrates Court with a direction to convict you of the offence. You were actually convicted after the events which concern me but before the sanctions and breach hearing in this case. You were given another suspended sentence. You committed the relevant contempts of Court after that case had been remitted with a direction to convict you. Even that knowledge did not dissuade you.

[150] **Insight:** You gave evidence in mitigation in two witness statements. Despite your assertions, you have not shown to my satisfaction any real understanding of the effects of your actions on society and taxpayers funds, on the emergency services and on the Court system. You assert that you were not motivated by defiance of a Court

order but I find those words to be a hollow fallacy. In relation to the last contempt you assert you were very upset and did not consider yourself to have done anything wrong. That is a window into your muddled and utterly self centred thinking.

[151] In addition you attempted to assert at the start of the main sanctions hearing that you did not consider that you personally were bound by the Cotter Injunction due to a misreading of or a technical point taken on the terms which you adopted after talking to your lawyers. I have already ruled on that application and dismissed it. The approved transcript of my judgment is in the Appendix to this judgment.

[152] **Mitigation:** In mitigation you assert that you are a conscientious protester. You assert that you have been a conscientious campaigner for 3 years. You assert that by delaying the HS2 project you are seeking to avert an "environmental catastrophe". You assert you are concerned about the carbon foot print of the use of heavy machinery and the destruction of ancient woodland and habitats. You have not been able to explain how your tunnelling and obstruction makes any such contribution to avoiding an environmental catastrophe save for the mere assertion. You assert that the HS2 project is a "scam".

[153] You asserted in your witness statement that a new project should instead be built. You called it a *"transport network that has sufficient interconnectivity to present a real alternative to travelling by car"*. It is wholly unclear to me how that would be built nationwide without heavy machinery, a lot of it, which would give off fumes.

[154] It is right and clear that conscientious protestors may usually be entitled to a *Cuadrilla v PU* [2020] EWCA Civ 9, "discount" in contempt proceedings when the Court considers sanction. However in my judgment each such discount depends on:

(1) proof of conscientiousness;
(2) the insight of the objector;
(3) the activity carried out;
(4) the history;
(5) the dialogue between the Court and the objector;
(6) the involvement of the objector with the Court process;
(7) many other factors.

[155] In the case of you, Elliott Cuciurean, it is no longer a dialogue between the Courts and you. It is a monologue from the Courts with you, Cuciurean, refusing to listen and engage, show real remorse or responsibility and publicising your intent to continue to flout the orders of this Court.

[156] As the Supreme Court in *Attorney General v Crossland* [2021] UKSC 15 (Judgment of the whole Court) made plain at para. [47]:

> "there is no principle which justifies treating the conscientious motives of the protestor as a licence to flout court orders with impunity".

[157] I take into account the 5 character referees' witness statements you have put before the Court.

[158] **Apology**: I did not find your apology in your first witness statement either persuasive, heartfelt or insightful. The wording of it was mealy mouthed and it lacked persuasiveness.

[159] **Expert evidence:** I have taken into account the expert and other evidence put before me relating to a private medical issue. I take into account the contents of and conclusions in the report you rely on from Peter Pratt a clinical psychologist. He is not a consultant psychiatrist but he is experienced. You have not provided medical evidence from a suitably qualified consultant psychiatrist that you have any diagnosed medical or psychiatric condition. Peter Pratt did not diagnose any psychiatric condition the symptoms of which would include any self harm risk. However he was of the view that you are at risk of self harm if you are imprisoned.

I also heard from another experienced guide on prison policy and procedure whom I shall not name who worked with Peter Pratt on his report. I found that evidence helpful and relevant. The risk in the report from Mr Pratt was stated in a less exaggerated way than in his evidence in mitigation. I accept that there is a real risk for you of violence and self-harm in prison and the prison authorities will need to implement their protocols and policies to ensure you are assisted with protections and adjustments on arrival. It is not my role to enter into any discussion of the effectiveness or policies of the prison service. Nor do I wish to. It is clear to me that the arrangements to be made for your imprisonment, start to finish, are a matter for the prison service not this Court.

[160] I accept that if imprisoned you will find it particularly difficult. You provided private information during mitigation which I found persuasive concerning the effects which prison will have on you which are above and beyond what many will suffer. You are concerned about arrangements. You asked for a further adjournment for more time for a full pre sentence report from the probation service.

[161] However you have already been granted an adjournment of 8 weeks. Despite your assertion in July that your probation officer had been asked and offered to provide a report to the Court no such report has been provided. Instead two late emails were provided by a trainee probation officer which did not take your case forwards as you no doubt had hoped. For the reasons set out in the judgment given in the private hearing I refused the adjournment but heard your evidence on the private information. My judgment on the adjournment was provided ex-tempore.

[162] I also note that Peter Pratt recorded that you told him:

> "… that, despite this suspended sentence, he simply continued to engage in protest behaviour since he believed that the strict conditions of the suspended order was not to break an HS2 injunction, rather than not "*to break the law*". He therefore felt empowered to trespass on land without an injunction.
>
> Indeed, he added that he was actually in a tunnel on HS2 land on the day that his appeal came through."

Also:

> "Current Suspended Sentence
>
> He then informed us that he was now already under a suspended sentence, ten weeks suspended for a year, handed down in July 2022. This, it appears, has a history in its own right in that his original "not guilty" plea was accepted by the City of London Magistrates Court. However, this matter was appealed, and it appears that the original Sentencing Court were told that they had "got the law wrong", hence a further conviction.
>
> He believes that he had to pay £200 costs, and was again required to engage in 15 hours of "rehabilitation", which has not yet substantively started."

[163] I take into the Court of Appeal's approach in a potentially relevant and analogous case: *Regina v Catarina Illingworth* [2017] EWCA Crim 2722.

[164] **Admission:** I take into account that after your technical objection was dismissed you admitted all of your breaches of the Cotter Injunction. That admission was made as late in time as an admission can be made. You have gained some credit for it but less than you would have gained had you come clean at the first reasonable opportunity.

[165] Despite knowing that the hearing was to determine whether breach was proven and to determine sanction if it was, you failed to prepare and bring to Court the evidence you asserted that you needed in mitigation. You asked for an adjournment. More costs were incurred as a result.

Custody threshold

[166] I have taken into account the **Sentencing Guidelines**.

[167] I consider that your breaches were serious, the harm was moderate to high and your culpability was high. They take you well past the custody threshold. Your counsel accepted this in mitigation.

[168] **Fine:** I consider that you should pay a fine of **£3,000** as part of the sanction for your breaches.

[169] **Imprisonment:** I consider that a fine would not be a sufficient punishment for your breaches nor would it send out the right message to others who use direct action to protest and seek to dig tunnels or for your repeatedly contemptuous behaviour against HS2 and the taxpayers and the Courts. A fine alone would not reflect the seriousness of your breaches.

[170] I pass a sentence of imprisonment on you for a term of **332 days.** I have calculated this by imposing 7 days for every day you spent under ground (46 x 7 = 332). I reduce that to **268 days** (so by around 20%) as a result of all of the mitigation you have provided.

[171] **Suspension:** I have considered suspending the term, but this is not your first contempt. You have not gained insight into the seriousness of breaching Court orders. You have not shown insightful remorse and your apology, such as it was, I found unconvincing. I consider that there is a very real risk to the HS2 project and the public purse, the emergency services and the administration of justice that you will continue breaching Court orders. I will not suspend your term of imprisonment. The dialogue between you and the Courts in relation to conscientious objection has been far too one sided for far too long.

[172] You will be entitled to release after serving half the term. You have the right to appeal by notice filed and served 21 days from today.

Ritchie J
delivered extempore 23 September 2022
Approved 3.9.2022

Appendix attached

APPENDICES FOLLOW CONTAINING THE APPROVED TRANSCRIPTS OF 4 DECISIONS MADE EXTEMPORE DURING THE HEARINGS

DECISION 1 - ON D33'S UNPLEADED DEFENCE:

THE ISSUE IN THIS JUDGMENT

1. D33 asserts that he was not covered or bound by the injunction. D33 made the application at the hearing without any notice of application or pleading the case in a defence. D33 seeks a preliminary ruling in law on the facts as to whether D33 is bound by the terms of the injunction.

PROCEDURAL DEFAULT

2. Directions were given for the conduct of the claim for committal for alleged breaches of the injunction by the Defendants on 15th June 2022. The Defendants were ordered to provide addresses for service and the names of their lawyers. The Defendants were permitted to serve evidence by 27th June 2022 and to provide bundles of authorities and evidence by 15th July 2022 and skeleton arguments by 21st July 2022.

3. D33 ignored these directions entirely, save as to the Court receiving a letter from Robert Lizar dated 21st July 2022, which was received on 25th July 2022, and, as I understand it, an electronic communication was provided by Robert Lizar as to the skeleton argument, which was delivered on time.

4. No notice of application has been issued for this preliminary issue to be heard. It was not raised at the pre-trial review. It was not pleaded in a defence. It was first raised well out of time between the Parties, five days before the hearing. This is a last minute ambush by D33 on the Claimants.

5. I reject the application on the procedural basis that D33 has not issued any application for the trial of a preliminary issue or paid the fee for such application, failed to attend the pre-trial review, failed to raise the issue in a properly pleaded defence, failed to comply with the court's directions in relation to evidence and bundles of authorities and intentionally ambushed the Claimants.

6. The asserted delay in obtaining legal aid is not an excuse for breaching the Court's orders because D33 could and should have instructed lawyers after the service of the injunction, which occurred soon after it was made in April 2022. He chose not to do so.

7. I shall now deal with the substance of the application in case my decision on procedural irregularity is overturned on appeal.

PLEADINGS AND CHRONOLOGY OF THE ACTION

8. By a notice of application dated 25th March 2022, the Claimants sought possession of CPL and an interlocutory injunction to remove the protestors from CPL. This was part of a wider application for a track wide injunction, which was eventually heard by Knowles J and for which judgment is awaited.

9. On 11th April 2022, Cotter J granted the CPL injunction and made prohibitory and mandatory orders for the onsite protestors to leave and not to return to CPL and prohibiting new protestors from entering CPL. Cotter J also granted possession to the Claimants.

10. At that time, the relevant evidence was heard and read by the court and the issues relating to the granting of the injunction were aired. D33 was present at the hearing. It is admitted by D33 that he spoke to Cotter J in open court at the hearing.

TERMS OF THE INJUNCTION

11. Mr. Wagner, counsel for D33, relies on the drafting of the terms of the injunction to justify the application, acknowledging the prohibitory and mandatory terms which are not in dispute. The issue raised by Mr. Wagner arises from the wording of the categories of persons bound by the injunction. By the definitions in the order made by Cotter J, the injunction binds two categories of person:

    i) The Cash Pit land (CPL) Defendants who are named but did not include D33.

    ii) Persons unknown entering or remaining at CPL, who I shall call PUs.

12. In addition and separately, the annex to the injunction sets out various named Defendants to the whole track wide action. This list is much larger than the named list for the CPL injunction.

D33's APPLICATION

13. D33 asserts that the injunction does not bind him because he was not a named CPL Defendant and he was not and did not become a PU despite entering CPL or remaining at CPL after the injunction was granted. He makes this submission based on the facts that (a) he was in fact named in the annex to the injunction as a Defendant to the main action but (b) not named as a CPL Defendant, so it was submitted he was not a person unknown, not a PU. On the contrary, it was submitted he was a person known, a PK, and so cannot have been a person unknown, a PU.

THE EVIDENCE

14. I heard no live evidence from witnesses. I have read the witness statements served by the Claimants, none of which is disputed insofar as the facts are relevant to this application and I accept the contents thereof insofar as they are relevant to this

application, on the criminal standard of proof. I have also read the undated witness statement of D33, which I allowed into evidence despite it being served very late, in breach of the directions I had given, and being itself undated.

FINDINGS OF FACT

15. The witness statements of the Claimants prove so that I am sure that at the time the injunction was made by Cotter J, D33 was not believed by the Claimants to be or have been at CPL. That is why he was not a CPL named Defendant in the injunction.

16. Of course, he was a potential PU in the future should he choose to step onto the CPL land and take part in the protest and obstruct HS2 in their works and do so in the knowledge of and in breach of the terms of the injunction. He could also become a PU if he was already on CPL but hiding, for instance, in a tunnel and hence be a person unknown to the Claimants in the sense that they did not know he was on or under the land.

17. D33 has a long history of fighting the Claimants over the HS2 railway. The cases are set out in the authorities bundle. I list them here:
HS2 v Cuciurean [2020] EWHC 2614;
HS2 v Cuciurean [2020] EWHC 2723;
HS2 v Cuciurean [2021] EWCA Civ 357.
DPP v Cuciurean [2022] EWHC (Admin) 736.
HS2 v Cuciurean [2022] EWCA Civ 661.

18. Mr. Wagner has appeared in all of the cases for D33. D33 has been on legal aid for all of these cases and D33 has not paid the adverse costs orders made against him in full on any of them. This was confirmed to me at the hearing by counsel. It is therefore not surprising to me and was foreseeable to the Claimants that D33 was a potential PU in the terms of the injunction. However, properly and professionally, the Claimants did not name him or many of the other Defendants to the main action as a named Defendant to the CPL injunction because they did not have evidence that he was on the land at that time.

19. In his witness statement, D33 admitted that he was present in Court when the injunction was granted. He accepted that he was named as D33 in relation to the "route-wide injunction", his words. There is a confusing paragraph numbered 4 of his witness statement. He asserts that, "The Cotter order. This specifically excludes the named Cash's Pit Defendants". The opposite is true. It specifically binds the Cash's Pit Defendants. He then asserted, "I am not a Cash's Pit Defendant". He then went on to assert the following:

> "Reading the order now, it is unclear whether it binds me. I am not a persons unknown as clearly they are aware of my identity. I am a party to the injunction."

20. D33 admitted in his witness statement that after the injunction was granted, he decided to resist both the order and the eviction and he admitted that he breached the prohibitory and mandatory terms imposed which ordered possession and in effect for the protestors to leave CPL. Furthermore, he accepted that he had made the decision to do so long before the injunction was granted. He explained that his refusal to leave was based on conscientious grounds relating to the environment.

21. Through his counsel and in his witness statement, D33 admitted that he was in the tunnel at CPL from 5th May 2022, at the latest, and did not leave until 25th June 2022. I note that D33 did not and does not assert:-

    i) At the time he was served with the injunction, as proven by the Claimants' affidavits and accepted by D33 (by it being thrown down the entrance hole to the tunnel); or

    ii) At any time before he left CPL on 25th June 2022

    that he was confused about the terms of the injunction or that he considered he was not bound by it or that it was ambiguous to him as to its scope. On the contrary, he decided to resist it.

22. I find as a fact that D33 believed and knew very well that he was bound by the injunction after he was served and before he left CPL. I find as a fact, based on his own witness statement, that he only raised the "I am not bound" issue after he left CPL and after he gained legal advice. I should say here that it is to D33's credit that he has been frank about the facts. This is therefore not an application about injustice to D33 or about D33 asserting that he has been misled by any ambiguous injunction terms. It is a purely technical get out of jail free application based on legal argument constructed after the event.

THE LAW

23. In Mr. Wagner's 25 page skeleton, he raises the following submissions in relation to the issue:

    i) D33 is not a named CPL Defendant in the injunction and so not bound by being named.

    ii) Pursuant to *Canada Goose v Persons Unknown* [2020] EWCA Civ 303, per Sir Terence Etherton at para.82, there are three PU categories permitted in law for injunctions: (a) **PU current tortfeasors** (a term I will use loosely for trespassers or those in breach of an injunction as in this case) who are currently anonymous but **will be identifiable later**; (b) **PU current tortfeasors** who are anonymous and **will never be identified** (like a hit and run driver where no one has seen the registration plate of the car); (c) **PU future tortfeasors** who have not yet committed any tort but will do so in the future and will become bound by the

injunction. So one can imagine a man standing on the A51 near CPL wearing a balaclava with a placard but who has not yet entered the land. Mr. Wagner describes category (c) as "newcomers", a term which is easy to understand but does not cover the whole of the category.

iii) D33 was not a PU because he had been named in the main action for the track wide injunction so was not unknown.

iv) So it was submitted that because D33 was not a named CPL Defendant and cannot be a PU, he must, by definition, escape the injunction.

v) Mr. Wagner warns this court that case law has made it clear that the PU jurisdiction must be exercised with care and circumspection (see *GYH v Persons Unknown* [2017] EWHC 3360 para.10, approved in *Canada Goose* at para.87).

vi) In addition, the injunction hearing would and should have included an analysis of the Article 10 and Article 11 of the *European Convention on Human Rights* of D33 if he had been a named Defendant in the CPL injunction, whereas allowing him to be a potential PU was an easy route taken, whether by design or happenstance, by the Claimants to avoid balancing D33's rights at the injunction hearing, thereby depriving D33 of a proper hearing before the injunction was granted. In addition, it was submitted this route avoided an analysis by Cotter J of D33's rights under s.6 of the *Human Rights Act.*

vii) Alternatively, Mr. Wagner submits that the injunction was ambiguous as to the scope of those it bound, so should be found not to bind D33 under the principles in *Redwing v Redwing* [1947] 64 RCP paras.67 and 71 and *Bloomsbury v Publishing* [2003] 1 WLR 1633 and *Cuadrilla v Persons Unknown* [2020] EWCA Civ 9 at para.59 per Leggatt LJ.

viii) Mr. Wagner also relied on *Bennion on Statutory Interpretation* at paras.23.12 *et sequentes* to submit that the Latin maxim *expressio unius* principle applies. If the list of named CPL Defendants did not include D33, then he cannot be included and must have been excluded.

ANALYSIS

24. I consider that the *Bennion* submission is misguided. The categories of Defendants for the CPL injunction were not just (1) the named CPL Defendants but included (2) an additional category for PUs who were either onsite and unidentified or would arrive onsite in the future.

25. I rule that the Latin maxim does not apply to the PUs category and is irrelevant to that category. As to the application of the maxim to the first category of named Defendants,

the Latin maxim adds nothing to the facts. D33 was not named as a CPL Defendant at that time.

APPLYING THE LAW TO THE FACTS

26. In D33's presence, Cotter J granted possession and the interlocutory injunction governing CPL after hearing argument and taking into account the relevant convention rights. Such rights, as set out clearly by Linden J in *HS2 v Maxey & Hooper* [2022] EWHC 1010 at paras.45 to 46, do not prevail over private land ownership rights. There was no avoidance of the necessary balancing exercise. It was carried out.

27. It is fanciful to suggest that Cotter J should have considered the personal circumstances of all the other named Defendants in the annex on the off chance that they might choose to enter the CPL site in future and become bound by entering the PU category. A *quia timet* injunction is based on the factors necessary to found it at the time, not some fanciful future fears.

28. The legal framework for protests and injunctions and any committal applications arising from any breach of those injunctions was clearly set out by the Court of Appeal in *HS2 v Cuciurean* [2021] EWCA Civ 357 at paras.9 and 10, and in particular at 9(iv). Where the Court has conducted the balancing exercise and granted the injunction, the order must be obeyed unless it has been set aside and D33 did not apply to set it aside. Quite the opposite, he chose to resist it and now seeks to say it never applied to him.

29. D33, of all people, should understand the judgment in his own case, a case which he lost at first instance and on his appeal on liability. He succeeded in part on appeal in that the sentence was reduced. In my judgment, D33 should have been well aware of the vital importance of complying with an order of the Court having been sentenced to imprisonment for contempt of Court for three months in the case set out in the preceding paragraphs. The sentence was suspended for one year in October 2020, yet that suspended sentence did not alter his disregard for Court injunctions one jot when he arrived at CPL some months after the suspensions ended.

30. As to the alleged ambiguity, the lack of clarity in *Cuadrilla v PU*, para.59, related to the prohibited behaviour covered by the injunction, not the category of Defendant bound by it. In this case, D33 does not allege that at the time he was in Court making arguments to Cotter J and then listening to the making of the injunction or at the time when he was in the tunnel being served with the injunction he did not understand it to bind him. I find, so that I am sure, on his own evidence, that he thought he was bound by it and chose not to comply.

31. Turning then to the meat of the application in law, I consider that when the injunction was granted by Cotter J, he was right to identify two categories of persons to be bound:

    i) Those thought by the Claimants to be on the CPL by name; and

ii) Those who may, in future, trespass on the CPL as "PU" newcomers or were onsite but were not yet identifiable by name: current "PUs".

32. No one knew, at that time, who would become a newcomer. No one knew whether D33 or any other named Defendant to the main track wide claim, as distinct from those believed already to be onsite, would arrive and take up protest there. Not all the site dwellers had been identified. So I consider that it is completely clear from the wording of the injunction that anyone who was not believed to be on the site and hence was not named as a CPL Defendant would and could potentially fall into the PU category if they walked onto the site in the knowledge of the order nailed to a post at the front entrance or if they ignored the daily shouted warnings of the security guards and stayed on the site or if they broke through the fences or if they entered the tunnel.

33. In particular, those named Defendants in the main action who had been trespassers before elsewhere on HS2 land but had not yet appeared on the CPL site were bound by the PU category as soon as they entered on the site or remained there in the knowledge of the Cotter Injunction order.

34. I rule that the interpretation proposed by Mr. Wagner for the injunction on behalf of D33 is strained, subjective, inappropriate and wrong.

CONCLUSIONS

35. I dismiss the application by D33 for an order that the injunction does not bind him. I rule that the injunction did bind D33, who was a PU under the terms of the injunction. I make this ruling on the basis that the words of the injunction, when subjected to their natural and ordinary, objective interpretation cover all persons unknown who were already at CPL at the time of the injunction and those PUs who deliberately entered or remained on the CPL after the operative date of the injunction in the knowledge of the injunction. D33 was one such person as he admits. This is a simple question of dual capacity. In his capacity as Defendant to the track wide injunction, he was named. In his capacity as potential PU to the CPL injunction, he was not named.

36. A further argument was raised by the Claimants based on how D33 would be in breach of the injunction even if he had not been bound by it directly. *AG v Newspaper Publishing* [1988] 1 Ch 333 was relied upon. It was submitted by the Claimants that if D33 was not a PU, then he was in breach because he:

i) Carried out the acts knowing of the order;

ii) Aided others to breach the order;

iii) Interfered with the administration of justice.

37. I do not need to decide on these submissions in the light of my ruling on the proper interpretation of the injunction. In any event, Mr. Wagner complained that he had not

had enough time to answer them properly so asked for a few days to consider them so the issues would have needed to be dealt with later in the hearing in any event. In the event he never did make any further submissions on the point. As for the ambush point, I have some sympathy but D33 ambushed the Claimants with the unpleaded defence to start the process rolling so it is perhaps unsurprising that the counter arguments were received late in the day.

CONSEQUENTIALS

38. I did offer D33 the option to withdraw this application at the close of submissions yesterday and that offer was refused. The effect of that refusal shall be taken into account when sentencing for D33's admitted intentional and deliberate breaches of the injunction. The Claimants shall draw up the order and submit it to the court by 10.00 a.m. tomorrow, the 27th.

39. The Claimants' costs of D33's failed application shall be paid by D33 on the standard basis, to be summarily assessed at the end of the hearing herein if they are not agreed before then.

DECISION 2 - SANCTION – LEANNE SWATERIDGE - UNDERTAKING

40. Cash's Pit land is adjoining the A51 in Swynnerton, Staffordshire. It is about four acres. It is a rectangle of forest surrounded by farmers' fields south of Stoke-on-Trent. It also has a thin strip of land adjoining the north-side verge of the A51. It is that land which I will call "CPL" in this ruling.

41. In approximately March 2021, according to the evidence of the claimant, which as I understand it is not in dispute - I will be told as I go through this short ruling if anything I say is in dispute and I will deal with it there and then, otherwise the facts that I am going to set out here are found beyond reasonable doubt so that I am sure, but because I have not heard all of the detail of what may or may not be in dispute I am sensitive to counsel being able to stand up and say: "My Lord, no, that is not right".

42. CPL camp was established approximately in March 2021 by protestors against HS2. A year later on 25th March 2022 by a notice of application the claimants, HS2 and the Secretary of State for Transport, applied for prohibitory and mandatory injunctions, in layman's language those are "don't do it" and "do it" injunctions, obviously the "it" is different, the "don't" is "don't go on the land" and the "do" is "get off the land" but those are the legal terms for those injunctions. They also applied for possession and declarations. "Declarations" is a legal word for "these are our rights, judge, tell the world these are our rights". They also applied for alternative service orders. Legal fees were incurred on that because protestors were occupying CPL. The proceedings were issued against various named persons who have been involved in protests in relation to HS2 before and also persons unknown because HS2 and the Secretary of State did not know everybody who was on CPL at the time. Evidence was filed in support from

Richard Jordan in a witness statement dated March 2022 and from others, but much of the background I have taken roughly from Mr Jordan's affidavit. He was the Chief of Security at the time.

43. A history of the HS2 process was set out there which I do not need to go into in any detail. There was a broad range of groups involved, including apparently Extinction Rebellion (I do not know whether that is absolutely so) or HS2 Rebellion or Stop HS2, and there may have been others. The aim was to cause direct harm to HS2, that means financial harm, increased costs and increased delays for it, according to the groups. I am not saying that that was the aim of Flowery Zebra, who has expressed her own aim in court. There were, according to Mr Jordan, 1,007 incidents between October 2017 and December 2021 and the security costs so far, so he said, were £121 million, paid for by the taxpayer. I have divided that by 30 million taxpayers and it was a relatively small sum per taxpayer, but it is still money for every taxpayer in this country that every taxpayer is paying out.

44. There were assertions that others were involved in trespass, criminal damage and violence. That is not asserted against Flowery Zebra. Occupants of CPL came from previous camps, or some did, one a camp in Windover, another a camp in Euston Square. Previous injunctions had been granted in 2019 and 2020, various evidence was put before me of Facebook interviews, interviews with the national press and suggestions that some of the defendants, including D33, Mr Cuciurean, had been involved in tunnelling under various roads. That is what was set out in Mr Jordan's witness statement. I am not saying I am finding that as a fact; it was an assertion which was made. I would have to hear more evidence to be able to find that beyond reasonable doubt. In any event, there were multiple incidents in Euston and in other camps. As a result, when the HS2 organisation came to seek an injunction of CPL they set out the history to show that the protests would be relatively likely to continue.

45. The order that was made by Cotter J on 11th April 2022 did have two parts to it, mandatory and prohibitory. In layman's terms, possession was granted to HS2 of the land, that means that they can take possession of it, and the prohibitory part of the injunction prohibited the named defendants and all other unnamed defendants from entering CPL or remaining there. It also said that those defendants and unknown persons should not interfere with the works on CPL or the fencing or gating or damage the property or the belongings of the sub-contractors or climb onto vehicles and so on. It also said that the defendants and unknown persons should cease tunnelling at CPL and should not encourage or assist others tunnelling at CPL. It expressly did not prevent lawful protest and freedom of speech.

46. Service provisions were provided because it is tricky to serve those who are of no fixed abode, but that was coped with within the order by various mechanisms. The application came before me on directions and I was keen to ensure that those in court had a chance to speak and those that did turn up did have a chance to speak and I set out a timescale for the defendants and unknown persons who were at CPL to serve their

evidence and file it and file their lawyers' statements and the like before this application, for it is crucial for the courts to allow people to defend themselves. It is not our job just to steamroller people into committal proceedings. We take care to give opportunities to all those accused or otherwise who face potentially serious consequences, we give them a timescale and we give them opportunities and that is what occurred in this case. I have already granted to the defendants who are in court permission to file statements late, their solicitors have worked hard under limited financial arrangements provided by the taxpayer through Legal Aid, as have their counsel, and it seemed to me right, even though everything was done in breach of the orders that I set down, that the timescales were relaxed because those that actually left the tunnel on the 25th or the 18th had less time, as a result of their own decisions, to instruct lawyers and get their statements in.

47. However, in relation to Flowery Zebra she left on 10th May 2022 without any violence or abuse or creating difficulties for the men and women who were employed just simply to take possession of the CPL land. Flowery Zebra comes to court today showing integrity and respect in that she will stand up for herself, she has given evidence, she has answered questions honestly and she has given an apology to this court and she has given her reasons for what she does, and I will never wish to stand in the way of people expressing their views, or their right to protest or to exercise their Article 10 and 11 rights to associate and get across their views, however, not in breach of court orders. What holds society together is the criminal law and the civil law. The criminal law has its own function in its own way. In this court it is civil law and contracts do not work with builders, with care workers and others unless the court can enforce them with orders, then people know contracts work and society can keep going. If people are injured in road traffic accidents or other negligent events it is court orders that make insurance companies pay out and others realise that they need to be careful of each other. That is the purpose of civil law, and that is why I take seriously an application for committal to prison for people who have breached court orders for whatever reason.

48. I have to take into account the long established case law of the conscientious objector being treated in a slightly more lenient way than others because of the value that the courts place on freedom of speech. However, those cases also say that your conscientious objection should not be on other people's private land, and there are various other checks and balances and so there are limits and that is what has led to the injunction order in this case and the application to commit and the legal fees involved.

49. However, coming specifically to Flowery Zebra, the breaches which she admits occurred on 10th May 2022. When the enforcement men and woman came on the site and removed those who were occupying she went without difficulty or without abuse to the men and women who were just doing their job and I take that into account. I also take into account that she admits her breaches, that she was escorted from a tree house and she admits her breaches, she was aware of the court order and she left voluntarily. These matters are important matters, for if breach of court injunctions are aggravated

by violence or threats or other matters that make life more dangerous for those men and women just doing their job those aggravating matters are taken into account.

50. I take into account and find that Flowery Zebra is truly conscientious and is concerned about the environment, about the creatures that we are fortunate to live with here and the biodiversity. It does not mean she can win her argument, because we elect Parliaments to make decisions and Parliaments make decisions about infrastructure and then implement them. But I do consider that she is a conscientious objector and take that into account.

51. This brings me to the undertaking that has been negotiated between Flowery Zebra and HS2 and the Secretary of State. I commend both parties for negotiating no doubt possibly late into the night and at weekends to get this done, I am grateful to counsel and the solicitors for doing so. There is a penal notice on it, and it says you are going to get in big trouble if you do not do what you have said in your undertaking. But it is clear to me that Leanne Swateridge understands that, from what she said in the witness box, she has agreed to stay away from the HS2 land and not to enter or remain on it or obstruct it or interfere with business and I take her at her word on that. If, in fact, she does not mean what she has said to me frankly and honestly today then the next judge will probably, to use common parlance, bang her up, and that is not what the courts want to do. But I hope that she is telling me the truth and she will restrict her conscientious objections to non-violent peaceful lawful means, in which case I am sure more people will listen. I accept the undertaking; it has been signed and I also fully understand that Flowery Zebra has looked at the plans roughly and gets that it is the whole of HS2 so there is not going to be a misunderstanding in the future.

52. The application is granted on the findings that are made.

DECISION 3 - SANCTION – RORY HOOPER- UNDERTAKING

53. What I said in relation to the background in relation to Flowery Zebra applies equally to Rory Hooper and therefore I carry that part of the judgment over and deal only with the personal breach, aggravation and mitigating factors in relation to Rory Hooper.

54. Rory comes from a family with what might be called an honourable tradition of conscientious objection, his dad being Swampy, but he is a grown up and an individual and it is a matter for him now how he lives his life. When the events took place, which he admits, which were breaches of a court order on 10th May 2022 at CPL he was only 17; he is 18 how. When the men and women came who were to regain possession of the land he climbed a tree to frustrate repossession, he put a lock-on device in a tree house and it took an hour for the member of the possession security staff to take him out of the lock-on device and then to escort him from the site. That was an intentional nuisance and it is a serious thing, for if those that go up trees fall out of trees they can be injured and it showed a little bit more than just being present on the site, so Mr

Hooper is going to need to be careful going forward with that sort of behaviour for it is a potential aggravating factor.

55. He admits his breaches. He did not behave in a violent or abusive way to the men and women who were clearing the site.

56. His personal mitigation involves conscientious objection. One only has to see the direction in which he is heading as he grows into a man, environmentalism and an apprenticeship in forestry with which I wish him the greatest of luck and the greatest of success, he clearly is a conscientious objector.

57. The difficulty is he is using the wrong methods, illegal methods, particularly methods in breach of court orders, which are dangerous for him and could be dangerous for those who need to clear sites where he is occupying. However, he tells me he has no intention going forwards of continuing to breach any court order.

58. All the more important is the undertaking that he has given. He has undertaken in the form set out which has been put before me, it has a penal notice on it so he knows the effects of breaching this solemn promise to the court, and the promise is: D31 Rory Hooper accepting that he is a Cash's Pit defendant, as defined in the order of Cotter J, accepting that he has been properly served, admitting that he entered upon Cash's Pit Lane in breach of the order and failed to remove himself from there, he has promised, he has undertaken that he will not do any of the following: - enter or remain on HS2 land, obstruct or otherwise interfere with free movement of vehicles, equipment or persons accessing or egressing HS2 land or interfere with any fence or gate or perimeter of HS2 land where such conduct has the effect of damaging and/or delaying or injuring HS2 and the Secretary of State, their agents, servants, contractors, sub-contractors, group of companies, licensees, invitees or other employees.

59. In effect the undertaking is a promise not to muck with HS2 again on their land. He can protest all he wants elsewhere and legally is the thrust of what is being said.

60. I compliment both his barrister and Mr Fry for dealing with your case in the way that they have.

61. This time you have got away without paying any costs. Next time there will be substantial costs. I have a bill in front of me for £40,000 worth of costs that HS2 have had to run up. I will be paying that, albeit a small part, because I pay tax, and so will every other taxpayer in this country be paying towards the costs that you have run up, and that is one of the adverse effects of breaching court orders. Despite that, the undertaking is acceptable and I do accept it and there will be no costs order.

DECISION 4 - SERVICE OF DOCUMENTS AND BREACH

DAVID BUCHAN - SERVICE

62. The first step that I need to take in relation to the Claimants' claim for committal for breach of the Cotter injunction dated April 2022 in relation to David Buchan, aka David Holliday, Defendant 61 to the claim, is to consider whether David Buchan has been served with two bundles of documents. The first is the Cotter order and ancillary documents and the second is the application to commit him for contempt.

EVIDENCE

63. Factually, as to the background, Mr. Buchan has taken no part in these proceedings, has failed to instruct lawyers, has failed to attend. However, I have before me considerable evidence to show that he was onsite at CPL in April and May of 2022, leaving on 28th May 2022 when he was arrested and detained.

64. Those dates for his presence onsite are evidenced by the affidavits of Mr. Dobson and Mr. Harrison and are summarised in the Statement of Claim at paras.40 to 45. In slightly more detail, they assert that on 20th April 2022, Buchan entered CPL and stayed after being warned verbally of the injunction. On 2nd May 2022, he entered CPL and refused to leave despite warnings of the injunction. On 10th May 2022, he was remaining on CPL until he was escorted off by security and on 28th May 2022, he entered CPL and was arrested and was detained.

65. I have carefully been taken to and have carefully read the evidence in relation to service of the Cotter order, namely the injunction, in the affidavit of Mr. Harrison dated 13th April 2022. It is clear that a huge number of copies of the Cotter order and evidence in support thereof were distributed to the CPL site, put into the CPL post box, which was constructed by the protesters at the entrance and on various wooden posts, north, south, east and west of the site.

66. In addition, in accordance with the affidavit of Ms. Dilcock dated 9th June 2022, the documents were posted on the HS2 website. All of these methods were permitted for service on David Buchan by the Cotter order.

67. I also take into account the evidence of Dobson in the affidavit before me in the hearing bundle p.A077 that many oral warnings were given to Buchan and also in the affidavit of Mr. Harrison in hearing bundle A41 (that affidavit being 9th June 2022) that on 20th April, as I have summarised above, Mr. Buchan was seen and issued with a warning when he was in the vicinity of structure 1.

FINDING

68. Therefore, I find such that I am sure, that Mr. Buchan was aware of and was served with the Cotter order and the ancillary documents in accordance with the Cotter order and I accept the certificate of service.

69. The second matter is whether Mr. Buchan was served with the application to commit him to prison for contempt. I accept the certificate of service at bundle A516 of Robert

Shaw dated 20th June 2022. This method of service was required because Buchan had left CPL and had avoided providing any email address, postal address or other contact address, so the Claimants had researched and found a Facebook address for him, set up their own Facebook address and messaged him at his Facebook address in his aka David Holliday and that was a permitted method of service by Cotter J.

70. I accept that those documents were served by Facebook Messenger to Buchan's Facebook Messenger account and then take into account the most recent witness statement of Robert Shaw dated 23rd July 2022, which shows a receipt of a cheeky Facebook message back from Buchan's Facebook account, namely a thumbs up and a "LOL". I have been given two interpretations of "LOL", neither of which are relevant to my decision to accept the evidence of Mr. Shaw that the alternative service provisions set out in the directions order that I made on 15th June 2022 and the injunction order that Cotter J made in April 2022 have been complied with and I am sure that service has properly been effected on Mr. Buchan.

(For proceedings after judgment see separate transcript)

DAVID BUCHAN - BREACH

71. In relation to the claim against David Buchan, the next part of this judgment deals with the evidence of breach. I refer back to the earlier part of this judgment which dealt with evidence of service. In relation to the allegations of breach, the Statement of Claim sets out at paras.40 to 45 the following allegations against Buchan:

i) That he wilfully breached para.4A of the Cotter order on Wednesday, 20th April 2022 by entering and remaining on CPL. D61 was seen next to and entering a large wooden structure that had been erected by activists on CPL. D61 was informed by the First Claimant's security contractors that he was on land subject to a High Court injunction and refused to leave CPL.

ii) D61 wilfully breached para.4A of the Cotter order on Wednesday, 20th April 2022 by entering and remaining on the CPL. He had left the CPL land to use a latrine situated to the west and re-entered at 4.08 p.m.

iii) On 26th April 2022, D61 wilfully breached para.4A of the Cotter order by entering onto CPL and was seen by the First Claimant's security contractors and was informed that he was on the land subject to a High Court injunction and refused to leave.

iv) On 10th May, when the Claimant's security staff sought to clear the site of protestors having obtained a warrant for possession, D61 remained on the CPL and was found by the security contractors there and was walked off the site.

v) On 28th May, Buchan entered the site again from the south, was intercepted, detained and arrested by the police.

72. I find, so that I am sure to the criminal standard, that those events occurred as set out in the affidavits of Dobson and Harrison but I also say, in relation to those breaches, that it is clear to me from this evidence that David Buchan, aka David Holliday, was non-violent, non-rude and simply was non-compliant with the court order, not going any further than that. So the breach has been established to the criminal standard and I so find.

(For proceedings after judgment see separate transcript)

STEFAN WRIGHT - SERVICE

73. In this part of my stop and start judgment, I am dealing with four matters. The first is proof of service of the directions order on Stefan Wright, D61.

74. I have read and considered the evidence of Karl Harrison in his certificates of service dated 15th June 2022 with the photos therein that show him putting down the entrance to the tunnel for the attention of William Harewood, Elliott Cuciurean, Liam Walters and Stefan Wright the documentation in relation to today's hearing and the directions order.

75. So then going back in time to proof of service of the Cotter order, I accept the certificate of service dated 13th April 2022 from Karl Harrison about his multiple methods of serving the Cotter order and the ancillary documents on the CPL site at the points of the compass, at the entrance and in the post box at the site. I also accept the evidence in Dobson's first affidavit of service of these documents at the relevant website set out and permitted by the Cotter order and I accept ancillary to this that warnings, as set out in Dobson's first affidavit, were shouted down the tunnels and to other CPL residents over the dates set out in Dobson 1.

76. Therefore I am satisfied, so that I am sure, that the Cotter order and ancillary documents were served on Stefan Wright.

77. Next, turning to service of the committal application pursuant to my own order dated 15th June of this year, four copies of the committal application and ancillary evidence were lowered down into the entrance of the tunnel, which was a permitted method of alternative service on the Defendants as evidenced by the certificate of service of Karl Harrison dated 9th June 2022 and, if I remember correctly, I have already found that I was satisfied that that service was good on other tunnel occupants and so all I am doing really is repeating a finding that I made earlier.

FINDINGS

78. So, therefore, in relation to Stefan Wright, I am satisfied, so that I am sure, that the Cotter order, the committal application, all ancillary documents to both of those and the directions order that I made which set out the date of this hearing in it were served on Stefan Wright, who, as far as the Claimants were aware, and the Court was aware, at

all times, was down the CPL tunnel. If he was not down the tunnel, then the various other methods of service that were permitted by putting up copies of these documents on various wooden posts north, south, east and west and in the postal box would have been sufficient to come to his **(For proceedings after judgment see separate transcript)**

STEFAN WRIGHT - BREACH

79. As a result of the evidence that I have read from Dobson in affidavit 1 and Dobson in affidavit 2 in the hearing bundle at A089 and A318, the second affidavit being sworn on 11th July 2022, I find and am sure that Stefan Wright, (who seems to have no aka) breached the Cotter order in the ways set out in the Statement of Claim at paras.49, 50, 51 and 52 and that the breach under para.51 continued until 25th June 2022, when the great escape occurred, when he and others left through a tight wormhole tunnel under the fence at CPL and ran off into the night. That is a total of 46 days.

80. I do mention here, although it is more a matter for sentence, that there is no evidence from the Claimants of violence by Stefan Wright to any of their staff or subcontractors or indeed in any way threatening or rudeness and I leave over any other matters in relation to danger, harm or risk as not dealt with in this part of the judgment but to be dealt with in relation to sentence if they are relevant and if they are proven so that I am sure.

(For proceedings after judgment see separate transcript)

WILLIAM HAREWOOD - BREACH

81. In relation to William Harewood, aka Satchel, the Eighteenth Defendant, the Claimants alleged in paras.23 to 30 of the Statement of Claim dated 8th June 2022 as follows, that:

> "Harewood wilfully breached on each day from 10th May 2022 to the date of this Statement of Case and is wilfully in continuing breach of para.4A of the Cotter order by remaining on the CPL and being present on the CPL and failing to remove himself from the land."

82. At 24:

> "D18 wilfully breached on each day from 10th May 2022 to the date of this Statement of Case and is wilfully in continuing breach of para.4B(i) of the Cotter order by being present on CPL with the effect of delaying and hindering the First Claimant by instructing and impeding the activities undertaken by the First Claimant's contractors and subcontractors to gain vacant possession of the CPL in connection with the HS2 scheme."

83. By para.25, it is alleged:

> "D18 wilfully breached on each day from 10th May to the date of this Statement of Case and is wilfully in continuing breach of para.4C(i) of the Cotter order by failing immediately to leave the tunnel which he occupies".

84. By para.26:

> "D18 wilfully breached para.4C(i) of the Cotter order on 10th May by re-entering the tunnel at 18.49 hours having left the tunnel shortly before."

85. Paragraph 27:

> "D18 wilfully breached para.4C(i) of the Cotter order on 10th May 2022 by re-entering the tunnel at 19.38 having left the tunnel shortly before."

86. Paragraph 28:

> "D18 wilfully breached para.4B(ii) of the Cotter order on 10th May 2022 at 19.51 by turning a surveillance camera installed by the Claimant's contractors away from the mouth of the tunnel, preventing them from monitoring the activities of those within the tunnel. This action constitutes an interference with activity on the CPL with the effect of delaying and hindering the First Claimant by interfering with the activities undertaken by the Claimant's contractors and subcontractors to gain vacant possession of the CPL in connection with the HS2 scheme."

87. Paragraph 29:

> "D18 wilfully breached para.4C(i) of the Cotter order on the night of 10th May 2022 or morning of 11th May by re-entering the tunnel after having moved the surveillance camera."

Details of these breaches are set out in paras.58 to 74 of Dobson 1.

FINDINGS

88. Having read the witness statements filed and served by the Claimants, I find the breaches proved and I also note that William Harewood admits the breaches in the Statement of Claim and therefore my finding beyond reasonable doubt matches the admissions that William Harewood has made.

89. The pleaded allegations are all a bit legal so I shall put this in plain language: it was being a tunneller and staying in the tunnel until the later evidence of Mr. Shaw informs this court that William Harewood was part of the "great escape" on 25th June 2022 via the wormhole, under the fence and out into the fields. So it was a 46 day stay in the

tunnel on the HS2 land which is really the root of the breach that William Harewood has been found to have committed. Popping out and tweaking the CCTV is a nuisance but by no means has the evidence shown that D18 has been violent or rude or threatening to the HS2 staff or subcontractors.

90. I am, however, concerned about the activities by unknown persons who were involved in tunnelling in putting concrete caps with bits of metal or glass into tunnel entrances. I am not holding that against any of the Defendants or William Harewood here because I do not have direct evidence to do so but if I had been given such direct evidence, if that had been caught on camera, I would have taken that very seriously indeed as a step away from protecting the environment and a step towards injuring human beings or animals or anything else, which would not be acceptable to me in any way, manner or form, but, in this case, these breaches that are proven are breaches of occupation in a particular way and those are the breaches in relation to Harewood that I find proven.

91. I do not need to deal with risk and other matters. They will be dealt with once I have heard submissions from the Defendants' counsel and from Mr. Fry, so risk and harm and other matters will be dealt with at that stage. So in relation to Satchel, breaches admitted and proof.

ELLIOTT CUCIUREAN - BREACH

92. In relation to "Elliott Cuciurean, the Statement of Claim in the application to commit for contempt of court deals with the asserted breaches at paras.35 to 39. Paragraph 35 states:

> "D33 wilfully breached on each day from 10th May to the date of this Statement of Case and is wilfully in continuing breach of para.4A of the Cotter order by remaining on the CPL and being present on the CPL and failing to remove himself from the land."

93. Paragraph 36 states the allegation that:

> "D33 wilfully breached on each day from 10th May to the date of this Statement of Case and is wilfully in continuing breach of para.4B(i) of the Cotter order by being present on the CPL within a tunnel, with the effect of delaying and hindering the First Claimant by obstructing and impeding the activities undertaken by the First Claimant's contractors and subcontractors to gain vacant possession of the CPL in connection with the HS2 scheme."

94. By para.37, it is alleged:

> "D33 wilfully breached on each day from 10th May 2022 to the date of this Statement of Case and is wilfully in continuing breach of para.4C(i)

> of the Cotter order by failing immediately to leave the tunnel which he occupied."

95. By para.38 of the Statement of Claim, it is alleged:

> "D33 wilfully breached para.4C(i) of the Cotter order on 10th May 2022 having left the tunnel at approximately 19.38 hours. He re-entered the tunnel at some point that same evening or on the morning of 11th May after D18 moved the surveillance camera."

Details of the breaches are set out in the various paragraphs of the affidavit of Dobson 1.

96. In addition, I have seen the additional evidence of Dobson from the affidavit or witness statement dated 11th July 2022, which states that Elliott Cuciurean was one of the "great escapees" through the wormhole on 25th June 2022, therefore he also was in breach of the Cotter order for a total of 46 days.

FINDINGS

97. I find so that I am sure that the pleaded allegations are proven.

98. I have not been taken to any evidence that would suggest violence or threatening behaviour by Mr. Cuciurean and so it is, if you will say, direct action by passive occupation rather than violent or threatening active occupation and that is the nature of the breaches that I find to have occurred beyond reasonable doubt and those breaches now, in accordance with Mr. Cuciurean's signed and dated witness statement, are admitted by Mr. Cuciurean, so he has not put the Claimants to proof of those.

LIAM WALTERS - BREACH

99. I have dealt with Rory Hooper and Leanne Swateridge by undertakings.

100. I have made findings of service and breach in relation to William Harewood, David Buchan, Stefan Wright and Elliott Cuciurean. So the final Defendant is D65, Liam Walters. Liam Walters does not benefit from an aka that I am aware of (unless he is one of the Ivans but that has not yet been made clear to me). In any event, Liam Walters is the 65th Defendant in these proceedings.

101. The Statement of Claim dated 8th June 2022 sets out allegations against D65 at paras.54 to 59. They are as follows. It is alleged that Liam Walters, in para.54:

> "At the date of this statement, D65 is not a named Defendant. He is bound by the terms of the Cotter order as he falls within the class of persons covered by the unknown persons provision".

102. Paragraph 55:

> "Having entered and remained on the CPL without the consent of the Claimants, D65 wilfully breached on each day from 10th May 2022 to the date of this Statement of Case and is wilfully in continuing breach of para.4A of the Cotter order by remaining on the CPL and being present on the CPL and failing to remove himself from the land."

103. Paragraph 56:

> "D65 wilfully breached one each day from 10th May 2022 to the date of this Statement of Case and is wilfully continuing in breach of para.4B(i) of the Cotter order by being present on the CPL land within a tunnel with the effect of delaying and hindering the First Claimant by obstructing and impeding the activities undertaken by the First Claimant's contractors and subcontractors to gain vacant possession of the CPL in connection with the HS2 scheme."

104. Paragraph 57:

> "D65 wilfully breached on each day from 10th May 2022 to the date of this Statement of Case and is wilfully in continuing breach of para.4C(i) of the Cotter order by failing immediately to leave the tunnel which he occupied."

105. Paragraph 58:

> "D65 wilfully breached para.4C(i) of the Cotter order on 10th May 2022 having left the tunnel at approximately 19.28 hours. He re-entered the tunnel at some point that same evening or on the morning of 11th May after D18 moved the surveillance camera."

FINDINGS

106. The evidence in support of the acts of contempt are set out in the affidavit of Dobson called affidavit Dobson 1 and the affidavit of Dobson 2 dated 11th July 2022. I accept the contents of both so that I am sure that Walters left the tunnel on 18th June 2022 and so he is a 39-day dweller as opposed to the 46-day dwellers in the other cases.

107. He has provided a signed and dated witness statement now in which he admits the breaches set out in the Statement of Claim and therefore I have no difficulty finding, so that I am sure, that those breaches are proven not only by the admission but also by the evidence that has been called before me.

108. It is likewise not alleged against Liam Walters that he was violent or threatened violence during his time and hence was an active protestor but not a threatening or violent protestor.

(For proceedings after judgment see separate transcript)

END

Neutral Citation Number: [2022] EWCA Civ 1519

Case No: CA-2022-001987

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE RITCHIE
([2022] EWHC 2457 (KB))

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE EDIS

- -

Between:

Elliott Cuciurean	**Appellant**
- and -	
(1) Secretary of State for Transport	**Respondents**
(2) HS2 Limited	

- -
- -

Tim Moloney KC & Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Appellant**
Richard Kimblin KC & Michael Fry, Brendan Brett (instructed by **DLA Piper**) for the **Respondents**

Hearing Date: 9 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 17 November by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. By a judgment dated 23 September 2022 ([2022] EWHC 2457 (KB)), Ritchie J ("the judge") sentenced the appellant to 268 days immediate custody for contempt of court. He also fined him £3,000. The relevant order was dated 6 October 2022. The appellant appeals against that order as of right.

2. There were originally four Grounds of Appeal. Ground 1 complained about the judge's conduct of the contempt hearings. Grounds 2 and 3 went to the sanction that the judge imposed. Ground 4 was a challenge to the finding of contempt: the argument was that the injunction in question did not apply to the appellant and therefore he was not in contempt of court.

3. On the Monday before the appeal hearing, the court was informed that Ground 1 had been abandoned. Save in one very limited respect, I say no more about it. Of the remaining Grounds, it is appropriate to consider Ground 4 first because, if the appellant is right, there was no contempt of court. As will become apparent below, the court has concluded, by a majority, that the injunction applied to the appellant and he was in contempt of court. It is therefore necessary to consider the question of sanction (Grounds 2 and 3): for the reasons set out below, the court is unanimously of the view that the sanction imposed by the judge was not excessive or unreasonable. In the result, therefore, the appeal will be dismissed.

2. The Appellant

4. The appellant is a serial protestor against the HS2 Scheme. This has led to at least one criminal conviction, a number of findings of contempt of court and the imposition of various terms of imprisonment although, until the present case, those have always been suspended.

5. On 16 October 2020, the appellant was committed for contempt of court for 12 breaches of an injunction protecting HS2 land at Crackley, near Kenilworth in Warwickshire. In his judgment on liability ([2020] EWHC 2614 (Ch)), Marcus Smith J found the contempt proved, saying that the appellant "would go to very considerable lengths in order to give his objections to the HS2 scheme as much force as they possible could have". He found the appellant to be an evasive witness.

6. The sanction imposed by Marcus Smith J was 6 months imprisonment suspended for one year. That term was reduced by this court to 3 months imprisonment, suspended for one year ([2021] EWCA Civ 357). Despite that reduction, I note that, when that year was over, on 24 October 2021, the appellant published a social media message which read: "Goodbye suspended sentence, injunction breaking here we come." The judge rejected the suggestion that that was some sort of "joke" on the part of the appellant, and there is no appeal against that finding.

7. In fact, it appears that the appellant had not waited until the end of the one year period to continue to break the law. Between 16 and 18 March 2021 - in other words, during the period in which the suspended sentence was operational - he trespassed on land in Hanch, near Lichfield in Staffordshire, and dug and occupied a tunnel there, again to

disrupt the HS2 scheme. Although he was initially acquitted of aggravated trespass, the Divisional Court, in their judgment of 30 March 2022 ([2022] EWHC 736 (Admin)), remitted the case to the magistrates' court with the direction to convict the appellant.

8. The appellant was duly found guilty of aggravated trespass on 29 June 2022. On 21 July 2022, he was sentenced to a 10 week term of imprisonment, again suspended for a year. No further details of this sentence have been provided. It is unclear to me why, having committed a further HS2-related offence during the period in which the original suspended sentence was extant, the appellant was not given a term of immediate custody. This history also means that, at the time of the contempt with which this appeal is directly concerned (May-June 2022), the appellant knew that he was going to be convicted and sentenced for the aggravated trespass, but he did not allow that to deter him. It appears that neither of the earlier suspended sentences were ever activated, either in whole or in part and, although this history was identified by the judge, it was not treated as the particularly aggravating feature I consider it to be.

3. The Order And The Alleged Contempt

9. On 28 March 2022, the respondents commenced proceedings against 63 defendants in respect of land, known as the Cash's Pit Land ("CPL"), on the proposed route of HS2 in Staffordshire. D1-D4 were all categories of "persons unknown" defined by reference to particular activities. D1 was defined as:

> "Persons unknown entering or remaining without the consent of the claimants on, in or under land known as land at Cash's Pit, Staffordshire, coloured orange on Plan A annexed to the Particulars of Claim (the Cash's Pit Land")."

D5-D63 were all named defendants. The appellant was D33.

10. The Claim Form and Particulars of Claim ("PoC") sought immediate possession of the CPL. The PoC explained at paragraph 12 that the respondents did not know the names of all those occupying the CPL, but knew enough to identify D5-D20, D22, D31 and D63. That group of defendants, which did not include the appellant, were called the "Cash's Pit Named Defendants" in the PoC. However, the PoC made clear that there were other individuals-whether other named defendants or otherwise-who might come and go on the CPL. That was why the claim for trespass was made against both the Cash's Pit Named Defendants and D1. Those defendants, taken together, were called "the Cash's Pit Defendants".

11. At paragraph 17 of the Particulars of Claim, the respondents sought an order for possession of the CPL. At paragraph 18 they sought a declaration confirming their immediate right to possession of the CPL. Both those claims were made against the Cash's Pit Defendants. At paragraph 24, the respondents set out their reasonable fear that, having removed the Cash's Pit Defendants from the CPL, "the Defendants will return to trespass on or cause nuisance to the CPL" or on other parts of the HS2 land. This last was a reference to the wider injunction sought against the defendants in relation to the entire route of the HS2 scheme, with which this appeal is not concerned.

12. In the prayer for relief, the respondents claimed:

"(1) An order that the Cash's Pit Defendants deliver up possession of the Cash's Pit Land to the First Claimant forthwith;

(2) Declaratory relief confirming the First Claimant's immediate right to possession of the Cash's Pit Land;

(3) Injunctive relief in the terms of the draft Order appended to the Application Notice;

(4) Costs;

(5) Further and other relief."

13. The injunction in respect of the CPL was granted by Cotter J on 11 April 2022 ("the Cotter Order"). It was to all intents and purposes in the form referred to at paragraph (3) of the prayer in the PoC. Paragraph 3 of the Cotter Order ordered the Cash's Pit Defendants to give the respondents vacant possession of the CPL. Paragraph 4 contained the operative injunction:

"4. With immediate effect, and until the earlier of (i) Trial; (ii) Further Order; or (iii) 23.59 on 24 October 2022:

a. The Cash's Pit Defendants and each of them are forbidden from entering or remaining upon the Cash's Pit Land and must remove themselves from that land.

b. The Cash's Pit Defendants and each of them must not engage in any of the following conduct on the Cash's Pit land, in each case where that conduct has the effect of damaging and/or delaying and/or hindering the Claimants by obstructing, impeding or interfering with the activities undertaken in connection with the HS2 Scheme by them or by contractors, sub-contractors, suppliers or any other party engaged by the Claimants at the Cash's Pit Land:

i. entering or being present on the Cash's Pit Land;

ii. interfering with any works, construction or activity on the Cash's Pit Land;

iii. interfering with any notice, fence or gate on or at the perimeter of the Cash's Pit Land;

iv. causing damage to property on the Cash's Pit Land belonging to the Claimants, or to contractors, sub-contractors, suppliers or any other party engaged by the Claimants, in connection with the HS2 Scheme;

v. climbing onto or attaching themselves to vehicles or plant or machinery on the Cash's Pit Land used by the Claimants or any other party engaged by the Claimants.

c. The Cash's Pit Defendants and each of them:

> i. must cease all tunnelling activity on the Cash's Pit Land and immediately leave and not return to any tunnels on that land;
>
> ii. must not do anything on the Cash's Pit Land to encourage or assist any tunnelling activity on the Cash's Pit Land."

14. Consistent with the PoC, the Cash's Pit Defendants were defined in the Cotter Order as:

> "D1 and D5 to D20, D22, D31 and D63 whose names appear in the schedule annexed to this Order at Annex A."

The relevant parts of Annex A identified D1 in the same terms as the Particulars of Claim (paragraph 9 above).

15. Paragraph 6 of the Cotter Order was in the following terms:

> "6. The Court makes declarations in the following terms:
>
> The Claimants are entitled to possession of the Cash's Pit Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

Paragraphs 7, 8 and 9 of the Cotter Order were all concerned with the service of the Order itself by the various methods identified there.

16. The appellant was in court when the Cotter Order was made. He said that, at the time, he understood that the Cotter Order related to him. As Mr Wagner fairly conceded on his behalf during the appeal hearing: "he always thought he was bound by the order". The appellant further admitted that, despite that knowledge, he continued his protest against the HS2 scheme by going on to the CPL on 10 May 2022, and staying in the tunnel from 10 May 2022 to 25 June 2022, a period of 46 days. The evidence was that, every day, the respondents' contractors issued verbal warnings to the occupiers of the CPL about the terms of the Cotter Order. On 25 June 2022, the appellant burrowed out of the tunnel with others and escaped across a field outside the CPL.

4. The Subsequent Proceedings

17. By then, the appellant and six others were the subject of an application for committal for contempt. Those committal proceedings were commenced on 8 June 2022. It is accepted that the papers were served on the appellant on 9 June when he was still occupying the CPL. On 10 June he was served with notice of a directions hearing in the committal proceedings, to take place on 14 June 2022. The appellant stayed on the CPL and did not attend and was not represented at the directions hearing.

18. At the directions hearing various directions were made as to i) the provision by the defendants of a service address by 20 June; and ii) the service of any evidence by 27 June. Although those directions, too, were served on him, the appellant did not comply with them. Following his flight from the CPL, a skeleton argument was provided on his

behalf on 20 July, in accordance with the judge's directions. This raised, for the first time, the argument that he was not in contempt at all because of the wording of the Cotter Order.

19. The committal hearing took place over three days in July 2022 (25, 26 and 27 July), involving the appellant and a number of co-defendants. The appellant then sought an adjournment to put in evidence on a variety of issues, including a personal medical issue. The judge acceded to that request, which led to a further two day hearing on 22 and 23 September 2022. In my view, this process was unnecessarily drawn-out, particularly given the relatively straightforward issues raised by the contempt proceedings.

20. As I have said, although the appellant thought at the time that the Cotter Order applied to him, and admitted the conduct which amounted to contempt, it was argued by Mr Wagner at the hearing in July that, on a proper construction of the Cotter Order, it did not concern him. The argument was that he was not one of the named defendants within the definition of Cash's Pit Defendants and, because he was a named defendant, he could not be a 'Persons Unknown' within the definition of D1. The judge rejected that argument. That left the September hearing to address the issue of sanctions against the appellant.

21. The judge found that the appellant's culpability was high for the reasons set out at [142]-[144] of the judgment under appeal. No challenge is made to those findings. The judge also identified the wide-ranging nature of the harm he had caused at [145], noting that "the limited tax-payers resources of our society would have been better spent on the NHS, social care, the environment, the underprivileged and other needy issues then chasing and waiting around after you as you played your underground civil disobedience games in breach of the Cotter Injunction". The judge had earlier noted at [34] – [36] and [142] that any increase in cost in the HS2 project was an increase that had to be met by the tax-payer, and that the cost of the security for the events at the CPL alone amounted to approximately £8 million. Again, there is no appeal against those findings in respect of harm.

22. As to aggravating factors, the judge said this:

> "[146] **Aggravating factors** You accept that you did not engage with the Courts or the lawyers for HS2 at all until after you came out of the tunnel. You did not attend the pre-trial review about which I am sure that you were aware. You did not raise any evidential or legal issues which would be relevant to the final hearing at the pre-trial review. You did not serve the evidence which you now rely upon in accordance with the Court's directions.
>
> [147] On the other hand from late June onwards you did engage, you instructed lawyers, applied for legal aid and you served your first witness statement, you gave evidence to me direct and you provided mitigation through your counsel. However you did not do so at the main hearing because you did not gather your evidence on time. Instead you sought an adjournment to put in more evidence because you had not prepared the evidence you wished to rely upon before the main hearing. You increased the costs and expenses of HS2 and the Secretary of State as a result."

The judge also referred to the previous contempt in respect of the injunction at Crackley, and the aggravated trespass at Lichfield.

23. On the question of insight, the judge found at [150] that the appellant had not shown any real understanding of the effects of his actions on society and tax payers' funds, on the emergency services and on the court system. At [151] he said:

> "[151] In addition you attempted to assert at the start of the main sanctions hearing that you did not consider that you personally were bound by the Cotter Injunction due to a misreading of or a technical point taken on the terms which you adopted after talking to your lawyers. I have already ruled on that application and dismissed it. The approved transcript of my judgment is in the Appendix to this judgment."

The judge dealt in detail with the possible mitigating factors between [152]-[165]. He found that the case passed the custody threshold (which is not a finding which is appealed to this court), and he concluded that a fine would not be sufficient punishment [169].

24. In calculating the sanction, the judge took a starting point of 332 days imprisonment (46 days underground x 7 days per day of occupation), and reduced that by around 20% to reflect the mitigating factors. That left a net term of 268 days imprisonment. The judge said that, in all the circumstances, he could not suspend the term [171], a conclusion which, again, is not appealed. He concluded by saying this: "the dialogue between you and the Courts in relation to conscientious objection has been far too one-sided for far too long".

5. Was The Appellant Caught By The Cotter Order (Ground 4)?

5.1 The Issue

25. The first issue raised by this appeal is whether or not the appellant was caught by the Cotter Order. If he was not, then there would be no contempt. So although it was the last ground of appeal, it must be considered first.

26. During the July hearing, the judge gave a number of *ex tempore* judgments on matters which arose during the course of argument. They were then usefully gathered up as an Appendix to the September judgment. The first of these concerned the appellant's argument that he was not caught by the Cotter Order. The judge ruled against the appellant for two reasons. First, he said that no notice of the submission had been given at the pre-trial review; that it was a preliminary issue which had not been raised until 5 days before the hearing. He described it as "a last-minute ambush". He therefore rejected the submission on procedural grounds. If he was wrong about that, the judge went on to consider and reject the submission on its merits.

5.2 The Procedural Bar

27. In their written skeleton argument on appeal, Mr Moloney KC and Mr Wagner complained that the judge was wrong to dismiss the submission as a matter of procedure because it was not a preliminary issue, but a substantive defence to the claim for

contempt. In his skeleton argument, Mr Kimblin KC did not seek to support this aspect of the judge's approach.

28. I can well understand the judge's irritation that, at the start of what appeared to be a hearing dealing with sanctions for admitted contempt on the part of a large number of defendants, the appellant was raising, for the first time, an issue of liability. Furthermore, it is not an answer to say that this was a pure point of law and that, because it was in the skeleton argument (which was served in time), there was no default on the part of the appellant. The appellant subsequently gave evidence on this topic: he should therefore have addressed this point in a witness statement served weeks before the hearing in accordance with the judge's directions. In addition, as I note below at paragraph 52, there was an obvious riposte to this argument which, somewhat ironically, Mr Wagner said in July that he could not deal with, because it was raised late. There was therefore a real risk that, in raising the point for the first time at the hearing, the appellant was gaining a potential procedural advantage.

29. However, I accept Mr Wagner's basic submission that this was not a preliminary issue as such, but a substantive argument about whether the appellant was caught by the Cotter Order, and therefore whether or not he was in contempt of court. Although the appellant can properly be criticised for not complying with court orders until the last minute or beyond, and for not giving what I consider to be proper and fair notice of this issue, it was plainly something which the judge had to address at the hearing in July. In effect, the respondents had to show that the appellant's submission on the wording of the Cotter Order was wrong in order to establish contempt.

30. I note that, in his ruling on this aspect of the case, the judge did not identify any part of the CPR which would have permitted him, as a matter of procedure, to rule out the appellant's submission without considering it on the merits. Pleadings are not usually required in contempt applications and certainly none were ordered here, so the judge's criticism that the matter had not been pleaded was erroneous. Although, as I have said, the point was not unlinked to the evidence, it would have been wrong in principle to rule out any consideration of what was, at root, a matter of construction because of the absence of evidence, particularly in circumstances where the direction in respect of witness statements was not framed as an unless order.

31. I therefore agree with Mr Wagner that the judge erred in dismissing the appellant's argument as a matter of procedure. The remaining question is whether he was wrong to dismiss it on its merits.

5.3 The Substantive Argument

32. The core of the argument is that the appellant was a named defendant (D33) in the Cotter Order and therefore could not be a 'Person Unknown' at the same time. That is said to be illogical: he was known (and named), and therefore he could not be a 'Person Unknown'. Mr Wagner accepted that his argument was "a narrow one", although he said that paragraph 6 of the Cotter Order provided support for the proposition that, when the respondents wanted orders to cover all the defendants, they had no difficulty in framing them as such.

33. In answer to that, Mr Kimblin said that there were two stages: getting possession of the CPL (paragraph 3 of the Cotter Order) and then keeping it free of protestors (paragraph

4). He said that the named defendants within the definition of Cash's Pit Defendants were those relevant to stage one; those who were believed at the time to be in occupation of the CPL. Since the appellant was not believed to be in occupation of the CPL at the time of the Cotter Order, he was not one of those named defendants. But, he said, in respect of stage two, anyone who then went to the CPL after the order was made "became a person to whom the injunction was addressed and a defendant" in the words of Sir Tony Clarke MR in *South Cambridgeshire DC v Gammell* [2005] EWCA Civ 1439; [2006] 1WLR 658 at [32]. They were therefore covered by the definition of D1 whether they were otherwise named or not.

34. I agree with Mr Kimblin. My reasons are these. The Cash's Pit Defendants, as defined in the Cotter Order, fell into two groups. One group were those particular defendants "whose names appear in the Schedule and Annex to the order". They were D5-D20, D22, D31 and D63. They did not include the appellant because it was believed (correctly, as it turned out) that he was not occupying the CPL in April. He was not therefore in that group, called in the PoC "the Cash's Pit Named Defendants".

35. The other group of Cash's Pit Defendants were those defined as D1, namely "persons unknown entering or remaining without the consent of the claimants on, in or under the CPL". That was aimed at Mr Kimblin's second stage, after possession: keeping the CPL free of protestors. On the face of it, when the appellant went to the CPL the following month, and remained there for 46 days, he fell within the definition of D1. Thus, although he was not a *named* Cash's Pit Defendant, he was a *defined* Cash's Pit Defendant because he was caught by that definition of D1.

36. It is not seriously argued to the contrary that, on the plain words of the D1 definition, the appellant was not caught by the definition. The argument therefore depends on other parts of the Cotter Order, and alleged inconsistencies or illogicalities to which those other parts might give rise. Although I accept that the wording of an injunction in a contempt case should be free from all reasonable doubt, it is not insignificant that, for the purposes of the appeal, the critical parts of the Cotter Order are clear. Who are the Cash's Pit Defendants? Certain named defendants and D1. Did the appellant fall within the definition of D1? When he went to the CPL and occupied the tunnel after the Cotter Order, Yes, he did. He did all the things prohibited by paragraph 4(b).

37. The main argument put forward by Mr Wagner is that the appellant could not be a "person unknown" because he was known to the respondents and named in the Cotter Order. But why not? If the definition of D1 is clear, then there is no reason why he could not be both. The principal purpose of the wide definition of D1 was to cover anyone who might go onto the CPL after the making of the Cotter Order. At the time that the Cotter Order was made, the appellant was not a person known to the respondents as occupying the CPL. So he was not in that group of named defendants, who were on the CPL at the time. But the respondents could not look into the future. They did not know what the appellant (or any of the other defendants, named or not) was going to do thereafter. But they still needed to protect themselves against anyone, be they named defendants or others, from trespassing on to the CPL and causing nuisance after they had obtained possession.

38. In this way, the respondents needed a 'Persons Unknown' category to protect themselves against trespass and nuisance in the future. Through the definition of D1, the Cotter Order gave them that, and provided the vital means of ensuring that those

who needed to be notified of the injunction were notified appropriately. And when, the following month, the appellant went to the CPL and occupied the tunnel, he was notified of the terms of the injunction (although he knew them anyway) and he fell foursquare within the definition of D1.

39. Mr Wagner said during argument that, in this case "'Persons Unknown' describes activities which will make you a defendant and in breach of the order". I agree with that. It is the prohibited activities in the future which matter for the definition of D1, not whether the respondents happened to know your name at the date of the Cotter Order, and so could name you as a defendant. When the appellant went to the CPL and occupied the tunnel in May 2022, he was undertaking an activity which caused him to be within the D1 definition, and therefore a defendant in breach of the Cotter Order. It matters not that he was separately a named defendant.

40. I accept that the declaration at paragraph 6 of the Cotter Order extends to all defendants, and plainly caught the appellant. It may therefore have been possible for the respondents to include a wider group of defendants - perhaps all the defendants - in the relevant parts of the Cotter Order at paragraphs 3 and 4. But a declaration is a different thing to an injunction and, certainly in a case of this sort, precise targeting is less important. Furthermore, I do not consider that this goes to the narrow argument advanced by Mr Wagner: what matters is whether the relevant part of the Order, which is the definition of Cash's Pit Defendants, includes the appellant *if* the appellant went on to the site in breach of its terms. I believe it clearly did.

41. As with many matters of interpretation, different views are possible. I have seen the judgment of Phillips LJ in draft, and note that he takes a different view on the wording of the Cotter Order. But although I understand why, it does not, with great respect to him, cause me to alter my conclusion.

42. Moreover, I would be troubled about any interpretation which signalled to the respondents that they would have been better off naming *all* the defendants in respect of *all* the prohibitions, so as not to fall foul of this sort of narrow argument, even though they knew that not all the named defendants were on the CPL originally. It would be unfortunate if this court sent a signal that 'kitchen sink' drafting was better than a properly targeted injunction; indeed, such a signal would be contrary to the judgment of this court in *Canada Goose*, noted below.

43. For those reasons, I consider that the judge was right to conclude that the appellant was a Cash's Pit Defendant for the purposes of the Cotter Order. In my view, such a reading is in accordance with *Gammel,* and the cases on 'persons unknown' injunctions.

44. In this context, I should address briefly the decision of this court in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1WLR 2802. Ground 1 of the appeal in that case was concerned with whether there was effective service on "persons unknown". It built upon the Supreme Court decision in *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 and Lord Sumption's observations that service of the originating process "is the act by which the defendant is subjected to the court's jurisdiction" [14], and that "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" [19].

45. The problem in *Canada Goose* was that the injunction was too widely drafted and gave rise to issues of service and proper notification. Hence, at paragraph 82 of the judgment of the court in that case (to which Mr Wagner referred in argument), the obvious point was made that if defendants are known and have been identified, they must be joined as individual defendants to the proceedings, in contrast to "persons unknown". That latter category "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".

46. As that brief summary makes plain, this part of the judgment in *Canada Goose* was concerned with service, and in particular the problem of service on "persons unknown". Service is not in issue here: in accordance with *Canada Goose*, the respondents joined the appellant as a named defendant and served him as such. They served him again when he went to the CPL in May. But *Canada Goose* was not stipulating that, in every case, and regardless of the wording of the order in question, a named defendant could not also be, in particular and clearly defined future circumstances, a "person unknown".

47. I also consider that paragraph 82(1) of the judgment in *Canada Goose*, which refers to the "persons unknown" as including "people who in the future will join the protest and fall within the description of the 'persons unknown'", supports the respondents' case. In respect of the CPL, the appellant "joined the protest" in May and fell within the description of 'persons unknown' in D1.

5.4 Ambiguity

48. Mr Wagner had a fall-back position in respect of Ground 4. He said that, even if he was wrong as to its construction, the Order was ambiguous and, in those circumstances, it could not properly form the basis of findings of contempt of court. He referred to *Cuadrilla* (citation below) in which Leggatt LJ (as he then was) said at [59] that, "in principle, people should not be at risk of being penalised for breach of a court order if they act in a way that 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." Mr Wagner argued that, if it was unclear whether the order related to the appellant, he should not have been found in contempt of court.

49. I accept the proposition that a lack of clarity in the underlying order may impact on the court's ability or willingness to find contempt of court. I also acknowledge that, in view of Phillips LJ's dissenting judgment, it may be said that this is just such a case. However, for two principal reasons, I do not consider that any question of ambiguity arises here.

50. The first reason is because, although I respectfully acknowledge that the argument put forward by Mr Wagner is plausible, it did not sway me from what I consider to be the clear and sensible construction of the Cotter Order. Merely because there is an alternative argument does not make the Cotter Order ambiguous, or trouble me as to the propriety of the finding of contempt of court.

51. Secondly, I consider that the proof of this pudding is in the eating. Leggatt LJ talked about "conduct" because it is obvious that, if it is unclear what conduct is prohibited, a subsequent finding of contempt will or may be unjustified. But this is not a case in which conduct is in issue: the appellant accepts that what he did breached the Cotter

Order. On the appellant's case, what may matter is identity: who was caught by the Cotter Order? But here, the appellant accepts that he understood that the Cotter Order referred to him and "always thought he was bound by it". He did not consider that to be ambiguous at the time he was deliberately occupying the tunnel. He would have acted as he did come what may. Accordingly, I do not consider that the fact that an alternative construction was plausible means that the Order was so ambiguous as to make the finding of contempt unjustified.

52. I should add this. The underlying reality is that, by his presence on the CPL for 46 days, despite the daily warnings and the service of the contempt proceedings, the appellant was *prima facie* procuring and encouraging the breach of the injunction by those to whom it was addressed. That would put him in contempt of court regardless of the narrow construction argument. When this proposition was put to Mr Wagner by the judge at the hearing in July, he said that, because the contempt case had not so far been put in that way, he was not able to deal with it. I am uncomfortable with that, not only because it seems to me self-evident that the appellant was in contempt in those ways, but also because the objection to that alternative way of looking at the contempt potentially rewarded the appellant for taking his original argument about the Cotter Order so late. It is another reason why I consider that any question of doubt about the relationship between the Cotter Order and the appellant should, perhaps unusually in a case of this sort, be resolved in the respondents' favour.

53. In essence, however, I conclude that the appellant was the subject of the injunction; he always knew that he was the subject of the injunction; he deliberately breached the terms of the injunction; and his conduct, however it is categorised, amounted to a contempt of court. In those circumstances, in my view, there is no room for any ambiguity.

54. In my view, therefore, Ground 4 of the appeal must fail.

6. Was The Sanction Excessive (Grounds 2 & 3)?

6.1 The Legal Principles

55. The legal principles as to sanctions in protestor cases were summarised recently in the judgment of this court in *Breen & Ors v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405 at [5]-[17]. It is therefore unnecessary to repeat those paragraphs here: they should be read as if they were part of this judgment. The principles there set out are distilled from what I consider to be the most relevant authorities, namely *Cuadrilla Boland Ltd. & Others v Persons unknown & Others* [2020] EWCA Civ 9: [2020] 4 WLR 29 ("*Cuadrilla")*; *Cuciurean v SoS for Transport & Anr* [2021] EWCA Civ 357 (*"Cuciurean"); Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 ("*Crosland")*; *National Highways Limited v Heyatawin* [2021] EWHC 3078 (KB); [2022] Env.L.R. 17 (*"Heyatawin")*; *National Highways Limited v Buse & Others.* [2021] EWHC 3404 (QB) ("*Buse")* and *National Highways Ltd v Springorum and Others* [2022] EWHC 205 (QB) ("*Springorum*").

56. As to the test which this court should apply, an appeal like this is not a re-hearing but a review: see CPR r.52.21(1). This court will only interfere if it is satisfied that the decision under appeal is "(a) wrong, or (b) unjust because of a serious procedural or other irregularity": r.52.21(3). A decision on sanction involves an exercise of judgment

which is best made by the judge who deals with the case at first instance: see [20] of *Cuciurean*. This approach was also stated in [85] of *Cuadrilla*, which led Leggatt LJ to say that it followed that "there is limited scope for challenging on an appeal a sanction which is imposed for contempt of court as being excessive (or unduly lenient)".

6.2 *Ground 2(a) Legal Submission On Liability Wrongly Treated As an Aggravating Factor.*

57. It is said that the judge erred in treating the argument under Ground 4 - namely the construction argument as to whether or not he was caught by the terms of the Cotter Order - as an aggravating factor. Mr Moloney argues that it was wrong in principle for a defendant to be penalised for running an unsuccessful defence.

58. The answer to this complaint is that the judge did not treat this as an aggravating factor. I have set out at paragraph 22 above those matters which he expressly regarded as aggravating factors, and this was not identified. What the judge might have said during the course of argument in July about what was or may be an aggravating factor is nothing to the point: it is what he said in the sanctions judgment in September that matters. The premise on which Ground 2(a) is based is therefore not made out.

59. I accept that the judge did have regard to this point when considering the question of the appellant's insight: see [151] of the judgment, set out at paragraph 23 above. In my view, what the judge said there was erroneous: the running of an argument on the construction of the Cotter Order on the advice of his lawyers had nothing to do with the appellant's insight (or lack of it). However, it does not appear that the judge's (erroneous) observations in this paragraph was a relevant element in the assessment of the sanction. It did not appear to have been treated as an aggravating factor in any event.

60. For the avoidance of doubt, I reject out of hand Mr Kimblin's submission that in some way the criticisms of the judge in Ground 1, now abandoned, also reflected adversely on the appellant's insight. They are wholly unrelated.

61. However, I cannot leave this part of the case without expressing my disquiet over the way in which the judge suggested that the appellant was "taking a risk" by continuing with the submission that he was not bound by the Cotter Order. Indeed, in his *ex tempore* judgment in July on this point, the judge said:

> "38. I did offer D33 the option to withdraw this application at the close of submissions yesterday and that offer was refused. The effect of that refusal shall be taken into account when sentencing for D33's admitted intentional and deliberate breaches of the injunction."

62. Although, for the reasons I have given, the running of the construction argument does not appear to have had any effect upon the judge's assessment of the appropriate sanction two months later, the judge had no right to offer some sort of 'deal' to the appellant, or to suggest that, if the appellant pursued his argument on liability, he might be penalised for so doing. That was, I regret to say, an unprincipled approach which might have prevented a defendant from ventilating a legitimate defence. It should not have happened.

63. However, as a matter of substance, I consider that there is nothing in Ground 2(a) because there is nothing to show that the running of the construction point was in fact

taken into account in the assessment of the sanction at all, much less as an aggravating factor.

6.3 *Ground 2 (b): Submission Of Further Evidence Not An Aggravating Factor*

64. Mr Moloney argued that the judge wrongly penalised the appellant by reference to his subsequent evidence, at the September hearing, about a private medical issue.

65. In my view, that complaint is unfair, and based on a misreading of the judge's judgment, when set in its proper context. The point that the judge was making was that the appellant did not engage with the courts once the committal proceedings had been served. He stayed in the tunnel. He did not attend or arrange representation at the pre-trial review. As a result he did not raise in advance any particular issues to be addressed at the trial itself. He did not serve any evidence.

66. It was only from late June/early July onwards that the appellant engaged in the process. As a result, he was not properly ready for the hearing later in July. The expert evidence, which went amongst other things to the private medical issue, was not ready for that hearing. The appellant was therefore obliged to seek an adjournment of the sanctions hearing. That is why the matter had to be put off until September. It was that aspect of the history which the judge regarded as an aggravating factor.

67. In my view, the judge was entitled to reach that conclusion. The appellant had ignored the committal proceedings until too late to allow a complete resolution of the issues at the hearing in July. That was the reason why the sanctions hearing had to be adjourned until September. In my view, the courts have, throughout, gone out of their way to accommodate the appellant, and the judge was entitled to regard it as an aggravating factor that the same could not be said the other way round. As noted in *Breen v Esso* at [62], the heart of a committal application is the defendant's flouting of court orders. Repeated failures to comply with court directions, will – in an appropriate case – be rightly regarded as an aggravating factor, as they were in *Breen v Esso*.

68. There is therefore nothing in Ground 2(b).

6.4 Ground 3(a) No Application Of The 'Cuadrilla' Discount

69. Mr Moloney argued by reference to the decision in *Cuadrilla* that the judge should have granted a discount to the sanction which would otherwise have been imposed. That entitlement was said to arise out of the fact that the court was dealing with a conscientious objector. In particular, Mr Moloney said that the judge was wrong to conclude that, in a case where he had concluded that dialogue was not possible, no discount was applicable. He did not suggest that the judge was wrong to conclude that, in this case, dialogue was not possible. His narrow submission was that, even in such a case, some (albeit limited) discount was still appropriate.

70. In response, Mr Kimblin argued that the judge plainly did take *Cuadrilla* into account but identified a number of matters (in particular the absence of a dialogue with the appellant and the presence of a monologue) which meant that the applicability of a *Cuadrilla* discount in this case had not been made out.

71. As Lord Justice Edis pointed out during the course of argument, it is rather misleading to talk about a *Cuadrilla* discount at all. It is not as if there is some sort of guideline sanction from which a reduction, to a greater or lesser extent, then needs to be made to reflect the decision in *Cuadrilla*. What matters is that the judge reaches a proportionate sanction in all the circumstances of the case, including the culpability of the contemnor. I respectfully agree with that.

72. Accordingly, the position is rather more nuanced than Mr Moloney suggested. Moreover, *Cuadrilla* is itself based on what Lord Hoffmann said in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, at [89]:

> "But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protestors 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 protestors into account".

73. So it follows that if, for example, the court concluded that a defendant had not behaved with a sense of proportion, or had caused excessive harm, or had not accepted the penalties imposed, his or her culpability would be much higher and there would be little or no basis to expect corresponding restraint from the courts.

74. In addition, in a case of a serial contemnor such as the appellant, where the court has concluded that dialogue is no longer possible, the fact that the underlying protest was non-violent and a matter of conscience may be of no or negligible weight in the balancing exercise. That is because the whole thrust of *Cuadrilla*, and the subsequent cases, is about the importance of dialogue. As Dame Victoria Sharp, President of the Kings Bench Division, noted in *Heyatawin* at [53]:

> "53. In some contempt cases, there may be scope for the court to temper the sanction imposed because there is a realistic prospect that this will deter further law-breaking or, to put it another way, encourage contemnors to engage in the dialogue described in *Cuadrilla* with a view to mending their ways or purging their contempt. However, it is always necessary to consider whether there is such a prospect on the facts of the case. In some cases, there will be. In some cases, not. Moreover, it is important to add, that "there is no principle which justifies treating the conscientious motives of the protestor as a licence to flout court orders with impunity": *Attorney General v Crosland* [2021] UKSC 15, at [47]."

75. It is clear that, in the present case, the judge did take *Cuadrilla* into account: see for example [154]. It is also clear that he did not give it very much weight because of the absence of dialogue: see [155]. I consider that he was quite entitled to reach that conclusion. The mitigating factors available to the appellant were limited. His serial contempt of court meant that he was emphatically not the sort of defendant which the court had in mind in *Cuadrilla.* A protestor, no matter how conscientious he or she believes themselves to be, cannot keep ignoring the court's orders, and then expect some sort of discount in the sanction to be applied every time they are dealt with for

contempt. That would be contrary to principle and the two-way nature of the process emphasised by Lord Hoffmann in *Jones*.

76. I therefore reject Ground 3(a).

6.5 Ground 3(b) Requiring Detailed Views From The Appellant

77. The next complaint is that the judge erred in asking the appellant, during the course of argument, to provide details of an alternative to HS2. The lack of a coherent answer was then reflected in the judgment at [153]. The appellant's complaint is that there is no authority for the proposition that a defendant must give a detailed account of his beliefs in order to qualify for mitigation. Mr Moloney fairly accepted that this was "a small point".

78. The full passage of the judgment to which this point goes reads as follows:

> "[152] **Mitigation:** In mitigation you assert that you are a conscientious protester. You assert that you have been a conscientious campaigner for 3 years. You assert that by delaying the HS2 project you are seeking to avert an "environmental catastrophe". You assert you are concerned about the carbon foot print of the use of heavy
> machinery and the destruction of ancient woodland and habitats. You have not been able to explain how your tunnelling and obstruction makes any such contribution to avoiding an environmental catastrophe save for the mere assertion. You assert that the HS2 project is a 'scam'.
>
> [153] You asserted in your witness statement that a new project should instead be built. You called it a *"transport network that has sufficient interconnectivity to present a real alternative to travelling by car"*. It is wholly unclear to me how that would be built nationwide without heavy machinery, a lot of it, which would give off fumes."

79. Again, I consider the criticism of these passages to be unfair. There are two reasons for that. First, as already noted, one of the distinguishing features of a protester case may be the extent to which dialogue with the contemnor is possible. The judge cannot be criticised for endeavouring to initiate that dialogue with the appellant. The legitimacy of a protestor's claim that he or she was driven solely by conscience is undermined if the court concludes that their protests are quixotic or hopelessly impractical, and merely adding to the considerable cost of the project which they are disrupting.

80. Secondly, it does not seem to me that these paragraphs had any real significance in the judge's assessment of any sanction, save perhaps to add further weight to the conclusion that the so-called *Cuadrilla* discount was of very limited application in this case.

81. I pause here to note that, instead of asking the appellant about alternatives to HS2, the judge might have been better off simply noting that HS2 is being built after many years of public and Parliamentary scrutiny. It was Parliament which concluded that HS2 was the best solution, a decision confirmed by a review of the Scheme after the 2019 General Election: see *Packham v SoS For Transport and Others* [2020] EWHC 829 (Admin), subsequently upheld by the Court of Appeal.

82. I therefore reject Ground 3(b).

6.6 Ground 3(d): Discount for Plea

83. Just as Mr Moloney did, I take Ground 3(d) next. That is a complaint that there was insufficient credit for the equivalent of the appellant's guilty plea. I reject that submission for two reasons.

84. First, it might be said that, on the facts, there should be no or no significant discount for the equivalent of a guilty plea, given that the argument that the Cotter Order did not apply to the appellant (and that therefore there was no contempt of court) has continued right up to this judgment. In a criminal case, if a defendant admits the facts of the offence but says that their admission is subject to the resolution of an overarching issue (whether following legal argument or a Newton Hearing) which may provide a complete defence, they will usually plead not guilty. The discount for plea does not start to run until that matter has been resolved against the defendant and a guilty plea entered. Here, the argument that the appellant was not in contempt of court at all has been run right up to the Court of Appeal. There has therefore been no equivalent of a guilty plea.

85. Secondly, to the extent that any credit is due, it would be modest. The appellant did not leave the CPL when he was served with the committal proceedings. He did not participate in the legal process until the last moment, failing to comply with the earlier directions of the court. Even if one ignores the qualified nature of any plea, it was effectively made just before the hearing. In a criminal case, that would not entitle a defendant to more than about 10% discount. Here, given the qualified nature of the plea, the appropriate reduction would have been even less.

86. For those reason, I do not consider that there is anything in Ground 3(d).

6.7 Ground 3(c) 20% Discount for Mitigation

87. As noted above, the judge identified a 20% discount for all matters of mitigation. The complaint is that the 20% was not broken down.

88. I reject that criticism. In a criminal case, a judge must identify the discount for a guilty plea, because there are strict guidelines relating to the precise discount available in any given circumstance. That does not apply here. Aside from that, a judge sentencing in the Crown Court will usually take all other mitigating factors into account in one composite discount. In a contempt case, the judge is quite entitled to take an overall percentage to reflect the mitigating factors.

89. I should also make it quite clear that, in my view, the judge's 20% discount in this case was generous. There was, given the appellant's history, little that could be said by way of mitigation.

90. I therefore reject Ground 3(c).

6.8 Summary On Grounds 2 &3

91. For the reasons set out above, I consider that there is nothing in Grounds 2 or 3. They are either wrong in principle or not applicable on the facts of this case. They do not meet the applicable test on appeal noted at paragraph 56 above.

7. The Overall Sanction

92. The overall sanction in this case was a custodial term of 268 days and a fine of £3,000.

93. It was not appropriate to fine the appellant on the particular facts of this case. He has no assets, and was the subject of a term of immediate custody. The reasons why a fine is usually inappropriate for an impoverished protestor serving a term of imprisonment are explained in *Breen v Esso* at [83]-[88]. The fine must therefore be quashed.

94. As to the methodology by which the judge calculated the overall term, I do not consider it appropriate for the reasons set out in *Breen v Esso* at [47]-[49]. In the light of that, and my acknowledgement above of the fact that the judge made some comments which were erroneous and/or irrelevant, it is appropriate for this court to review the overall sanction and to consider whether the period of 268 days was excessive or unreasonable.

95. In my view, the period of 268 days imprisonment (the equivalent of just under 9 months) was not excessive or unreasonable. The judge found that the appellant's culpability was high and that the harm that he had caused was wide-ranging. As I have said, there is no appeal against those findings and, in my judgment, they were rightly made. In addition, for the reasons I have already explained, there were a range of aggravating factors, including the appellant's previous history of offending, and the fact that there were earlier suspended sentences, whilst there was little in the way of mitigation.

96. The term was also consistent with the sanction imposed in recent cases. Depending on the circumstances of the case, a first time contemnor may receive immediate prison sentences of between 3 to 6 months: see *Heyatawin* and *Breen*. The appellant in this case was a serial contemnor with suspended sentences imposed in the past. He must therefore have expected a significantly longer custodial term than in those cases.

97. For those reasons, I consider that the appellant can have no complaints about the term imposed by the judge. It was in no way excessive or unreasonable. Save for quashing the fine of £3,000, I would dismiss this appeal.

LORD JUSTICE PHILLIPS:

98. I agree with Coulson LJ, for the reasons he gives, that the Judge was wrong not to entertain the legal argument that the appellant was not caught by the terms of the injunction granted by the Cotter Order. I take a different view, however, as to the merits of that argument. For my part, I would allow the appeal on ground 4.

99. The Cotter Order is expressly addressed to the appellant, naming him as D33. Paragraph 6 grants relief against him (in common with all defendants) in the form of a declaration, including that, in the event that he enters the CPL, the respondents are entitled to possession as against him. The Cotter Order does not list him as one of the named defendants against whom an injunction is granted, first and foremost, against entering the CPL.

100. Contrary to the Judge's alternative finding (having refused to entertain the objection), I see no basis for interpreting the Cotter Order so that, upon entering the CPL, the appellant became not only D33 but also a "person unknown" within the rubric describing D1 for the following reasons:

i) It is plain that D33 is not only a "known" person for the purposes of the proceedings and the Order, but is "known" as a person who may subsequently enter the CPL, as expressly referenced (and for which relief is granted) in paragraph 6 of the Order. In those circumstances, I cannot see how D33 could fall within the definition of person unknown within the rubric of D1. Interpreting D1 as including the appellant would be directly contrary to the authoritative guidance provided by this Court in the *Canada Goose* case at [82] that "If they are known and have been identified, they must be joined as individual defendants in the proceedings". There is a clear and principled distinction between unknown persons and those who are known about, a distinction which rules out, quite clearly in my judgment, interpreting D1 as including a known defendant such as D33. While the distinction may be most important in relation to questions of service, the fact that service does not in the event prove to be an issue does not remove the distinction which must be made (and understood to have been made) at the time an injunction is granted.

ii) The Order fully anticipates that the appellant (as D33) may subsequently enter the CPL, and grants declaratory relief in that regard, but not injunctive relief. In those circumstances, it would be bizarre, and in my judgment impermissible, to find that an injunction was not applied for or granted in respect of anticipated conduct by a known defendant, but came into effect by the back-door through the rubric defining D1. Orders should not, in my judgment, be interpreted in that way.

101. I appreciate that, as the appellant believed that he was bound by the injunction at the time it was made and served, the above analysis would exculpate him on a technical and (in the broadest sense) unmeritorious basis. However, such arguments are properly open to any defendant and require close attention, particularly in the context of applications to commit for contempt. The Judge was quite wrong not to entertain the argument and it is concerning that he indicated that it would be held against the appellant if the point was pursued. If the appellant was not, as I would find, subject to the injunction by virtue of a technical flaw in the drafting of the Order, it would be quite wrong to commit him nonetheless. The proper course might have been to apply to commit him on the basis that, whilst on notice of the Order, he assisted or procured its breach by those injuncted, but I make no comment on whether such an application would have been (or would in future be) justified or successful.

102. If the appellant's liability for contempt is upheld notwithstanding my views, I am in full agreement with Coulson LJ as to the proper disposal of the issues arising in relation to the appropriate sanction to be imposed.

LORD JUSTICE EDIS:

103. I agree with the judgment of Coulson LJ. I would make the order he proposes for the reasons he gives. I add only two observations about sentencing in these cases.

104. First, I would respectfully endorse these observations made by Coulson LJ in *Breen and others v. Esso Petroleum Company Limited* [2022] EWCA Civ 1405 at paragraph 8.

> "In accordance with general principles, any sanction for civil contempt must be just and proportionate. It must not be excessive. But in civil contempt cases, the purposes of sanctions are rather different from those in criminal cases. Whilst they include punishment and rehabilitation, an important aspect of the harm is the breach of the court's order: see [17] of *Cuciurean.* An important objective of the sanction is to ensure future compliance with the order in question: see *Willoughby v Solihull Metropolitan Borough Council* [2013] EWCA Civ 699 at [20]."

105. I would suggest that in civil contempts, as opposed to criminal contempts, punishment is probably a less significant aim of an order than securing compliance with the orders of the court. The distinction was examined by Lord Toulson in *R v. O'Brien* [2014] UKSC 23; [2014] AC 1246 at [42]:-

> "The question whether a contempt is a criminal contempt does not depend on the nature of the *court* to which the contempt was displayed; it depends on nature of the *conduct*. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. "Civil contempt" is not confined to contempt of a civil court. It simply denotes a contempt which is not itself a crime."

106. Although some of the authorities refer to rehabilitation as a purpose of committal orders in cases involving breaches of orders it is not necessarily true that short orders of imprisonment such as are frequently found in such cases have any rehabilitative effect. They are amply justified where they are required in order to secure compliance with an order of the court even though they may not tend to promote rehabilitation. The court will always seek to impose the least onerous order it can, while at the same time securing compliance with its order. Where that requires immediate committal to prison that will be the result even though the effect is likely to be seriously adverse to the contemnor and not conducive to rehabilitation.

107. The civil court cannot impose community orders which are designed to promote rehabilitation. In some of the statutory schemes for civil injunctions there are powers to impose positive requirements, but in practice there is often no infrastructure to enable these orders to be made. Usually, the choice of sanction is limited to fines, costs orders and suspended or immediate committal orders.

108. The statutory purposes of sentencing established by section 57 of the Sentencing Act 2020 do not apply in the contempt jurisdiction.

109. The second observation I would make concerns the use of a fine in conjunction with a sentence of imprisonment. I agree with Coulson LJ that the fine in this case was wrong because the appellant does not have the means to pay it and enforcement attempts will be a further drain on public resources. However, I consider that there will be cases where a fine and a committal to prison may well be appropriate.

110. It is clear that no prison term should be imposed where the court concludes that a fine constitutes a sufficient sanction. The question arises where a court decides that the custody threshold is met and further decides that compliance with the order would be more effectively secured if a fine were also imposed on a person with the means to pay it.

111. *Arlidge Eady & Smith On Contempt* 5th Edition at [14-118] says:-

> "It has long been established that the courts may impose fines for criminal contempt, either with or without sentences of imprisonment."

In this respect there is no reason why the powers of the court should differ as between criminal and civil contempt. It may well be that orders for a committal to prison and a fine are rare and confined to cases of people with very substantial assets who show themselves to be prepared to lose their liberty but may be more concerned about those assets. In appropriate cases I would say that they should be available.

Neutral Citation Number: [2023] EWHC 1837 (KB)

Case No: QB-2022-001098

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2023

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

(1) ESSO PETROLEUM COMPANY, LIMITED	**Claimant**
(2) EXXONMOBIL CHEMICAL LIMITED	
- and –	
(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT) UPON ANY OF THE FOLLOWING SITES ("THE SITES")	**Defendants**

(A) THE OIL REFINERY AND JETTY AT THE PETROCHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED RED AND GREEN BUT EXCLUDING THOSE AREAS EDGED BLUE ON THE ATTACHED 'FAWLEY PLAN')
(B) HYTHE OIL TERMINAL, NEW ROAD, HARDLEY SO45 3NR (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HYTHE PLAN')
(C) AVONMOUTH OIL TERMINAL, ST ANDREWS ROAD, BRISTOL BS11 9BN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'AVONMOUTH PLAN')
(D) BIRMINGHAM OIL TERMINAL, WOOD LANE, BIRMINGHAM B24 8DN (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'BIRMINGHAM PLAN')
(E) PURFLEET OIL TERMINAL, LONDON ROAD, PURFLEET, ESSEX RM19 1RS (AS SHOWN FOR IDENTIFICATION EDGED RED AND BROWN ON THE ATTACHED 'PURFLEET PLAN')

(F) WEST LONDON OIL TERMINAL, BEDFONT ROAD, STANWELL, MIDDLESEX TW19 7LZ (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'WEST LONDON PLAN')
(G) HARTLAND PARK LOGISTICS HUB, IVELY ROAD, FARNBOROUGH (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'HARTLAND PARK PLAN')
(H) ALTON COMPOUND, PUMPING STATION, A31, HOLLYBOURNE (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED 'ALTON COMPOUND PLAN')

(2) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER OR REMAIN (WITHOUT THE CONSENT OF THE FIRST CLAIMANT OR THE SECOND CLAIMANT) UPON THE CHEMICAL PLANT, MARSH LANE, SOUTHAMPTON SO45 1TH (AS SHOWN FOR IDENTIFICATION EDGED PURPLE ON THE ATTACHED 'FAWLEY PLAN')
(3) PERSONS UNKNOWN WHO, IN CONNECTION WITH THE 'EXTINCTION REBELLION' CAMPAIGN OR THE 'JUST STOP OIL' CAMPAIGN, ENTER ONTO ANY OF THE CLAIMANTS' PROPERTY AND OBSTRUCT ANY OF THE VEHICULAR ENTRANCES OR EXITS TO ANY OF THE SITES (WHERE "SITES" FOR THIS PURPOSE DOES NOT INCLUDE THE AREA EDGED BROWN ON THE PURFLEET PLAN)
(4) PAUL BARNES
(5) DIANA HEKT

- -
- -

Timothy Morshead KC and **Yaaser Vanderman** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
No appearance or representation by the **Defendants**

Hearing date: 10 July 2023
- -

Approved Judgment

This judgment was handed down remotely at 2pm on 18 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

Mr Justice Linden :

Introduction

1. This was the trial of the Claimants' claim for an injunction to restrain certain forms of trespass by Extinction Rebellion and Just Stop Oil protesters at specified sites around the country ("the Sites").

Procedural matters

2. An interim injunction was first granted in these proceedings by Ellenbogen J at a without notice hearing on 6 April 2022, and that injunction was extended by Bennathan J on the return date, which was 27 April 2022. That hearing was not attended by any of the Defendants, and they were not represented, but Counsel instructed by a person involved in the environmental movement attended and made submissions to the court with a particular focus on whether the Claimants had sufficient proprietary interests in the Sites which they sought to protect, to be entitled to bring a claim in trespass.

3. The injunction was then extended again by Collins Rice J at a hearing on 27 March 2023. However, she was unwilling to do so on an interim basis for a period of a year, as proposed by the Claimants, and she therefore gave directions for trial. Again, there was no attendance or representation on the Defendants' side. But four individuals who had been identified as actual or potential Defendants gave assurances that they did not intend to act inconsistently with the terms of the injunction. On that basis Collins Rice J directed that they were not subject to its terms.

4. Similarly, no Defendants attended the trial before me or were represented or submitted evidence. However, the Fourth and Fifth Defendants gave undertakings which were satisfactory to the Claimants, and these will be embodied in an Order which applies to their cases.

5. In the course of Mr Morshead KC's submissions, however, it became apparent that a person in the public gallery wished to address the court. She told me she was Ms Sarah Pemberton, that she was qualified as a barrister (though not practising) and that she was informally representing her friend, Mr Martin Marston-Paterson, because he would not have been able to attend the hearing until the afternoon. I allowed her to address the court and she drew to my attention the fact that there had been correspondence between Bindmans LLP, who were acting for Mr Marston-Paterson, and Eversheds Sutherland (International) LLP who were instructed by the Claimants. Bindmans had proposed that the hearing be adjourned pending the decision of the Supreme Court in the appeal from the decision in *London Borough of Barking & Dagenham & Others v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295 (now *Wolverhampton City Council & Others v London Gypsies and Travellers & Others* UKSC 2022/0046).

6. Ms Pemberton stressed that she was not making an application to adjourn the trial but she pointed out that if the Supreme Court were to overturn the decision of the Court of Appeal in the *Barking & Dagenham* case, any final injunction which I granted would likely be unlawful. She also told me that submissions had been made to the Supreme Court to the effect that the risk of an adverse order for costs was having a chilling effect on climate change protesters who might otherwise have contested this type of application for injunctive relief. She said that provision for a review of any injunction which I granted

would not adequately safeguard the position of the Defendants given that I would have made findings of fact which it would be problematic to reopen in circumstances in which, at least possibly, Defendants had been prevented from putting in evidence by the risk of an order for costs.

7. The correspondence was handed up to me by Mr Morshead. This showed that the matter had been raised by Bindmans on 30 June 2023. In a phone call and an email dated 3 July, Eversheds Sutherland said that their clients would be unwilling to consent to an adjournment, pointing out that Collins Rice J had directed that the trial take place. No threat of an application for costs in the event of an adjournment was made. On 7 July, Bindmans confirmed that they were not instructed to apply to adjourn or to intervene in the matter.

8. I decided not to adjourn the trial. It had been listed, by Order of Collins Rice J, since 5 May 2023. There had expressly not been any application to adjourn. Nor had I been shown any evidence that submissions or evidence would have been put before the court by any Defendant or interested party were it not for the fear of an adverse costs order, still less given an indication of what those submissions or that evidence might be. The appropriate course was, in my view, to decide the Claim on the law as it currently stands but to make provision in any Order for a review shortly after the judgment of the Supreme Court is handed down. This, in my judgment, fairly addressed any risk of injustice caused by proceeding with the trial.

9. As far as service and notice of the trial are concerned, I had regard to section 12(2) of the Human Rights Act 1998 which, so far as is relevant for present purposes, provides that in cases where the court is considering whether to grant any relief which might affect the exercise by the respondent of the right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR"), and the respondent is not present or represented, such relief must be refused unless the court is satisfied *"(a) that the applicant has taken all practicable steps to notify the respondent"*. Each of the judges who has dealt with this matter has considered this question and, in the case of Bennathan J and Collins Rice J, whether the alternative directions for service in the preceding order had been complied with. Each has been satisfied that they had been and that, accordingly, all practicable steps had been taken for the purposes of section 12(2)(a).

10. As far as the trial is concerned, Collins Rice J directed that service of her Order and any further documents would be effected on the First to Third Defendants by fixing copies in clear transparent containers at a minimum of 2 locations on the perimeter of each of the Sites, together with notices which stated that they could be obtained from the Claimants' solicitors and viewed at a specified company website. Service was also to be effected by posting the documents on that company website and by sending an email to specified email addresses for Extinction Rebellion and Just Stop Oil, notifying them of the availability of the documents on that website.

11. Mr Nawaz Allybokus, who is one of the solicitors acting for the Claimants in these proceedings, gave evidence, in his 6th witness statement dated 24 May 2023, that the Order of Collins Rice J and the Notice of Trial were served in accordance with the directions of the Court on 12 May 2023. In his 8th witness statement, dated 4 July 2023, he gives evidence that the directions as to service of the evidence relied on by the Claimants for

the purposes of the trial were complied with in the third week in June 2023 and therefore in good time before the trial.

12. I was therefore satisfied that sufficient notice of the hearing had been given to the Defendants. They had also been provided with access to the materials on which the Claimants rely, and all practical steps had been taken to notify them for the purposes of section 12(2)(a) of the 1998 Act. I decided to proceed notwithstanding the absence of any Defendant but, bearing this in mind, to probe the Claimants' case appropriately.

13. Mr Morshead answered questions from the court about the identity of the parties and the scope of the relief which he was seeking. He had put in a skeleton argument dated 4 July 2023, and he developed some of the points in that document orally. At the invitation of the court there was a particular focus on the question whether it was appropriate to impose a final injunction in the light of the evidence about the risk of acts of trespass by protesters at the sites in question and the likelihood of harm as a result in the event that the injunction was refused.

14. I also gave Ms Pemberton an opportunity to make any points in reply which she wished to make. She did not specifically challenge what Mr Morshead had submitted about the risk of trespass in the future, or the potential risks if this were to happen, but she drew attention to the distinction between the official positions of Extinction Rebellion and Just Stop Oil in relation to direct action, the former having said in January 2023 that it was stepping back from direct action. She also emphasised the risk that a lack of clarity in any Order which I might make could have a chilling effect on the rights to freedom of expression and association. I have taken these points into account in coming to my decision.

15. Ms Pemberton also raised a concern that Mr Marston-Paterson had not received the full trial bundle. She told me that she had checked and had received a message from him during the hearing which confirmed this point. Whereas Mr Morshead was referring to a 708-page bundle, the bundle which had been forwarded to Mr Marston-Paterson by Extinction Rebellion by email dated 16 June 2023 ran to 413 pages. Mr Morshead said, in response, that his instructions were that the full bundle had been sent to Extinction Rebellion. At her request, I gave permission for Mr Marston-Paterson to put in evidence on this matter if he wished, and permission to the Claimants to reply within 24 hours.

16. I then reserved judgment and extended the interim injunction pending the handing down of my decision.

17. On the day after the trial, I received statements made by Ms Pemberton and Mr Allybokus, both dated 11 July 2023. Her statement covered new matters, reprised what had happened at the trial and provided more detail on points which she made to me. No doubt inadvertently, some aspects of her account of what happened at the trial were not accurate but, in any event, I was not prepared to admit further evidence other than in relation to the question of service of the trial bundles. Ms Pemberton had an opportunity to put in any evidence on which she wished to rely before the trial and, other than the extent which I had indicated, it was not in the interests of justice for her to be permitted to do so after it had concluded.

18. There was then a 10th witness statement submitted by Mr Allybokus on 12 July 2023 but, with respect to him, this did not add anything material.

19. The evidence shows that Mr Allybokus sent the correct trial bundles to the three email addresses identified in the Order of Collins Rice J on 16 June 2023. They were enclosed via Mimecast. The email said that copies of the trial bundles would be uploaded shortly onto the company website. Ms Pemberton says in her statement that she manages the relevant email address for Extinction Rebellion and therefore read Mr Allybokus' email on 16 June 2023. She did not access the documents via Mimecast for reasons which she does not explain in her statement. Instead, she went on the company website and downloaded the bundles from there on 16 and 18 June. The final versions had not yet been uploaded at this point: that took place on 20 June 2023.

20. I do not consider that this issue means that the trial was unfair and Ms Pemberton does not suggest that it does. The concern which she raised with me about Mr Marston-Paterson not having the full bundle, and him messaging her during the trial to confirm this, is not referred to in her statement. What she says is that she read the trial bundles which she had downloaded and that the purpose of her attendance at the hearing was to observe and take a note. She does not suggest that she is a party. She then became concerned because her version of volume 2 to the trial bundle did not contain documents to which Mr Morshead referred in his oral submissions.

21. From the section of volume 2 of the trial bundle which Ms Pemberton says she did not see, Mr Morshead referred me to the undertakings which were given by the Fourth and Fifth Defendants and two press reports in which Just Stop Oil made statements about their intention to carry on protesting until they achieved their objectives. The material parts of these statements were read out by him in open court and they are referred to by me below. This point was also covered in the witness statements, and the press statements were two examples amongst many. I have not taken any other document in volume 2 into account in coming to my conclusion. Nothing in Ms Pemberton's statement therefore causes me to think that it would be in accordance with the overriding objective for me to revisit my decision to proceed with the trial.

Factual background

22. The detail of the factual background is set out in the witness statements relied on by the Claimants for the purposes of the trial, in particular the witness statements of Mr Anthony Milne (Global Security Adviser at the First Claimant) dated 3 April 2022; Mr Stuart Wortley (Partner at Eversheds Sutherland) dated 4 April 2022; Mr Allybokus dated 22 April 2022, 20 March 2023 and 13 June 2023; and Mr Martin Pullman (European Midstream Manager at the First Claimant) dated 27 February and 6 June 2023. The facts which led to the interim injunctions are also helpfully summarised by Ellenbogen J in her judgment of 6 April 2022, neutral citation number [2022] EWHC 966 (QB) and therefore need not be rehearsed by me in detail.

23. In outline, the Claimants are well known oil, petroleum and petrochemical companies. The injunction which they seek would restrain certain forms of trespass on their sites at the Fawley Petrochemical Complex in Southampton, the Hythe Terminal in Hardley, the Avonmouth Terminal near Bristol, the Birmingham Terminal, the Purfleet Terminal, the

West London Terminal, the Hartland Park Logistics Hub near Farnborough and the Alton compound at Holybourne.

24. Ellenbogen J carefully considered whether the Claimants had a sufficient proprietary rights in each of these sites to bring a claim in trespass and concluded that they did: see [21] of her judgment. At [6]-[8] she found that the Fawley Petrochemical Complex comprises an oil refinery, a chemical plant, and a jetty. The First Claimant is the freehold owner of the refinery and the chemical plant, and the registered lessee of the jetty. The Second Claimant is the lessee of the chemical plant. This is the explanation for a separate category of persons unknown: the Second Defendant in the proceedings.

25. Fawley is the largest oil refinery in the United Kingdom. It provides twenty per cent of the country's refinery capacity and is classed as Tier 1 Critical National Infrastructure. The chemical plant has an annual capacity of 800,000 tonnes, is highly integrated with the operations of the refinery, and produces key components for a large number of finished products here and elsewhere in Europe.

26. Ellenbogen J found that the First Claimant is also the freehold owner of the oil terminals at Hythe (primarily serving the South and West of England); that part of Birmingham which is material to the application (primarily serving the Midlands); Purfleet (primarily serving London and the South East of England); and West London (serving a range of customers in Southern and Central England and supplying aviation fuel to Heathrow Airport). It is also the registered lessee of the Avonmouth Terminal (primarily serving the South West of England). Title to the Purfleet jetty is unregistered, although the First Claimant has occupied the jetty for approximately 100 years. These Terminals are large and they play an important role in supplying the national economy.

27. The First Claimant has an unregistered leasehold interest in Hartland Park which is a temporary logistics hub comprising project offices, welfare facilities and car parking for staff and contractors, together with storage for construction plant materials, machinery and equipment in connection with the construction of a replacement fuel pipeline between the Fawley Petrochemical Complex and the West London oil terminal. It is also the freehold owner of the Alton compound, comprising a pumping station and another compound at Holybourne used in connection with the replacement fuel pipe line.

28. Submissions on this subject were addressed to Bennathan J on 27 April 2022 by Counsel for the interested person but he rejected them: see his judgment at [2022] EWHC 1477 (QB) [27]. He said that he was fully satisfied that the Claimants had the necessary proprietary interests. No evidence has been put before me to question the decisions of Ellenbogen and Bennathan JJ on this point and I therefore accept and adopt their findings.

29. Extinction Rebellion and Just Stop Oil are well known campaigns on the issue of climate change. The latter is focussed on the fossil fuel sector, and the former on climate change more generally.

30. The evidence before Ellenbogen and Bennathan JJ was that Just Stop Oil and Extinction Rebellion were organising action against the fossil fuel industry in March and April 2022. The intention was that groups or teams would block or disrupt oil networks including refineries, storage units and adjacent roads. Individuals were also being encouraged to sign up to direct action which would lead to their arrest.

31. Ellenbogen J summarised the evidence before her that, between 1 and 4 April 2022, four of the Sites - West London, Hythe, Purfleet and Birmingham - were subject to direct action as part the wider campaign which was disrupting various oil terminals in the United Kingdom. The evidence was that both Extinction Rebellion and Just Stop Oil were claiming involvement in that action on social media and through logos and banners which were displayed during some of the incidents.

32. On 1st April 2022, the operations of each of these four sites had been disrupted. At Birmingham approximately 20 people blocked the entrance in the small hours of the morning, preventing the collection of fuel from the site. A tanker was stopped at the entrance and two individuals climbed onto it. Others sat in front of it. One person glued himself to the path outside the Terminal. Police attended and around six arrests were made. The protest was dispersed and the site reopened at 5.30 p.m. that day.

33. At around the same time, approximately 24 people blocked the entrance to the West London Terminal by attaching barrels to the gates to the entrance used by vehicles so as to weigh them down and prevent them from lifting. Tripods were also erected immediately outside the access gate so as to block access. At approximately 6.45 a.m., four people cut a hole in the access fence and scaled one of the fuel storage tanks. The First Claimant was obliged to initiate its emergency site procedures, including the temporary shutdown of the pumping of aviation and ground fuels from Fawley to the West London Terminal. The four, and approximately eight others, were arrested a few hours later. As a result, by around 3:00 p.m., those responsible for the direct action had left the site and it was reopened.

34. At around 5:00 a.m. on the same day, seven people blocked the access to the Hythe Terminal, using the Extinction Rebellion “pink boat” and preventing access to the site. The police attended, the boat was removed at around 11.45 a.m. and the protesters were moved away. The site reopened an hour later.

35. Also on 1 April 2022, at around 6:30 a.m., 20 people blocked the access road to the Purfleet Terminal. Six people climbed onto a lorry which was delivering additives to the site. The police attended. By 3:00 p.m., some individuals remained on the lorry, but others in attendance had been arrested, or had dispersed. The site opened to customers at approximately 5:00 p.m.

36. On 2 April 2022, at around 09:45 a.m., approximately 20 people blocked access to and from the Purfleet Terminal. Some locked themselves to the access gates, and others sat in the access road. The police made a number of arrests and removed the protestors. The site opened to customers at approximately 5:30 p.m. There were other protests at other terminals across the country, albeit not terminals owned by the First Claimant and it was reported in the Press that around 80 arrests had been made.

37. At around 5:00 a.m., on 3 April 2022, approximately 20 protestors blocked access to the Birmingham Terminal by sitting in the road. Some also climbed on to a Sainsbury's fuel tanker. One protestor cut through the security fence around the Terminal, scaled one of the fuel storage tanks and displayed a Just Stop Oil banner. The First Claimant therefore initiated its emergency site procedures, including the temporary shutdown of the pumping

of ground fuel from Fawley to the Terminal. The police attended and made a number of arrests. The site was reopened to customers at around 4:00 p.m.

38. At around 4.30 a.m. on 4 April 2022, approximately 20 protestors arrived at the West London Terminal and used a structure to obstruct access to and egress from the Site. That evening, a number of individuals were arrested whilst they were on their way to the Purfleet site.

39. At [14] Ellenbogen J also noted a number of earlier incidents, going back to August 2020, which she accepted were evidence of the risk of the disruption continuing. These incidents were similar in nature to the incidents at the beginning of April 2022, although they varied in seriousness. At least four of the incidents had included displaying Extinction Rebellion banners or other insignia, and Extinction Rebellion had also associated itself with a number of these activities in the Press and on social media. In an incident in October 2021 protesters had broken into the Fawley Petrochemical Complex using bolt cutters and had climbed to the top of two storage tanks. In December 2021 they had used the same method to break into the site at Alton and had caused extensive damage to buildings, plant, and equipment there.

40. According to the evidence of Mr Allybokus there were further incidents around the time of the Order made by Ellenbogen J which included the following:

    a. On 6 April 2022, a group blocked a roundabout on the main route from the M25 to the Purfleet Terminal by jumping onto a tanker and gluing themselves onto the road. Another group blocked a roundabout on the main route to the West London Terminal by jumping onto lorries.

    b. On 8 April 2022, around 30 individuals blocked a main route from the M25 to the Purfleet Terminal.

    c. On 13 April 2022, a group blocked an access road near the Purfleet Terminal, and 3 people climbed on top of a tanker.

41. Mr Wortley also gives evidence of more than 500 arrests in March/April 2022 at the Kingsbury Terminal operated by Valero Energy Limited in Staffordshire, and of injunctions being granted in that case.

42. However, the evidence is that the interim injunctions which were granted in the present case have been complied with.

43. In relation to the risk of trespass should the claim for a final injunction be refused, Mr Morshead also relied on the evidence of Mr Pullman that Just Stop Oil protesters have targeted the First Claimant's Southampton to London pipeline (which does not comprise one of the Sites). This included digging and occupying a pit so as to obstruct specialist construction equipment, and it led to injunctions being granted by Eyre J on 16 August 2022 and then HHJ Lickley KC on 21 October 2022. There was also a committal of one person to prison for breach of Eyre J's Order. Another admitted that he had breached that Order but the Court accepted his undertaking not to do so again.

44. Protesters have organised a number of events in order to carry out direct action against various targets, all with some connection to the energy industry. They have also targeted the offices of the Claimants' solicitors including by a sit-down protest in November 2022 which obstructed the entrance and by throwing purple paint over the glass structure of the building.

45. Although, in January 2023, Extinction Rebellion announced that it was changing its tactics and moving away from public disruption as a primary tactic, Just Stop Oil has made clear its intention to continue with this approach. Mr Morshead showed me public statements by Just Stop Oil along the lines that the public should "expect us every day and anywhere" and that its supporters "will be returning – today, tomorrow and the next day – and the next day after that – and every day until our demand is met: no new oil and gas in the UK". This includes asking people to "Sign up for arrestable direct action…".

46. Mr Morshead also relied on evidence that, more generally, there has been no let-up in the activities of climate change protesters. For example, there was disruption of the Grand National and the World Snooker Championship in April 2023, as well as a sit-down protest at the Global Headquarters of Shell following a weekend of protest in central London organised by Extinction Rebellion. Since 24 April 2023 there has been a campaign of "slow marching" in London and Just Stop Oil protesters were arrested in or around Whitehall and Parliament in May 2023. There was also disruption of the Chelsea Flower Show and other sporting events including the Ashes test match and Wimbledon. Mr Pullman also gave evidence about extensive litigation in the civil and criminal courts arising out of protest activities with a number of injunctions being granted and/or extended, and various prosecutions and convictions in the Magistrates Court for public order offences.

47. As for the harm which would result from the acts of trespass which are sought to be restrained, disruption of the Claimants' operations is in itself harmful to their interests. The evidence is that such disruption has potential financial consequences for them, but it also has consequence for the wider economy given the impact on the businesses of wholesale and retail suppliers of fuel, and the effect on access to fuel for purposes including road, rail and air transport as well as heating. Indeed, in March/April 2022 Just Stop Oil and Extinction Rebellion were open about the fact that they were seeking to emulate the 2000 protests by haulage drivers, which disrupted supplies of oil to the country with severe economic consequences.

48. There is also evidence of the risk of serious physical harm resulting from acts of trespass by protesters. This refers not merely to the damage to property which results from them cutting through security fences and vandalising the Sites, but also to the risk of very serious accidents. The Claimants' sites are used for the production and storage of highly flammable and otherwise hazardous substances. As is obvious, this is a highly dangerous activity and for this reason there are stringent security and health and safety measures in operation at the Sites. Access is strictly controlled, and all of the Claimants' employees and contractors are trained in relation to the hazards which they might encounter and, where appropriate, provided with protective clothing and equipment.

49. Mr Milne and Mr Pulman give written evidence on this subject. The Petrochemical Complex at Fawley and each of the oil Terminals are regulated by the Health & Safety Executive under the Control of Major Accident Hazards Regulations 2015 (COMAH).

All of the Sites have fully licensed security personnel, security barriers at the point of vehicular access, closed circuit television infrastructure linked to an Access Control system and fenced areas where active operations are undertaken. The operational area of the Petrochemical Complex at Fawley is protected by 2 fences, one of which is electrified.

50. All authorised visitors to the Sites are required to watch an induction safety video which highlights both the hazards and the emergency safety procedures. Most of the Sites include higher risk areas which require additional safety precautions. Within these areas, authorised personnel are required to wear fire retardant clothing and the appropriate personal protective equipment (hard hats, safety glasses, fire retardant gloves, safety shoes).

51. In some areas, devices which measure hydrocarbon vapour levels in the air must be carried. One of the potential hazards inside these facilities is a vapour cloud, which can result from an unplanned release of hydrocarbon or biofuels. Such a release can be extremely hazardous. Potential ignition risks such as smoking, using mobile phones or cameras and wearing clothes which accumulate static electricity (e.g. nylon) are strictly prohibited within the higher risk areas.

52. Protesters will not be trained in relation to the risks on these sites, nor familiar with which areas are the more dangerous ones, and nor are they likely to be wearing appropriate protective clothing. As I have noted, in previous incidents in 2021 and 2022 protesters have used bolt cutters to cut through both security fences at the Fawley Petrochemical Complex, the security fence at the First Claimant's compound in Alton and the security fences at the West London and Birmingham Terminals. During the protests in 2022 some protesters broke into higher risk areas and were carrying iPhones, cameras, cigarette lighters and/or nylon sleeping bags, thus exposing themselves and others to the risk of death or serious injury.

53. Apart from the risk of an explosion or a fire, there are obvious risks in protesters climbing onto fuel tanks 20 metres above the ground without the necessary safety equipment, and in climbing onto fuel tankers as they have been. Moreover, blocking access to the Sites prevents evacuation and access for emergency vehicles in the event of an incident.

Jurisdiction

54. In *London Borough of Barking and Dagenham & Others v Persons Unknown* (supra) the Court of Appeal confirmed that the jurisdiction to grant both interim and final injunctions in this context is provided by section 37 Senior Courts Act 1981. This states, so far as material:

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

55. The Court of Appeal held that there is, therefore, jurisdiction to grant a final injunction against persons unknown who are "newcomers" i.e., persons who have not committed or

threatened to commit any tortious act against the applicant for the injunction and therefore have not been served with the proceedings and made subject to the jurisdiction of the court before the order was made. Provided such a person has been served with the order they will become a party to the proceedings if they knowingly breach the terms of the injunction. Any risk of injustice which arises from this position is mitigated by the fact that such a person may apply to vary the injunction or set it aside, and by the fact that the duration of the injunction can be limited by the court, and it can be subject to periodic review. As I have noted, an appeal was heard by the Supreme Court in February this year and judgment is awaited. However, at the time of writing the law is as stated by the Court of Appeal.

The Claimants' cause of action

56. The cause of action relied on by the Claimants is now limited to trespass, and the relief which they seek is limited to restraining protesters from entering the Sites in order to carry out their activities. This point is important because of the effect which it has on the balancing of rights under the ECHR.

57. As a general proposition *"seriously disrupting the activities of others is not at the core of"* the right to freedom of assembly and this is relevant to the assessment of proportionality: see Lords Hamblen and Stephens in *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408 at [67]. As Leggatt LJ (as he then was) put it in *Cuadrilla Bowland Ltd & Others v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 at [94]:

> *"... the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest…this is an important distinction. ...intentional disruption of activities of others is not "at the core" of the freedom protected by Article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire….;"*

58. But, in addition to this, in *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] 3 WLR 446 at [45] the Divisional Court held that there is no basis in the caselaw of the European Court of Human Rights:

> *"to support the ... proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has ... consistently said that Articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights ... There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under Articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights."*

59. This means that in the present case the injunction sought by the Claimants does not engage Articles 10 and 11 ECHR or, if they are engaged, it would be compatible with these provisions for it to be granted because restraining trespass would obviously be

proportionate. Section 12(3) of the Human Rights Act 1998 is not engaged because it applies to interim injunctions.

60. The tort of trespass to land consists of any unjustified intrusion, whether by a person or an object, by one person upon land in the possession of another. It may also include intrusion into the airspace above land. There is no requirement that the intrusion be intentional or negligent provided it was voluntary. Trespass is actionable without proof of damage and by a person who is in possession i.e., who occupies or has physical control of the land. Proof of ownership is prima facie proof of possession but tenants and licensees will have rights of possession and be entitled to claim in trespass in order to secure those rights. In broad terms, entry onto another's land may be justified by proving a legal or equitable right to do so, or necessity to do so in order to preserve life or property. Justification therefore does not arise in the present case. (Clerk & Lindsell on Torts 23rd Edition, chapter 18).

Is relief just and convenient in principle?

61. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch); [2019] 1 WLR 2 Marcus Smith J said this at [31(3)] in relation to final anticipatory injunctions:

> *"(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"*

62. He then went on to give guidance as to what may be relevant to the application of this approach in a given case.

63. With respect, I confess to some doubts about whether the two questions which he identified are part of a *"test"* or a *"two stage"* test. To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is *"just and convenient"* but they are not threshold tests. I also note that, even taking into account *Vastint*, the editors of Gee on Commercial Injunctions (7th Edition) say at 2-045:

> *"There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."*

64. Where the court is being asked to grant an injunction in circumstances where no tort has been committed or completed it will naturally need to be persuaded that the risks and consequences of not making such an order are sufficiently compelling to grant relief. Where, as in the present case, tortious conduct has taken place but the identity of the tortfeasors is unknown, and relief is sought on a final basis against future tortfeasors who

are not a parties and are identified only by description, again the court will be cautious. But it would be surprising if, for example, a court which considered that there was a significant risk of further tortious conduct, but not a strong probability of such conduct, was compelled to refuse the injunction no matter how serious the damage if that conduct then took place.

65. However, Marcus Smith J analysed the authorities carefully, successive cases have adopted his test and the matter was hardly argued before me. I therefore do not propose to depart from what he said. Nor do I need to. Bennathan J was satisfied that the *Vastint* test was satisfied in this case, and so am I in the light of the evidence before me: I am also satisfied that, having regard to the risks in the event that relief is refused, it is just and convenient to grant relief.

66. As noted above, this was the issue on which I pressed Mr Morshead bearing in mind that only some of the incidents in 2021/2022 involved trespass and only on some of the Sites. There has been compliance with the injunctions ordered by Ellenbogen and Bennathan JJ. Extinction Rebellion announced a change of tactics in January 2023 and a good deal of the evidence about protest activities since April 2022 is about activities of a different nature to those which led to the injunctions in this case. Where protesters have been identified in these proceedings, they have been prepared to give undertakings not to trespass on the Sites. All of these considerations could be argued to show something less than a strong probability of further trespassing on the Sites.

67. Having considered the evidence in the round, however, I was satisfied that the first limb of the *Vastint* test is satisfied. It would have been very easy for Extinction Rebellion or Just Stop Oil to give assurances or evidence to the court that there was no intention to return to their activities of 2021/2022, and no risk of trespass on the Sites or damage to property by protesters in the foreseeable future, but they did not do so. One is therefore left with the evidence relied on by the Claimants. This shows that they intend to continue to challenge the oil industry vigorously, including by causing disruption. As to the form that that disruption will take, it appears that the effect of the various injunctions which have been granted in this case and others has been to prevent or deter them from taking the steps prohibited by the orders of the court although, of course, not invariably so. If, therefore, an injunction is refused in the present case the overwhelming likelihood is that protests of the sort which were seen in 2021/2022 will resume, and that they will include acts of trespass of the sort to which I have referred.

68. As to the second limb of the *Vastint* test, I had little hesitation in holding that it is satisfied. Whatever the merits of the protesters' cause, and I make no comment on this, their activities in breaking into the Sites are highly disruptive and dangerous. These activities have significant financial and wider economic consequences which are unquantifiable in damages, and any award of damages would likely be unenforceable in any event. They also risk very serious damage to property and endanger the protesters and others.

69. I have considered Ms Pemberton's suggestion of a distinction between Extinction Rebellion and Just Stop Oil protesters but found this unconvincing in the absence of any assurance from Extinction Rebellion. As Mr Morshead pointed out, their strategy could change at any time. Given the risk posed by Just Stop Oil protesters, relief is appropriate and it would be naïve of the court to leave open the possibility of trespass on the Sites by protesters who said that they were acting under the Extinction Rebellion banner. If there

is no intention on the part of Extinction Rebellion protesters to trespass on the Sites, the injunction will not affect them anyway.

70. I have also considered whether relief should be limited to certain Sites and not others given that some had not been subjected to trespass but I agree with Ellenbogen J that the essence of anticipatory relief, where it is justified, is that the claimant need not wait until harm is suffered before claiming protection: see her judgment in these proceedings at [2022] EWHC 966 (KB) [29].

Canada Goose

71. Turning to the other considerations identified by the Court of Appeal in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 at [82], albeit in relation to interim injunctions:

    a. Those "persons unknown" (as defined) who can be identified have been and they have given assurances or undertakings. There were six of them. The four who gave assurances are therefore not named defendants. The Fourth and Fifth Defendants were joined to the proceedings by Order of Collins Rice J and have given separate undertakings and will be subject to a separate order ([82(1)] *Canada Goose)*.

    b. The "persons unknown" are defined in the originating process and the Order by reference to their conduct which is alleged to be unlawful i.e. they are people who enter or remain on the Sites without the consent of the Claimants for the purposes of the Extinction Rebellion and the Just Stop Oil campaigns ([82(2) and (4)]). People who have not entered the Sites will not be parties to the proceedings or subject to the Order.

    c. I have addressed the question of anticipatory relief, above, in relation to final injunctions ([83(3)]);

    d. The acts prohibited by the injunction correspond to the threatened torts and do not include lawful conduct given that they are all acts which take place in the context of trespass i.e., on the Sites delineated in the plans attached to the Order ([82(5)]).

    e. The terms of the injunction are clear and precise so as to ensure that those affected know what they can and cannot do. ([82(6)]).

    f. The injunction has clear geographical and temporal limits. The geographical limits are indicated on the plans attached to the Order and the duration of the injunction will be five years subject to a review following the handing down of the judgement of the Supreme Court in the *Wolverhampton* case and annually in any event ([82(7)]). I note that a five year term with annual reviews was ordered, for example, by Eyre J in *Transport for London v Lee* [2023] EWHC 1201 (KB) at [57]. There is also provision for applications on notice to vary or discharge the Order.

Service of the Order

72. I approve the terms of the draft Order as to service. There is good reason to permit alternative methods of service (see CPR rules 6.15 and 6.27), namely that standard methods of service in accordance with CPR rule 6 are not practicable. The arrangements in the draft Order are those which have been approved by Ellenbogen, Bennathan and Collins Rice JJ.

Conclusion

73. For all of these reasons I am satisfied that it is just and convenient to grant the Order which I have made.

A

Supreme Court

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

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

B

[2023] UKSC 47

2023 Feb 8, 9; Nov 29

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adair v The New River Co (1805) 11 Ves 429

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cardile v LED Builders Pty Ltd [1999] HCA 18; 198 CLR 380
Carr v News Group Newspapers Ltd [2005] EWHC 971 (QB)
Cartier International AG v British Sky Broadcasting Ltd [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143, HL(E)
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)
Chapman v United Kingdom (Application No 27238/95) (2001) 33 EHRR 18, ECtHR (GC)
Commerce Commission v Unknown Defendants [2019] NZHC 2609
Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24; [2023] AC 389; [2022] 2 WLR 703; [2022] 1 All ER 289; [2022] 1 All ER (Comm) 633, PC
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
D v Persons Unknown [2021] EWHC 157 (QB)
Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare) [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
ESPN Software India Pvt Ltd v Tudu Enterprise (unreported) 18 February 2011, High Ct of Delhi
Earthquake Commission v Unknown Defendants [2013] NZHC 708
Ernst & Young Ltd v Department of Immigration 2015 (1) CILR 151
F (orse A) (A Minor) (Publication of Information), In re [1977] Fam 58; [1976] 3 WLR 813; [1977] 1 All ER 114, CA
Financial Services Authority v Sinaloa Gold plc [2013] UKSC 11; [2013] 2 AC 28; [2013] 2 WLR 678; [2013] Bus LR 302; [2013] 2 All ER 339, SC(E)
Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087, HL(E)
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 9
Harlow District Council v Stokes [2015] EWHC 953 (QB)
Heathrow Airport Ltd v Garman [2007] EWHC 1957 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
Iveson v Harris (1802) 7 Ves 251
Joel v Various John Does (1980) 499 F Supp 791
Kingston upon Thames Royal London Borough Council v Persons Unknown [2019] EWHC 1903 (QB)
M and N (Minors) (Wardship: Publication of Information), In re [1990] Fam 211; [1989] 3 WLR 1136; [1990] 1 All ER 205, CA
MacMillan Bloedel Ltd v Simpson [1996] 2 SCR 1048
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Marengo v Daily Sketch and Sunday Graphic Ltd [1948] 1 All ER 406, HL(E)
Mareva Cia Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509, CA

A *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143
Mercedes Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew [1983] Lexis Citation 198; The Times, 25 June 1983, CA
B *Murphy v Murphy* [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
C *Parkin v Thorold* (1852) 16 Beav 59
R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
D *Revenue and Customs Comrs v Egleton* [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA (The Siskina) [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022]
E EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
F *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487, HL(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch);
G [2019] JPL 161
United Kingdom Nirex Ltd v Barton [1986] Lexis Citation 644; The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Winch, Persons formerly known as, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
H *Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
Z Ltd v A-Z and AA-LL [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556, CA

The following additional cases were cited in argument:

A v British Broadcasting Corpn [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037, SC(Sc)
Abortion Services (Safe Access Zones) (Northern Ireland) Bill, In re [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)
Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752; The Times, 11 July 2011, CA
Birmingham City Council v Nagmadin [2023] EWHC 56 (KB)
Cambridge City Council v Traditional Cambridge Tours Ltd [2018] EWHC 1304 (QB); [2018] LLR 458
Cameron v Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant [2021] EWHC 1679 (Ch); [2021] 1 WLR 3834; [2022] 1 All ER 83; [2022] 1 All ER (Comm) 239
High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)
Hillingdon London Borough Council v Persons Unknown [2020] EWHC 2153 (QB); [2020] PTSR 2179
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
MBR Acres Ltd v McGivern [2022] EWHC 2072 (QB)
Mid-Bedfordshire District Council v Brown [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
Porter v Freudenberg [1915] 1 KB 857, CA
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (M) v Secretary of State for Constitutional Affairs and Lord Chancellor [2004] EWCA Civ 312; [2004] 1 WLR 2298; [2004] 2 All ER 531, CA
Redbridge London Borough Council v Stokes [2018] EWHC 4076 (QB)
Secretary of State for Transport v Cuciurean [2021] EWCA Civ 357, CA
Winterstein v France (Application No 27013/07) (unreported) 17 October 2013, ECtHR

APPEAL from the Court of Appeal

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

By appellant's notices filed on or about 7 June 2021 and with permission of the judge, the following local authorities appealed: Barking and Dagenham London Borough Council; Havering London Borough Council; Redbridge London Borough Council; Basingstoke and Deane Borough Council and Hampshire County Council; Nuneaton and Bedworth Borough Council and Warwickshire County Council; Rochdale Metropolitan Borough Council;

Test Valley Borough Council; Thurrock Council; Hillingdon London Borough Council; Richmond upon Thames London Borough Council; Walsall Metropolitan Borough Council and Wolverhampton City Council. The following bodies were granted permission to intervene in the appeal: London Gypsies and Travellers; Friends, Families and Travellers; Derbyshire Gypsy Liaison Group; High Speed Two (HS2) Ltd and Basildon Borough Council. On 13 January 2022 the Court of Appeal (Sir Geoffrey Vos MR, Lewison and Elisabeth Laing LJJ) [2022] EWCA Civ 13; [2023] QB 295 allowed the appeals.

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

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

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

The appellants are concerned about the detrimental consequences which the injunctions sought by the local authorities will have for the nomadic lifestyle of Gypsies and Travellers, including a chilling effect on those seeking to practise the traditional Gypsy way of life.

A court cannot exercise its statutory power under section 37 of the Senior Courts Act 1981 so as to grant an injunction which will bind "newcomers" (i e persons who at the time of the grant of the injunction are neither defendants to the application nor identifiable, and who were described in the injunction only as "persons unknown") save on an interim basis or for the protection of Convention rights as an exercise of the jurisdiction first recognised in *Venables v News Group Newspapers Ltd* [2001] Fam 430.

The High Court's power to grant an injunction under section 37 neither expressly permits nor prohibits the making of orders against persons unknown and so does not on its own terms provide an answer to the question. Although it had previously been argued by some of the local authorities below that, regardless of any limitations which applied to section 37, the court had a separate power to grant injunctions against persons unknown by virtue of section 187B of the Town and Country Planning Act 1990 the Court of Appeal held that the procedural limitations under section 37 and section 187B were the same and that the latter did not bestow any

additional or more extensive jurisdiction on the court: see [2023] QB 295, paras 113–118.

A final injunction operates only between the parties to the claim: see *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191. The act by which a person becomes a party is the service of the claim form: see *Cameron v Hussain* [2019] 1 WLR 1471. A person who is unknown and unidentifiable cannot be served with a claim form. He or she will thus not be a party and will not be bound by the final injunction.

It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard: see *Porter v Freudenberg* [1915] 1 KB 857, 883, 887–888, *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, para 8 and *Cameron*, paras 17–18.

Cameron, in particular, is determinative of the appeal. It dealt with—and the decision is therefore binding as to—the position of newcomers, albeit that the proposed defendant was someone who was said to have committed an unlawful act in the past, rather than a person who might commit an unlawful act in the future. Even if *Cameron*, because of that distinction, was not strictly concerned with newcomers, the application of the Supreme Court's reasoning in that case leads inescapably to the conclusion that such persons cannot be sued.

Newcomers are by their very nature anonymous. A person unknown may, if defined with sufficient particularity, be capable of being identified with a particular person. In the first instance decision in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 150 Nicklin J suggested that some of the protesters "could readily be identified on . . . camera footage as alleged 'wrongdoers' and, if necessary, given a pseudonym (e g '. . . the man shown in the footage . . . holding the loudhailer')". The person in question will still be anonymous, but he or she is identifiable and whatever the practical difficulties in locating him or her, it is not conceptually impossible to effect service. By contrast, however, designations of the type used in the instant cases, which are intended to capture newcomers ("persons unknown", "persons unknown occupying land", "persons unknown depositing waste", "persons unknown fly-tipping") do not identify anyone. They do not "enable one to know whether any particular person is the one referred to": see *Cameron*, para 16.

The Court of Appeal wrongly held that *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 was authority for the proposition that a final injunction can bind newcomers. That case concerned an interim injunction. It was explained by the Supreme Court as an example of alternative service—not as authority for the proposition that final injunctions bind newcomers—and the Court of Appeal below erred in departing from that interpretation. The other cases relied on by the Court of Appeal below (in particular *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9 and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100) provide no real support for the Court of Appeal's decision. Those cases either (at best) simply accepted, without deciding the point, that final injunctions could

bind newcomers or, when properly understood, they undermine such a conclusion.

The reasoning in *Gammell* cannot properly be extended to cover final injunctions to bind newcomers. There is a qualitative distinction between interim and final injunctions. Parties must be identified before a final determination takes place so that they have an opportunity to present their case. The courts have long been willing to accept lower—or at least different—standards of fairness at the interim stage, in recognition of the fact that interim orders are temporary and designed to hold the ring (or limit damage) pending trial. Thus, for example, interim orders may be sought without notice to the defendant, or may control the way in which a defendant deals with his or her property in order to prevent the defendant frustrating any eventual judgment. Interim orders may indeed be more favourable to a claimant than any final order could be: see, for example, *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224 ("*Spycatcher*").

As Nicklin J recognised at first instance, the courts have recognised that this can create an incentive for a claimant to obtain an interim injunction and then fail to progress the case to trial: see [2021] EWHC 1201 (QB) at [89]. The answer to this has not been to expand the principle in *Spycatcher* to final orders: instead, the court will put in place directions to ensure that the matter is progressed to a final hearing: see Nicklin J, paras 91–93. Interim relief which binds newcomers can only properly be granted where it is to preserve the position pending trial.

Although in certain cases the court has granted injunctions on a contra mundum basis (see *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422, *Venables v News Group Newspapers Ltd* [2001] Fam 430, *X (formerly Bell) v O'Brien* [2003] EMLR 37, *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB), *OPQ v BJM* [2011] EMLR 23, *RXG v Ministry of Justice* [2020] QB 703 and *D v Persons Unknown* [2021] EWHC 157 (QB)), there is a principled distinction between that line of cases and injunctions prohibiting the unauthorised use or occupation of land. Those cases were all concerned with the publication of personal information, such as the identity of offenders. Once in the public domain, the subject matter protected by the injunction is irretrievably lost. This court should confirm that an injunction contra mundum should only be granted where to do otherwise would defeat the purpose of the injunction. That principle will not apply in traveller injunction cases.

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

"Persons unknown" injunctions, although said to be aimed at curtailing unlawful protest, also have a chilling effect on lawful campaigning and protest. They expose wide groups of citizens to the risk of prohibitively costly legal proceedings and punitive sanctions, including unlimited fines and imprisonment for contempt for up to two years. There are serious obstacles to contesting the claims and a significant inequality of arms when accessing justice with no costs protection.

There is an increasingly widespread use of such injunctions, often on an industry and country-wide basis, with private companies in particular utilising private law proceedings as a default mechanism to address perceived

public order issues despite there being tailored statutory provisions and safeguards provided for by Parliament in the criminal law. A

The ruling of the Supreme Court in *Cameron v Hussain* [2019] 1 WLR 1471, paras 11–12 makes clear that it is not simply a matter of the court's wide discretion to entertain a claim if a person (who is not evading service) cannot be served and cannot reasonably be expected to have notice of the claim so that he may have an opportunity to defend it. Identification is B necessary so that the court can be satisfied that a person is properly subject to its jurisdiction with the capacity to be a party to legal proceedings. However unjust the outcome for the claimant who may have been wronged (as in the case of the claimant in *Cameron*, who had been injured in a vehicle collision caused by the negligence of another driver of unknown identity), the claim has simply not been validly brought.

C

One of the purposes of a persons unknown injunction is to deter such newcomers from coming into existence and if it is effective there will only ever have been one party to the claim, namely the claimant. This is not, therefore, properly to be described as a permissible claim against persons unknown in the *Bloomsbury Publishing* sense (see *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633). It is D simultaneously a claim against nobody, but can only be effective if it is in principle binding on everybody.

Justice between parties to litigation is not only about a just outcome. That outcome must be arrived at pursuant to a fair and just process. In addition to being contrary to basic principles of procedural fairness and natural justice, in both the Gypsy and Traveller context and in the protest context, newcomer injunctions can have arbitrary and disproportionate E adverse impacts on fundamental rights, including the Convention rights under articles 8, 10 and 11 and the common law protections for free speech and assembly.

The notion that a person only becomes a party to proceedings by the acts that put them in breach of an order made in their absence and upon its enforcement against them is fundamentally at odds with such core principles. F In contempt cases, the court's approach will not be concerned with whether the injunction should have been granted or the appropriateness of the terms which have led to the contempt. An order of the court has to be obeyed unless and until it has been set aside or varied by the court.

Even if an injunction is subsequently varied or set aside, that is irrelevant to the liability in contempt of a person who breaches the injunction G (although it may be relevant to sentence): see *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, paras 33–34 and *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, paras 76–77. Moreover, in *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 at [57]–[62] the Court of Appeal rejected the argument that liability for contempt for breach of a persons unknown injunction required knowledge of its terms. H

In the protest context, the courts have recognised the injustice of the enforcement of orders against individuals without giving them an opportunity to be heard and without consideration of their individual circumstances even if bound by the order when made: see *Astellas Pharma*

Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752 and *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

The lack of procedural fairness and natural justice intrinsic to orders against newcomers means that they should not even be imposed at the interim stage. If such injunctions were to be allowed on an interim basis, they should be limited to cases where there is a danger of real and imminent unlawful action, with a view to holding the ring and allowing claimants time to identify unknown but existing defendants.

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

It is not open to the court to significantly expand the contra mundum jurisdiction so as to permit courts in Gypsy, Roma and Traveller ("GRT") or protester cases to make persons unknown orders (interim or final) which bind newcomers. The Court of Appeal's conclusion in this case demonstrates the serious limitations of seeking to solve complex questions of social policy by deploying a tool of civil law. A court cannot lawfully make a final injunction against newcomers when the injunction is likely to interfere with the human rights of newcomers and there has not been any assessment of the individual facts of their case.

Unlike established orders such as freezing orders, *Anton Piller* orders, or possession orders which are targeted at specific people, final persons unknown injunctions frequently involve severe interference with the rights of a large category of people, often extending to vast swathes of land, entire boroughs or the entirety of the strategic road network. They can cover entirely peaceful, lawful protest.

In both GRT cases (where article 8 rights are involved) and in protest cases (where articles 10 and 11 are involved) an individual assessment of proportionality is required. In the former context, there is a clear line of Strasbourg authority emphasising the strictness of the proportionality test when imposing measures which affect the GRT community, such as injunctions to prevent encampments. A potential breach of planning authorisation, for example, will not be enough: see *Winterstein v France* (Application No 27013/07) (unreported) 17 October 2013. Consideration must be given to individualised matters such as the length of time of the encampment, the consequences of removal and the risk of becoming homeless. Similar considerations apply in protester cases: see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417, para 136 and *Kudrevičius v Lithuania* (2015) 62 EHRR 34, paras 145, 155. This applies not just to Convention rights, but to fundamental common law rights such as the right to a home, to respect for one's ethnic identity and to freedom of expression.

The serious impact of persons unknown injunctions is graphically illustrated by the way in which some claimants have aggressively sought committal of persons who have breached persons unknown injunctions, even in circumstances where the breaches were "trivial and wholly technical" as in *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (QB). In that case a solicitor was prosecuted by a private company for attending a protest site in her professional capacity and was said to have breached the injunction by parking her car for an hour in an "exclusion zone". The committal proceedings lasted two days and were dismissed as "wholly frivolous", but

necessitated the solicitor self-reporting to the Solicitors Regulation Authority and ceasing to work for her firm until authorised to return.

General category measures involve complex issues of policy and are matters for the legislature, as in the measures considered in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505: see also *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, para 52. A court at first instance is singularly ill-equipped to make such a category assessment.

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

The essential starting point for addressing these issues is section 37 of the Senior Courts Act 1981, because section 37 is the statutory power which is being exercised when the High Court grants an injunction in a case of this nature (unless it is acting under a specific statutory power). There are three important points to make about what Parliament has enacted in section 37(1). First, it is a statutory power which Parliament has elected to confer in terms of the greatest possible breadth. It is engaged whenever the court considers that the grant of an injunction would be "just and convenient". Secondly, section 37(1) expressly applies both to interlocutory (interim) orders, and to final orders, without drawing any distinction between them whatsoever. Thirdly, the section 37 power is expressly exercisable in "all" cases where the grant of an injunction would be just and convenient. The appellants are therefore wrong to suggest that it is only exercisable in "some" cases, not including cases of the present nature.

The courts are well aware that, as with any other broad discretionary power conferred upon it, the section 37 power must be exercised on a principled basis. Thus it is axiomatic, for example, that the grant of injunctive relief in a particular form must represent a proportionate response to the factual situation with which the court is faced; that the court must so far as possible ensure fairness to all those affected by the injunction; and that the injunction is consistent with Convention rights.

It is wrong to fetter the exercise of the section 37 power in advance, whether by inflexible judge-made rules, or through the division of cases into rigid and potentially artificial categories to which distinct rules apply. Rather, a broad and flexible approach is called for: see *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389. If the grant of an injunction would not be a fair or proportionate measure on particular facts, then it will not be granted. But if an injunction in a particular form would be the appropriate response to the actual or threatened commission of a legal wrong—and especially if such an injunction represents the only effective means of protecting legal rights and preventing significant harm—then the court should be slow to conclude that it is powerless to grant such relief.

Newcomer injunctions are just one sub-species of the "precautionary" (quia timet) injunction which is solidly established in English law, and for whose award the courts have long since established a framework of governing principles. The claimants in these proceedings manifestly have an interest which merits protection.

Cameron v Hussain [2019] 1 WLR 1471 should be seen as a case about the need for the court to guard against exposing people to detrimental legal consequences without their having had an opportunity to be heard or

A otherwise to defend their interests. It did not lay down an absolute conceptual or jurisprudential bar to the grant of newcomer injunctions. Albeit stating that the general rule is that proceedings may not be brought against unnamed parties, Lord Sumption specifically endorsed the approach in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 of granting injunctions against anonymous but identifiable defendants provided B that the injunction is brought to the attention of the putative defendant (for example by posting copies of the documents in some prominent place near the land in question) and the defendant is afforded an opportunity to apply to set it aside

The practice endorsed in *Cameron* applies as much to final orders as it does to interim orders. There is no relevant conceptual difference between the two, and it would be paradoxical if the court's powers were less C extensive when making a final order after trial. Nicklin J in the present case attempted to resolve this paradox by saying that interim injunctions could only be granted against persons unknown for a short period during which they were expected to be identifiable, but there is no sign of any such approach in existing authority, for example *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 or *Ineos Upstream* D *Ltd v Persons Unknown* [2019] 4 WLR 100.

Newcomer injunctions are not intrinsically incompatible with natural justice. There are many situations in which courts make orders without having heard the persons who might be affected by them, usually because it is impractical, for one reason or another, to afford a hearing to those persons in advance of the making of the order. In such circumstances, fairness is secured by enabling any person affected to seek the recall of the order E promptly at a hearing inter partes: see *R (M) v Secretary of State for Constitutional Affairs and Lord Chancellor* [2004] 1 WLR 2298, para 39 and *A v British Broadcasting Corpn* [2015] AC 588, para 67.

Guidelines are already in place as to when newcomer injunctions should be granted and as to the safeguards which must be observed: see *Ineos* [2019] 4 WLR 100, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] F 4 WLR 29 and *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were to be replaced by a universal prohibition. For examples of the court applying the correct approach to particular facts, see *Hillingdon London Borough Council v Persons Unknown* [2020] PTSR 2179, G paras 95–122, *Cambridge City Council v Traditional Cambridge Tours Ltd* [2018] LLR 458, para 81 and *Birmingham City Council v Nagmadin* [2023] EWHC 56 (KB), at [34]–[37], [49]–[54], [59]–[60]. [Reference was also made to *Crédit Agricole Corporate and Investment Bank v Persons Having Interest in Goods Held by the Claimant* [2021] 1 WLR 3834.]

The operation of newcomer injunctions is not intrinsically incompatible with Convention principles of proportionality. It is accepted that, depending H on the nature of the injunction in question, Convention rights of newcomers may well (though will not always) be engaged. But they have to be balanced against any competing common law or Convention rights of persons living in close proximity to the land in question who would otherwise be adversely affected by the prohibited acts. This is always a fact-sensitive exercise. The

court is well-equipped to carry out the necessary proportionality test even where the newcomers are not before the court, just as it is when granting injunctions which carry *Spycatcher*-type consequences for third parties: see *Attorney General v Punch Ltd* [2003] 1 AC 1046, paras 108, 113–114, 116, 122–123.

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

Precautionary injunctions against persons unknown which bind newcomers form a species of injunction against the world, as the Court of Appeal correctly held in the present case: see [2023] QB 295, paras 119–121. The fact that they are exceptional orders that are only granted in narrow circumstances as a last resort (see *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, para 99 et seq and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, paras 31–34) falsifies any "floodgates" argument.

Section 37 of the Senior Courts Act 1981 frames the question which the courts must ask: is it "just and convenient" to grant an injunction? The appellants' argument would require the Supreme Court to pre-judge this question by holding in advance that it will never be just and convenient to grant an injunction to prevent future wrongs by persons who cannot be identified when the injunction is granted.

This would not only deny a remedy to the victims of unlawful encampments: it would prevent courts from granting injunctions to prevent a wide range of other wrongdoing, such as urban exploring and car cruising. To remove from the armoury of the courts the remedy which the courts have devised over the last 20 years would be to incentivise such wrongful conduct.

Moreover, if wrongdoers know that they cannot be subject to an injunction which does not name them, they will be provided with a perverse incentive to preserve their anonymity.

There is no fundamental distinction between interim and final injunctions. Section 37 includes the power to fashion an injunction which has some of the characteristics of both and such injunctions should be permitted where they are just and convenient. *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633 illustrates this.

The courts have laid down guidelines as to when such injunctions should be granted and as to the safeguards which must be observed. Those guidelines provide a fair balance. They would be otiose if the Supreme Court acceded to the appeal and the safeguards which they provide were replaced by a universal prohibition. This would offend principles of justice, most notably the principle that where there is a wrong, the law should provide a remedy: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 25.

It makes no sense to say that such injunctions should only be granted to protect Convention rights. There is no authority that Convention rights must be in play before an injunction against the world can be issued. As the Court of Appeal correctly observed at paras 80 and 120, the fact that protester or encampment cases do not fall within the exceptional category with which *Venables v News Group Newspapers Ltd* [2001] Fam 430 was concerned does not mean that a species of injunction against the world is not also appropriate in protester or encampment cases.

A On the contrary, if it is right for the court to fashion an unconventional injunction, addressed to the whole world, in order to protect a claimant's Convention rights, it is unprincipled to conclude that it must never do so to protect non-Convention rights. The distinction between Convention rights and other rights is arbitrary and artificial.

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

Each of the third to tenth respondent local authorities' injunctions in these proceedings were sought and granted pursuant to section 187B of the Town and Country Planning Act 1990. Travellers injunctions under section 187B should be seen as a statutory exception to the "general" rule set C out in *Cameron v Hussain* [2019] 1 WLR 1471, para 9 that proceedings may not be brought against unnamed parties.

By section 187B(1) a local authority may seek an injunction to restrain "any actual or apprehended breach of planning control": hence the local authority only has to "apprehend" a breach in order to apply for an injunction. By subsection (2) the court "may" grant "such injunction as it thinks appropriate", thus giving it the same wide jurisdiction as under D section 37 of the Senior Courts Act 1981. (The permissive "may" in subsection (2) applies not only to the *terms* of any injunction but also to the decision *whether* to grant an injunction: see *South Bucks District Council v Porter* [2003] 2 AC 558, para 28.) And by subsection (3), rules of court (currently to be found in CPR PD 49E) may provide for injunctions to be issued against persons whose identity is unknown. In unauthorised E encampment cases the court may describe the persons targeted by reference to evidence of what might potentially happen on the land sought to be protected, in the same way that persons unknown in unauthorised development cases are often defined by reference to the evidence of what was happening on the land (for example the injunction directed at "persons unknown . . . causing or permitting hardcore to be deposited [and] caravans . . . stationed [on F specified land]" in *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88).

Section 187B does not confine itself to interim injunctions. Nor was the Court of Appeal in *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 confining itself to interim injunctions, as may be seen from its reliance (at para 29) on *Mid-Bedfordshire District Council v Brown* [2005] 1 WLR 1460, which was a case about a final injunction (under G section 187B) which bound newcomers as well as the named defendant. [Reference was also made to *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 1–4 and *Redbridge London Borough Council v Stokes* [2018] EWHC 4076 (QB) at [10]–[23].]

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

H Although the appellants complain about the "chilling effect" of injunctions on the right to protest, consideration should also be given to the beneficial effect of injunctions to deter disruptive, unlawful conduct: see *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 83. It is no part of the Secretary of State's or HS2's case that lawful

protest should be constrained. However, since 2021 there has been significant disruption to the strategic road network caused by the unlawful conduct of protesters seeking a change of government policy. Similarly, since 2017 there has been significant disruption to the construction of the HS2 rail link by the unlawful conduct of activists opposed to the project. Hence the need for the Secretary of State and HS2 to seek tailored "newcomer" injunctions (see, for example, *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB)) to prevent activities which are not only unlawful but often risk injury to contractors and/or members of the public.

Any person affected by such injunctions will have liberty to apply at any time to vary or discharge the injunction and anyone who successfully discharges an order would in principle be entitled to their costs. Further, claimants are normally required to give a cross-undertaking in damages that, should it later be determined that the interim injunction should not have been granted, they must compensate for any loss caused by the injunction.

Although the term "contra mundum" is frequently used—the ultimate in catch-all terms—it is necessary to consider what it actually means on the particular facts of each case. It is obtuse to consider the appropriateness of a contra mundum order on the basis that everybody is affected: it is not, for example, the whole world which wishes to climb gantries on the M25. Rather, the court should (and does as a matter of practice) take a view about who, in the particular circumstances, might be affected. It will be a cautious view. It is a matter of degree and a judgement which is not difficult to make.

Drabble KC replied.

The court took time for consideration.

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

1. Introduction

(1) The problem

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

2 In these circumstances, the appeal raises the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time

A when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date: "newcomers", as they have been described in these proceedings.

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

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

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

(2) The factual and procedural background

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

7 The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by

reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth", "persons unknown entering or remaining without planning consent on those parcels of land coloured in Schedule 2 of the draft order", and "persons unknown who enter and/or occupy any of the locations listed in this order for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphernalia".

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

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

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

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

A discharged the final injunctions either in full or in so far as they were addressed to any person falling within the definition of "persons unknown" who was not a party to the proceedings at the date when the final order was granted.

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

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

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

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

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

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

F *2. The legal background*

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

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

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

H (3) Can a claim form properly describe the defendants as persons unknown, with or without a description referring to the conduct sought to be enjoined? Can an injunction properly be addressed to persons so described? If the description refers to the conduct which is prohibited, can the defendants properly be described, and can an injunction properly be

issued, in terms which mean that persons do not become bound by the injunction until they infringe it? A

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

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

(1) The jurisdiction to grant injunctions C

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

17 The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed (2014) ("*Spry*"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20–21 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act. F G H

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

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

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

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

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

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

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power

is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

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

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

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

(2) Injunctions against non-parties

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

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

25 Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is

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

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

(i) Representative proceedings

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

28 However, it has long been established that in appropriate
H circumstances relief can be sought against representative defendants, with other unnamed persons being described in the order in general terms. Although formerly recognised by RSC Ord 15, r 12, and currently the subject of rule 19.8 of the CPR, this form of procedure has existed for several centuries and was developed by the Court of Chancery. Its rationale was

explained by Sir Thomas Plumer MR in *Meux v Maltby* (1818) 2 Swans 277, 281–282:

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

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

29 A representative action may in some circumstances be a suitable means of restraining wrongdoing by individuals who cannot be identified. It can therefore, in such circumstances, provide an alternative remedy to an injunction against "persons unknown": see, for example, *M Michaels (Furriers) Ltd v Askew* [1983] Lexis Citation 198, concerned with picketing; *EMI Records Ltd v Kudhail* [1985] FSR 36, concerned with copyright infringement; and *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB), concerned with environmental protesters.

30 However, there are a number of principles which restrict the circumstances in which relief can be obtained by means of a representative action. In the first place, the claimant has to be able to identify at least one individual against whom a claim can be brought as a representative of all others likely to interfere with his or her rights. Secondly, the named defendant and those represented must have the same interest. In practice, compliance with that requirement has proved to be difficult where those sought to be represented are not a homogeneous group: see, for example, *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, concerned with industrial action, and *United Kingdom Nirex Ltd v Barton* [1986] Lexis Citation 644, concerned with protests. In addition, since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR r 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

(ii) Wardship proceedings

31 Another situation where orders have been made against non-parties is where the court has been exercising its wardship jurisdiction. In *In re X (A Minor) (Wardship: Injunction)* [1984] 1 WLR 1422 the court protected the welfare of a ward of court (the daughter of an individual who had been convicted of manslaughter as a child) by making an order prohibiting any publication of the present identity of the ward or her parents. The order bound everyone, whether a party to the proceedings or not: in other words, it was an order contra mundum. Similar orders have been made in subsequent cases: see, for example, *In re M and N (Minors) (Wardship:*

Publication of Information) [1990] Fam 211 and *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254.

(iii) Injunctions to protect human rights

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

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

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (e g as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

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

(vi) The effect of injunctions on non-parties

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

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

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

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

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

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

> " 'The Sunday Times' in the instant case was perfectly at liberty, before publishing, either to inform the respondent and so give him the

A opportunity to object or to approach the court and to argue that it should be free to publish where the defendants were not, just as a person affected by notice of, for example, a *Mareva* injunction is able to, and frequently does, apply to the court for directions as to the disposition of assets in his hands which may or may not be subject to the terms of the order."

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

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

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

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

43 An injunction against newcomers purports to restrain the conduct of
G persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Owners of cargo lately laden on board the Siskina v Distos Cia Naviera SA*
H [1979] AC 210 ("*The Siskina*"), at p 256. There has been a gradual but growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea* [2023] AC 389, cited in para 17 above, where the

Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

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

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

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

A claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2007] Bus LR 44).

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

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

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

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

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

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

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

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

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

55 Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is

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

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

D

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

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

F

(1) Bloomsbury

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

59 The Vice-Chancellor acknowledged that it would under the old RSC and relevant authority in relation to them have been improper to seek to

identify intended defendants in that way (see para 27 above). He noted (para 11) the anomalous consequence:

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

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

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

(2) Hampshire Waste Services

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

61 Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or remained on any of the sites in question on or around the specified date. This

A is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

(3) Gammell

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

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

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

65 Several months later, Ms Gammell, without securing or applying for
G the necessary planning permission or making an application to set the injunction aside or vary its terms, proceeded to station her caravans on the land. She was therefore a newcomer within the meaning of that word as used in this appeal, since she was neither a defendant nor on notice of the application for the injunction nor on the site when the injunction was granted. She was served with the injunction and its effect was explained to her, but she continued to station the caravans on the land. On an
H application for committal by the local authority she was found at first instance to have been in contempt. Sentencing was adjourned to enable her to appeal against the judge's refusal to permit her to be added as a defendant to the proceedings, for the purpose of enabling her to argue that the injunction should not have the effect of placing her in contempt until a

proportionality exercise had been undertaken to balance her particular human rights against the grant of an injunction against her, in accordance with *South Bucks District Council v Porter* [2003] 2 AC 558.

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

(4) Meier

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

(5) Later cases concerning Traveller injunctions

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

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

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

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

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

73 All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who might in future commit the acts which the injunction prohibited (e g *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an early return date.

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

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

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

were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* [2003] 2 AC 558 (para 65 above), para 13.

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

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

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

79 The fact that Travellers and Gypsies have almost invariably chosen not to appear in these proceedings (and have not been represented) has left judges with the challenging task of carrying out a proportionality assessment

which has inevitably involved weighing all of these considerations, including the relevance of the breadth of the injunctions sought and the fact that the injunctions were directed against "persons unknown", in deciding whether they should be granted and, if so, for how long; and whether they should be made subject to particular conditions and safeguards and, if so, what those conditions and safeguards should be.

(6) Cameron

80 The decision of the Supreme Court in *Cameron* [2019] 1 WLR 1471 (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene. The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

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

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

83 Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all of these modes of service was the same, namely to enable the court to be satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to

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

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

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

E

(7) Ineos

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

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

H **88** These arguments were addressed head on by Longmore LJ, with whom the other members of the court agreed. He rejected the submission that a claimant could never sue persons unknown unless they were identifiable at the time the claim form was issued. He also rejected, as too absolutist, the submission that an injunction could not be granted to restrain newcomers from engaging in the offending activity, that is to say persons who might only

form the intention to engage in the activity at some later date. Lord Sumption's categorisation of persons who might properly be sued was not intended to exclude newcomers. To the contrary, Longmore LJ continued, Lord Sumption appeared rather to approve the decision in *Bloomsbury* and he had expressed no disapproval of the decision in *Hampshire Waste Services*.

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

(8) Bromley

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

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

92 The particular questions giving rise to the appeal were relatively narrow (namely whether the judge had fallen into error in finding the order sought was disproportionate, in setting too high a threshold for assessment of the harm caused by trespass and in concluding that the local authority had

failed to discharge its public sector equality duty); but the Court of Appeal was also invited and proceeded to give guidance on the broader question of how local authorities ought properly to address the issues raised by applications for such injunctions in the future. The decision is also important because it was the first case involving an injunction in which the Gypsy and Traveller communities were represented before the High Court, and as a result of their success in securing the discharge of the injunction, it was the first case of this kind properly to be argued out at appellate level on the issues of procedural fairness and proportionality. It must also be borne in mind that the decision of the Supreme Court in *Cameron* was not cited to the Court of Appeal; nor did the Court of Appeal consider the appropriateness as a matter of principle of granting such injunctions. Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

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

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

95 Coulson LJ went on (at paras 99–109) to give the wider guidance to which we have referred, and this is a matter to which we will return a little later in this judgment for it has a particular relevance to the principles to which newcomer injunctions in Gypsy and Traveller cases should be subject. Aspects of that guidance are controversial; but other aspects about which

there can be no real dispute are that local authorities should engage in a process of dialogue and communication with travelling communities; should undertake, where appropriate, welfare and impact assessments; and should respect, appropriately, the culture, traditions and practices of the communities. Similarly, injunctions against unauthorised encampments should be limited in time, perhaps to a year, before review.

(9) Cuadrilla

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

(10) Canada Goose

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

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

A animals. PETA was subsequently added to the proceedings as second defendant at its own request.

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

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

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

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

103 Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated

only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* [2019] 1 WLR 1471 that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables* [2001] Fam 430, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron*—that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91). In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

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

(11) The present case

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

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

A infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

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

4. A new type of injunction?

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

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

H 110 *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2017] EMLR 11; *RXG v Ministry of Justice* [2020] QB 703;

In re Persons formerly known as Winch [2021] EMLR 20 and [2021] EWHC 3284 (QB); [2022] ACD 22); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111 The next in time is the *Bloomsbury* case [2003] 1 WLR 1633, the facts and reasoning in which were summarised in paras 58–59 above. The case was analysed by Lord Sumption in *Cameron* [2019] 1 WLR 1471 by reference to the distinction which he drew at para 13, as explained earlier, between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

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

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

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

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

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

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

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

116 We also have reservations about the theory that it is necessary, in order for service to be effective, that the defendant should be identifiable. For example, Lord Sumption cited with approval the case of *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69, as illustrating circumstances in which alternative service was legitimate because "it is possible to locate or H communicate with the defendant and to identify him as the person described in the claim form" (para 15). That was a case concerned with online defamation. The defendants were described as persons unknown, responsible for the operation of the website on which the defamatory statements were published. Alternative service was effected by sending the claim form to

email addresses used by the website owners, who were providers of a proxy registration service (i e they were registered as the owners of the domain name and licensed its operation by third parties, so that those third parties could not be identified from the publicly accessible database of domain owners). Yet the identities of the defendants were just as unknown as that of the driver in *Cameron,* and remained so after service had been effected: it remained impossible to identify any individuals as the persons described in the claim form. The alternative service was acceptable not because the defendants could be identified, but because, as the judge stated (para 16), it was reasonable to infer that emails sent to the addresses in question had come to their attention.

117 We also have difficulty in fitting the unnamed defendants in *Bloomsbury* [2003] 1 WLR 1633 within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron.* The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

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

119 More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed

Gammell solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

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

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

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

123 That justification addresses what the Vice-Chancellor may have perceived to be one of the main objections to the joinder of (or the grant of injunctions against) unnamed persons, namely that it is too vague a way of

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

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

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

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

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

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the

injunction and who had then continued to disobey it. He was not concerned with the position of a newcomer, wishing to camp on a prohibited site who, after learning of the injunction, simply decided to obey it and move on to another site. Such a person would not, on his analysis, become a defendant at all, even though constrained by the injunction as to their conduct. Service of the proceedings (as opposed to the injunction) was not raised as an issue in that case as the necessary basis for in personam jurisdiction, other than merely for holding the ring. Neither *Cameron* nor *Fourie v Le Roux* had been decided. The real point, unsuccessfully argued, was that the injunction should not have the effect against any particular newcomer of placing them in contempt until a personalised proportionality exercise had been undertaken. The need for a personalised proportionality exercise is also pursued on this appeal as a reason why newcomer injunctions should never be granted against Travellers, and we address it later in this judgment.

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

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

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

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

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

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

133 As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been

identified in *Canada Goose* [2020] 1 WLR 2802. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose*?

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

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

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

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

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

prohibit unidentified persons from behaving unlawfully, and which enable such persons subsequently to become parties to the proceedings and to seek to have the injunctions varied or discharged.

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

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

proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at the interim stage.

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

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

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

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

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

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

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

and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.

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

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

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

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

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

145 Faced with the development by the lower courts of what really is in substance a new type of injunction, and with disagreement among them

about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

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

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

146 Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* [2007] 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see eg *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

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

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

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> categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

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

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

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150 Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Pt 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* [2009] 1 WLR 2780 (para 67 above) as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Baroness Hale JSC at para 25 is resonant:

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

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To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (para 130 above) at p 187, cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 at para 14.

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

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> "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find, that by

A insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

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

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

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

H **154** It should not be supposed that all relevant general equitable principles favour the granting of injunctions against newcomers. Of those that might not, much the most important is the well-known principle that equity acts in personam rather than either in rem or (which may be much the same thing in substance) contra mundum. A main plank in the appellants'

submissions is that injunctions against newcomers are by their nature a form of prohibition aimed, potentially at least, at anyone tempted to trespass or camp (depending upon the drafting of the order) on the relevant land, so that they operate as a form of local law regulating how that land may be used by anyone other than its owner. Furthermore, such an injunction is said in substance to criminalise conduct by anyone in relation to that land which would otherwise only attract civil remedies, because of the essentially penal nature of the sanctions for contempt of court. Not only is it submitted that this offends against the in personam principle, but it also amounts in substance to the imposition of a regime which ought to be the preserve of legislation or at least of byelaws.

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

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

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

158 It may be said, correctly, that orders of this kind are usually made so as to protect the integrity of the court's process from abuse. Nonetheless they have the effect of attaching to a species of intangible property a legal regime giving rise to a liability, if infringed, which sounds in contempt, regardless of the identity of the infringer. In conceptual terms, and shorn of

A the purpose of preventing abuse, they work in rem or contra mundum in much the same way as an anti-trespass injunction directed at newcomers pinned to a post on the relevant land. The only difference is that the property protected by the former is intangible, whereas in the latter it is land. In relation to any such newcomer (such as the journalist) the embargo is made without notice.

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

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

E **161** But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP that it is, or has even threatened to be, itself a wrongdoer. The injunction is
F based upon the application of "ordinary principles of equity": see *Cartier* [2018] 1 WLR 3259 (para 20 above) per Lord Sumption JSC at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings
G which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2015] Bus LR 298, para 198.

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

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

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

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

166 Tempting though the superficial similarities may be as between possession orders against squatters and injunctions against newcomers, they afford no relevant precedent for the following reasons. First, they are the creature of the common law rather than equity, being a modern form of the old action in ejectment which is at its heart an action in rem rather than in personam: see *Manchester Corpn v Connolly* [1970] Ch 420, 428–429 per Lord Diplock, *McPhail v Persons, Names Unknown* [1973] Ch 447, 457 per Lord Denning MR and more recently *Meier* [2009] 1 WLR 2780, paras 33–36 per Baroness Hale JSC. Secondly, possession orders of this kind are not truly injunctions. They authorise a court official to remove persons from land, but disobedience to the bailiff does not sound in contempt. Thirdly, the possession order works once and for all by a form of execution which puts the owner of the land back in possession, but it has no ongoing effect in prohibiting entry by newcomers wishing to camp upon it after the order has been executed. Its shortcomings in the Traveller context are one of

the reasons prayed in aid by local authorities seeking injunctions against newcomers as the only practicable solution to their difficulties.

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

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

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

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

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

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

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

generally be built into the process for the application for, grant and subsequent monitoring of this type of injunction.

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

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

171 Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The appellants did not engage with the detail of any of these points, their objection being more a matter of principle.

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

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

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

175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in F an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of G a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

176 But advertisement in advance might well alert bodies with a mission to protect Travellers' interests, such as the appellants, and enable them to intervene to address the court on the local authority's application with focused submissions as to why no injunction should be granted in the H particular case. There is an (imperfect) analogy here with representative proceedings (paras 27–30 above). There may also be a useful analogy with the long-settled rule in insolvency proceedings which requires that a creditors' winding up petition be advertised before it is heard, in order to give advance notice to stakeholders in the company (such as other creditors)

and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

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

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

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

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

181 There are of course exceptions to this pattern of temporary camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for

trespass: see e g the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the site on notice, in the usual way, not least because there would be known targets capable of being served with the proceedings, and any interim application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

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

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

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

185 The point was made by Stephanie Harrison KC for Friends of the Earth (intervening because of the implications of this appeal for protesters) that the potential for a newcomer injunction to cause procedural injustice was not regulated by any procedure rules or practice statements under the

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

186 Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate exercise of the court's equitable discretion, where the general conditions set out in para 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

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

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

(1) Compelling justification for the remedy

188 Any applicant for the grant of an injunction against newcomers in a Gypsy and Traveller case must satisfy the court by detailed evidence that

A there is a compelling justification for the order sought. This is an overarching principle that must guide the court at all stages of its consideration (see para 167(i)).

189 This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are) properly to consider and provide lawful stopping places for Gypsies and
B Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The third is whether the authority has taken appropriate steps to control or even
C prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.

D

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

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

191 The starting point is section 23 of the Caravan Sites and Control of
E Development Act 1960 ("CSCDA 1960") which gave local authorities the power to close common land to Gypsies and Travellers. As Sedley J observed in *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans might be brought, whether for temporary purposes or for use as permanent
F residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.

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

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

194 The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the

impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 ("H(W)A 2014"). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to "carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area". If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

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

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

(iii) Planning policy

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

198 Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled *Gypsy Sites and Planning*. This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local planning authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 13.

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

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

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

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

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

(iv) Consultation and co-operation

H 203 This is another matter of considerable importance, and it is one with which all local authorities should willingly engage. We have no doubt that local authorities, other responsible bodies and representatives of the Gypsy and Traveller communities would benefit from a dialogue and co-operation to understand their respective needs; the concerns of the local authorities, local charities, business and community groups and members

of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action.

(v) Public spaces protection orders

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

(vi) Criminal Justice and Public Order Act 1994

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

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

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

A authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

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

(vii) Byelaws

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

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

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

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (62 & 63 Vict c 30).

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the
H Countryside Act 1949 (12, 13 & 14 Geo 6, c 97) (as amended by the Natural Environment and Rural Communities Act 2006); in relation to National Parks and areas of outstanding natural beauty under sections 90 and 91 of the 1949 Act (as amended); concerning the protection of country parks under section 41 of the Countryside Act 1968; and for the protection and

preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000.

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

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

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

(viii) A need for review

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

A But these are undoubtedly matters that must be explored upon the review of these orders.

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

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

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

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

F

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

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

(4) The prohibited acts

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

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

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

(5) Geographical and temporal limits

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

(6) Advertising the application in advance

226 We recognise that it would be impossible for a local authority to give effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the

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

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

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

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

(7) Effective notice of the order

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

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

(8) Liberty to apply to discharge or vary

232 As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to

apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) Costs protection

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

(10) Cross-undertaking

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

(11) Protest cases

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

236 Counsel for the Secretary of State for Transport has submitted and we accept that each of these cases has called for a full and careful assessment of the justification for the order sought, the rights which are or may be interfered with by the grant of the order, and the proportionality of that interference. Again, in so far as the applicant seeks an injunction against newcomers, the judge must be satisfied there is a compelling need for the order. Often the circumstances of these cases vary significantly one from another in terms of the range and number of people who may be affected by the making or refusal of the injunction sought; the legal right to be protected;

A the illegality to be prevented; and the rights of the respondents to the application. The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained.

(12) Conclusion

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

6. Outcome

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

(i) The court has jurisdiction (in the sense of power) to grant an injunction against "newcomers", that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.

(ii) Such an injunction (a "newcomer injunction") will be effective to bind E anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

COLIN BERESFORD, Barrister

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

Claim no: QB-2022-000904

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

Date: 26th January 2024

Before:
MR JUSTICE RITCHIE

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BETWEEN

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

Claimants

-and-

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

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

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

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

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

Hearing date: 17th January 2024

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Approved Judgment

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

Mr Justice Ritchie:

The Parties

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

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

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

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

The 8 Sites

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

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

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

Bundles

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

Summary

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

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

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

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

The Issues

10. The issues before me were as follows:

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

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

10.3 What should the terms of any such injunction be?

The ancillary applications

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

Pleadings and chronology of the action

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

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

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

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

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

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

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

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

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

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

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

The lay witness evidence

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

Service evidence

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

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

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

Substantive evidence

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

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

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

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

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

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

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

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

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

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

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

Tuesday 5th April 2022

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

Thursday 7th April 2022

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

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

Saturday 9th April 2022

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

Sunday 10th April 2022

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

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

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

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

Friday 15th April 2022

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

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

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

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

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

Tuesday 26th April 2022

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

Wednesday 27th April 2022

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

Thursday 28th April 2022

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

Wednesday 4th May 2022

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

Thursday 12th May 2022

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

Monday 22nd August 2022

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

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

Tuesday 23rd August 2022

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

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

Wednesday 14th September 2022

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Previous decision on the relevant facts

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

Assessment of lay witnesses

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

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

The Law

Summary Judgment

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

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

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

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

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

Final Injunctions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

…

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

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

Compelling justification for the remedy

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

…

"(viii) *A need for review*

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

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

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

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

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

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

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

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

(4) The prohibited acts

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

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

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

(5) *Geographical and temporal limits*

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

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

(6) Advertising the application in advance

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

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

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

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

(7) *Effective notice of the order*

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

respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

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

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

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

(9) *Costs protection*

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

(10) *Cross-undertaking*

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

(11) *Protest cases*

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

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

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

58. **(A) Substantive Requirements**

Cause of action

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

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience – compelling justification

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

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

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

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

Applying the law to the facts

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

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

Cause of action

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

Full and frank disclosure

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

Sufficient evidence to prove the claim

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

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

No realistic defence

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

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

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

Balance of convenience – compelling justification

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

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

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

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

Damages not an adequate remedy

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

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

Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

Conclusions

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

END

Neutral Citation Number: [2024] EWHC 1770 (KB)

Case No: KB-2024-BHM-000127

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2024

Before :

MR JUSTICE JOHNSON

- -

Between :

University of Birmingham	**Claimant**
- and -	
(1) Persons Unknown **(2) Mariyah Ali**	**Defendants**

- -
- -

Katharine Holland KC and Michelle Caney (instructed by Shakespeare Martineau LLP) for the Claimant
Liz Davies KC and David Renton (instructed by Hodge, Jones and Allen) for the Second Defendant

Hearing date: 4 July 2024

- -

Approved Judgment

This judgment was handed down by release to The National Archives on 9 July 2024

Mr Justice Johnson:

1. This case concerns an encampment by students (and possibly others) at the University of Birmingham ("the University") on the University's campus. The campers are opposed to actions of the Israeli Defence Force in Palestine. They demand that the University takes certain steps to show that it too opposes those actions. The University seeks an order for possession of its land against the campers. It says that a summary order for possession should be made under Part 55 of the Civil Procedure Rules.

2. Mariyah Ali is one of the campers. She is, apparently, the only one who is willing to reveal her identity and take part in these proceedings. She says that there are grounds to dispute the claim and that directions should be given for a trial of the issues. Specifically, she says that the University's decisions to terminate her licence to use its land, and to seek possession of its land, are unlawful because (i) they discriminate against her on the grounds of her beliefs, contrary to sections 13 and 91 of the Equality Act 2010, (ii) the University has not complied with its public sector equality duty, contrary to section 149 of the 2010 Act, (iii) the decisions amount to a breach of the University's statutory duty to ensure freedom of speech for university students, contrary to section 43(1) of the Education (No 2) Act 1986, and (iv) they amount to a breach of her rights to freedom of expression and freedom of assembly, contrary to section 6 of the Human Rights Act 1998 read with articles 10 and 11 of the European Convention on Human Rights ("the Convention").

The test for granting a summary order for possession

3. Part 55 of the Civil Procedure Rules makes provision for possession claims, meaning claims for the recovery of possession of land: CPR 55.1(a). This includes a possession claim against trespassers, meaning (for these purposes) a claim for the recovery of land which the claimant alleges is occupied only by persons who are on the land without the consent of anyone entitled to possession of the land: CPR 55.1(b).

4. Where, in a possession claim against trespassers, the claimant does not know the name of a person in occupation or possession of the land, the claim must be brought against "persons unknown" in addition to any named defendants: CPR 55.3(4).

5. Once a claim has been issued, a hearing must be fixed. At that hearing, or any adjourned hearing, the court may either decide the claim or may give case management directions: CPR 55.8(1). CPR 55.8(2) states:

> "Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions… will include the allocation of the claim to a track or directions to enable it to be allocated."

6. The test for deciding whether to make a summary possession order is the same as the test that applies to the grant of summary judgment under Part 24 of the Civil Procedure Rules: *Global 100 Limited v Maria Laleva* [2021] EWCA Civ 1835, [2022] 1 WLR 1046 *per* Lewison LJ at [13] – [14]. A summary order for possession may therefore be made if there is no real prospect of successfully defending the claim and there is no other compelling reason why the claim should be disposed of at trial: CPR 24.3. If this test is satisfied then it will necessarily follow that the court is satisfied that the claimant

would be likely to establish at a trial that possession should be granted (cf section 12(3) Human Rights Act 1998).

7. The procedure under Part 55 of the Civil Procedure Rules (and its predecessor provision, order 13 of the Rules of the Supreme Court) has been used by universities and other academic institutions on many occasions to secure summary possession orders against students taking part in encampments or "sit-ins": *University of Essex v Djemal* [1980] 1 WLR 1301, *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 ("*SOAS*"), *University of Sussex v Protesters* [2010] PLSCS 105, *University of Sussex v Persons Unknown* [2013] EWHC 862 (Ch), *University of Birmingham v Persons Unknown* [2015] EWHC 544, *University of Manchester v Persons Unknown* (transcript, 20 March 2023).

The issues

8. The parties agree the University is the registered freehold and leasehold owner of the land that is occupied by the camp. They agree that the defendants are in occupation of the land. They agree that the defendants do not have an interest in the land or any right to occupy the land. They agree that the University has (purportedly) terminated any licence that they had to use the land.

9. That means that subject to any defence that the defendants might have to the claim, the University is entitled to an order for possession of the land.

10. The parties agree that if the decisions to terminate any licence Ms Ali had to use the land, and to bring possession proceedings, were unlawful then Ms Ali has a real prospect of successfully defending the claim: *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 *per* Lord Bingham at [19], *Aster Communities Ltd v Akeman-Livingstone* [2014] EWCA Civ 1081 [2014] 1 WLR 3980 *per* Arden LJ at [2], [2015] UKSC 15 [2015] AC 1399 *per* Baroness Hale at [17], *Forward v Aldwyck Housing Group Ltd* [2019] EWCA Civ 1334 [2019] HLR 47 *per* Longmore LJ at [21], [25] and [31].

11. Ms Ali's case is that the University's decisions to terminate any licence she had to use the land, and to seek possession of the land, are unlawful for the reasons set out in paragraph 2 above.

12. The primary issue on this application for a summary possession order is therefore whether Ms Ali has a real prospect of successfully defending the claim on one or more of these grounds.

The facts

13. The basic factual background is largely undisputed. I summarise the facts based on the following sources:

    (1) The statements of case, so far as the University's summary of facts in the particulars of claim is admitted in the amended defence.

    (2) A judgment of Ritchie J given at an earlier stage of these proceedings: [2024] EWHC 1529 (KB) at [5] – [29].

(3) Written witness statements of Ms Ali.

(4) Written witness statements of Dr Nicola Cárdenas Blanco, the University's director of legal services, together with exhibits to those statements.

(5) A written witness statement of Mark Lawrence, the University's head of community safety, security and emergency planning, together with exhibits to that statement.

(6) Written witness statements of Jon Elsmore, the University's director of student affairs, together with exhibits.

14. The University is a corporate body created by Royal Charter in 1990, It is an exempt charity under schedule 3 to the Charities Act 2011. Its governing body is "the council", and members of the council are the claimant's charitable trustees. It has approximately 38,000 students and 9,000 staff. It has two main campuses in Birmingham, one of which is at Edgbaston, the other at Selly Oak.

15. The University is the registered freehold and leasehold owner of land at its Edgbaston campus. Part of the Edgbaston campus includes "The Green Heart". The Green Heart is an open area of land which is intended to "provide stimulating, secure and accessible landscaped surroundings." Dr Blanco says that students use The Green Heart both to study on the grass, and to take a break from studies in the adjoining library. Marquees are often erected on The Green Heart for different events in the University's annual calendar, including enrolment in September, a festival to celebrate belonging and inclusion at the start of Semester 2, and a programme of activities in the summer term. The main site for graduation celebrations is a marquee located on The Green Heart.

16. The University has a Code of Practice on Freedom of Speech ("the Code"). The Code is incorporated in every student's contract with the University. The Code covers demonstrations and protests and other events organised by the University's staff or students. It draws attention to the Public Sector Equality Duty:

> "which requires the University to have due regard to the need to eliminate discrimination, harassment, victimisation, and to advance equality of opportunity and foster good relations between people who share 'protected characteristics' (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation) and those who do not.
> …
> …for freedom of speech, the University 'must promote the importance of freedom of speech and academic freedom', and must 'take such steps as are reasonably practicable' to secure freedom of speech within the law. For other duties, including PSED… universities are required to 'have due regard' to the need to achieve the aims of these pieces of legislation. Therefore, in balancing these obligations and making decisions, the University will be mindful that it has a particular responsibility to promote and protect freedom of speech."

17. The Code requires the organiser of an event to comply with its provisions and to follow a prescribed procedure. This includes discussing the activity with the organiser's Head of School before proceeding. The Head of School is then responsible for determining whether (and what) additional measures should be put in place. It states:

> "Where the Head of School or Head of College's assessment is that there are particular risks raised by the event that require a fuller risk assessment and mitigations to be put in place, this should be escalated to and discussed with the Pro-Vice-Chancellor (Education) or the Pro-Vice-Chancellor (Research), who are the Authorising Officers for education and research activities respectively (see section 7.2). Examples of where this might be the case are: teaching or research seminars that involve speech which may fall within paragraph 5.2 of Appendix B; …or where other risks are raised by the event (for example due to the prevailing political context, or the timing or physical location of the event…). On these occasions, relevant aspects of the procedure in Appendix B of this Code should be followed. Examples include the completion of a risk assessment, and identification and implementation of mitigations that are relevant to the teaching or research activity. The Head of School should discuss these with the Authorising Officer, who is responsible for approving whether academic-related activities that have been escalated in this way may go ahead."

18. The Code states that the duty to promote and protect freedom of speech means that the starting point for any event is that it should be able to go ahead, but that a risk assessment must be carried out which should include the identification of steps that can be taken to ensure that lawful speech is protected. Such steps may include putting in place measures to ensure that opposing views can be put forward lawfully.

19. Mr Elsmore says that in the academic years commencing in 2020, 2021 and 2022 requests were made for a total of 1,596 events. Permission was granted in all cases. In 1,465 cases (just over 90%) no conditions were imposed. In the remaining 131 cases some conditions were imposed. Since October 2023, a number of requests have been made for "Pro-Palestinian events" to take place at the University. Permission was granted in every case (although Ms Ali gives evidence that in one case the event was required to be postponed and it has not yet been re-arranged). These events included vigils and speaking events. In a small number of cases conditions were imposed (for example to ensure that the event was held in a location away from an unauthorised protest that was taking place at the same time). There were also a number of unauthorised protests. At one of these it is said that an antisemitic banner was displayed, resulting in more than 1,500 complaints and a police investigation (this pre-dates the Green Heart camp and therefore cannot be attributed to that camp). The University became aware of one unauthorised protest in advance, and a letter was sent to the organiser to advise that the protest was not authorised, and explaining how authorisation could be secured.

20. Ms Ali describes herself as a British-Pakistani Muslim woman and one of the University's undergraduate students. She pays tuition fees to the University via the Student Loans Company. She condemns the attacks perpetrated by Hamas against

Israeli people on 7 October 2023, but she also opposes the response of the Israeli Defence Force since 9 October 2023. She considers that response amounts to genocide, or that there is a risk of genocide. She says that she has "philosophical beliefs in regards to Palestinian Liberation and Self-Determination, sanctity of religious worship; and against Genocide, and against racism and apartheid." She is a committee member of one of the University's student societies, the Friends of Palestine Society. She is concerned that the University's investment strategy "might be directly or indirectly involved, perhaps through profiting from investments in companies who have a very direct, or lesser, involvement in the conflict." She gives, as an example, a partnership between the University's engineering department with BAE Systems which, she says, builds fighter jets that are used by the Israeli Defence Force to attack Palestinian civilians.

21. In late April 2024, a student society wrote a letter to the University's Vice-Chancellor and made a series of demands. These included that the University should apologise "for the University's delay in condemning Israel's genocide and scholasticide Gaza, and for it's repression of student and staff organising in solidarity with Palestinians, and specifically the University's currently known investments and partnerships with companies, particularly arms manufacturers, linked to Israel."

22. From the early hours of 9 May 2024, a camp commenced at The Green Heart. No permission had been sought for the camp, as required by the Code.

23. The camp initially involved approximately 15 people. Those present were served with notices entitled "notice to quit" which stated that the University had not given permission for a protest at The Green Heart, that the occupation amounted to a trespass, and that the University required them to leave the campus immediately. Further such notices were served as new tents appeared on the camp. A series of "demands" were made of the University (relating to its relationship with institutions and businesses connected to Israel) on social media accounts which are said to be associated with the campers.

24. On 17 May 2024, the Vice-Chancellor published a message "to all students". This said:

> "You may have seen that a group of tents has been set up on the Green Heart by individuals protesting in support of Palestine and I wanted to address this in this message. Firstly, I want to emphasise that we will support students who wish to take part in protests about issues that they care deeply about. There are many ways in which this can be done lawfully, including through authorised demonstrations and our staff have worked with students over recent weeks and months to encourage this wherever possible. However, this does not extend to setting up tents where there is no authority or permission to do so. Although the camp has been largely peaceful to date, the Green Heart is a space which is important for University activities, and the presence of the camp (which has also included those who are not members of the University community) causes disruption to current and planned University activities in and close to that area. This includes examinations, the summer programme activities, which take place from the start of June, and the July degree

> ceremonies. It is also true that camps at other universities have led to incidents that we do not want to see repeated here.
>
> While I have informed the students involved that I am unable to meet with them whilst the camp is in place, members of the University's senior team are visiting the camp daily for welfare checks. Once the encampment ends, I remain open to meeting with them. As I have said above, there are other ways in which protests can be done lawfully, and we are happy to discuss and facilitate these with the organisers so that those who wish to can continue to protest…"

25. On 24 May 2024, the University sent an email to an email account associated with the campers. It said that the camp would cause "increasing disruption to essential activity planned for the whole student community, including the summer term programme and graduation ceremonies and celebrations".

26. The evidence suggests there were 61 tents on The Green Heart on 3 June 2024, rising to 83 by 20 June 2024. Dr Blanco says that the campers advertise daily schedules of events to take place on The Green Heart and continue to call for external third parties to attend and to join the camp.

27. Ms Ali is one of those taking part in the occupation. She is doing so, she says, to manifest her beliefs. For periods of time there were camps in other parts of the claimant's land, but those camps have ceased following an order made by Ritchie J.

28. The University claim that a number of concerning incidents have occurred, but the facts of these are disputed. For example, there is evidence of red paint being sprayed on one of the University's buildings, but Ms Ali says that was some distance from the camp and there is no evidence that it relates to the camp. In another incident, there is a dispute as to whether an item being carried by a student was a weapon or a religious item. Mr Elsmore says that on 22 May 2024 a group of masked individuals from the camp entered one of the University's building and surrounded the outside of a meeting room where a meeting was taking place. They banged on the door and walls of the meeting room, shouting and chanting loudly, intimidating the staff who were attending the meeting, many of whom were visibly shaken. I was provided with a video of this incident. Mr Elsmore also says:

> "The encampment has caused ongoing disruption to the wider university community, with a number of complaints and concerns raised by staff and students - in particular our Jewish staff and students who have described the encampment as having created an uncomfortable and hostile environment. The permanence of the camp is creating an increasingly uncomfortable and hostile environment for all others who use the campus including members of staff. The protestors have stated that their intention is to disrupt University business. Masked protestors have shouted at staff, blocked people's movement around campus, attempted to force their way into University meetings. On Wednesday 5 June 2024 several buildings across the campus were vandalised by masked individuals. This

> included spraying red paint across a large part of the front of the Aston Webb building, damaging an important sculpture which is part of the University's Research and Cultural Collections. This act of vandalism was posted on social media by pal_action who state that the action was carried out by midlands_pal_act being one of the groups associated with the camp and it was supported on social media by the bhamliberationzone account."

29. It is not practical, on this summary application where no oral evidence has been heard, to resolve the rights and wrongs of these disputed accounts. I proceed, in Ms Ali's favour, on the basis (which, anyway, is consistent with the bulk of the evidence) that the camp has been (at least largely) peaceful and has not involved any actual or threatened violence.

30. On the other hand, the camp has the undoubted effect that the University's land has been occupied in a way that has prevented the University from using it in the way it would wish. For example, it is unable (so long as the camp continues) to hold graduation ceremonies at The Green Heart, which it would otherwise have done. This amounts to a significant incursion into the University's right to possession of its land. It also prevents the University from operating the Code in the way it would wish, so as to ensure freedom of speech (including for those who hold views that differ from the campers). It also has a potential impact on many of the University's (ex) students, for example by depriving them of having a graduation ceremony at The Green Heart.

The decision to bring possession proceedings

31. The camp was discussed by the University's executive board (which forms part of the claimant's council, and hence its governing body) on 13 May 2024. The Vice Chancellor said that the camp involved "individuals protesting in support of Palestine". The minutes record "There were many ways to protest lawfully and the profile of a cause raised, including through authorised demonstrations. However, this did not extend to setting up and occupying tents on University property without authority or permission to do so."

32. On 3 June 2024 the Board's minutes record:

> "…there had been escalation and growing disruption to University business and student events. There had been several incursions by members of the camp wearing masks into Aston Webb. There had been a demonstration outside the meeting of the Investment Sub-committee. Attempts had been made by protestors to enter the Vice-Chancellor's Office. The student summer programme due to be held in the Green Heart and Chancellor's Court had been disrupted as the encampment occupied the spaces where the programme was to be held. The Graduation Ball due to be held in Chancellor's Court was also at risk of not going ahead. Those in the encampment had stated publicly their intention to disrupt University activities. It was particularly concerning that junior members of staff had been targeted and reported feeling intimidated and upset by the masked protestors. There was a significant risk that the

> encampments and actions of protestors would disrupt the forthcoming Graduation Ball, Open Days, and Graduation Ceremonies. Other universities with encampments had seen growing escalation with very concerning incidents at Manchester, Oxford, Leeds and Exeter. Nottingham, the only University to go to court to date over the issue, had not experienced such escalation; the University had made offers to the encampment to meet them to listen to their concerns and to offer alternative means for them to protest peacefully if they ended their encampment but all these had been rejected by the camp with the message that they would only meet the Vice-Chancellor to discuss their demands. The University would make another offer to meet this week, this time with the Pro-Vice-Chancellor (Education), noting the threat to the Graduation Ball and other student events;
>
> …
>
> UEB discussed the matter. UEB… noting its concern over the camp's disruption of and risks to University business and key events for students, such as the Graduation Ball and Graduation Ceremonies, as well as the Open Days.
>
> **Resolved** that in relation to the encampments, the University would:
>
> (i) apply for a Possession Order in the High Court…
>
> (ii) continue to make further attempts to engage with the encampment, noting the Pro-Vice-Chancellor (Education) would offer this week to meet the encampment."

33. On 11 June 2024, the Vice-Chancellor sent a message to students in which he explained the decision to bring possession proceedings:

> "Taking legal action is not a step that any of us would take lightly and I recognise that not everyone will agree with this approach. This is now necessary as a result of the escalation and unacceptable behaviour, and in order to look after the interests of the whole University community, including students and graduands, and their families and friends who wish to enjoy their graduation ceremonies without concern that their special day will be disrupted."

34. Dr Blanco says that the decision to bring possession proceedings was made because the camp was unauthorised, it amounted to a trespass, it was interfering with the University's activities and it was having a negative impact on other members of the claimant's community. She says the decision had nothing to do with the beliefs of Ms Ali or the other defendants, and that the same decision would have been made if the protest related to any other cause.

35. Dr Blanco is not a member of the Executive Board. She was not present when the decision to seek a possession order was made. She does not identify the source of her

knowledge for this part of her witness statement. I do not therefore attach any weight to it.

Procedural background

36. The University issued proceedings on 10 June 2024. A hearing took place on 14 June 2024, before Ritchie J. Hodge, Jones and Allen solicitors wrote a letter to the court "in support of the Persons Unknown" indicating that they were not yet formally instructed but intended to act as legal representatives once instructions had been obtained and funding arranged. They sought an adjournment of 21 days. Following a hearing on 14 June 2024, Ritchie J handed down a reserved judgment on 19 June 2024. He made an order joining Ms Ali as a second defendant to the claim and recording that the proceedings had been validly served against all defendants. He also granted summary orders for possession:

    (1) in respect of part of the University's land known as "Chancellor's Court" against all defendants.

    (2) In respect of Edgbaston Campus against all those in occupation of that campus save for any of the University's students or staff.

37. As to the balance of the claim, Ritchie J adjourned the proceedings to 25 June 2024.

38. On 19 June 2024 Hodge, Jones & Allen filed a notice of acting on behalf of Ms Ali. At the adjourned hearing on 25 June 2024, Ritchie J recused himself from further involvement in the proceedings. The hearing was relisted for hearing on 4 July 2024.

Does Ms Ali have a real prospect of successfully defending the claim?

39. In order to answer this question, it is necessary to determine whether Ms Ali has a real prospect of success in respect of any of her four defences (see paragraph 2 above).

(i) Unlawful discrimination: section 13 of the Equality Act 2010

40. A person's "religion or belief" is a protected characteristic for the purposes of the Equality Act 2010: section 4. A person's belief, in this context, means any religious or philosophical belief (or lack of belief): section 10(2). For the purposes of the 2010 Act, a person discriminates against another if, because of a protected characteristic, they treat that person less favourably than they treat or would treat others: section 13(1). The University's governing body must not discriminate against Ms Ali (or any other student) by not affording her access to a facility, or by subjecting her to any other detriment: section 91(2)(d) and 91(2)(f) of the Equality Act 2010. If there are facts from which the court could decide, in the absence of any other explanation, that the University contravened the 2010 Act then the court must hold that the contravention occurred, unless the University proves otherwise: section 136 of the 2010 Act.

41. The University disputes that Ms Ali has a belief that is protected by the 2010 Act. It says that Ms Ali's claimed beliefs do not satisfy the criteria required to constitute a philosophical belief within the meaning of the 2010 Act, as explained by Burton J in *Grainger PLC v Nicholson* [2010] ICR 360 at [24]. I heard extensive submissions on this issue from Liz Davies KC for Ms Ali and Michelle Caney (who argued this part of

the case for the University). It is the type of issue which may well be better determined following oral evidence at trial rather than at a summary hearing. In the event, it is not necessary to determine the issue and I prefer not to do so. I am content to assume (but, emphatically, without in any way deciding the point) that Ms Ali has a real prospect of establishing that she has a relevant philosophical belief, amounting to a protected characteristic.

42. The next issue is whether the University's governing body decided to terminate any licence Ms Ali had to use the land, and to bring these proceedings, because of her belief. There is no evidence to support such a suggestion. The basic facts do not suggest that this was the University's motivation. Ms Ali has not provided any evidence to support her contention that this was the motivation for terminating her licence or bringing possession proceedings. The University has disclosed minutes of the meetings that resulted in the decision to bring possession proceedings. Nothing in those minutes suggests that the decision was motivated by Ms Ali's beliefs. Rather, they suggest that they were motivated by the unauthorised nature of the camp and the disruption it caused. That is consistent with the communications sent by the Vice Chancellor before and after the decision was made. Ms Ali has not identified any comparator unauthorised camp that was permitted to proceed where the campers espoused different beliefs. By contrast, the University points to a previous instance where it has taken enforcement action against an unauthorised camp which had nothing to do with Israel or Palestine: *University of Birmingham v Persons Unknown* [2015] EWHC 544 (Ch).

43. Ms Davies and David Renton point out, in their written submissions, that at a hearing under CPR 55.8 the court is not obliged to accept the claimant's evidence. I agree. They also point out that at a trial they would be able to cross-examine the witnesses. Again, I agree. They also point out that this hearing is taking place prior to disclosure. Again, I agree. But that does not mean that the case should be permitted to continue just because something might emerge on disclosure or in cross-examination.

44. There is nothing in the facts, as they have emerged from the available evidence, which would entitle the court to decide that the University terminated Ms Ali's licence, or brought these proceedings, because of Ms Ali's beliefs. The reverse burden of proof under section 136 of the 2010 Act is not triggered. Ms Ali does not therefore have any real prospect of establishing a contravention of section 91(2) of the 2010 Act on the grounds of direct discrimination within the meaning of section 13 of the 2010 Act.

45. In the course of her oral submissions, Ms Davies recognised that this element of the case could not be sustained. Very properly, she formally withdrew the claim for direct discrimination.

46. Ms Davies maintains, however, that this is not fatal to Ms Ali's claim for discrimination contrary to the 2010 Act. She argues that even if there had not been direct discrimination on the grounds of Ms Ali's belief, the University did discriminate against Ms Ali on the grounds of actions taken by her (the participation in the camp) which were a manifestation of her belief. This, says Ms Davies, is sufficient to constitute unlawful discrimination. She relies on the decision of Eady J, President of the Employment Appeal Tribunal, in *Higgs v Farmor's School* [2023] EAT 89 [2023] ICR 1072. That case concerned claims in the employment tribunal for direct discrimination on grounds of religion or belief contrary to section 13 of the 2010 Act. Eady J drew attention to EU law, and specifically Council Directive 2000/78/EC which aims to combat certain

forms of discrimination in the workplace. The protection afforded by the Directive extends not just to the holding of a particular belief, but also its manifestation: Eady J at [32], *Bougnaoui v Micropole SA* (Case C-188/15) [2018] ICR 139 at [30]. Further, article 9 of the Convention protects the freedom to manifest one's religion or beliefs. The employment tribunal has no jurisdiction to entertain a claim for breach of Convention rights, but claims for breach of the Equality Act 2010 must be determined compatibly, so far as possible, with those rights: Eady J at [35]. Eady J explained the step-by-step analytical approach that should be taken to such a claim "within the employment context": Eady J at [94]. That analytical approach corresponds to the test for deciding whether an interference with the freedom to manifest breach of article 9 of the Convention is justified.

47. The present case does not arise in the employment context. The court (unlike the employment tribunal) has jurisdiction to determine a claim for breach of Convention rights, and the court, as a public body, must itself act compatibly with Convention rights. I do not see any basis on which Ms Ali could realistically fail in an argument under article 9 of the Convention, but succeed in an argument raised under the Equality Act 2010 interpreted in the way explained in *Higgs*. For all these reasons, I prefer to deal with this aspect of the case by reference to article 9 of the Convention – see paragraphs 58 – 75 below.

(ii) Breach of public sector equality duty: section 149 of the 2010 Act

48. Section 149 of the Equality Act 2010 states:

> "Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act…
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> …
>
> (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a)tackle prejudice, and
>
> (b)promote understanding.

> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
> …
> religion or belief;
> …
> …"

49. Public authority: The duty under section 149 of the 2010 Act only applies to public authorities, or to a person exercising public functions. Katharine Holland KC, for the University, submits that a university is not a public authority, and it is not, here, exercising public functions. The relevant function, she says, is the claim for possession of land that it owns. It owns its land in a purely private capacity, and there is no public element to its decision to enforce its right to possess its own land.

50. There may well be force in this argument in some contexts, for example if a university seeks possession of a property that it has leased. However, the test for determining whether a person is exercising public functions is multi-factorial, fact-sensitive and complex. Here, the defendants claim to be exercising public law rights. The University owes statutory duties to its students, including under section 43 of the 1986 Act. Disputes concerning a University's compliance with section 43 of the 1986 Act may be brought by way of a claim for judicial review - that provision does not create private rights which can readily be assured by other means: *R v University College London ex parte Riniker* [1995] ELR 213 *per* Sedley J at 216. The University is seeking an order for possession in a context where Ms Ali claims to be exercising her rights of freedom of expression and assembly, and her right to manifest her beliefs. I do not consider that it would be appropriate to make a final ruling on the issue following a summary hearing where there has been no disclosure and no oral evidence. I therefore assume, for the purposes of this decision, and in Ms Ali's favour, that the decisions to terminate Ms Ali's licence and to seek a possession order did amount to the exercise of public functions.

51. Breach of section 149: The next question is whether the University breached its obligations under section 149. Ms Davies relies on well-established principles as to the application of section 149 of the 2010 Act, as explained by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. She draws particular attention to:

(1) The intention of Parliament that considerations of equality of opportunity are placed at the centre of formulation of policy by all public authorities.

(2) The heavy burden on public authorities in discharging the duty and ensuring the availability of evidence to demonstrate that discharge.

(3) The obligation to fulfil the duty before and at the time when a particular policy is being considered.

(4) The obligation to assess the risk and extent of any adverse impact and the ways in which such a risk may be eliminated, before adopting a proposed policy.

(5) The need for the duty to be discharged in substance rather than by ticking boxes.

52. Ms Davies submits that there was a breach of this obligation. At no point did the University assess the risk and extent of any adverse impact that its decision to seek possession might have, and the ways in which such a risk might be eliminated. There was simply a "one-way discussion" with no consideration of the fact that Ms Ali had rights that needed to be accommodated. Nor was any consideration given to taking lesser steps, such as meeting the students and listening to them.

53. The evidence convincingly shows that the University had due regard to the factors identified in section 149 of the 2010 Act, including the need to foster good relations between persons who share a relevant protected characteristic and those who do not (and, specifically in this context, those who have conflicting views or beliefs), and the need to tackle prejudice and to promote understanding. The relevant underlying policy is the Code. The public sector equality duty is explicitly referenced in the Code, and not simply in a "tick box" manner. The substantive content of the Code indicates a real commitment to structured decision-making on requests to hold events on campus. It does so in a way that is designed to ensure freedom of speech and to accommodate those who hold different, challenging, and opposing views and beliefs. The evidence shows that, in practice, the University has delivered on that commitment. It authorises hundreds of diverse events every year, and has not refused authorisation for any single event. It has imposed conditions in only a small proportion of cases. Where it has done so it appears from the evidence that that has been to enhance, promote and protect freedom of speech, rather than in any way to undermine the expression of opinion or manifestation of belief. It has authorised many events which have enabled Ms Ali, and those who hold similar beliefs, to express their views and manifest their beliefs. It has apparently tolerated similar events, including protests, which were held without authorisation (there is no evidence of any disciplinary action being taken against students in such circumstances). It did not immediately issue proceedings when the camp commenced on 9 May 2024. The Vice Chancellor's message to students on 17 May 2024 expressed a commitment to support students who wished to take part in protests about issues that they cared deeply about. It pointed out that there were many ways in which that could be done lawfully, including through authorised demonstrations. It expressed a commitment to work with the organisers of the camp to enable them to continue to protest. The decision to issue proceedings was not made until 3 June 2024. It is now accepted that the decision was not made because of Ms Ali's beliefs, or the beliefs of others taking part in the encampment. The decision was made because of the impact of the camp on the rights of the University and its students, and because those taking part in the camp were unwilling to bring it to an end peacefully and explore other ways of manifesting their beliefs.

54. All of this demonstrates that throughout its decision-making process the University practically and substantively had regard to its public sector equality duty. Ms Ali does not have a real prospect of success on this issue.

(iii) Breach of section 43 of the Education (No 2) Act 1986

55. Section 43 of the 1986 Act states:

> "**Freedom of speech in universities, polytechnics and colleges**
>
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
>
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
>
> (a) the beliefs or views of that individual or of any member of that body; or
>
> (b) the policy or objectives of that body."

56. Subsection (2): It is convenient first to address the specific duty imposed by subsection (2). Ms Ali claims a breach of this duty because, she says, the University is denying her the use of The Green Heart on a ground connected with her beliefs or on a ground connected with the objectives of those taking part in the camp. Ms Holland does not dispute that The Green Heart is "premises" within the meaning of section 43(2). Her primary argument is that the defendants are not using the premises. They are, instead, occupying (part of) the premises. That is a false dichotomy. The defendants are using the premises by occupying them for their encampment. As to the reason why the University seeks to deny the defendants the use of the premises, I have already rejected the discrimination claim. That reason has no connection with the beliefs of the defendants or their objectives. Ms Ali thus has no real prospect of establishing a breach of subsection (2).

57. Subsection (1): The University has promulgated a Code which is intended to ensure that freedom of speech within the law is secured for its members, students and employees and for visiting speakers. The evidence shows that the Code achieves its intended effect. The University has thus taken such steps as are reasonably practicable to ensure that freedom of speech is secured. Its decision to seek a summary possession order in this case, where the defendants have decided not to act in accordance with the Code, does not amount to a breach of subsection (1).

(iv) Breach of Convention rights: section 6 of the Human Rights Act 1998 read with articles 9, 10 and 11 of the Convention

58. It is unlawful for a public authority to act in a way which is incompatible with a Convention right: section 6(1) of the Human Rights Act 1998. The rights and freedoms set out in Articles 9, 10 and 11 of the Convention are each Convention rights: section 1(1)(a) of the 1998 Act. Article 9 provides that everyone has the right to manifest their beliefs. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of assembly and to freedom of association with others. In each case the right is qualified; conduct of a public authority

that interferes with the right may be justified if the conduct is (a) prescribed by law and (b) necessary for the protection of the rights of others: article 9(2), 10(2), article 11(2).

59. Ms Ali contends that the decision to terminate her licence to use the land, the decision to seek a possession order, and (if it were made) a summary possession order, each amount to an unjustified interference with her rights under articles 10 and 11. It is convenient, at this point, to consider also whether it would amount to an unjustified interference with her rights under article 9 (see paragraph 47 above).

60. For the reasons given at paragraph 50 above, I proceed on the basis that Ms Ali has a real prospect of establishing that the University is, in this context, to be treated as a public authority for the purposes of the Human Rights Act 1998. Even if that is wrong, the court is a public authority and must act compatibly with Convention rights.

61. Ms Holland disputes that a summary possession order will interfere with Ms Ali's rights under articles 9, 10 and 11 of the Convention. She says that Ms Ali is not exercising such rights by camping on the University's land and that the Convention does not give anyone a right to trespass: *Richardson v Director of Public Prosecutions* [2014] UKSC 8, [2014] AC 635 *per* Lord Hughes at [3], *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888 *per* Lord Burnett CJ at [45], *Ineos Upstream Limited v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100 *per* Longmore LJ at [36]. Further, she submits that there is no scope for a Convention defence to a possession claim under Part 55 of the Civil Procedure Rules: *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273.

62. I do not consider that this point is straightforward. In *Cuciurean*, Lord Burnett CJ considered it was "highly arguable" that articles 10 and 11 were not engaged on the facts of that case, but did not ultimately determine the issue (see at [45]). There are many cases where articles 10 and 11 have been found to be engaged in the context of conduct which amounts to a trespass, or an obstruction of the highway, or is disruptive: *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 *per* Lord Hamblen and Lord Stephens at [64] – [69], *Steel v United Kingdom* (1998) 28 EHRR 603 at [142], *Appleby v United Kingdom* (2003) 37 EHRR 38, *Kudrevičius v Lithuania* (2016) 62 EHRR 34 at [98], *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 (see *per* Leggatt LJ at [23], [43] and [45]), *Hall v Mayor of London* [2010] EWCA (Civ) 817 *per* Lord Neuberger MR at [37] – [42], *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039, *R (Tabernacle) v Secretary of State for Defence* [2009] EWCA Civ 23 *per* Laws LJ at [37].

63. In *Hicks v Director of Public Prosecutions* [2023] EWHC 1089 (Admin) Chamberlain J (at [46]) described a submission that "articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing" as "ambitious", but it was not necessary to decide the point. Bean LJ agreed (at [52]).

64. In the present case it is also unnecessary to resolve the point. I prefer not to do so on what is a summary application where there has been no process of disclosure and no oral evidence. I assume, in Ms Ali's favour, that the decision to make a possession order, and the making of an order, do interfere with her rights under articles 9, 10 and 11 of the Convention.

65. (a) Prescribed by law: The University is the registered owner of the land at The Green Heart. Its decisions to terminate any licence that Ms Ali had, and to seek a summary possession order, do not amount to unlawful discrimination, a breach of the public sector equality duty or a breach of section 43 of the 1986 Act. These decisions are not otherwise unlawful. The making of a summary possession order is regulated by Part 55 of the Civil Procedure Rules. Those decisions, and the making of a summary possession order, are thus prescribed by law.

66. (b) Necessary for the protection of the rights of others: The termination of any licence, the decision to seek a possession order, and the making of an order, is for the purpose of protecting the University's right to occupy its own land, to the exclusion of others. The underlying purpose, therefore, is "the protection of the rights of others".

67. In order to show that the interference with Ms Ali's Convention rights is necessary for the protection of its property rights, the University must show that the measure constituting the interference (the decisions to terminate the licence and seek a possession order, and the making of the order) is proportionate. That means that (1) the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) the measure is rationally connected to the objective, (3) no less intrusive measure could be used without unacceptably compromising the achievement of the objective, and (4) balancing the severity of the measure's effects on Ms Ali's rights against the importance of the objective, to the extent that the measure will contribute to its achievement, the former does not outweigh the latter: *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 *per* Lord Reed at [74].

68. *(1) Sufficient importance*: The law gives strong protection to the right of a land-owner to possess its own land. That right is "of real weight when it comes to proportionality": *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45, [2011] 2 AC 104 *per* Lord Neuberger MR at [54]. It is a right that has been consistently recognised as being of sufficient importance to justify interference with the qualified Convention rights of students who are seeking to trespass on university premises.

69. *(2) Rational connection*: There is a direct connection between the measure and the University's objective to secure possession of its land. The measure (a summary possession order) has consistently been recognised as being appropriate in this context: *Secretary of State for Environment Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 *per* Baroness Hale at [35] and Lord Collins at [96].

70. *(3) Less intrusive measure*: There may be other measures that could achieve the same objective. It might (subject to the application of the Protection from Eviction Act 1977) be open to the University to exercise the remedy of self-help. Or it might be open to the University to seek injunctive relief to prevent the trespass. Neither of these measures would be less intrusive of Ms Ali's Convention rights. They would both have at least the same impact on those rights. Even if the remedy of self-help is available, it is undesirable because of the risk of disturbance and the potential for use of force that is not regulated by a court order. "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary": *McPhail v Persons Unknown* [1973] Ch 477 *per* Lord Denning MR at 456E and 457C. An injunction could be tailored. It might, for example, permit one token tent symbolically to remain to enable the University to take possession of the rest of the land whilst allowing the defendants still to exercise their Convention rights on the land

through the medium of a single tent. That would not, however, achieve the legitimate aim of enabling the University to recover all its land, rather than only part of its land. There is no measure that is less intrusive of the defendants' rights that could achieve the legitimate aim of restoring the land to the University.

71. *(4) Balance*: It is not for a court to tell anyone how they should exercise their article 9, 10 and 11 rights. Weight should be attached to the defendants' autonomous choices as to the way in which they wish to manifest their beliefs, or assemble together or express their opinions. Ms Ali has, anyway, advanced cogent reasons as to why the defendants have chosen to exercise their rights by means of a camp at The Green Heart.

72. There are, however, many other ways in which the defendants could exercise their Convention rights without usurping to themselves land that belongs to the University. The University has shown that it is anxious to ensure that its students, including Ms Ali, are able to exercise their Convention rights. It has formulated a Code which achieves that end. That Code forms part of the contract between the University and its students. By entering into that contract, Ms Ali agreed to comply with the Code. She decided to breach that agreement, and not to follow the Code, and not to engage with the University, when she embarked on the camp. No good reason has been given by Ms Ali, or any of the other defendants, for that decision. It impacts on the University's ability to ensure freedom of speech for its students, for example by ensuring that alternative or competing opinions are also heard. Ms Ali's licence to use the land at The Green Heart has been terminated. The termination of her licence was lawful (subject to the questions that arise under the 1998 Act). She is a trespasser. I have assumed that her rights under articles 9, 10 and 11 of the Convention are engaged, but her conduct is "not at the core of [those] freedom[s]": *Kudrevičius* at [97]. The weight that is to be given to those rights is significantly attenuated by reason of each of these contextual factors.

73. As against that, the University's right to possession of its own land is of real weight (see paragraph 68 above). That is all the more so where the University positively seeks to use its land in a way that gives full voice to rights of free expression and where part of the reason for seeking possession is because the campers have completely disregarded a framework that is designed to protect freedom of expression.

74. For these reasons, the severity of the impact on Ms Ali's rights does not (by a significant margin) come anywhere close to outweighing the importance of the objective of the University being able to regain possession of its own land. This is a conclusion that can comfortably and confidently be reached on a summary application.

75. It follows that Ms Ali does not have a real prospect of establishing that a possession order would amount to an unlawful interference with her Convention rights. She thus has no real prospect of successfully defending the claim on that basis.

Is there any other compelling reason why the claim should go to trial?

76. The parties sought to argue issues which are not straightforward and which are potentially fact sensitive: whether the University is exercising a public function when it seeks a summary possession order in this context, whether the defendants' beliefs amount to a protected characteristic within the meaning of the 2010 Act, whether the defendants' activities fall within the scope of articles 9, 10 or 11 of the Convention, and

whether the defendants are entitled to rely on the Convention as a defence to a claim for the summary possession of land. If any of them had required resolution then it might well have been better to determine them only after a process of disclosure, and after hearing oral evidence tested under cross-examination at a trial. That may then have amounted to a compelling reason why the claim should have proceeded to a trial, rather than being subject to summary determination.

77. It is not necessary to determine those issues and I prefer not to do so. Irrespective of the answer to those issues, Ms Ali has no real prosect of establishing discrimination on the grounds of her belief, a breach of the public sector equality duty, a breach of section 43 of the 1986 Act or a breach of her Convention rights. She therefore has no real prospect of success on any of her defences to the claim. There is good reason for claims like this to be determined summarily ("a remedy which is speedy and effective") where it is possible to do so. That is the case here. There is no other compelling reason why the case should go to trial. Put another way, there is no reason not to exercise the discretion in CPR 55.8(1) to make a summary order for possession.

Claim against "persons unknown"

78. The claim against the first defendant, the "persons unknown", is not defended. The University has proved its case against the first defendant. It has proved that it has a right to regain possession of its land. Its decision to terminate any licence to use the land, and to seek a summary possession order, was not unlawful on any ground, and the granting of a summary possession order is compatible with the defendants' Convention rights. The University has taken all practicable steps to notify the "persons unknown" of these proceedings and this hearing (section 12(2)(a) Human Rights Act 1998).

Relief

79. It follows that a summary order for possession will be made.

80. A residual issue concerns whether the order should be made only in respect of the land at The Green Heart, or whether it should extend to the remainder of the University's land at Edgbaston Campus and also to its land at the Selly Oak Campus and the Exchange Building. There is currently no camp at the Edgbaston Campus besides that at The Green Heart. Nor is there any camp at the Selly Oak Campus or the Exchange Building. Nor is there evidence of any immediate risk that anybody might unlawfully occupy that land.

81. However, there was an occupation of the Chancellor's Court as part of the activity which is now continuing at The Green Heart. The camp at The Green Heart commenced without warning, and in the early hours of the morning. The evidence suggests that in other universities similar camps are taking place, and that there is the potential where a possession order is made in only one limited area for a camp simply to move to another part of the campus. In these circumstances, the authorities recognise that it is justified to make a summary possession order not just in respect of the occupied land, but also other land belonging to the University (albeit this issue has been left open by the Supreme Court): *Djemal per* Buckley LJ at 1304G and *per* Shaw LJ at 1305D, *Meier per* Lord Neuberger at [69] – [70], *SOAS per* Henderson J at [31], *University of Sussex v Protesters per* Vos J at [8] – [9], *University of Sussex v Persons Unknown per* Sales

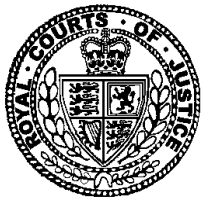
J at [26]. It is justified to make the wider order that is sought in the circumstances of the present case.

Outcome

82. There is no real prospect of Ms Ali successfully showing that the University has discriminated against her, contrary to section 91 and 13 of the 2010 Act, or that it has breached its public sector equality duty, or that it has breached section 43 of the 1986 Act, or that a possession order would be incompatible with her Convention rights.

83. The defendants have no real prospect of successfully defending the claim, and there is no other compelling reason why the claim should proceed to trial or why a summary possession order should not be made.

84. The University has therefore established that it is entitled to a summary possession order.



Neutral Citation Number: [2024] EWHC 1952 (Ch)

Claim No.BL-2022-001396

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

26 July 2024

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

- -

B E T W E E N :

(1) ARLA FOODS LIMITED

(2) ARLA FOODS HATFIELD LIMITED

Claimants

-and-

(1) PERSONS UNKNOWN WHO ARE, WITHOUT THE CONSENT OF THE CLAIMANTS, ENTERING OR REMAINING ON LAND AND IN BUILDINGS ON ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM ("the Sites"), THOSE BEING:

a. "THE AYLESBURY SITE" MEANING ARLA FOODS LIMITED'S SITE AT AYLESBURY DAIRY, SAMIAN WAY, ASTON CLINTON, AYLESBURY HP22 5EZ, AS MARKED IN RED ON THE PLANS AT ANNEXE 1 TO THE CLAIM FORM;

b. "THE OAKTHORPE SITE" MEANING ARLA FOODS LIMITED'S SITE AT OAKTHORPE DAIRY, CHEQUERS WAY, PALMERS GREEN, LONDON N13 6BU, AS MARKED IN RED ON THE PLANS AT ANNEXE 2 TO THE CLAIM FORM;

c. "THE HATFIELD SITE" MEANING ARLA FOODS HATFIELD LIMITED'S SITE AT HATFIELD DISTRIBUTION WAREHOUSE, 4000 MOSQUITO WAY, HATFIELD BUSINESS PARK, HATFIELD, HERTFORDSHIRE AL10 9US, AS MARKED IN RED ON THE PLANS AT ANNEXE 3 TO THE CLAIM FORM; AND

d. "THE STOURTON SITE" MEANING ARLA FOODS LIMITED'S DAIRY AT PONTEFRACT ROAD, LEEDS LS10 1AX AND NATIONAL DISTRIBUTION CENTRE AT LEODIS WAY, LEEDS LS10 1NN AS MARKED IN RED ON THE PLANS AT ANNEXE 4 TO THE CLAIM FORM

(2) PERSONS UNKNOWN WHO FOR THE PURPOSE OF PROTESTING ARE OBSTRUCTING ANY VEHICLE ACCESSING FROM THE HIGHWAY THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(3) PERSONS UNKNOWN WHO FOR THE PURPOSE OF PROTESTING ARE OBSTRUCTING ANY VEHICLE ACCESSING THE HIGHWAY FROM ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(4) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING CAUSING THE BLOCKING, SLOWING DOWN, OBSTRUCTING, OR OTHERWISE INTERFERING WITH THE FREE FLOW OF TRAFFIC ON TO, OFF, OR ALONG THE ROADS LISTED AT ANNEXE 1A, 2A, 3A, AND 4A TO THE CLAIM FORM

(5) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES ON TO ANY VEHICLE WHICH IS ACCESSING OR EXITING THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(6) PERSONS UNKNOWN WHO ARE FOR THE PURPOSE OF PROTESTING, AND WITHOUT THE PERMISSION OF THE REGISTERED KEEPER OF THE VEHICLE, ENTERING, CLIMBING ON, CLIMBING INTO, CLIMBING UNDER, OR IN ANY WAY AFFIXING THEMSELVES ON TO, ANY VEHICLE WHICH IS TRAVELLING TO OR FROM ANY OF THE SITES LISTED IN SCHEDULE 2 OF THE CLAIM FORM

(7) 34 OTHER NAMED DEFENDANTS LISTED AT SCHEDULE 1 OF THE INJUNCTION ORDER

Defendants

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

Caroline Bolton and Natalie Pratt (instructed by Walker Morris LLP) for the Claimants
The Defendants did not appear and were not represented
Hearing date: 23 July 2024

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APPROVED JUDGMENT

JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

Introduction

1. The First Claimant is the largest farmer-owned dairy co-operative in Europe, owned by approximately 9600 dairy farmers, 2,400 of whom are in the UK. It provides 40% of the milk supplied to supermarkets in the UK and is the largest supplier of milk in the UK. While it operates from several sites in the UK producing a range of dairy products, the present proceedings concern four of those sites that produce and distribute milk (the **"Sites"**). The four sites are at Aylesbury Dairy, Samian Way, Aston Clinton Aylesbury HP22 5EZ (the **"Aylesbury Site"**), Oakthorpe Dairy, Chequers Way, Palmers Green, London N13 6BU (the **"Oakthorpe Site"**), Hatfield Distribution Warehouse, 4000 Mosquito Way, Hatfield Business Park, Hatfield, Hertfordshire AL10 9US (the **"Hatfield Site"**) and finally Pontefract Road, Leeds LS10 1AX and the National Distribution Centre at Leodis Way, Leeds LS10 1NN (the **"Leeds Site"**).

2. The Second Claimant, a wholly owned subsidiary of the First Claimant, holds the leasehold title to the Hatfield Site.

3. By the present Part 8 proceedings, the Claimants seek injunctions against a number of identified defendants and persons unknown to restrain future action at the Sites by animal rights activists associated with the protest group initially known as Animal Rebellion, which rebranded last year to Animal Rising (the **"Claim"**).

4. The Claimants sought and obtained from Bacon J on 31 August 2022 urgent and without notice relief to restrain apprehended unlawful acts of protest. The interim relief was continued by Fancourt J at a return date on 4 October 2022, and the Judge permitted the Claimants to add 31 named defendants. By way of a 25 October 2022 order, three further defendants were added, one of whom was identified only by a photograph rather than by name. Following the Claimants' 12 January 2023 application, the final disposal of the claim was adjourned pending the expedited appeal to the Supreme Court in *Wolverhampton City Council and Others v London Gypsies and Travellers and others* [2023] UKSC 47; [2024] 2 WLR 45, which concerned whether injunctions could be granted against persons unknown and if so what the test for doing so should be. Following the handing down of the Supreme Court decision in *Wolverhampton* on 29 November 2023, the case was brought on for a final hearing before me to deal with the disposal of the claim against the identified Defendants and a continuation of the injunction order against the defendant persons unknown. This is my judgment following that hearing.

5. Therefore, the Defendants fall into two categories: 34 named or identified Defendants and six categories of persons unknown. 33 of the former category of Defendants are named and one- the 40th Defendant- identified by photograph. All 33 of the named Defendants have now agreed to stays of the proceedings through consent orders in return for the giving of undertakings.

6. That leaves the 40th defendant, who is identified by image 1 at Schedule 1A of the re-Amended Claim Form but whose name is not known by the Claimants and therefore who cannot be asked by them to sign an undertaking.

7. A number of the signed draft consent orders supplied to the Claimants at midnight the day before the hearing contained an error in the main body of it, so I agreed not to provide a draft judgment for 24 hours in order that these could be corrected, and I have duly made the consent orders in the terms sought.

8. The Claimants were represented before me by Caroline Bolton and Natalie Pratt. I am grateful for their submissions. The Defendants did not appear, were not represented, and have not acknowledged service or filed any evidence in the proceedings.

Decision

9. For the reasons set out below, I grant the order sought.

10. I shall take first the relevant factual background, before setting out the law and then applying it.

Relevant factual background

11. Animal Rising have two stated objections to the dairy industry: what they see as its contribution to climate change and its use of animals in the production of milk. For convenience, I shall refer to the individuals involved as animal rights protestors in this judgment.

12. The Claimants have adduced witness evidence from a number of sources:

    (1) Four individuals to explain, among other things, the operation of the sites and the past actions on them: Joanne Taylor (Aylesbury), Melanie Savage (Hatfield); David Dons (Oakthorpe) and Anne-Frances Ball (Leeds);

    (2) Nicholas McQueen (partner) and James Damarell (senior associate) of Walker Morris LLP, their solicitors;

    (3) one of their directors; Afshin Amirahmadi; and

    (4) Samantha Sage, the Quality, Environmental, Health and Safety Manager at the Aylesbury Site.

13. I have not had the benefit of having the evidence tested by arguments from the defendants. However, having considered it carefully, I have no reason to doubt its veracity or accuracy, and I accept it. I set out the key points from its below.

14. To understand the actions that have occurred and the causes of action relied on, it is first necessary to understand in outline the layout of the Sites and their operation.

The layout and operation of the Sites

15. The First Claimant holds the freehold title to the Aylesbury Site. The Aylesbury Site is the largest dairy in the UK, processing around 10% of the milk in the UK. Therefore, it

is a significant contributor to the UK dairy industry. 700 members of staff are employed at the dairy and it is very busy, such that free access to the Site is required at all times to ensure that operations at the dairy can run, and that the surrounding road network remains free-flowing and is not adversely impacted by operations at the dairy. Around 300 trucks enter and leave the dairy each day, consisting of 160 raw milk deliveries and 140 outbound departures.

16. The trucks that enter and leave the site are a mixture of tankers and other HGV lorries, and as the A41 is the only access road to the site, apart from Samian Way, all vehicles travelling to and from the site use this road. There are three access points to the site, Gatehouses 1 to 3, each of which serves a different function: one is used for raw milk intake and outbound exits, another for access to the employee and visitor car park and the third as the outbound access. All of the access points are from Samian Way, which is an adopted highway for which the local highway authority is responsible. Gatehouses 1 and 2 are manned, and Gatehouse 3 is unmanned but visitors enter using a swipe-card at the barrier or by ringing the intercom to make themselves known to the security staff.

17. Significant security measures have been put in place at the site since the anticipation of protests in September 2022.

18. The Second Claimant holds a 15 year lease to the Hatfield Site. Arla operates the Hatfield Site as a distribution centre, employing 500 staff there. The centre handles around 350 million kilograms of palletised food products and around 520 million kilograms of fresh milk, which is delivered direct to the stores of Arla's customers, mostly supermarkets. The centre processes a very significant proportion of the total milk supplied by Arla in the UK. It also stores and processes significant proportions of the UK's cheese and other dairy product supply. The Site is like the Aylesbury Site a busy one, with around 400 vehicular movements a day: around 180 inbound and 220 outbound.

19. Most if not all of these vehicles will use the A1001 and/or A1(M) when travelling to and from the Site. There are two vehicular access points to the Site, both directly off adopted highways maintained by the local highway authority. The first is Gypsy Moth Avenue, from which the HGVs access and exit the site. They travel a short way along a private road into the site before coming to a manned entry barrier. The second is Mosquito Way, where cars access and exit the Site from. That access is controlled by a barrier that is operated by a swipe-card and intercom system. Pedestrian access to the Site is located at the Mosquito Way access, next to the vehicle barrier, through a swipe-card and intercom operated turnstile.

20. The Site is staffed around the clock by a security team so that two people are always on duty, it is fully fenced and it is monitored by CCTV.

21. The First Claimant holds the freehold title to the Oakthorpe Site. It operates a dairy business at the Site, processing 350 million litres of milk every year and employing approximately 200 staff. It produces fresh milk, organic milk and fresh cream products for major retailers. It also produces fresh organic milk under its Yeo Valley brand at the dairy.

22. The Site is busy with vehicular movements, and relies on the same for the operation of its business. There are around 40-50 inbound HGV vehicles a day and around 50-60

outbound HGVs, together with the movement of around 10-20 other vehicles, such as contractors, goods deliveries and waste collections.

23. The Site is surrounded by a perimeter fence, although access is possible from the bank of Pymmes Brooke, which runs along the southern and eastern boundaries of the Site. It could in theory also be possible to access the site from neighbouring properties, but Arla considers that both of these routes would be incredibly challenging.

24. There are 5 vehicular access points to the Site:

(1) Chequers Way, which is an adopted highway. There is a swing gate at the access point which is left open to facilitate HGV access. Inside the access point HGVs can turn left to access the dairy's intake or straight on, in which case they encounter a barrier preventing access to the rest of the Site, which is operated by a swipe-card and intercom system.

(2) There is a second access point off Chequers Way, which can be used by cars, larger vehicles and small trucks but not for tankers, trailers or larger vehicles. It is accessed through a swing gate, which is left open to facilitate access to the Site, and just inside the gate is a barrier and pedestrian access point which require swipe-card access or use of the intercom to contact the Site's security staff.

(3) There are two vehicle access points from Owen Road, which is a public highway: one facilitates inbound traffic and the other outbound traffic. They utilise a barrier requiring swipe-card access or use of an intercom to speak to the Site's security staff. There is also a pedestrian turnstile.

(4) There is a vehicular access off Ostliffe Road, a highway, which utilises a barrier requiring the same measures to enter as set out above. This access is used only as an exit point and almost exclusively as the HGV exit, although temporary use can be made as an exist for all vehicles.

25. Aside the measures set out above, there is a security building on the site, vehicle barriers operate automatic number plate recognition cameras, all entry and exit points are covered by CCTV and monitored by security staff, and one vehicular access pointt is closed between 7pm and 7am to minimise disruption to local residents.

26. The First Claimant holds freehold title to the Leeds Site. The Site actually comprises two sites: the Stourton dairy and Arla's national distribution centre. The two sites are next to each other, linked by an inter-site gate, such that they form one large site. 450 Arla employees work at the dairy, along with 150 embedded contractors for various services, and the distribution centre employs 405 staff. The dairy processes just over 750 million litres of milk each year. It is the third largest dairy in the UK and Arla's second largest dairy, the Aylesbury Site being the largest. The dairy accounts for around 7% of the UK's milk supply output. The dairy produces own label milk for supermarkets, Arla's branded Cravendale filtered milk, fresh creams, fermented creams, cottage cheese, custard, alcohol cream and milkshake and ice-cream sundae products.

27. Like the other Sites, the Leeds Site is busy with vehicular movements and relies on the same for the operation of its business. There are around 300 vehicular movements a day

around the dairy and around 225 around the distribution centre. Most, if not all, of these vehicles will use the A639 and/or the M1 when travelling to or from the Site. There are four vehicular access points:

(1) The distribution centre can be accessed from two points off Leodis Way, a highway, which are a few metres apart. One is the HGV entry and exit point and the second the entry and exit point to the car park that services the distribution centre, including for pedestrians. Access through the former is by barrier, controlled by a full-time manned security gatehouse. Access to the latter is by keycard- controlled automatic gate, and only be used to access the car park and not the rest of the site.

(2) The dairy can be accessed at two points off Pontrefract Road, a highway. One is for HGVs and cars to enter, and the other, which is 200 metres away, is for their exit. One security guard is present in the gatehouse at the entrance, and the entrance and exit are controlled by keycard operated gates.

28. Each of the access points is well signed and utilise distinctive green fencing, so their location could be easily identified by protestors. Arla could, if the Pontefract Road access points were blocked, run its operation from the access points on Leodis Way. However, if all access points were blocked, operations would likely have to cease within a matter of hours, with the consequence that a significant volume of milk would be lost, and the distribution centre would have to cease operations within around two hours.

29. In addition to the security measures above, the dairy is surrounded by a security fence, most of its internal doors are keycard controlled, and around 75% of its internal areas are covered by CCTV. The distribution centre is also surrounded by a perimeter fence, has a significant CCTV system both externally and internally, and all staff at the distribution centre are issued with a security access card which must be used at strategic points of the site to allow access and to pass through the Site.

Past animal rights protests at the Sites

30. There have been past animal rights protests at three of the sites: the Oakthorpe, Aylesbury and Hatfield Sites.

31. Animal rights protestors first entered one of the sites in March 2020. Animal Rebellion has claimed on its website that members of its group were responsible for the relevant action. On 3 March, two protestors entered the Oakthorpe Site and climbed on silos in which dairy product was stored. They were arrested and a minor delay in production operations was caused. Four days later, a much larger demonstration occurred, to which the 3 March demonstration appears to have been a precursor. Around 100 Animal Rebellion protestors entered the site and handcuffed themselves to the railings next to the tanker bay at the Site. They were removed by the Police. The protestors also erected a makeshift structure outside the site and attached themselves to it. They were removed and arrested. The protests came at a financial cost to the Claimants' business, both in the additional resources needed to protect the business and the adjustments needed to mitigate the impact.

32. On 31 August 2021, at around 5.30 am, around 50 protestors associated with Animal Rebellion attended the Aylesbury Site. The protest lasted approximately 24 hours. They

(a) prevented access to the dairy by blocking Samian Way between the roundabout and first gatehouse; (b) erected two bamboo towers on Samian Way and attached themselves to the towers; and (c) parked a Luton-style van lengthways across the road, making the road impassable and locked themselves to the van. Further (d) several protestors sat in the road and erected and occupied tents on the grass verges, which are within Arla's freehold title.

33. Thames Valley Police arrived at the Site at around 6 am and remained there for the majority of the 24 hour period. They removed the protestors that had attached themselves to the bamboo structure, and dismantled the structure itself. Around twelve of the protestors were arrested. The blocking of access to the dairy necessitated the closure of the A41 for most of the day, Samian Way was closed for most of the 24 hour period and there was also significant traffic disruption caused in the neighbouring village of Buckland as a result of the closure of the A41.

34. Animal Rebellion's website, as it stood at 28 August 2022, details a campaign called "*Down with Dairy*", which includes a description of the campaign, stating, among other things, that:

> "*The action is part of a sustained campaign, which saw a march and blockade of the Arla Factory by Animal Rebellion in March the previous year.*"
>
> "*Thirteen of the world's largest dairy corporations, including Arla, together emitted more greenhouse gases in 2017 than major polluters BHP and ConocoPhillips, mining and oil giants respectively.*"
>
> "*We're not just demanding that Arla go plant-based by 2025, we're demanding that the government supports companies like Arla by funding a just transition for workers in meat and dairy industries to just and sustainable alternatives.*"
>
> "*You can read more about some of those involved in our campaign against Arla here.*"

35. More generally, the website explained the "*Down with Dairy*" campaign as follows:

> "*Animal Rebellion is calling on the dairy industry to transition to plant-based production by 2025…*"

36. The August 2021 protests caused the following harm: (a) it prevented inbound deliveries of raw milk and other raw materials to the Aylesbury Site, which were all diverted elsewhere, and which in turn meant that around 80 farms could not have their milk collected; (b) outbound deliveries were disrupted, which caused disruption to 76 stores operated by Arla customers in the UK and impacted international cream products; (c) finished product went to waste; (d) other activities at the Aylesbury site were also impacted, customer audits of Arla's facilities were cancelled, tenants on other areas of Arla's land away from its dairies and distribution centres were impacted, and their operations stopped. The main financial loss was the loss of revenue from uncollected milk of around £170,000. There were also additional cleaning and security costs.

37. The following accommodations also needed to be made, which caused a significant disruption to Arla's operations: (a) Arla staff were required to park on Samian Way, walk to work, or use the emergency access; (b) raw milk deliveries were diverted away from the Aylesbury Site; (c) planned deliveries such as fuel, bottle resin and packaging, were rescheduled for the following day; (d) outbound vehicles were stuck at the dairy and unable to leave, and no empty vehicles could enter the Site to load outbound deliveries; (e) the dairy only had 250 milk cages on-site due to the inability to replenish stocks and could not therefore run; and (f) additional security was requested to cover the third gatehouse and patrols.

38. Moving forward to 2022, in or around August 2022 the Claimants became aware from Animal Rebellion's website of a plan to disrupt the dairy supply in the UK in September over a one to two week period. The website included a section entitled "*This Changes Everything- A Plant Based Future*", which stated, among other things, as follows:

> "*The near term goal is fairly simple, this September we will be disrupting the dairy supply across the UK with 500 people over a 1-2 week period, cutting off the supply of milk to supermarkets and causing unignorable high-level disruption which will be felt by tens of millions of people across the UK and be a sustained no.1 news story. This will result in more than one thousand arrests and put the damage and exploitation of animal agriculture at centre stage. We will then build on that momentum with a large-scale occupation in the centre of London…*
>
> *This is the beginning of a long term civil resistance project, where we will be raising the stakes through the actions we take and also continuing our resistance through the court systems…*
>
> ***Strategy***
>
> *The two key mechanisms / tools to achieve our aims are large-scale material disruption and the drama of interactions with the public by more localised disruptions…*
>
> *We need to make sure we create a crisis at the start, so going in with maximum intensity to make sure our issue is a number one news story, and after that we can keep the debate going with relatively minimal effort….*
>
> *A key action design principle is all actions must be "simple, unbeatable and repeatable".*
>
> *…*
>
> ***Action plan:***
>
> *Phase 1- warm up actions and mobilisation starting at the beginning of June*
>
> *…*
>
> *Phase 2- two weeks high-intensity in September with 500+ people*

The objective is simple- we are going to have supermarket shelves empty of milk for two weeks, and will stack all energy and mobilisation towards this goal. We will be asking for people to commit to taking one week off. This phase will have a clear end and a clear ask for people to join us at phase 3…

<u>Phase 3- mobilise to the city</u>

Phase 3 will be an openly-organised mass occupation in London with no barrier to entry. We will mobilise during Phase 2 and we can double down on this by taking out newspaper adverts and by our spokespeople press releases talking about the meeting date and location. This will happen a week or so after Phase 2 and may be part of a broader coalition with XR [Extinction Rebellion] and JSO [Just Stop Oil]."

39. There was also a concern that the Leeds Site may have been surveyed by potential protestors and/or other persons associated with Animal Rebellion, because a dog-walker was seen on 24 August 2022 walking near the Leeds Site and appearing to be recording a video when doing so.

40. This all led to the 31 August 2022 without notice application, and order bearing the same date made by Bacon J against the persons unknown described in the heading to this judgment e.g. "*Persons unknown, who are, without the consent of the Claimants, entering into or remaining on land and in buildings on any of the sites listed in Schedule 2 of the Claim Form*". The order barred the following acts: (a) entering into, entering onto, tunnelling under or remaining on the Sites (paragraph 2.1 of the order); (b) blocking, slowing down, obstructing or otherwise interfering with vehicular access to or from the highway at the Sites (paragraph 2.2); (c) approaching, slowing down, or obstructing any vehicle on or moving along the roads identified in various annexes to the order, for the purpose of (i) disrupting vehicular access to or from the Sites or (ii) protesting (paragraph 2.3); (d) entering, climbing onto, climbing into, or climbing under any vehicle travelling to or from the Sites (paragraph 2.4); (e) affixing themselves ("locking on") to any vehicle on, entering or existing the Sites where the locking on is for the purpose of protesting (paragraph 2.5); (f) affixing themselves or any other items to any of the roads in (c) or any other person or object on, under or over those roads for the purposes of (i) disrupting vehicular access to or from any of the Sites; or (ii) protesting (paragraph 2.6); or (g) erecting any structure on those roads for the purpose of (i) disrupting vehicular access to or from any of the Sites or (i) protesting (paragraph 2.7).

41. Alternative service was allowed by a number of methods, including placing the order and documents leading to it on the First Claimant's websites and Facebook pages, e-mailing a copy of this order to Animal Rebellion, and placing signs and/or notices on the perimeter of each of the Sites. The injunction order was duly placed on the First Claimant's website on 2 September 2022, a relevant entry added to the First Claimant's Facebook page the same day, an e-mail sent to Animal Rebellion the same day, which led to an auto-reply from two Animal Rebellion e-mail addresses, and signs placed on the perimeters of the Sites that day.

42. However, three protest incidents occurred a few days later in September 2022 at the Sites: one on 4th September at the Aylesbury Site, one on 5th September at the Aylesbury Site and one on 8th September at the Hatfield Site.

43. The incident at the Aylesbury Site on 4 September 2022 started at about 5.30 am. Four protestors entered the Site and climbed on top of four milk silos, where they stayed for the next 10 to 12 hours. As a result of this, and the risk of contamination to the milk product contained in the silos, it was necessary to dispose of 640,000 litres of milk. Trespassing on the Aylesbury Site was a breach of paragraph 2.1 of the 31 August 2022 injunction order, so this appears to have breached that order.

44. Six protestors entered the Site and climbed on top of three raw milk tankers. Again, that appears to have been a breach of paragraph 2.1 of the 31 August 2022 injunction order.

45. Several protestors also blocked 'College Road', one of the access routes to the Site, which was protected under the injunction order, and climbed aboard and occupied vehicles on the road. It took until approximately 1.30 pm for all of the protestors to be removed from the road and vehicles in the vicinity of the Site, and for free access to the Site to recommence. These actions appear to have been in breach of paragraphs 2.2 to 2.5 of the injunction order.

46. 23 protestors were arrested in connection with the incident.

47. The next morning, 5 September 2022, at around 2.30 am, approximately 6 protestors entered the Site, and climbed aboard tankers or lay in the loading areas. All protestors were removed by around midday and 4 protestors were arrested.

48. Three days later, on 8 September 2022, at around 10 am, approximately 20 supporters of Animal Rebellion entered the Hatfield Site. A number of them caused physical damage by drilling into tyres and/or cutting the valves off lorry tyres to immobilise the lorries, before climbing onto a lorry in the loading bay and occupying the site. Over 400 tyres were either drilled or had their valves cut and had to be disposed of. The costs of replacement would be over £170,000. 17 people were arrested for aggravated trespass and criminal damage.

49. There were no similar incidents in September 2022 at the other two Sites, namely the Oakthorpe and Leeds Sites.

50. However, there were a number of other actions taken in relation to the dairy campaign between 3 and 8 September 2022. These included protests on 4 September at three sites owned by Muller, entering two Muller facilities on 5 September, disrupting three dairy sites on 6 September (including one of Muller), staging a sit in at four supermarkets and preventing customers at those stores accessing dairy and meat products, staging a protest at Westminster, and again entering a Muller facility on 8 September, blocking entry to the site and gluing themselves to the entry to the site.

51. The period of protest was temporarily paused on 8 September because of the death of Queen Elizabeth II.

Developments since September 2022

52. When the matter came back before Fancourt J on 4 October 2022 for the return date of the injunction, the Claimants applied to add 31 persons as named defendants in light of their involvement in the September 2022 incidents, and an order was made continuing the injunction and adding them.

53. Following the pause for the death of Queen Elizabeth II, Animal Rebellion engaged in a number of pieces of direct action protest in October to December 2022, including attending Fortnum & Mason, Harrods and supermarkets in London, Norwich, Manchester and Edinburgh and pouring milk taken from the shelves of those shops onto the floor. Three of the individuals named in the 25 October 2022 order appear each to have been involved in or linked to one of the acts. Of the remaining named defendants, Rosa Sharkey is stated in an Animal Rebellion website article to be the spokesperson for the 12 supporters of Animal Rebellion who broke into and took 18 beagle puppies from the MBR Acres facility in Wyton, Cambridgeshire on 20 December 2022.

54. As explained above, the final disposal of the claim was adjourned in light of the Supreme Court proceedings in the *Wolverhampton* case.

55. There have not been any further cases of direct action against the dairy industry since the matters set out above. Animal Rising have focused largely, although not exclusively, on animal-related sporting events in 2023, such as high-profile horse racing events, although there was at least one farming-related incident, where three Animal Rising activists entered the Appleton Farm on the Sandringham Estate, from which they removed three lambs without the permission of the owner of the animals.

56. However, the Claimants remain concerned that future acts of direct action and protest will occur. This is largely for a combination of the following reasons:

(1) The Animal Rebellion website continues to seek the support of new activists.

(2) The August 2022 website entry described the September 2022 intended action as the start of a long-term civil resistance project that stated that it would include large scale disruption.

(3) That website specifically, in its reporting of the 2021 incident, named and targeted Arla as a large dairy producer.

(4) The campaign against the dairy industry has, from Animal Rising's perspective, not been won.

(5) On the contrary, the plan to bring about a transition to a plant-based system by 2025 is now more pressing than ever given how close 2025 is. Given that the Claimants supply 40% of milk to UK supermarkets, and the stated aim of Animal Rising of stopping the supply of dairy to UK supermarkets, achieving their aim is likely in their minds to involve further action against the Claimants' Sites.

(6) The Claimants consider that the September 2022 action was not as extensive as Animal Rebellion had hoped, given the statements made on its website in August 2022 about the scale of the action planned.

(7) There was further direct action in October to December 2022, including in relation to the dairy industry.

(8) The Claimants consider that the absence of action since September 2022 is a product in large part of the injunctions in place. Therefore, were they to fall away, that deterrent would be lost. They accept that the September 2022 action against the Claimants occurred despite the injunction, but contend that other dairy and

distribution sites, particularly those operated by Muller, appeared to be disproportionately targeted, and the Claimants infer this is because Muller has no such injunction.

57. Therefore, the Claimants seek draft orders, with the same substantive restrictions as in the orders sought before and granted by Bacon J and Fancourt J, but for five years with annual review in respect of the element of the order relating to persons unknown.

58. It was explained to me, in response to a question that I asked during the hearing, that the website was changed around 10 days before the hearing, and that as part of this it removed reference to the specific plan to bring about a transition to a plant-based system by 2025. I asked for a witness statement to evidence the points that I was told of orally, and this was duly provided the next day. While I think it would have been desirable for this to be provided before the hearing started, I consider it appropriate to admit this in so that the duty of full and frank disclosure can be satisfied.

59. The website appears to have been revamped. As part of the description of Animal Rising's activities, it states that "*the key solution to these challenges [the challenges caused by the animal farming and fishing industries] is to support farming and fishing communities in the necessary and urgent transition to a sustainable and just plant-based food system*". The "*How We Achieve It*" section contains three routes. The first is "*[b]y generating a national conversation on the need to transform our food system with bold and impactful campaigns*", the second is supporting local people to create change for themselves, and the third is building alliances with key stakeholders. There is a page on previous campaigns, which states under "*2022 PLANT-BASED FUTURE*" that those involved "*successfully stopped the supply of milk to supermarkets across the South of England*".

The evidence relating to the named defendants who have not signed consent orders

60. Finally, I set out a summary of the evidence in relation to the remaining identified defendant who has- necessarily- not signed a consent order, namely the 40th Defendant.

61. The 40th Defendant appears to be female and have blue hair on the basis of a video taken of the 8 September incident at the Hatfield Site. There is video evidence of her trespassing on the Hatfield Site during the 8 September 2022 incident and filming the activities of the Animal Rebellion protestors. Such filming appears to have been carried out for Animal Rebellion, who post footage of their incidents on their website. In the video evidence, she is seen leaving the site by herself before arrests were made.

The legal test

62. The injunction is sought to restrain:

(1) trespass on the Claimants' Sites;

(2) interference with the Claimants' common law rights, and the rights of their assigns and licensees, to access the highway from the Claimants' Sites; and

(3) public nuisance caused by obstruction of the highway.

63. I shall start with the requirements of (1), (2) and (3), and then deal with what must be shown in the present case to order (a) an injunction against the 40th Defendant as an identified defendant and (b) against persons unknown.

Trespass to land

64. Starting with trespass to land, that consists of any unjustifiable intrusion by one person upon land in the possession of another. No further elaboration is necessary for present purposes.

65. The Claimants submitted that deciding whether a trespass has occurred (or in the present case would or might occur in the future) does not involve any balancing of the Claimants' rights to possession with the Defendants' rights of expression or freedom of assembly under Articles 10 and 11 of the European Convention on Human Rights (**"ECHR"**), because:

(1) Articles 10 and 11 do not include any right to trespass when exercising those rights: *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515 at [36]-[37] per Longmore LJ;

(2) trespass is a blatant and significant interference with the Claimants' rights under Article 1 of the First Protocol to the ECHR; and

(3) the exercising of rights under Articles 10 and 11 cannot normally justify a trespass: *Cuciurean v The Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 359 ("***Cuciurean (2021)***") at [9(1)] to [9(2)] per Warby LJ.

66. I accept that submission.

67. Article 10 provides as follows:

> "10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

68. Article 11 provides as follows:

> "(1) Everyone has the right to freedom of peaceful assembly …

> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. …"

69. Article 1 of the First Protocol provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

70. The other provision to mention is section 12 of the Human Rights Act 1998 (**"HRA"**). Section 12(1) provides that section 12 applies if a Court is considering whether to grant any relief which, if granted, might affect the exercise of the ECHR right to freedom of expression, namely that in article 10. Where section 12 applies, then, among other things, the Court must have particular regard to the importance of the ECHR right to freedom of expression: section 12(4).

71. In *DPP v Ziegler* [2021] UKSC 23; [2022] AC 408, the Supreme Court endorsed at [58] the Divisional Court's identification of the five questions that arise when an Article 10 or 11 right may be engaged, which was expressed in the following terms by the Divisional Court:

> "63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:
>
> (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
>
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others?

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

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

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

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

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

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

In *Ziegler*, the question arose in the context of a statutory provision, namely section 137(1) of the Highways Act 1980.

72. It is convenient to deal in this section on the legal principles with whether Articles 10 and 11 could justify a trespass in the present case. In my judgment, they could not, for the following reasons:

(1) The exercising of rights under Articles 10 and 11 cannot normally justify a trespass: *Cuciurean (2021)* at [9(1)] to [9(2)]. Here, I see nothing to take this out of the ordinary case.

(2) Articles 10 and 11 do not include any right to trespass when exercising those rights: *Boyd* (above) at [36]-[37]. The reason for that is that Articles 10 and 11 do not contain any right to protest on privately owned land: *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661 (***"Cuciurean (2022)"***) at [31], applying the European Court of Human Rights decision in *Appleby v UK* (2003) 37 EHRR 38. The Court of Appeal endorsed in the latter case the explanation of the Divisional Court at [45] of its judgment, where Lord Burnett CJ and Holgate J explained that:

"*there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of*

forum" in the specific context of interference with property rights (see Appleby at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The further that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights."

(3) As the European Court explained in *Appleby* at [43], one must also consider the rights under Article 1 of Protocol 1: "*while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No.1*". That underlies the specific points in (1) and (2) above.

(4) It appears that the result of the application of the above principles is that the proportionality exercise does not apply in a case where the protest takes place on private land: *Cuciurean (2022)* at [33].

73. Therefore, as did Ritchie J in *Valero Energy Limited v Persons Unknown* [2024] EWHC 134 (KB), I do not consider that articles 10 and 11 provide any defence to what would otherwise constitute a trespass in the present case.

74. It was accepted by the Claimants that I should consider whether articles 10 and 11 are engaged here, whether as a result of considering whether section 12 of the HRA applies, and if so in having particular regard to the importance of the ECHR right to freedom of expression, or the Court's duty as a public authority under section 6(1) of the HRA. Therefore, I do not need to consider that question further.

<u>*Public nuisance*</u>

75. As in *Ineos* (above), the Claimants asked me to proceed on the basis that the same core principles applied to public nuisance and the criminal offence of obstructing the highway under section 137(1) of the Highways Act 1980. I am content to do so, and would expect the two to march hand in hand.

76. As explained at [65] of that judgment, for there to be an offence under section 137(1), it must be shown that:

"(1) There is an obstruction of the highway which is more than de minimis; occupation of part of a road, thus interfering with people having the use of the whole road, is an obstruction…

(2) The obstruction must be wilful, ie. deliberate;

(3) The obstruction must be without lawful authority or excuse; 'without lawful excuse' may be the same thing as 'unreasonably' or it may be that it must in addition be shown that the obstruction is unreasonable."

77. The purposes for which a highway may be used are not limited to travelling. As Lord Irvine stated in *DPP v Jones* [1999] 2 AC 240 at 245G-255A:

> "*The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I have set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a right to peaceful assembly on the public highway.*"

78. A highway may be put to many other uses. It would be surprising if "*two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of Salvation Army singing hymns and addressing those who gather to listen*": [1999] AC 240 at 254F-G. Therefore, there is a right to peaceful assembly on the highway.

79. As Lord Reed explained in *The Safe Access Zones Bill Reference* [2022] UKC 32 at [22], the approach in *Jones* was, prior to the coming into force of the HRA, to use *common law* rights of freedom of speech and assembly as an important factor in assessing whether the use of the highway was reasonable. That would apply equally to section 137(1) as it would to the Public Order Act 1986 offence considered in *Jones*.

80. In *Ziegler* the Supreme Court considered the interaction of section 137(1) with Articles 10 and 11 in light of the coming into force of the HRA. The Court held that section 137 has to be read and given effect, in accordance with section 3 of the HRA, on the basis that the availability of the defence of lawful excuse, in a case raising issues under Articles 10 or 11, depends on a proportionality assessment, as the Divisional Court had considered.

81. Their Lordships in *Ziegler* adopted at [72] the non-exhaustive list of factors to consider when evaluating proportionality that had been set out by Lord Neuberger MR in *City of London Corporation v Samede* [2012] EWCA Civ 160 at [39]-[41]. Paraphrasing that content, those factors are:

    (1) the extent to which the continuation of the protest would breach domestic law;

    (2) the importance of the precise location to the protestors;

    (3) the duration of the protest;

    (4) the degree to which the protestors occupy the land;

    (5) the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public;

    (6) whether the views giving rise to the protest relate to 'very important issues' and whether they are 'views which many would see as being of considerable breadth, depth and relevance'; and

    (7) whether the protestors 'believed in the views that they were expressing'.

82. In the *Safe Access Zones Bill Reference* case, Lord Reed, giving the judgment of the Court, considered that the Divisional Court in *Ziegler* should- before resorting to the special interpretative duty imposed by section 3 of the HRA- have considered whether the established interpretation of section 137, as stated for example by Lord Irvine in *Jones*, would result in a breach of Convention rights: [23]. However, given that the question of the need to apply in the context of section 137 the proportionality test set out in *Ziegler* was not before the Court, Lord Reed made no specific comment on it: [26].

83. What he did address was the comment in *Ziegler* at [59] that "*[d]etermination of the proportionality of an interference with ECHR rights is a fact-sensitive enquiry which requires the evaluation of the circumstances in the individual case*". He stated that while this might be the useful position in a criminal trial of offences charged under section 137 where Article 9, 10 or 11 rights were engaged, if the section was interpreted as it was in *Ziegler*, that would not universally be the case: [28]-[29]. Questions of proportionality, particularly where they concerned the compatibility of a *rule or policy* with ECHR rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case: [29]. Further, it is possible for a piece of legislation to ensure that its application in individual circumstances will meet the proportionality requirements under the ECHR without any need for evaluation of the circumstances in the individual case: [34].

84. Therefore, when a defendant relies on Article 9, 10 or 11 in the defence of a protest-related defence, the Court should- if those articles are engaged- consider whether the ingredients of the defence themselves strike the proportionality balance: [55]. If it considers that they do not strike such a balance, the Court's duty under section 6 of the HRA is to consider whether there is a means by which the proportionality of a conviction can be ensured, whether through using the interpretative duty under section 3 in the case of construing the legislation creating a statutory offence or developing the common law where the offence arises at common law: [56]-[61].

85. In the present case, the Claimants accept, as explained above, that the requirements for public nuisance should be the same as those in section 137 of the Highways Act 1980. Therefore, on the face of it, the proportionality requirements set out in *Ziegler* would apply, and I consider that I should apply them given that Lord Reed made clear in *Safe Access Zones Bill Reference* that he was not specifically considering this point in the context of section 137.

86. The Claimants submit in relation to the injunction sought against persons unknown that it is not possible to apply the proportionality requirements under the ECHR to *specific individual* protestors because by definition the identity and circumstances of those individuals is not presently known. Rather at one should apply a proportionality test to the restrictions imposed by the draft order sought with future protests in mind. I accept that I should take the latter course.

87. As explained below, I consider that the order sought satisfies that test.

Right to access the public highway

88. Lord Atkin explained this right with characteristic succinctness in *Marshall v Blackpool Corporation* [1935] AC 16 at 22:

> "*The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so…whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access; just as the right of access is subject to the rights of the public and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway.*"

89. An interference with the right is actionable without proof of loss, and if an interference does cause a loss, then damages can be obtained.

90. Taking the last part of the extract from *Marshall* above, in my judgment the key question here is the qualification of the right of access by the rights of the public. In *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch), Morgan J considered at [107] the interaction of the adjoining landowner's right of access to the highway with the protestors' right to a reasonable use of the highway. He assumed in favour of the protestors that if they were carrying on a reasonable use of the highway which impacted on the rights of the claimants in that case to access the highway, that would not be an infringement of the right of access to the highway.

91. While Morgan J did not have to decide the point, because the claimants in that case put their case on the basis of public nuisance rather than the landowner's right to access the highway, in my judgment that is correct and I should take the same approach here. The rights of the public include the right to reasonable use of the highway. Therefore, applying the principles set out in *Marshall*, a reasonable use of the highway by members of the public will not constitute unlawful interference with the adjoining landowner's right to access the highway.

92. It was submitted by the Claimants that the decision of Julian Knowles J in *High Speed Two (HS2) Limited v Four Categories of Persons Unknown & Monaghan & Others* [2022] EWHC 2360 (KB) at [196] suggests that no balancing act is to be applied between the right to access the highway and the Article 10 and 11 rights of the defendants, because in a claim under this cause of action much, if not all, of the relevant protest is taking place on private land. I do not take Julian Knowles J to be going so far in [196]. Rather he simply put forward the fact that in the case before him much if not all of the protests had taken place on private land as being the first of three reasons why there was no unlawful interference with Articles 10 and 11 on the facts before him. Further, here, the Claimants rely on the obstruction of the highway, such as by protestors mounting and affixing themselves to vehicles on it, as future acts that would breach their right to access the highway, and that acts are not taking place on private land.

93. However, as set out below, I consider that the apprehended actions would amount to a violation of the Claimants' right to access the highway whether or not such a balancing act is to be applied. Therefore, I do not consider it necessary to consider further the question of whether such a balancing act needs to be applied.

Test for a precautionary injunction against named defendants

94. The test for a precautionary injunction against named defendants is as set out by Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 at [31], as applied in

Koninklijke Philips NV v Guandong Oppo Mobile Telecommunications Corp Ltd [2022] EWHC 1703 (Pat) (*Koninklijke*') and approved by the Court of Appeal in *London Borough of Barking and Dagenham & Ors v Persons Unknown & Ors* [2022] EWCA Civ 13 at [83]. That requires the following two questions to be asked and answered in the affirmative:

i) Is there a strong probability that unless restrained by injunction the defendant will act in breach of the claimant's rights?

ii) If the defendant did an act in contravention of the claimant's rights would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate?

95. If those questions are answered in the affirmative, the Court will consider whether it is just and convenient to make the order as envisaged by section 37(1) of the Senior Courts Act 1981.

<u>*Test for an injunction against persons unknown*</u>

96. The Claimants submit that the test laid down in *Wolverhampton* has helpfully been summarised by Sir Anthony Mann in his recent decision in *Jockey Club Racecourses Limited v Persons Unknown* [2024] EWHC 1786 at [17]-[19], which also concerned Animal Rising. I agree and set out those paragraphs:

> "*17. That case [Wolverhampton] involved Travellers, but while that context informed some of the requirements that the court indicated should be fulfilled before an injunction is granted, most of its requirements are equally applicable to other types of cases such as protest cases like the present (of which there now a number):*
>
> > *"167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:*
> > *(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.*
> > *(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima*

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

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

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

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

18. Later in the judgment the court returned to procedural safeguards to give effect to those matters of principle, and set out the following procedural and other matters. I omit some points that are relevant to Traveller cases and which have no counterpart in this case, and adjust others by omitting specific Traveller references and by making the wording applicable to the present (and similar) cases.

i) Any applicant for an injunction against newcomers must satisfy the court by detailed evidence that there is a compelling justification for the order sought. There must be a strong possibility that a tort is to be committed and that that will cause real harm. The threat must be real and imminent. See paragraphs 188 and 218. "Imminent" in this context means "not premature" – Hooper v Rogers [1975] Ch 43 at 49E.

ii) The applicant must show that all reasonable alternatives to an injunction have been exhausted, including negotiation – paragraph 189.

iii) It must be demonstrated that the claimant has taken all other appropriate steps to control the wrong complained of – paragraph 189.

iv) If byelaws are available to control the behaviour complained of then consideration must be given to them as a relevant means of control in place of an injunction. However, the court seemed to consider that in an appropriate case it should be recognised that byelaws may not be an adequate means of control. See paragraphs 216 and 217.

v) There is a vital duty of full disclosure on the applicant, extending to "full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application." – paragraph 219. Although this is couched in terms of the local authority's obligations, that is because that was the party seeking the injunction in that case. In my view it plainly applies to any claimant seeking a newcomer injunction. It is a duty derived from normal without notice applications, of which a claim against newcomers is, by definition, one.

vi) The court made it clear that the evidence must therefore err on the side of caution, and the court, not the applicant should be the judge of relevance – paragraph 220.

vii) "The actual or intended respondents to the application must be identified as precisely as possible." – paragraph 221.

viii) The injunction must spell out clearly, and in everyday terms, the full extent of the acts it prohibits, and should extend no further than the minimum necessary to achieve its proper purpose – paragraph 222.

ix) There must be strict temporal and territorial limits – paragraph 225. The court doubted if more than a year would be justified in Traveller cases – paragraph 125 again. In my view that particular period does not necessarily apply in all cases, or in the present one, because they do not involve local authorities and Travellers.

x) Injunctions of this kind should be reviewed periodically – paragraph 225. "This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made."

xi) Where possible, the claimant must take reasonable steps to draw the application to the attention of those likely to be affected – paragraph 226.

xii) Effective notice of the order must be given, and the court must disclose to the court all steps intended to achieve that – paragraphs 230ff.

xiii) The order must contain a generous liberty to apply – paragraph 232.

xiv) The court will need to consider whether a cross-undertaking in damages is appropriate even though the application is not technically one for an interim injunction where such undertakings are generally required.

19. The court recognised that not all the general requirements laid down will be applicable in protester, as opposed to Traveller, cases. I have borne that in mind, and have, as I have indicated, omitted reference to some of the matters which do not seem to me to be likely to apply in protester cases."

97. As comes through clearly from the above extracts, an injunction against persons unknown, who I shall refer to as "newcomers" as in *Wolverhampton*, is a novel exercise of an equitable discretionary power and therefore its limits and requirements must be carefully articulated and observed.

Applying the law to the facts

Precautionary injunction against named defendants

98. In my judgment, there is a strong probability that unless restrained by an injunction the 40th Defendant will act in breach of the Claimants' rights, and it is just and convenient that an injunction be ordered in the terms applied for by the Claimants.

99. I shall:

(1) start with the question of whether there is a strong probability that the 40th defendant will be involved in action in the future against the Claimants if not restrained by injunction, then

(2) consider whether such action would be in breach of the Claimants' rights, and

(3) then consider whether it is just and convenient to grant an injunction.

100. The cumulative reasons why I consider that question (1) should be answered in the affirmative are as follows:

(a) The 40th Defendant was involved in the action against Arla on 8 September 2022.

(b) Further, she was willing to trespass on the Claimant's land to do so.

(c) On the basis of the video evidence before me, I consider that she was filming the incident for Animal Rebellion, including for example the damaging of HGV tyres, and infer that her involvement with their cause therefore did not end immediately at the end of the action on the 8th September 2022.

(d) She appears to me to have left the scene before she could be arrested. This is what the video evidence before me suggests and Ms Savage explains that it appears that she is the third protestor that the Hertfordshire Constabulary believe fled the scene. The other two were arrested in the days following the incident. Therefore, at present she has not faced any sanction that I am aware of for her past actions that would deter her from future action.

(e) The mission statement of Animal Rebellion stated that the acts in September 2022 were "*the beginning of a long term civil resistance project*". This ties in with their stated desire to bring about a transition from reliance on the dairy industry by 2025, which has not yet from their perspective been achieved.

(f) These views are plainly strongly held by those participating, and I have no reason to doubt that this includes the 40th Defendant.

(g) Arla, as producer of 40% of the milk in the UK, is an obvious target for Animal Rising.

(h) While there have not been direct acts against the Claimants since the September 2022 incidents, in my judgment there is a strong probability that this is because of the injunctions in place. Refusing to order a final injunction would immediately come to the notice of Animal Rising, who the Claimants' solicitors have been corresponding with over the consent orders, and therefore in my judgment there is a strong probability that this would be regarded as removing an important impediment to taking direct action against Arla. It is true that the September 2022 incidents occurred despite the injunction, but they were considerably smaller than one would have taken from the plan on the website in August 2022, so it appears to me very likely that the injunction had some deterrent effect.

101. I have considered specifically whether the absence of acts against Arla since September 2022 suggests that further incidents of direct action against Arla are unlikely, or at least means that there is not a strong probability of them in the event of me declining to grant the injunction.

102. However, I consider that the features above, taken in combination, suggest that there is a strong probability.

103. I do not consider that the change to the website shortly before the hearing affects this. It does not indicate a shift in the views of Animal Rising towards the dairy industry, one would not expect such a shift, and Animal Rising knew of the impending Court date at the time the website was changed so I am reluctant to regard it as indicating a significant shift in their intended plans. Further, the first route stated in the current version of the website for achieving change is "*[b]y generating a national conversation on the need to transform our food system with bold and impactful campaigns*", which wording seems to me to encompass direct action to disrupt the supply of dairy and food that is reliant on animals.

104. I have also taken into account in this regard that the Leeds Site has not been the subject of action to date.

105. I consider that these anticipated actions would be in breach of the Claimants' rights.

106. Some of the past action occurred in the Sites themselves, and therefore amounted to trespass, and I would expect that to be repeated in the future.

107. As far as public nuisance is concerned:

(1) The past acts deliberately obstructed the relevant parts of the highway to a significant degree in a way that was designed to, and did, disrupt the Claimants'

business, albeit temporarily, to a significant extent and caused them significant financial loss, together with affecting members of the public who needed or wished to use the highway and other surrounding roads that could be blocked through its obstruction. A good example of this is the blocking of College Road during the incident at the Aylesbury Site on 4 September, when protestors climbed aboard and occupied vehicles on the road. Therefore, Articles 10 and 11 aside, it would constitute a public nuisance and this is the type of action that would likely be repeated absent an injunction because it is part of disrupting the passage of vehicles to and from the Sites.

(2) I have carefully considered the factors set out in *Ziegler* to be taken into account when assessing proportionality, which I summarised at paragraph 81 above. Taking them in turn:

(a) Future protests of the same type would breach domestic law for the reasons given in relation to trespass, public nuisance and access to the highway set out in this section of my judgment.

(b) The location of the protests is important to the protestors, because their intended aim is to disrupt the supply of milk from the Sites and therefore the obvious location for their action is at and immediately outside the Sites.

(c) The protests were significant in duration, lasting in one case for 24 hours. Unlike in *Ziegler*, they were not a one-off one-hour occurrence, and one cannot expect future incidents to be.

(d) Future protests are likely to involve occupation of and climbing aboard vehicles on the highway.

(e) Their significant duration together with the other features of the action, caused significant financial harm to the Claimants by disrupting their supply of milk. Unlike in *Ziegler* there is not an alternative route of access: the Sites were and could again be completely blocked. Further, the protests are likely to block entire roads, as was the case at the Aylesbury Site in 2021, when the A41 was blocked for most of the 24 hour period, making the road impassable to all. Moreover, the road outside the Sites give immediate access to major roads, or are in close proximity to them, so the obstructions affect the public at large. The other obvious impact of successful action is that this could restrict the amount of milk on supermarket shelves for a period.

(f) The views giving rise to the protest do relate to important issues, namely climate change and animal welfare, both of which are prominent features of current public and political debate.

(g) The protestors plainly believe in their cause and are prepared to risk arrest to take such action.

(3) I also take into account the fact that the past actions, and likely future acts, go beyond attempts to persuade Arla of the correctness of Animal Rising's aims, into seeking to disrupt their business in a way that will assist in bringing about change in the dairy industry. Therefore, the action intends harm to Arla as a necessary

feature of its intended ends, and correspondingly an injunction leaves it open to carry out peaceful protest through acts like standing on the pavement with a placard, making noise or shouting their message loudly through a loud hailer. Rather the order prevents only real and significant harm caused by unlawful acts.

(4) Taken together, I consider that the factors in (2)(a), (c), (d) and (e) and (3) above mean that the past action and similar future action would constitute a public nuisance, and that this is consistent with the 40th Defendant's Article 10 and 11 rights. This was and would in the future be action intended to significantly disrupt Arla's business and the injunction is tailored to prevent that end while allowing future protests within those parameters.

108. I consider that the past actions and the anticipated future actions would also violate the Claimants' rights as adjoining landowners to access the highway. The Claimants were blocked from accessing the highway for a significant period and this would likely be the intended aim of future action. For the reasons set out in relation to public nuisance, in my judgment the Claimants' actions do not constitute a reasonable use of the highway so as to legitimately qualify on the facts the Claimants' rights to access the highway, and this is consistent with the 40th Defendant's Article 10 and 11 rights.

109. Turning to whether it is just and convenient to grant an injunction, I have taken into account the reasons set out in paragraph 107(4) above.

110. Further, future action would cause financial harm to Arla that it would be difficult to redress, given the difficulty in seeking and enforcing effective recompense from the protestors individually. Moreover, climbing onto structures and lorries or entering the highway to stop lorries poses a risk of physical harm to staff or the protestors. The Claimants have taken a number of steps to seek to mitigate the harm, such as investing in future security, but the serious risk of significant future financial loss and the above risk of physical harm remains.

111. Therefore, it would be difficult for the Claimants to undo after the fact harm suffered through future pieces of direct action.

112. For these reasons taken collectively, I consider it just and convenient to grant an injunction in the terms sought.

113. I have considered whether anything in section 12(2) or (3) of the HRA should cause me not to order an injunction. The Claimants properly put this point before me. Section 12 is engaged where the Court is considering whether to grant any relief which might affect the exercise of the ECHR right to freedom of expression. Section 12(2) provides that if the respondent is not present or represented, no such relief should be granted unless the Court is satisfied that the applicant has taken all practicable steps to notify the respondent, or that there are compelling reasons why the respondent should not be notified. Section 12(3) provides that no such relief is to be granted to restrain publication before trial unless the Court is satisfied that the applicant is likely to establish that publication should not be allowed. Taking section 12(2) first, I am satisfied that the applicant has done all practicable to notify the respondent, through trying to ascertain her identity and through the alternative service routes.

114. As for section 12(3), the order does not restrain the 40th Defendant *publishing* her views. Rather restricts *where* she may express her views. Therefore, as in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB), where Johnson J considered the limits of the concept of 'publication' in some detail at [66]-[76], it does not appear to me that section 12(3) is engaged. Further and in any case, (a) this is a final order against the 40th Defendant, so section 12(3) has no application for that reason too, and (b) in any case, in my judgment any interference with "publication" is proportionate and justified for the reasons set out in paragraph 107(4) above.

115. The order sought against the named Defendants is final, so in my judgment no further cross-undertaking in damages should be required.

Injunction against newcomers

116. I have considered carefully and applied the requirements in [167] of *Wolverhampton*, as expanded upon later in the judgment in the way summarised by Sir Anthony Mann in *Jockey Club.* The relevant newcomers in this case are those persons unknown within the classes set out in the description of the first to sixth defendants.

Compelling justification for the remedy

117. I have set out above the strong probability of the future disruption to their business absent an injunction, coupled with the effects on others set out above, from future unlawful acts of trespass, public nuisance and interference with the Claimants' right of access to the highway. As Sir Anthony Mann explained in *Jockey Club* at [18], the threat must be real and imminent, and imminent means in this context "*not premature*" rather than immediate. This chimes with the approach of Julian Knowles J in his *HS2* decision at [176]-[177]. As he explained at [176], "*[a]s the authorities make clear, the terms 'real' and 'imminent' are to be judged in context and the court's overall task is to do justice between the parties and to guard against prematurity*". I am satisfied for the reasons set out above that there is a real and imminent risk if I do not grant an injunction of further direct action occurring.

118. There are a number of reasons why the Claimants have sought an order against persons unknown rather than limit the order to named or otherwise specifically identified defendants, and in my judgment they are compelling ones:

(1) It has not been possible to identify all protestors who might undertake future action.

(2) The evidence before me is that the Animal Rising site continues to recruit new members.

(3) It is an organisation whose membership fluctuates.

(4) While the Claimants known the identity of the group, they do not know the identity of all individuals involved with it.

(5) The Claimants do not have confidence that all those who participated in the earlier acts have been arrested.

119. Similarly, given the difficulty in identifying the membership of Animal Rising, its fluctuating membership and the presence of like-minded protest groups, in my

judgment there is also a compelling reason not to limit the definition of persons unknown to those who are members of Animal Rising.

120. As explained above, the Claimants have put in place significant security measures at their Sites, and sought to improve them after the September 2022 incidents. It is not realistic to suppose these will completely prevent future action, and nor would sensible levels of policing or the use of byelaws.

121. The harm that could be caused by future unlawful acts is serious, consistent with the intended purpose of such action being to significantly disrupt the supply of dairy products.

122. Taking these reasons for relief together with the limits of the restrictions imposed by the injunction explained above, in my judgment there is a compelling justification for the remedy.

123. As in relation to the injunction against identified persons, I have considered whether anything in section 12(2) or (3) of the HRA should cause me not to order such an injunction. In my judgment, there are compelling reasons why the persons unknown cannot be notified before the order is made before the alternative service of the previous documents, such as by posting on the Claimants' site or by notices put at the perimeter of the Sites, as their identity is not known. In any event they will be notified insofar as is practicable through the alternative service routes after the order is made. In my judgment, s.12(3) is not violated for similar reasons to those set out in paragraph 111 above. The order does not restrain what can be published, so section 12(3) is not engaged, and even if it is, the acts apprehended are unlawful and interfere significantly with the rights at others, so I am satisfied that the Claimants are likely to obtain the relief sought at a final hearing (if there was one).

Full and frank disclosure

124. The Claimants have complied with this duty, including drawing to my attention a number of points that may be taken against their position. I have dealt above with the update to the Animal Rising website.

Evidence must err on the side of caution

125. Further, the evidence has satisfied this requirement, and as far I can see has been careful not to overstate the position.

Identifying the respondents to the application as precisely as possible

126. In my judgment the order sought does so. The means of identification are in the same form as the orders previously granted by Bacon J and Fancourt J. As summarised at paragraph 40 above, the qualifying conditions for falling into the category of respondents are clear and precise, and focus on carrying out particular acts of interference with the Sites and access to them, such as affixing themselves or any items to any of the relevant roads for the purpose of disrupting vehicle access to the Sites and protesting, to take one example.

Is the injunction clear in its terms and confined to the minimum necessary to achieve its proper purpose?

127. The Claimants seek orders in the same substantive form as granted previously, subject to the temporal limits set out below. Those orders were, and the present order sought is, clearly drafted. The Claimants have not gone further, despite the breaches of the order, and the order sought allows for peaceful protest in the manner set out in paragraph 107(3) above. Rather it focuses on particular acts that would disrupt the Claimants' operations at the Sites. Therefore, I am satisfied that it does not go beyond the minimum necessary to achieve its purpose.

Is there a strict temporal and territorial limit?

128. As in the *Jockey Club* case, I agree that the one year period that the Supreme Court thought prima facie appropriate in Travellers cases is too short to deal with a campaign such as that of the animal rights activists. That can readily be seen from the fact that incidents have already occurred in 2020, 2021 and 2022. However, given those annual events in my judgment an annual review is more appropriate in case the position changes in the interim, as has been sought by the Claimants, and as was ordered in the *Jockey Club* case. The annual review will allow a continued assessment of whether circumstances have changed so as make the continuation of the injunction appropriate and the five year maximum adds an appropriate end-point. In my judgment, it would not be appropriate to require the Claimants to incur the costs of applying each year for a new or renewed injunction. Rather the review should be of whether the position has developed since the last review.

129. The territorial extent of the order is clearly set out in the maps and plans annexed to it. It is broadly limited to the roads immediately surrounding the sites, and the Claimants have not sought to include the larger roads such as the A41 to which they lead, and some of which were blocked by the earlier actions. Similarly, they have not sought to include their other dairy-related sites beyond the Sites, despite the breaches of the original injunctions order made. Therefore, I am satisfied that there is a strict territorial limit.

Have reasonable steps been taken to bring the application to the attention of those likely affected?

130. In my judgment, it has. The documents in the claim, including notice of this hearing, have been served on the named defendants and persons unknown in accordance with the alternative service orders made. The methods of service have included e-mail, posting on the Claimants' social media pages and notices at the Sites.

Is the proposed notice of the Order likely to be effective?

131. In my judgment it is. There are a number of routes specified in the alternative service provisions of the orders granted to date by Bacon J and Fancourt J, which in my view remain appropriate, including notices at the premises and e-mail.

Have the Claimants provided a generous liberty to apply clause?

132. In my judgment, they have, because the order sought provides for the ability to apply to vary or discharge the Order on 48 hours' notice.

Should a cross-undertaking be required?

133. Given that the order only prohibits acts that are in any event unlawful or highly likely to be unlawful, in my judgment as in *Jockey Club* it is not necessary for the Claimants to provide a cross-undertaking in respect of the injunction against newcomers.

Conclusion

134. I therefore grant the orders sought.

Case No: KB-2024-002361
NCN Number: [2024] EWHC 2224 (KB)

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

Thursday, 25 July 2024

BEFORE:

MR JUSTICE RITCHIE

BETWEEN:

DRAX POWER LTD

Claimant

- and -

PERSONS UNKNOWN

Defendants

Tim Morshead KC instructed by Walker Morris LLP appeared for the Claimant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. This is an application dated 23 July 2024, made ex parte against persons unknown, for an injunction to protect a power station situated within England and for directions relating to alternative service because the Defendants are persons unknown. The claim form was issued on 23 July 2024 to restrain trespass and nuisance on the Claimant's land and land close to it. The Particulars of Claim issued with the claim form set out four classes of unknown persons. All classes were connected with "Reclaim the Power", a protest organisation, or "Axe Drax"", a protest organisation, or other environmental campaigns. The first class of unknown person was a person entering or occupying the land covered by the injunction. I will define that land by reference to the Particulars of Claim in a minute. The second was a class of persons assembling on the verge or footway of two roads near the power station or the footways around and through the power station. The third class of persons was those obstructing or attempting to obstruct access to or egress from the power station by foot, vehicle or rail by the Claimant, their agents, employees, contractors or licensees. The fourth was a class of persons flying drones above the power station.

The pleading

2. It was pleaded that the Claimant owns the power station and I have been provided with a helpful map to show that they own quite a lot of land around the power station, the boundaries of which are well beyond the boundaries of the proposed injunction. They have leased out a substation within the boundaries of the power station and they also own a pumping station some distance from the power station. It was pleaded that the level of risk to the land owned by the Claimant, on which the power station and the pumping station sit, had risen in the last few months. It was pleaded that the Claimant has concerns that protests on the footpaths around the power station may mask fence penetration by protesters, and the Claimant seeks a buffer zone encompassing those footpaths adjoining the power station. Indeed, one footpath goes through the precincts of the power station, albeit fenced off.
3. In relation to the rail infrastructure, although it was pleaded that it was private and on the Claimant's land, it was asserted that the Claimant fears that obstruction would interfere with their operations. In relation to the highways nearby, it was feared that obstruction of access and egress would likewise interfere with their operations, and in relation to drones it was pleaded that the Claimant has concerns that use of drones by protesters would be to scope out how to disrupt by direct action or by dropping things onto the

power station and its equipment. The threats to the Claimant's power station were pleaded. The first organisation was “Reclaim the Power”, RTP for short, who have advertised the setting up of a mass direct action camp targeting the Drax Power Station "to crash Drax's profits". It is pleaded that the action is scheduled to occur between 8th and 13th August 2024, and that the RTP website threatens or promises direct action. The causes of action pleaded against the Defendants are trespass and nuisance. It is pleaded that the protesters have no consent from the Claimant to enter the power station or the pumping station or the private railway line.

4. In relation to third-party land, which is identified as the lease to the national power substation within the perimeter of the power station, the footpaths around the power station and alongside the highway that runs along the east side of the power station, it was pleaded that it would be necessary and proportionate to give effect to the injunction covering the Claimant’s land for the injunction to cover that third-party land by way of a buffer zone. It was pleaded that a specific area of land adjoining the power station and a public highway had been set up by the Claimant with agreement by the local police for permitted protest between 6th and 15th August 2024. In relation to potential defences, it is pleaded that no persons unknown have the right to enter the Claimant’s land and in relation to public land, it is pleaded that the injunction covering the public footpaths adjoining the power station is a necessary and proportionate intrusion on the public's right of passage, to protect the validity and efficacy of the injunction.

The evidence

5. In support of the claim and the application, there are two witness statements, the first from Martin Sloan, dated 23 July 2024, and the second from Nicholas McQueen, dated 23 July 2024. Martin Sloan is the security director at the Drax power station. He gives evidence that coal ceased to be used in March 2023. Nowadays this power station generates four per cent of the UK's electricity and eight per cent of the UK's renewable energy. Mr Sloan asserts that any interruption may threaten the continuity of power supply in the United Kingdom. He sets out that Drax has annual revenue of £6,790 million and that the fuel currently used in the power station is old wood and agricultural products delivered by road and rail, daily.

6. Turning to the history of direct action, by which I understand him to mean physical action

interfering with the Claimant's land, equipment, staff or business, he refers to activities in August 2006 where a camp was set up aiming for mass trespass to close the power station. An interim injunction was obtained against named and unnamed Defendants covering the power station and paths adjoining it. 600 marchers attended and 38 were arrested for criminal damage, aggravated trespass and assault on the police. The next historical direct action listed by Mr Sloan was taken by a group called "Earth First", who hijacked a train carrying coal to the power station for 16 hours, causing delays on network rail. An injunction was obtained. The next direct action evidenced by Mr Sloan was in July 2019, when RTP invaded a coal mine involving mass trespass. They halted operations there. I should say that it is not suggested in the statement that the Claimant owned the coal mine. The next direct action was in July 2019, so the same month, and involved protesters chaining themselves to railings in central London. They thought the building outside which the railings were situated was the headquarters of the Claimant. However, they were mistaken because it was the wrong building. In addition RTP climbed upon and occupied a crane at Keadby 2 Gas Power Station in Lincolnshire, stopping construction for 15 hours and they also blockaded the entrance. Mr Sloan set out that on 12 November 2021 "Axe Drax" put on their website that the disruption of the Claimant company was one of their guiding objectives. Karen Wildin, of Extinction Rebellion, in that month climbed onto a train carrying biomass to the power station. She was subsequently convicted and fined £3,000. Five months later, on 27 April 2022, "Axe Drax" carried out a direct-action attack by painting orange paint on the Government Department of Energy building in London. Coming forwards two years in April 2024, "Axe Drax" disrupted the AGM of the Claimant, crowding the entrances with protesters and banners.

7. In relation to his assertion that there is a real and immediate threat, Mr Sloan gave evidence that there is a planned protest camp for 8th to 13th August 2024 near the power station and that RTP and "Axe Drax" had issued open invitations, on their websites, to protesters to attend the camp. They did not then and have not now announced the location. Mr Sloan gave his opinion that he considered it likely that the protesters would commit direct action before 8th August 2024. He relied upon information talks set up and provided by RTP which took place on 24 February, 1 June and 29 June 2024 around the country, announcing blockades and occupations of the infrastructure and supply chains of the Claimant and the setting up of an action-focused camp. In addition, on the

websites of these two organisations, they proudly boast that they make interventions with their bodies. This is so stated in one of their principles documents. Further, a video was issued on 20 April 2024, aiming to stop the biomass power station, showing videos of trespass upon a cooling tower and trespassing upon a delivery lorry.

8. Mr Sloan set out his concerns, which he asserted were real, of protesters from the camp cutting fences and locking on and hiding their activities of cutting fences by assembling on the footpaths adjoining the power station and also by blocking access by road and rail. He set out six named persons associated with "Axe Drax", who were Karen Wildin, Meredith Dickinson, Joseph Irwin, Diane Warne, Fergus Eakin and Molly Griffiths-Jones. Mr Sloan had received police information that drones are used to assess where security is on site with a view to assisting direct action and to dropping things on the site.

9. In relation to the potential harm, Mr Sloan set out that there are a lot of moving parts in a power station, including moving vehicles and rail vehicles, which would cause a risk to staff and protesters if interfered with. He also set out PPE areas where personal protective equipment is required to protect staff and visitors, which no doubt protesters would not wear. He informed the Court that there are large volumes of oil and diesel fuel stored on the site, which would be dangerous if interfered with. He stated that the cooling water system and overhead power cables (carrying 400,000 volts) would be a source of danger to protesters and staff if interfered with and mentioned that the biomass domes contain nitrogen, which cannot be breathed by human beings safely. He also pointed out risk of climbing onto equipment and of falling off it. He set out the disruption that would be caused if supply was interfered with and the potential environmental damage caused by the release of noxious gases. He set out that the financial implications of having to stop generation of power if protesters invaded certain sensitive areas would be huge. He set out the Claimant's measures to protect themselves, which involve mainly high-specification fencing, gatehouses and security around their private railway. He informed the Court that British Transport Police had asked the Claimant to extend the requested injunction that they might obtain along the line towards or out of the power station. He stated that to self-protect, the Claimant would close the general permission for use, by the public, of the orange part of the pathway to the South and West of the power station between 6th and 15th August, and he gave his opinion that there is a compelling need for the injunction because of previous targeting by direct action;

announcements of the protest camp focused on direct action; protesters willing to break the criminal law; injunctions being effective deterrents; damages not being an adequate remedy: because of the danger from a health and safety perspective to staff; disruption of national power supply; harm to the environment; financial losses and protestors being unable to pay damages. There are many exhibits to his witness statement, which I have read and rely upon, but are too numerous to list in this ex-tempore judgment.

10. The second witness, Nicholas McQueen, is a partner in Walker Morris LLP. He describes the geographical area of the injunction shown in plans 1 and 2 and specifically that the land shaded blue is within the power station and that the land shaded red is adjoining it but within the buffer zone that the Claimant sought to include in the scope of the injunction to protect attacks directly into the power station through the fencing.

11. He set out further evidence about RTP, which he asserted was formed in 2012 and had carried out historical actions by occupation of West Burton power station. He set out evidence about "Axe Drax", who expressly state on their publications that they oppose Drax's operations and aim to disrupt their activities, which they regard as a crucial part of their purpose. On the website, "Axe Drax" assert they have raised 99 per cent of the crowd funding necessary for their direct action and on 4 April 2024 boasted that they will take mass direct action against the Claimant; on 10 May 2024 boasted that they consistently pull off radical direct action and on 10 July 2024 stated that the camp at Drax will take direct action to "crash Drax's profits". I stop here to say that there is no pleading by the Claimant that there has been or will be a conspiracy to interfere with their valid business activities, so no economic torts have been pleaded, therefore I restrict my approach to this case to consideration of trespass and nuisance.

12. As to previous injunctions Mr McQueen sets out eight sets of proceedings for injunctions to protect fossil fuel extractors and processers, namely Valero, Esso, Exxon, Essar, Stanlow, Infranorth, Navigator, Exolum and Shell. He asserted that injunctions granted in the past protecting the commercial premises of these organisations were effective and he was unaware of any breaches. He also set out applications for injunctions by North Warwickshire and Thurrock Councils and by HS2, which likewise he stated were effective. I should say that this evidence clashes with my own judicial knowledge that in HS2 approximately eight protesters breached the injunctions, and I imprisoned two or

three of them.

13. Continuing, the names of the potential future tortfeasors are not known to Drax, according to Mr McQueen, but he did set out that there are individuals publicly associated with "Axe Drax" who would be notified of the injunction, if obtained. He asserted that it was appropriate to make the application ex parte because of the Claimant's tipping-off concern, which is a concern that if the organisations are notified of the application, they would move forwards their direct action to defeat any injunction. He also set out, by way of hearsay, his worries feeding off the back of the concerns of the Claimant's witness. He asserted that full and frank disclosure had taken place and fulfilled that in part by referring to the *Public Order Act 2023*, section 7. He asserted that within his knowledge the *Public Order Act* had not been a deterrent so far, but I take that with a pinch of salt because one solicitor cannot be capable of a 360 view of what protesters up and down the country are doing or have decided to do as a result of the passing of the 2023 Act. He then referred to events to support that assertion, which occurred in relation to Valero in 2022, which are not relevant because they occurred before the passing of the *Public Order Act*. He referred to Just Stop Oil events in September 2023, which involved a publication on social media by a member of Just Stop Oil accepting that injunctions make protests impossible. He opined that criminal charges only arise after the event and would take a long time to go to trial and so are not as much of a deterrent as the Claimant would hope for. He also opined that the maximum punishment for some offences of interfering with the national infrastructure is only one year of imprisonment and he referred to a Daily Mail report that JSO protesters actively compete for the title of protestor with the most arrests. That article was published in October 2023.

14. In relation to alternative service, he suggested that his solicitors firm's website should be used. I shall return to that in a minute. I do not consider that alternative service or notification should take place at a solicitors firm's website. It seems to me that that responsibility is carried by the party, namely the Claimant and it should be on Drax Enterprises' website, not a solicitors firm's website. He also set out a suggestion that notices on stakes should be posted around the power station and emails should be sent to the two protest organisations.

The Law

15. I turn to the law in relation to the granting of ex parte injunctions. The Civil Procedure Rules at Rule 25.1 confirm the Court's power to grant interim injunctions or even quasi-interim or quasi-final injunctions, depending on how one wishes to term injunctions against persons unknown and the *Supreme Courts Act 1981* provides that power.

16. Turning to the case law, I will summarise firstly the general case law and then turn to the more specific case law in relation to persons unknown. I will start the story, if I may, with the unlimited power and where that has been identified. It was nicely summarised in *Broad Idea International Ltd v Convoy Collateral Ltd* [1991] PC 24 as being an equitable power exercised where it is just and equitable so to do, Per Lord Leggatt. Despite this being a Privy Council authority, it is a ruling that is more than just persuasive, as was confirmed by the Court of Appeal in *Re G* [2022] EWCA Civ 1312 at paragraphs 54 through 58 and 61. Injunctions are usually only ordered if they accord with an existing practice, as was noted in *Wolverhampton v London Gypsies* [2023] UKSC 47.

17. So, what is the existing practice that has built up and how is it relevant to this application for an injunction against PUs? The classic test was set out in *American Cyanamid v Ethicon* [1975] UKHL 1. It had seven sub-factors which included: whether there is a serious question to be tried, thereby excluding frivolous questions; noting that interim injunctions are generally temporary; taking into account that where there are contested facts at the interim stage the facts are generally assumed in the applicant's favour; imposing a balance of convenience test (although what I put in parenthesis here, as I shall explain later, that is not the test in persons unknown cases); that balance of convenience test involving balancing the injustice or harm caused by (a) granting or (b) not granting; then for quia timet injunctions, which ae injunctions where the Claimant fears something will happen which will cause harm, the Claimant must prove a real and immediate risk that unless restrained, the Defendants will cause damage by tortious or criminal activity. The reference for this last test historically is *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 and the judgment of Smith J. The next factor that is taken into account is that a Claimant should put before the Court evidence to show that damages would not be an adequate remedy and hence the injunction is required. Finally, cases where the injunction will affect the potential Defendants' freedom of speech or assembly, contained

in Articles 10 or Articles 11 of the *European Convention on Human Rights* [ECHR] require the Court to assess the necessity and proportionality of the injunction sought before considering granting it where it affects those matters.

18. The jurisdiction in relation to persons unknown has developed more recently and could be described in the following ways. Persons unknown injunctions appear neither to be interim nor final. I call them quasi-final. They are, by definition, against people who the Claimant cannot identify and so, because they cannot be identified, they cannot be served, or not served in traditional ways. Such injunctions are often made without prior notice but by subsequent advertisement, publication and hence notice. The importance of considering the ECHR rights is greatly increased because the persons unknown [PU] are not before the Court, and it is recognised that PU injunctions based on a quia timet (what we fear) basis are akin to a form of enforcement of established rights rather than enforcement of rights pending the trial of asserted but disputed rights. So, they are less designed to enhance or protect Court proceedings and more designed to protect established, indisputable rights.

19. Protester or PU injunctions were considered in *Ineos v Persons Unknown* [2019] EWCA Civ 515, and Longmore LJ set out six rough requirements for them. The first was there had to be a real imminent risk of tort. The second was that it had to be impossible to name the PUs. That is in effect inherent within the title "injunctions against PUs", but it has within it the requirement that, if it is possible to name Defendants then they should be named. The third is that the Court should be alive to construct or require effective after the event notice of the injunction, and I shall come back to that in a bit. The fourth is that the injunction must be in clear terms (that means non-legal terms) and must correspond to the torts claimed. The fifth is that there must be clear geographical and temporal limits, and the sixth must be that the prohibition wording should be non-legal, and that folds neatly into the fourth.

20. Feeding on that, in 2020 the Court of Appeal in *Cuadrilla v Persons Unknown* [2020] EWCA Civ 9, considered PU injunctions and Leggatt LJ reinforced the need for clear terms in the wording of the injunction and that the boundaries of the injunction should be carefully defined and considered if they impinged on lawful conduct. Specifically, at paragraph 50, Leggatt LJ gave some guidance that lawful conduct may be affected by

such an injunction protecting established rights but only if necessary to afford effective protection to the core injunction to restrain the unlawful conduct. What is and what is not necessary to provide effective protection has not been well or deeply examined by the Courts since 2020. It is something I am going to think about a little in this judgment.

21. I also take into account the following cases: *Shell v Persons Unknown* [2022] EWHC 1215 (QB); *DPP v Cuciurean* [2022] EWHC 736 (Admin); *Wolverhampton v London Gypsies* [2023] UKSC 47; and my own judgment in *Valero v Persons Unknown* [2024] EWHC 134 (KB) at paragraph 58 and the 15 factors set out therein. I wish to highlight one of those factors here before I turn to considering them. That is the fact that the third-party land which impinges on the factor set out by Longmore LJ and was considered by Leggatt LJ in relation to the justification for an injunction seeping over into prohibiting or interfering with lawful activity. Injunctions which impinge directly on Article 10 and Article 11 rights, raise a sensitive area which I remind myself I must be alive to in such applications. It is difficult, I have got to say, when examining this area, to do so in the absence of somebody representing the unknown persons. The Court is always assisted by at least two advocates, one for the Claimant and one for the Defendant, and so it is an onerous task for the Claimant's advocate to predict and argue against his own client, but Mr Morshead has fulfilled that with his usual elegance and professionalism. Even in discussion it is quite tricky to know the boundaries of that. For instance, in this case I do not know who uses the public footpath on the East side of the power station and the public footpaths, one of which is permissive and the other of which is a right of way, on the West side of the power station. It could be twitchers (bird watchers), it could be dog walkers, it could be running clubs, it could be a wide range of members of the public, and I do not know whose rights might be interfered with by any injunction that is granted, and it is for that reason that I am going to look very carefully at the wording of the injunction, if I permit it to cover these public areas, such that no person will be interfered with inappropriately or disproportionately. I take into account that members of the public who carry out normal, lawful activities do not want to come to Court to review or set aside an injunction that happens by chance to have prevented them doing something which is perfectly lawful. It is easy for lawyers to say that they can and should, but it is difficult for members of the public actually to do it. They have their lives to lead, and they may not be well-funded enough to want to do it.

Ex Parte

22. In any event, coming to the factors in this case, firstly I do consider that this ex parte application is justified within the rules governing the making ex parte applications. I am going to explain later that I consider there is a real imminent threat of direct action which could have very substantial consequences and which has been publicised. I consider that persons unknown are likely to answer the call and take direct action soon, very soon, at the Claimant's power station and I consider that the fear of tipping off these organisations by giving notification to them so that they could have attended, is a real fear. It would be so much better, in my judgment, if these organisations could publicise that, were their targets to wish to obtain injunctions, they wish to know and that they would undertake not to take any direct action until the applications had been heard. They would then have the right to come and make their submissions and they might succeed in them, but they do not and they have not done so. Instead, they have made threats in this case. Those threats imply a desire to get round criminal law and to crash the profits of the Claimant and to do that through trespass and nuisance. So I am satisfied that the ex-parte application is justified.

Cause of action

23. Secondly, as to the causes of action pleaded, they are trespass and nuisance, which are well known in tort. The ownership of the land has been proven to my satisfaction and this criteria is therefore satisfied.

Full and Frank

24. Thirdly, as to full and frank disclosure, I consider that the Claimant have done the best they can to set out the alternative remedies available to them, and I will come to those under compelling justification. They have also satisfied the need to provide their own self-protection mechanisms through CCTV, which I shall come to under compelling justification. They have made reasonable submissions on the *Public Order Act* alternative remedies, which I shall come to under compelling justification. I also consider that they have done their best to disclose to me matters which occurred in Parliament in 2006 and subsequently which could be seen as contrary to their own interests because they argued in favour of a new criminal law to protect them so that they did not have to bring actions for injunctions, and I did think carefully about whether, in view of that, I should say, well, this Claimant should rely on the criminal law. There

may come a time in the next few years, as the *Public Order Act 2023* settles in and the effects of criminal sentencing are acknowledged by protesters, that full and frank disclosure will show that there is no compelling justification for an injunction, but I do not think that tipping point has been reached on the evidence before me.

Evidence

25. I have looked at the fourth factor, the evidence to prove the claim, the ownership and the history of direct action and the quia timet threat. I am satisfied on ownership and I will come to the compelling justification to deal with the direct-action history and the threat later.

No realistic defence

26. As for the "no realistic defence" ground, I do not consider that any of the protesters have a realistic defence in relation to the Claimant's land, which interestingly is far larger than that over which they seek an injunction, and they have carefully restrained themselves to a smaller area for the injunction geographically, being within their power station boundaries and the pumping station boundary, with a small buffer zone around the outside. As for the buffer zone, I do not consider that the protesters have much of a realistic defence, because their stated aim is not to walk up and down the pavement with banners, avoiding direct action, which would probably be lawful, but is to camp on an unknown area and take direct action, which by definition is unlawful, and I do not consider that they have a realistic defence to unlawful acts, namely torts or trespass and nuisance, and, worse, no defence to criminal damage of the Claimant's fencing or any equipment or matter inside the boundaries of the power station or the pumping station.

Compelling justification

27. Factor six, compelling justification: as I have set out before, this is far trickier to prove than balance of convenience, for a Claimant. The balance is against granting the injunction unless there is a compelling reason. I have set out the evidence of the history of direct action by various protest groups, which goes back a long way to 2006, when the power station was invaded. Also I have set out the serious direct threats of direct action by these two organisations, which are now only three weeks away. I have taken into account that the Claimant has set up a specific protest zone marked out for the protesters, near to the power station, which they can occupy to carry out their lawful protests.

28. I have considered section 7 of the *Public Order Act 2023* and the other sections, which provide new criminal law protection and is being put into practice by the police who, for instance, have arrested the organisers of the M25 protests and have arrested those who intended to protest at airports. I am as yet unable to say how much of a deterrent effect that Act has had on future protesters. Certainly, it has not prevented protesters from threatening direct action at the Claimant's power station or at airports or at oil terminals, and so it is difficult to judge whether that, as an alternative remedy to an injunction, makes the need for an injunction uncompelling. What is for sure is that the criminal law does not provide the evidenced prospective protection that injunctions have provided over the last ten years or so. Although the evidence before me is a bit slim, namely one quote from Just Stop Oil, it is a bit wider or stronger when one looks at the paucity of applications for committal for contempt of PU injunctions. I say paucity because there have been some.

29. I consider that the CCTV and self-guarding which the Claimant has put in place is useful but it has its limits. The Claimant would need a large number of protective security guards, who could go out and investigate assemblies on the footpaths around the power station, to see whether the people in between the CCTV camera and the dark area behind were using bolt cutters to get through fences, and I am not sure that that is practical, nor is it a full proof protection. What the CCTV does is raise an alarm, but whether it provides protection in this case for the one week when the protesters are likely to be in camp and starting their direct action in groups, is unknown, particularly if the protesters carry out false moves or decoy moves. Thus, I have come to the conclusion that the alternative remedies are not sufficient to provide adequate protection for the threats. I consider that there is a compelling justification for injunctive protection for the power station the workers in the power station, the suppliers to the power station and the railways and lorry drivers who go in and out of the power station and the licensees.

Damages adequacy

30. I then come to the question of whether the damages are an adequate remedy. I have got to look at the harm which could be caused at the power station. This is set out well in evidence by Mr Sloan. I am concerned about the risk of explosion. I am concerned about the risk of stopping electricity production. I am concerned about the risk of stopping biomass being delivered to the power station so that the power station does not have the

fuel necessary to create electricity. I am concerned about deadly gas. I am concerned about traffic accidents and climbing onto vehicles stuffed with biomass and/or explosive oil or diesel. I am concerned about the protesters climbing water towers or breaking into electricity substations, which are dangerous places. This sort of harm, not only to the protesters but also to the staff, is not properly compensatable just by money. Human beings would much rather keep their facial skin, hands, arms, legs or ability to do sport or live family life, than have a lump sum of money given to them, having lost those matters. Secondly, there is no indication that the crowdfunding for the camp, which is publicised at £5,100, has had a part set aside to provide compensation to anyone injured or disadvantaged by the direct action. In addition, as yet, there is no historic way of justifying the assertion that unknown persons will have sufficient money to pay for the damage that they intend to cause because they are unknown persons. So, it seems to me, not only would damages not be an adequate remedy but there would not be any adequate damages.

Clear terms

31. Coming then to the terms of the injunction, I am going to deal with those with counsel if I grant the injunction, but I am going to ensure that they are absolutely clear and simple and are tied to the trespass and nuisance cause of action. I am going to make sure for the next factor that the prohibitions match the claim. I am going to make sure for the next factor that the geographical boundaries are absolutely clear in relation to the Claimant's land and any third-party land covered.

ECHR and other lawful rights

32. I should now then deal with the third-party land at the buffer zone. I was troubled by the whole idea of having a buffer zone, because it seems to me to be the thin end of the wedge and might lead to application creep covering more and more public land, but the fact here is all this land is owned by the Claimant except for the pavement that runs along the side of the road on the East side of the power station, so in fact it is mainly mission creep in relation to the Claimant’s own land and it only affects, firstly, a permissive footpath, which the Claimant is going to withdraw permission from for a week or two, and then a right-of-way footpath, which leads only around the North and the West side of the power station . Also, as I have said, it covers a verge and pavement on the East side of the power station. I do consider that to make the injunction (which I intend to

grant because there is compelling justification for it) effective, it is necessary to keep the protesters away from a small piece of land all around the fence, and that is delineated by the red shading on plans one and two. I think that is necessary. I think it is proportionate within paragraph 50 of *Cuadrilla.* I do not think it is unnecessary or disproportionate, and it seems to me, on the evidence, that the Claimant has thought carefully about keeping matters proportionate when asking for the buffer zone. I do consider that it is a sensible, proportionate and reasonable addition to the scope of the injunction

Notification

33. Coming to notification and service, I consider that the need for past service can be dispensed with in this case, because it is a bit of a fiction saying that knowing that the persons unknown has not been served, we will pretend that they have been served by giving them notification in arrears. It seems to me the more straightforward way is to dispense with service but to ensure tight notification and publication provisions after the order is made. Coming then to what is proposed, I have already trailed that I do not consider that the solicitors' website is the right place for notification. It should be made public via the Judicial Press Office website via the Judicial Press Office, via the Claimant's website, by notification to the two protest organisations and by stakes in the ground around the power station.

END

This transcript has been approved by the judge

Neutral Citation Number: [2024] EWHC 2254 (KB)

Case No: QB-2022-001236

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 September 2024

Before :

HHJ Emma Kelly sitting as a Judge of the High Court

- -

Between :

NORTH WARWICKSHIRE BOROUGH COUNCIL	**Claimant**
- and –	
THE DEFENDANTS LISTED AT SCHEDULE A TO THIS JUDGMENT	**Defendants**

- -
- -

Mr Jonathan Manning and Ms Charlotte Crocombe (instructed by **North Warwickshire Borough Council, Legal Services**) for the **Claimant.**

Ms Alison Lee (8th Defendant), **Ms Joanna Hindley** (78th Defendant) and **Ms Chloe Naldrett** (115th Defendant) in person and who participated in the hearing.

Mr Timothy Hewes (4th Defendant), **Mr Stephen Pritchard** (9th Defendant), **Mr Paul Raithby** (11th Defendant), **Mr Marcus Bailie** (25th Defendant), **Mr David Robert Barkshire** (32nd Defendant), **Ms Molly Berry** (33rd Defendant), **Ms Kate Bramfitt** (37th Defendant), **Ms Zoe Cohen** (49th Defendant), **Ms Ruth Jarman** (84th Defendant), **Mr Charles Laurie** (91st Defendant), **Ms Victoria Lindsell** (93rd Defendant), **Mr Christian Murray-Leslie** (113th Defendant), **Ms Stephanie Pride** (125th Defendant), **Ms Vivienne Shah** (135th Defendant), **Ms Sarah Webb** (150th Defendant) in person but who observed the hearing only.

Ms Caroline Cattermole (46th Defendant), **Ms Diana Martin** (98th Defendant), **Mr Nicolas Onley** (121st Defendant) and **Mr Daniel Shaw** (137th Defendant) in person by remote link but who observed the hearing only.

Hearing dates: 11-12 June 2024.
Judgment handed down: 6 September 2024

- -

APPROVED JUDGMENT

HHJ Emma Kelly:

Introduction

1. This is a claim for an injunction to restrict protests inside and in the locality of an inland oil terminal known as Kingsbury Oil Terminal ("the Terminal") in Kingsbury, Warwickshire. The claim is brought by North Warwickshire Borough Council ("the Council"). The Terminal is situated within the geographical area for which the Council has responsibility.

2. The claim arises from protest activities undertaken at and around the Terminal by individuals associated with the action group known as Just Stop Oil. Just Stop Oil is a civil resistance group whose aims are to end all new licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The named defendants are individuals said to have engaged in protest activities at the Terminal. The Council also pursues four categories of persons unknown defendants.

Background

3. From around 31 March 2022 to 10 April 2022 there were a series of protests at the Terminal by individuals associated with Just Stop Oil. I shall address the details of those protests in due course but they included both trespass onto the Terminal site and protests on land adjacent to the Terminal, including on the public highway.

4. In response to the protests, on 13 April 2022 the Council issued an application for a without notice interim injunction and power of arrest against 18 named defendants who had been arrested at a protest at the Terminal and a further unnamed defendant defined as "Persons Unknown who are organising, participating in or encouraging others to participate in protests against the production and/or use of fossil fuels, in the locality of the site known as Kingsbury Oil Terminal, Tamworth, B78 2HA."

5. By order dated 14 April 2022 Sweeting J granted a without notice interim injunction. In summary, the order prohibited any protest against the production or use of fossil fuels at the Terminal within an area demarcated on a plan attached to the injunction or within a 'buffer zone' of five metres of those boundaries. The order further prohibited certain types of conduct in connection with any such protest taking place anywhere within the wider 'locality' of the Terminal. The prohibited conduct was detailed in eleven sub-paragraphs and included activities such as obstructing the entrance of the Terminal, climbing onto or otherwise damaging or interfering with vehicles or objects, damaging pipes and equipment, and tunnelling under land. A power of arrest was attached to the order.

6. Following the grant of the interim order, there was further protest activity at the Terminal and the police exercised the power of arrest against various individuals said to fall within the definition of the persons unknown defendant. Again, I will revert to the detail of those ongoing protests in due course.

7. On 5 May 2022 Sweeting J heard the on notice return date of the interim injunction and an application by a Mr Jake Handling (73rd defendant and a protestor arrested for alleged breach of the interim order) and a Ms Jessica Branch (claiming to be an interested party) to discharge the interim injunction. The Council sought continuation of the interim injunction to trial but no longer required a five metre buffer zone around the perimeter of the Terminal. Sweeting J continued the interim injunction in an amended form and the power of arrest until the hearing of the claim. He gave reasons for his decision in a judgment handed down on 14 July 2023: [2023] EWHC 1719 (KB). The terms of the amended interim injunction are as follows:

> "The Defendants SHALL NOT (whether by themselves or by instructing, encouraging or allowing any other person):
>
> (a) organise or participate in (whether by themselves or with any other person), or encourage, invite or arrange for any other person to participate in any protest against the production or use of fossil fuels, at Kingsbury Oil Terminal (the "Terminal"), taking place within the areas the boundaries of which are edged in red on the Map attached to this Order at Schedule 1.
>
> (b) in connection with any such protest anywhere in the locality of the Terminal perform any of the following acts:
>
> (i) entering or attempting to enter the Terminal
>
> (ii) congregating or encouraging or arranging for another person to congregate at any entrance to the Terminal
>
> (iii) obstructing any entrance to the Terminal
>
> (iv) climbing on to or otherwise damaging or interfering with any vehicle, or any object on land (including buildings, structures, caravans, trees and rocks)
>
> (v) damaging any land including (but not limited to) roads, buildings, structures or trees on that land, or any pipes or equipment serving the Terminal on or beneath that land
>
> (vi) affixing themselves to any other person or object or land (including roads, structures, buildings, caravans, trees or rocks)
>
> (vii) erecting any structure
>
> (viii) abandoning any vehicle which blocks any road or impedes the passage any other vehicle on a road or access to the Terminal
>
> (ix) digging any holes in or tunnelling under (or using or occupying existing tunnels under) land, including roads;

> (x) abseiling from bridges or from any other building, structure or tree on land
>
> or
>
> (xi) instructing, assisting, or encouraging any other person to do any act prohibited by paragraphs (b)(i)-(x) of this Order."

8. Protest activity continued. Between April 2022 and September 2022 the police exercised the power of arrest attached to the interim order on a large number of occasions. In that period findings of contempt were made against some 72 individuals, including some who were found to have breached the injunction on two, three or four occasions.

9. By order dated 31 March 2023 Sweeting J granted the Council's application to add a further 139 named defendants to the claim, being individuals who had been arrested at or in the locality of the Terminal in relation to protest activity after the interim injunction was granted and whose identities were now known. Case management directions were given to trial. The trial of the claim was due to take place in July 2023 but was adjourned on several occasions to await the decision of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 ("*Wolverhampton*").

10. By order dated 6 December 2023 Soole J extended the time for any defendant, or person who wished to be heard at the final hearing, to file and serve an acknowledgment of service to 4pm on 27 December 2023. His order provided that any defendant or person failing to comply with the same would not be permitted to defend or take any further role in these proceedings without further order of the court. No defendant or any other person filed an acknowledgment of service whether by 27 December 2023 or otherwise.

11. As the claim has progressed, a number of the defendants offered undertakings that were acceptable to the Council. At a hearing before Mould J on 22 May 2024, the Court accepted those undertakings and the interim injunction and power of arrest were discharged against those defendants. A further defendant, Mr Alex White (152nd defendant) was not able to attend the hearing on 22 May to proffer his undertaking but did so on 11 June 2024 and the interim relief against him was similarly discharged. A number of other defendants offered undertakings but the Council declined to accept them, largely on the basis that such individuals had been arrested at the Terminal after the interim injunction was granted on 14 April 2022 and the lack of ability to attach a power of arrest to an undertaking troubled the Council. As a result of the various undertakings, the number of defendants against whom the claim proceeds has reduced. Schedule A to this judgment sets out the defendants against whom there remains a live claim.

12. On the first day of the trial on 11 June 2024, a number of unrepresented defendants attended the hearing. Of those attending, the majority simply wanted to observe the proceedings. However three defendants, Ms Alison Lee (8th defendant), Ms Joanna Hindley (78th defendant) and Ms Chloe Naldrett (115th

defendant) wished to address the court. I explained the effect of the order of Soole J and indicated that any defendant wishing to apply to participate in the hearing would be required to file an application for relief from sanctions. Each of the three defendants filed written applications for relief from sanctions, which I heard on the afternoon of the first day of trial. The three defendants did not seek to cross-examine the Council's witnesses or call any evidence of their own. They simply wanted a short opportunity to address the court by way of closing submissions. I granted each of their applications for relief from sanctions limited to permitting each to address the court in closing for 10 minutes on condition of serving a short document setting out the bullet point issues they wished to cover. Each defendant complied with those directions.

13. At the start of the trial, the Council applied to amend the definition of the persons unknown defendant to address concerns expressed by Sweeting J in his judgment on the interim order that the current definition did not provide sufficient particularity as to the conduct alleged to be unlawful. The Council's primary position was that, following the decision of the Supreme Court in *Wolverhampton*, there was no longer a need to amend the definition. If however the Court disagreed, the Council sought to amend the definition to include particulars of conduct in four new categories of persons unknown. For the reasons given in an ex tempore judgment on 11 June 2024, I concluded that the definition remained inadequate but granted permission for the Council to amend the claim to include what have become defendants 19A, 19B, 19C and 19D. The detail of those descriptions appears in Schedule A to this judgment.

The evidence

14. The factual evidence relied on by the Council was unchallenged. The only witness to give oral evidence was Mr Steven Maxey, the Council's Chief Executive. Mr Maxey adopted the contents of five witness statements he had made during the course of the proceedings and dated 13 April 2022, 3 May 2022, 18 January 2024, 20 February 2024 and 5 June 2024.

15. In addition, the Council relied on written evidence from the following individuals who were not called to give oral evidence:

    i) Mr David Smith, Temporary Assistant Chief Constable for Warwickshire Police, dated 10 April 2022.

    ii) Mr Jeff Morris, Delivery Lead for Warwickshire County Council County Highway Services, dated 12 April 2022.

    iii) Mr Stephen Brown, Distribution Operations Manager for Shell International Petroleum Company Limited, dated 13 April 2022.

16. The Council concluded it was not proportionate to call the aforementioned three witnesses in circumstances where no defendant had elected to acknowledge service and defend the claim. Mr Smith's witness statement has been prepared in a form that complies with s.9 of the Criminal Justice Act 1967 rather than containing a statement of truth in the wording required by Civil Procedure Rule Practice Direction 22 para. 2.2. Mr Smith exhibits to his statement a number of

statements from various police officers involved in policing protests at the Terminal in April 2022. Those statements are also in s.9 form and have signed declarations as to the truth of the contents of the statements. The lack of statements of truth in a CPR PD 22 compliant form does not, in my judgment, detract from the cogency of the written evidence in light of the otherwise formal manner in which the statements have been prepared with signed declarations of truth.

17. The Council's evidence provides a detailed picture of the Terminal and protest activity that has occurred both within and in the locality of the Terminal. The salient points of the evidence are set out below.

The Terminal

18. The Terminal is a series of inland oil terminals with 50 storage tanks and storage capacity for around 405 million litres of flammable liquids. It comprises four separate but neighbouring oil terminal sites which are located on the edge of the village of Kingsbury. The sites comprising the Terminal are operated by Shell UK Ltd, United Kingdom Oil Pipelines Ltd, Warwickshire Oil Storage Ltd and Valero Energy Ltd. Those companies have formed the Kingsbury Common User Group which enables the management of specific shared assets such as fire-fighting systems and allows operators to discuss common issues.

19. The Terminal is an 'Upper Tier' site for the purposes of the Control of Major Accident Hazards Regulations 2015 ("COMAHR") by virtue of the large quantities of dangerous substances that are present on site. It is said to be one of the largest oil terminals in the country.

20. The Terminal is a multi-fuel site, storing and distributing petrol and diesel (both standard and V-power), heating oils and aviation fuel. Most of the fuel, save for additives or biofuels which are imported by road, is fed into the Terminal by pipeline from the United Kingdom Oil Pipeline system. The products are then distributed from the Terminal using road tankers. Hundreds of vehicles enter and exit the Terminal each day. The Terminal is described as a critically important supply point for the Midlands. In addition to distributing fuel to petrol station forecourts, it supplies major airports in the region including Birmingham International and East Midlands airports.

21. There are various security measures at the Terminal. For example, the part of the Terminal operated by Shell UK Ltd is surrounded by six foot high palisade fencing or six foot high chain link fencing. Pedestrian access is via turn-style gates and vehicular access via locked gates. Only visitors or employees with a designated pass can gain access. All vehicles entering the site have to be registered on Shell UK Ltd's internal system and have vehicle and driver accreditations. There is a 24 hour, 7 day a week security presence with high-definition CCTV and security guards working day and night. Operational plans for the Terminal include a requirement that "all controlled items (mobile phones, cigarettes, lighters, paging units, matches etc) should be handed over at the Terminal Control Room…due to potential presence of explosive atmospheres."

The surrounding area

22. The Terminal lies to the east of the village of Kingsbury and to the south-west of the smaller village of Piccadilly. The villages of Kingsbury and Piccadilly have approximately 8000 residents with some of the residential areas being no more than a few hundred metres from the Terminal. A railway line abuts parts of the Terminal on the Kingsbury side of the site and other nearby land is used by the Ministry of Defence as rifle ranges. The area is well connected to the motorway network with a junction of the M42 being nearby.

23. Kingsbury lies on the River Tame which has a catchment area spanning Birmingham, Solihull, Sandwell, Walsall, Tamworth, Nuneaton and Hinckley. Locally there are 8 sites of special scientific interest, 7 local nature reserves and 27 non-statutory sites of local importance.

The protest activity

24. On 31 March 2022 to 1 April 2022 around 40 protestors attended the Terminal in possession of glue and devices to lock themselves onto objects. Some of the protestors stopped and then climbed onto oil tankers which were trying to access or egress the Terminal. Other protestors glued themselves to the road and sat in the roadway to the main entrance to the Terminal. The police stopped a Ford Transit van which contained a large quantity of timber, climbing ropes, food stuffs and devices for locking on. The occupants of the van freely admitted that the contents of the van were for building a tree house and encampment. Distribution operations at the Terminal were suspended and the police made 42 arrests.

25. At around 1930 hrs on 2 April 2022 approximately 40 protestors attended the Terminal and blocked the main entrance to the Terminal. Some glued themselves to the carriageway and others appeared to be using a long tube to chain themselves together. Others climbed on top of oil tankers. The activity continued throughout the night and into 3 April. Operations at the Terminal were suspended. It partially reopened at 1730hrs with protesters remaining on site until midnight. The police made various arrests throughout the day and, taken with the arrests of the previous day, the total number of arrests increased to 68.

26. At around 0730 hrs on 5 April 2022 around 20 protesters attended the Terminal and again blocked the main entrance, locking onto each other and gluing themselves to the carriageway. Two others climbed on top of an oil tanker holding a ‘save the oil’ sign. Their presence prevented the tanker from moving. Operations at the Terminal were again suspended, only resuming at around 1100hrs. However, at around 1130 hrs a second group of protesters targeted motorway junctions 9 and 10 of the M42, climbing onto oil tankers servicing the Terminal as those vehicles moved slowly off the slip roads. Operations at the Terminal were again suspended and traffic built up onto the motorway. The protesters were removed and the roads reopened at 1430hrs.

27. At around 0030 hrs on 7 April 2022 protesters approached the main entrance to the Terminal and attempted to glue themselves to the carriageway. As the police

were attending to those individuals, another group of around 40 protesters approached the rear of the Terminal across fields. They sawed through an exterior gate and scaled a fence to gain access to the Terminal. Once within the perimeter fencing, the protesters dispersed to a number of different locations. Some climbed on top of three large fuel storage tanks containing unleaded petrol, diesel and fuel additives. Two others entered insecure cabs of fuel tankers and secured themselves inside using a lock on device. Others climbed on top of two fuel tankers, onto the floating roof of a large fuel storage tank and into a half-constructed fuel storage tank. The protestors used a variety of lock on devices to secure themselves to those structures. A complex police operation was initiated, utilising a variety of specialist teams, who worked alongside staff from the Terminal and fire service. The Terminal was not cleared of protesters until approximately 1700 hrs.

28. On 9 April 2022 further protest activity took place. At around 1050 hrs four protesters arrived at the main entrance to the Terminal and attempted to glue themselves to the carriageway. A short time later another protester was arrested trying to abseil from a road bridge over Trinity Road to the north of the Terminal. At around 1530 hrs a caravan was deposited at the side of the road on Piccadilly Way to the south of the Terminal. Some 20 protesters glued themselves to the sides and top of the caravan. It was later discovered that occupants within the caravan were attempting to dig, via a false caravan floor, a tunnel under the road. The police entered the caravan at around 0200 hrs on 10 April 2022 and the six occupants were arrested. Activity continued into 10 April with protestors scaling oil tankers and gluing themselves to the carriageway.

29. Between the 31 March and 10 April 2022 the police made approximately 180 arrests at or in the locality of the Terminal in relation to protest related activity. A common feature of many of the arrests is that the detainees were passively resistant, going limp and thus requiring the police officers to carry the individual into custody. Much of the protest activity was publicised on Just Stop Oil's website, which included videos and photographs of the protest activity. A video clip featuring an individual identified as John 'aka' Sean Jordan shows Mr Jordan on top of the caravan stating "…I am here with Just Stop Oil, we are currently on the tenth day of our campaign having started on 1st April…" The protests commonly featured orange Just Stop Oil livery on placards or banners and protestors wearing orange high-viz vests. On 12 April 2022 Just Stop Oil published a press release on their website stating: "We find ourselves, as others have done through history, having to do what is unpopular, to break the law to prevent a much greater harm taking place … While Just Stop Oil supporters have their liberty the disruption will continue."

30. Following the granting of the without notice interim injunction on 14 April 2022 the protest activity at the Terminal reduced but did not cease. Between the 14 April and 14 September 2022 there were a further 14 protests resulting in over 120 arrests. The Council brought successful contempt applications against 72 protestors for 109 separate breaches of the interim injunction. In the various contempt proceedings, none of those arrested sought to challenge the claimant's

factual case that the protests were in relation to the production and/or use of fossil fuels.

31. At just before 0800 hrs on 26 April 2022 16 individuals gathered on a grass verge outside the main entrance to the Terminal. A peaceful protest, with various signs and banners, lasted for approximately two hours. By around 1000 hrs a number of the protesters spread out across the carriageway and sat down obstructing access to and egress from the Terminal. The protestors were arrested for breaching the interim injunction.

32. At just after 1600 hrs on 27 April 2022 a group of 10 individuals gathered on a grass verge to the side of the main entrance to the Terminal to protest against the production and use of fossil fuels. The protest was peaceful but inside the five metre buffer zone imposed by the original without notice injunction. The protesters were arrested and successful contempt proceedings followed.

33. At around 1135 hrs on 28 April 2022 a group of eight protesters, including some of those arrested on 27 April, engaged in a further peaceful protest adjacent to the external fencing to the terminal within the five metre buffer zone. The protesters were arrested

34. At approximately 1400 hrs on 4 May 2022 a group of 11 protestors attended the Terminal. They stood on a grass verge to the side of the entrance to the Terminal with placards and banners before moving to walking across the road outside the Terminal. The protest was peaceful but again inside the buffer zone. Some of those attending the protest on 4 May 2022 did so in defiance of a court order requiring them to attend court that day to face contempt proceedings in respect of events on 27 April. The protesters on 4 May 2022 were arrested and successful contempt proceedings followed.

35. At around 1400 hrs on 12 May 2022 a group of eight protestors attended the Terminal. A number of group sat down in the middle of the access road to the Terminal entrance blocking access.

36. On 24 August 2022 three protesters occupied a tunnel that had been dug alongside and under Piccadilly Way, some 400 metres from the Terminal. The incident was publicised by Just Stop Oil on its social media platforms, which posted details of the protestors' support of Just Stop Oil's aims together with video footage and video stills taken inside the tunnel. Contempt proceedings against two of the protesters failed for want of service of the interim injunction and the proceedings against the third succeeded only in respect of his occupation of the tunnel for a limited period of time following service of the order after entry into the tunnel. The existence of the tunnel and its occupation in conjunction with a protest in the locality of the Terminal nonetheless occurred.

37. At approximately 1130 hrs on 14 September 2022, 51 protesters were arrested in connection with a protest on the private access road to the entrance to the Terminal. The protest was peaceful but its location blocked access and egress to the Terminal with many of the protestors sitting across the carriageway. Some held Just Stop Oil banners and others wore orange high viz vests featuring the Just Stop Oil logo.

38. There have been no protests at the Terminal since September 2022. Mr Maxey's evidence is however that the Council has since been targeted by protestors associated with Just Stop Oil.

    i) In August and September 2023 various councillors received emails from named defendants including Sarah Webb, Catherine Rennie-Nash, Bill White, Karen Wildin and Clare Walters. Each defendant was critical of the Council's action in pursuing this claim.

    ii) On 21 September 2023 protestors attended the Council's offices with banners and positioned themselves near to one of the entrances.

    iii) On 27 September 2023 protestors interrupted a Council meeting, refused the Mayor's request for order and refused to leave the Council chamber causing the meeting to be suspended. The matter was only resolved following intervention by the police.

    iv) Mr Maxey subsequently met with some of the protestors to hear their complaints. He states that the protestors informed him that they took the view that the Council should not have obtained the interim injunction as it was preventing their protests from causing the disruption which they thought was necessary given their concerns about climate change.

The impact of the protest activity

39. The protests caused significant disruption to the operation of the Terminal, at times causing operations to be suspended. The disruption impacted on the companies operating from the Terminal, individual staff members working at the Terminal and others, such as tanker drivers, who were required to visit the Terminal as part of their work.

40. There is also evidence of the protests causing more widespread harm and risk of harm. Mr Smith, Temporary Assistant Chief Constable for Warwickshire Police, provides evidence as to the impact of the protests on police resources. He describes the policing operation as being one of the most significant he has experienced in his career. Large numbers of officers were deployed from across the force to the Terminal day and night. This caused non-emergency policing services to be reduced and, although core policing services were maintained, the protests impacted on the quality and level of policing available during that period. Officers who would otherwise have been policing communities, roads or supporting victims of crime were taken away from those duties to police the protests. The scale and sophistication of the protests meant that Warwickshire Police had to bring in additional police officers from other regional forces, in addition to specialist policing teams such as the working at heights teams and protest removal teams. Mr Smith reports this coming at significant additional financial cost to the police force.

41. The protests had an impact on the local community and beyond. A number of public highways around the Terminal had to be closed causing inconvenience to members of the public. The protest activity extended to disruption on the M42 motorway. Mr Smith considers that the significant police presence during the

protests created a level of fear and anxiety in the local community. He acknowledged the community had been disturbed by the large policing operation which had extended into unsociable hours and occasioned regular essential overnight use of the noisy police helicopter. The impact of the protests extended beyond the immediate community and across the wider West Midlands region, with fuel shortages occurring at some petrol station forecourts.

42. The protests also impacted Warwickshire County Council. Mr Morris, of County Highways Service, explains that the digging of the tunnel under the road on 9 and 10 April 2022 resulted in County Highways Engineers attending out of hours, a manual operative attending from Balfour Beatty, the emergency closing of the road and remedial works being required. He understands the cost to the taxpayer of his department's involvement to be in the region of £3189.95.

43. A number of the Council's witnesses comment on their concerns for public safety should protest activity at the Terminal cause a fire or explosion. Mr Smith considers the same would likely have catastrophic implications for the local community including the risk of widespread pollution to the ground, waterways and air. He notes that the protesters had no regard to the extremely hazardous nature of the site or for the safety of either themselves or others when using mobile phones at the Terminal, scaling and locking themselves onto very volatile fuel storage tanks, tunnelling in close proximity to high-pressure fuel pipelines and causing the forced stopping and scaling of fuel tankers on the public highway. Mr Smith states that such actions not only cause unacceptable levels of risk to the protestors themselves but also to the public and members of the emergency services attending any incidents.

The parties' positions

44. The Council seeks a final injunction in broadly the same terms as the interim order as amended at the hearing on 5 May 2022. The Council has set out the detail of its position in its skeleton argument of 5 June 2024 and in closing submissions. I shall return to the detail of those submissions in due course.

45. No defendant has filed an acknowledgment of service, defence or any witness evidence in response to the claim. Three of the defendants only have made closing submissions, each opposing the granting of an injunction notwithstanding that none of them have filed an acknowledgment of service or defence. Each of the three defendants stated that they had no intention of breaking any injunction in respect the Terminal in the future.

46. Ms Lee (8th defendant) submitted that no injunction is required in circumstances where, the since the making of the interim injunction, wider powers now exist under the criminal law providing a deterrent to protestors, as well as making it easier for the police to act in the event of a protest. She referred to the increased maximum sentence for the offence of wilful obstruction of the highway, increased in May 2022 to a 6-month term of imprisonment by virtue of the Police, Crime, Sentencing and Courts Act 2022. She also relied on a variety of new offences under the Public Order Act 2023, which introduced offences relating to protest activity of 'locking on', tunnelling, obstructing major transport works and interfering with major infrastructure. Ms Lee submitted that

the threat to the Terminal no longer exists as Just Stop Oil's tactics have changed and they have since turned their attention to more 'media friendly' protests. She argued that the proposed injunction is not a deterrent and amounts to an unlawful restriction of the rights of environmental defenders to protest.

47. Ms Hindley (78th defendant) told the court of her stress and worry since being named as a defendant following her arrest on three occasions in connection with the protests at the Terminal in 2022. She does not believe an injunction is proportionate and expressed concern that the Council is passing on the cost of the litigation to local residents. Ms Hindley submitted that the court should take into account what she described as malice and racism that she said prioritised local interests over the environmental devastation of the livelihoods of vulnerable brown and black people across the world.

48. Ms Naldrett (115th defendant) told the court that she was dismayed to discover that the conclusion of the contempt proceedings did not absolve those involved from remaining as named defendants to the claim for an injunction. She told the court she had no intention of returning to the Terminal and risking triggering her suspended sentence. She submitted that the claim for an injunction was not a good use of the court's time and that no injunction was required in light of the increased criminal powers under the Public Order Act 2023. She asked the court to prioritise the rights of ordinary people over those of oil companies.

The issues

49. It is useful at this juncture to summarise the key issues that require determination:

(1) Does the Council have the standing to bring these proceedings and, if so, can it establish the causes of action relied upon?

(2) Do the facts of this case justify restriction of the Article 10 and 11 rights of the protesters and, if so, to what extent?

(3) If it is appropriate to grant relief to restrict protest activity, is it appropriate to grant injunctive relief against (a) the named defendants and/or (b) 'newcomer' persons unknown taking into account the requirements outlined in *Wolverhampton*?

(4) If an injunction is to be granted, what are the appropriate terms thereof, and should a power of arrest be attached?

The Legal Framework

Standing of a local authority to bring proceedings and the underlying causes of action

50. The Council seeks to rely on a number of statutory provisions as bases for bringing the claim for injunctive relief. The principal power relied on is s.222(1) of the Local Government Act 1972 which states:

> "(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name …"

51. Whether it is 'expedient' for the purposes of s.222 to bring legal proceedings is for the local authority to decide subject to such decision being compatible with usual principles of judicial review. In *Stoke on Trent Council v B & Q Ltd* [1984] 1 Ch 1 Lawton LJ at 23A held as follows:

> "…[The local authority] must safeguard their resources and avoid the waste of their ratepayers money. It is in everyone's interest, and particular so in urban areas, that a local authority should do what it can within its powers to establish and maintain an ambiance of a law abiding community; and what should be done for this purpose is for the local authority to decide."

52. The Council puts its case on the basis that that the granting of an injunction "is appropriate and expedient for the promotion or protection of the interests of the inhabitants of their area, and in the exercise of the Court's discretion, that the defendants be restrained, by way of injunction, from committing tortious and criminal acts and, in particular acts amounting to a public nuisance and to breaches of the criminal law that the criminal law is unable to prevent." [Para. 56 of the Council's skeleton argument dated 5 June 2024.]

53. Subject to meeting the 'expediency' requirement, s.222 empowers local authorities to bring actions for injunctive relief to restrain public nuisance and criminal offending. In *Nottingham City Council v Zain* [2001] EWCA Civ 1248 the local authority sought to restrain a defendant alleged to have been involved in drug dealing on the grounds that his actions constituted a public nuisance. Schiemann LJ, at para. 8-13, held:

> "8. … The following passage from the judgement of Romer L.J. in *Attorney-General v PYA Quarries Ltd.[1957] Q.B. 169* at 184 has generally been accepted as authoritative.
>
> > "I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is

> sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."

> 9. Not everyone however is entitled to sue in respect of a public nuisance. Private individuals can only do so if they have been caused special damage. Traditionally the action has been brought by the Attorney General, either of his own motion, or, as was the situation in the *PYA* case, on the relation of someone else such as a local authority. In *Solihull Council v Maxfern Ltd* [1977] 127, Oliver J. considered the history of the legislative predecessors of s.222 and concluded that the effect of section 222 is to enable a local authority, if it thinks it expedient for the promotion or protection of the interests of the inhabitants of their area, to do that which previously it could not do, namely, to sue in its own name without invoking the assistance of the Attorney General, to prevent a public nuisance. I recognise that in that case the Local Authority was not suing in nuisance but rather was enforcing the criminal law in an area for which it had been given express responsibility, namely the enforcement of the Sunday trading provisions of the Shops Act 1950 . Nonetheless I respectfully agree with Oliver J.'s conclusion in relation to suing in nuisance…
>
> 13. …In my judgement it is within the proper sphere of a local authority's activities to try and put an end to all public nuisances in its area provided always that it considers that it is expedient for the promotion or protection of the interests of the inhabitants of its area to do so in a particular case. Certainly my experience over the last 40 years tells me that authorities regularly do this and so far as I know this has never attracted adverse judicial comment. I consider that an authority would not be acting beyond its powers if it spent time and money in trying to persuade those who were creating a public nuisance to desist. Thus in my judgement the County Council in *PYA* was not acting beyond its powers in seeking the Attorney General's fiat in trying to put a stop to the nuisance by dust in that case and thus exposing itself to potential liability in costs. It follows that, provided that an authority considers it expedient for the promotion and protection of the interests of the inhabitants of its area, it can institute proceedings in its own name with a view to putting a stop to public nuisance."

54. Keene LJ, agreeing with the judgment of Schiemann LJ, added the following observations at para. 27:

> "… Where a local authority seeks an injunction in its own name to restrain a use or activity which is a breach of the criminal law but not a public nuisance, it may have to demonstrate that it has some particular responsibility for enforcement of that branch of the law. But where it seeks by injunction to restrain a public nuisance, it may do so in its own name so long as it "considers it expedient for the promotion or protection of the interests of the inhabitants" of its area (section 222(1)). That is so even though it is seeking to prevent a

> breach of the criminal law, public nuisance being a criminal offence…"

55. As Sweeting J observed when considering the application for an interim injunction in this case ([2023] EWHC 1719 (KB) at para. 78), the terms of an injunction can extend to prohibiting lawful as well as unlawful conduct.

> "78. The purpose of the injunction was to prohibit conduct which if unchecked would amount to, or lead to, a public nuisance. It was the threat of significant harm, constituting a public nuisance, which led the Council to act and to seek restrictions which it regarded as necessary to afford effective protection to the public. Whilst the terms of an injunction should in so far as possible prohibit unlawful behaviour it is not the law that an injunction may only prohibit a tortious act; even lawful conduct may be prohibited if there is no other proportionate means of protecting rights. In the context of a threatened public nuisance of this nature and the form that protest had taken is not at all clear how injunctive relief could otherwise be framed effectively."

56. Sweeting J, at para. 81 of his judgment, noted that the previous common law criminal offence of public nuisance has been abolished and replaced by a statutory offence of public nuisance under s.78 of the Police, Crime, Sentencing and Courts Act 2022 in the following terms:

> "78 Intentionally or recklessly causing public nuisance
>
> (1) A person commits an offence if—
>
> (a) the person—
>
> (i) does an act, or
>
> (ii) omits to do an act that they are required to do by any enactment or rule of law,
>
> (b) the person's act or omission—
>
> (i) creates a risk of, or causes, serious harm to the public or a section of the public, or
>
> (ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
>
> (c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
>
> (2) In subsection (1)(b)(i) "serious harm" means—
>
> (a) death, personal injury or disease,

> (b) loss of, or damage to, property, or
>
> (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.
>
> (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.
>
> (4) A person guilty of an offence under subsection (1) is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding [the general limit in a magistrates' court] , to a fine or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.
>
> (5) In relation to an offence committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020 (increase in magistrates' court power to impose imprisonment) the reference in subsection (4)(a) to [the general limit in a magistrates' court]1 is to be read as a reference to 6 months.
>
> (6) The common law offence of public nuisance is abolished.
>
> …
>
> (8) This section does not affect—
>
> (a) the liability of any person for an offence other than the common law offence of public nuisance,
>
> (b) the civil liability of any person for the tort of public nuisance, or
>
> (c) the ability to take any action under any enactment against a person for any act or omission within subsection (1).”

57. In addition to s.222, the Council also relies on powers under the Localism Act 2011 and under the Highways Act 1980.

    i) Section 1(1) of the Localism Act 2011 confers on a local authority the “power to do anything that individuals [of full capacity] may generally do.” By section 1(5): “the generality of the power conferred by subsection (1) (“the general power”) is not limited by the existence of any other power the authority which (to any extent) overlaps the general power.”

    ii) By section 130(2) of the Highways Act 1980 “any Council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority,

> including any roadside waste which forms part of it." By section 130(5), "Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient."

58. The court has the ability to attach a power of arrest to an injunction in the circumstances provided by section 27 of the Police and Justice Act 2006:

> "(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972…
>
> (2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.
>
> (3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either–
>
> > (a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or
> >
> > (b) there is a significant risk of harm to the person mentioned in that subsection."

The applicability of the Human Rights Act 1998

59. The Council accepts that this claim engages s.12 of the Human Rights Act 1998 and Articles 10 and 11 of the European Convention on Human Rights.

60. Article 10, freedom of expression, provides:

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

61. Article 11, freedom of assembly and association, provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"

62. The engagement of Article 10 requires consideration of s.12 of the Human Rights Act 1998. The relevant parts of that Act are as follows:

> "12.— Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> …
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression …"

63. Articles 10 and 11 are qualified rights and thus can be restricted in the circumstances set out in paragraph 2 of each article. The approach to determining a whether a restriction of those rights is lawful was considered by Warby J (as he then was) in *Birmingham City Council v Afsar and others* [2019] EWHC 3217 (QB) in the context of a claim for injunctive relief by a local education authority to prevent protest activity within an exclusion zone around a school. At para. 102 Warby J held as follows:

> "102. The jurisprudence shows that Article 10 protects speech which causes irritation or annoyance, and information or ideas that "offend, shock or disturb" can fall within its scope: see, eg, *Sánchez v Spain* (2012) 54 EHRR 24 [53], *Couderc v France* [2016] EMLR 19 [88]. … Article 11 "protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote*": Lashmankin* [145]. But the rights engaged in this case have outer limits. … Article 11(1) does not protect violent or disorderly protest; the primary right is one of "peaceful" assembly. Further,

> whilst the right to education is unqualified, the rights guaranteed by Articles 8, 9, 10 and 11 are all qualified. Paragraph (2) of each Article makes clear that interference with the primary right may be legitimate if (but only if) two conditions are satisfied. It must be not only in accordance with or prescribed by law (a matter I have dealt with above) but also "necessary in a democratic society" in pursuit of one or more legitimate aims. Paragraph (2) of each Article identifies "the interests of … public safety ……or the protection of the rights and freedoms of others." Another legitimate aim identified in each Article is "the prevention of public disorder" or, in the case of Article 9(2), "the protection of public order", which would appear to be synonymous."

64. The application of Articles 10 and 11 in relation to criminal proceedings brought for wilful obstruction of the highway arising from protest activity was considered by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23. At para. 16 the Supreme Court adopted the explanation given by the Divisional Court in the same case as to the enquiry that needs to be undertaken under the Human Rights Act 1998.

> "63…It requires consideration of the following questions:
>
> (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11 ?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
>
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others?
>
> (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
>
> 64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> (1) Is the aim sufficiently important to justify interference with a fundamental right?
>
> (2) Is there a rational connection between the means chosen and the aim in view?
>
> (3) Are there less restrictive alternative means available to achieve that aim?
>
> (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

65. The Council accepts that when determining whether a restriction on any Article 10 or 11 right is justified, "it is not enough to assert that the decision was taken was a reasonable one" and "a close and penetrating examination of the factual justification for the restriction is needed." [*R (Gaunt) v Office of Communications (Liberty Intervening)* [2011] EWCA Civ 692 at para. 33.]

Injunctions against persons unknown

66. During the period in which the final hearing in this matter was adjourned, the Supreme Court handed down judgment in *Wolverhampton.* That case concerned applications for injunctions to prevent travellers from establishing unauthorised encampments in local authority areas. The Supreme Court reviewed the development of the law in relation to injunctions against 'newcomer' persons unknown, namely persons who, at the time of the grant of the injunction, are not identifiable and who cannot be shown to have committed any conduct which is sought to be prohibited or indeed to have any intention to do so in the future. At para. 167 the Supreme Court held:

> "167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:
>
> > (i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.
> >
> > (ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226-231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

> (iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.
>
> (iv) The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.
>
> (v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries."

67. The Supreme Court recognised, at para 171, that "the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para. 167 above…" When considering question (i), namely whether there is a compelling need for the remedy, the Supreme Court considered the availability of alternative powers available to the local authority by means such as public spaces protection orders, criminal offences and byelaws. [Paras. 204-216 of the judgment.]

68. At para. 235 of the judgment, the Supreme Court recognised the relevance of newcomer injunctions to protestor cases and noted:

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

Discussion

Does the Council have standing to bring proceedings for injunctive relief and, if so, can it establish the causes of action relied upon?

69. The effect of decisions such as *Nottingham City Council v Zain* is that it is settled law that a local authority can rely on s.222 of the Local Government Act 1972 to bring proceedings to restrain actual or threatened public nuisance or

breach of the criminal law where the local authority considers "it expedient for the promotion or protection of the interests of the inhabitants of the area."

70. The Council argues that it is expedient to bring these proceedings for the promotion and protection of the interests of the inhabitants of North Warwickshire when one takes into account the desirability of establishing and maintaining a law-abiding community; the need to protect inhabitants and visitors of North Warwickshire from serious threats to their safety, health, property and peaceful existence; the need to ensure that businesses of North Warwickshire can go about their lawful operations without disruption, and the need to protect emergency service staff and resources.

71. When considering whether it is expedient to act under s.222, the Council has to take into account any particular responsibilities it has. In this case, s.17 of the Crime and Disorder Act 1998 imposes a duty on the Council "to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent (a) crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); and …(c) re-offending in its area…" The Council also has the ability as a non-highway authority council under s.130(2) of the Highways Act 1980 to "assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority…"

72. The Council relies on underlying causes of action in public nuisance and breach or threatened breach of the criminal law. This is not one of those claims, as discussed by Keene LJ at para. 27 of *Zain*, where the injunction is brought to restrain only breaches of the criminal law such that a local authority may have to demonstrate it has some particular responsibility. As it happens, on the facts of this case, the Council does in any event have such a responsibility by virtue of s.17 of the Crime and Disorder Act 1998.

73. The Council's decision as to whether it was expedient to bring proceedings to promote or protect the interests of its inhabitants took into account multiple factors including the aforementioned statutory responsibilities, the high risks associated with storing very large volumes of flammable products at an 'Upper Tier' site adjacent to residential areas, and the significant scale and extent of disruption caused by protest activity occurring both inside and in the locality of the Terminal. In my judgment, those matters clearly justify the Council utilising its power under s.222.

74. The unchallenged evidence relied on by the Council establishes the commission of the tort of public nuisance and the threat of further such torts being committed. The actions of the protestors materially affected the reasonable comfort and convenience of those trying to go about their lives in North Warwickshire and the wider Midlands. Those affected included locals unable to use roads closed due to protest activity; businesses based at and those associated with the Terminal unable to operate fully due to operations at the Terminal being suspended; oil tanker drivers unable to go about their work when their vehicles were requisitioned by protestors; vehicle users finding they could not obtain fuel from forecourts suffering fuel shortages; local residents inconvenienced by the

scale and noise of required police operations, and individuals affected by the disruption to usual policing caused by additional police resources being diverted to policing the protests. Furthermore, the evidence demonstrates a risk of substantial public nuisance should an explosion or fire occur. The evidence of widespread use of mobile phones by the protesters in close proximity to highly flammable fuels, and the digging of tunnels without regard to the location of underground oil pipework, clearly creates a very significant risk to life, property and the environment. It was more by good luck rather than good judgement that the actions of some of the protesters did not result in a fire or explosion.

75. In light of my finding that the Council has established the commission of the tort of public nuisance, it is unnecessary to consider whether the same facts gave rise to any criminal offences that were in force at that time. The existence of the criminal law as a possible alternative remedy will however be relevant when considering whether it is appropriate for the court to exercise its discretion to grant injunctive relief.

The restriction of Article 10 and 11 rights

76. The Council accepts that the claim engages s.12 of the Human Rights Act 1998 given that the relief sought may affect the protestors' rights to freedom of expression. Some of the named defendants, and necessarily the persons unknown defendants, were neither present nor represented at the trial. By s.12(2) no relief is to be granted unless the court is satisfied that the Council has taken all practicable steps to notify the defendants. The question of service of the order of Soole J dated 6 December 2023 and of the Notice of Hearing was the subject of consideration at the start of the hearing on 11 June 2024. For the reasons given in an ex tempore judgment that day, and as embodied in my order of 12 June 2024, I was satisfied that proper notice had been given to the defendants that have chosen not to acknowledge or defend the claim or attend the trial.

77. It is not in dispute that Articles 10 and 11 are engaged. The issue is whether it is appropriate to interfere with those qualified rights. The Council encourages the court to adopt the approach adopted by Sweeting J at para. 133-136 of his judgment granting the interim injunction in this case. Whilst many of the considerations will be the same, in my judgment it is important to reconsider the appropriate framework of questions posed by the Supreme Court in *Ziegler* afresh, having now heard the evidence and the submissions of the three defendants.

78. The answers to the first four questions posed at para. 63 of *Ziegler* can be answered in fairly short order.

(1) The protesters actions in gathering with others to protest against the granting of licences for the production and use of fossil fuels was an exercise of their Article 10 and 11 rights.

(2) The Council's seeking of an injunction to restrict the rights to protest clearly interferes with the protestors' Article 10 and 11 rights as it would prevent much of the activity that has previously occurred.

(3) The interference is however prescribed by law in that the court has a discretion to grant an injunction under s.37 of the Senior Courts Act 1981 and the Council has the standing to bring a claim for injunctive relief pursuant to s.222 of the Local Government Act 1972.

(4) The interference is in pursuit of a legitimate aim namely the prevention of disorder or crime, the protection of health and the protection of rights of others.

79. The more complex question is that posed at para. 63(5) of *Ziegler* namely whether the interference is 'necessary in a democratic society' to achieve that legitimate aim? That involves consideration of the four further questions identified by the Supreme Court in para. 64(1) – (4).

80. The Council's primary concern is to protect the local community and environment from the risks associated with extreme forms of protesting in close proximity to highly flammable fuels. Given the potential ramifications of any fire or explosion at or in the locality of the Terminal, the stated aims to prevent crime and disorder, protect the health of the community and the rights of others are sufficiently important to justify interference with the Article 10 and 11 rights. The Council can therefore satisfy the question posed by para. 64(1).

81. The terms of the proposed injunction seek to prohibit protests inside the Terminal (ie on private land to which the defendants have no right to enter anyway) and to restrict certain specified acts in the locality of the Terminal. The Council does not seek to prohibit all protest activity in the locality of the Terminal but only more extreme form of protest activity, such as blocking entrances, climbing on structures, locking on, digging or tunnelling and abseiling. For the purposes of the question posed by para. 64(2), there is thus a rational connection between the terms of the injunction sought and the aims of preventing crime and disorder and protecting the health of the community and rights of others.

82. It is then necessary to consider whether there are less restrictive means available to achieve the Council's aims. (Para. 64(3) of *Ziegler*.) The defendants' submissions to the effect that an injunction is unnecessary in light of expanded criminal law powers can be viewed as a request that the court adopt a less restrictive approach and allow the position to be governed by existing laws.

83. The main alternative remedies to be considered as potential means of achieving the Council's aims are (a) a Public Spaces Protection Order ('PSPO'), (b) byelaws and (c) the existing criminal law. The evidence of Mr Maxey (witness statement 5 June 2024 at paras. 7-9) sets out his views on the suitability of a PSPO and byelaws. Mr Smith (witness statement 10 April 2022 at page 4) comments on the attempted use of criminal law to control the protest activity.

84. The Supreme Court in *Wolverhampton* (at para. 204) discussed the availability of PSPOs in the context of considering whether there was a compelling justification for a newcomer injunction against persons unknown. It was noted that a PSPO is directed at behaviour and activities carried on or in a public place which have a detrimental effect on the quality of life of those in the area. A

number of the disadvantages of a PSPO identified by Mr Maxey are valid concerns. The level of protection provided by a PSPO is restricted by virtue of the Council not having jurisdiction to impose such an order on private land. Any order could not therefore extend to the Terminal itself and would be limited to any public land adjacent thereto. The evidence in this case is that some of the protest activity, including some of the more extreme activity in locking onto fuel tanks, occurred inside the perimeter fencing. A PSPO would not therefore address the aim of protecting the local community from the health implications of a fire or explosion caused by a protest within the Terminal. Furthermore, the maximum sanction for breach of a PSPO is a level 3 fine (up to £1000) giving rise to concern that such an order would not have the same deterrent effect as an injunction, breach of which gives rise to a maximum penalty for contempt of two years' imprisonment. Additionally, breach of a PSPO is not an arrestable offence meaning that the police would not be able to remove with immediate effect a protester whose actions were putting at risk the local community. That limits the utility of a PSPO. In my judgement, a PSPO is not a viable less restrictive means of achieving the Council's aims.

85. Byelaws suffer many of the same shortfalls as seen with PSPOs. Breach of a byelaw gives rise to a maximum fine of £500 and is not an arrestable offence. The Council cannot unilaterally make a byelaw and the process requires assessment, consultation, application and approval of the scheme by the Secretary of State and further consultation. It is not therefore an agile solution either in terms of speed of implementation or in terms of the ability to vary the byelaw should circumstances change. It is not therefore a viable less restrictive means of achieving the Council's aims.

86. Since the making of the interim order by Sweeting J in May 2022, the range and seriousness of criminal offences relevant to protest activity have increased. From 12 May 2022, the sentence for the offence of wilful obstruction of the highway has increased from a fine to a maximum of 6 months' imprisonment. (s.80 of the Police, Crime, Sentencing and Courts Act 2022 amending s.137 of the Highways Act 1980.) The Public Order Act 2023 ("the 2023 Act") introduced a range of new offences with effect from 3 May 2023. Those offences include an offence of locking on (s.1), being equipped for locking on (s.2), causing serious disruption by tunnelling (s.3), causing serious disruption by being present in a tunnel (s.4), being equipped for tunnelling (s.5) and interfering with the use or operation of key national infrastructure including downstream oil infrastructure (s.7). There are differing maximum sentences for each of those offences but, other than the 'being equipped' offences which attract fines, the remainder can attract sentences of imprisonment. Section 10 and 11 of the 2023 Act extend police powers of stop and search to a number of the offences. The prosecution can apply for a serious disruption prevention order (s.20) subject to various conditions being met. Those conditions include a requirement that a defendant has committed another protest -related offence or a protest -related breach of an injunction within the five years ending on the day of conviction for the current offence. Certain individuals, such as the chief constable, can apply for a serious disruption prevention order on application (s.21). A local authority such as the Council does not however have standing to make such an application.

87. Ms Lee's submission is that the enhanced criminal powers provide a deterrent to protesters and give increased powers of arrest to the police such that an injunction is no longer required. The Council does not accept the increased criminal powers obviate the need for an injunction. Mr Manning submits that the object of the proceedings is defeated if the local community has to wait until criminal offences occur before action is taken. He submits that the evidence from the police suggests that the criminal justice system is not well equipped to prevent protesters returning to the site because individuals arrested are not typically remanded in custody and offences take time to progress through the criminal courts. It is said that it can also be a matter of circumstance whether an individual protester is prosecuted as that is subject to the view taken by the prosecuting authorities rather than the Council. Mr Manning submits that there is no evidence of the deterrent effect of the increased criminal penalties and new offences in circumstances where public nuisance was already a common law offence in 2022 and did not deter the protestors from acting. In short, the Council submits that the criminal law does not provide a systematic means of protecting the local area from the harm that the authorities are concerned about.

88. It is not helpful that the police evidence relied on by the Council has not been updated to reflect any effects of the introduction of new criminal offences and increased sentencing powers. However, the existence of relevant criminal offences does not, of itself, mean it is inappropriate to grant an injunction to restrain public nuisance nor, particularly in cases where a local authority has a particular responsibility for enforcement, to restrain breaches of acts which would amount to other criminal offences. Indeed, in *Zain,* serious criminal offences existed in respect of the alleged illegal drug activity but it was nonetheless appropriate to grant injunctive relief. The criminal justice system does not, in my judgment, achieve the Council's aims in as comprehensive a manner as injunctive relief could. Firstly, I am not persuaded that new criminal offences and increased sentencing powers have the same deterrent effect as an injunction and power of arrest. The common law offence of public nuisance existed when the protests occurred in 2022 and, as a common law offence, technically had a maximum sentence of life imprisonment. That did nothing to deter the protesters. The increased sentence for wilful obstruction of the highway and many of the offences under the 2023 Act have lower maximum sentences than the 2 years' maximum imprisonment for contempt of court. Secondly, the mechanism by which a protester is brought before the civil courts following arrest is expeditious in that it requires production before a court within 24 hours. It therefore provides both a significant deterrent to a would-be unlawful protester who risks immediate incarceration, and immediate respite to the local community. Thirdly, an injunction hands control of the pursuit of contempt proceedings against protestors to the local authority. By contrast, with criminal proceedings it is for the criminal prosecuting authority to determine whether to pursue a matter. The Council is likely better placed to assess whether contempt proceedings further the Council's aims in preventing crime and disorder in its area and protecting the health of its residents. Moreover, the Council has a positive duty under s.17 of the Crime and Disorder Act 1998 to exercise its functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area (including anti-social and other behaviour adversely

affecting the local environment) and to prevent re-offending. Permitting the Council rather than prosecuting authorities to take action to prevent unlawful protest activity is consistent with the Council's obligation to do all it reasonably can to prevent crime and disorder. Fourthly, an injunction is designed to be preventative in nature as opposed to the criminal law which reacts to events that have already occurred. In seeking to prevent crime and disorder and protecting the health and rights of others, it is little comfort that the criminal law will swing into action only after the damage has been done. I do not therefore conclude that reliance on the existing criminal law is an adequate less restrictive means of achieving the Council's aims.

89. The final question in determining whether an interference with a qualified convention right is proportionate requires consideration of whether there is a fair balance between the rights of the individual and the general interest of the community, including the rights of others. (Para. 64(4) of *Ziegler*.) The proposed injunction does not prohibit all protests in the locality of the Terminal but only those which involve more extreme forms of protest activity which put the community at risk. By permitting some protest activity, the proposed injunction strikes a fair balance between the rights of the protestors and the general interest of the local community.

Is it appropriate to grant injunctive relief against the named defendants?

90. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 the Court of Appeal guidance at para. 82(1) was to the effect that if an individual is "known and has been identified, they must be joined as individual defendants to the proceedings." The decision in *Wolverhampton* does not affect that proposition. Of named defendants appearing at Schedule A to the judgment, those numbered up to and including the 17th defendant were the original named defendants to the claim having been arrested at or in the locality of the Terminal in relation to protest activity taking place between 31 March and 10 April 2022. The defendants numbered 20th onwards were added as named defendants following their arrest at or in the locality of the Terminal in relation to protest activity after the initial interim injunction was granted on 14 April 2022.

91. Mr Maxey recognises in his evidence that "the Council has no means of knowing definitively whether every one of the named defendants has continued to be involved in this type of protesting, as we do not have access to the records of the criminal courts or the police national computer…It seems to me that the only realistic course that the Council can therefore take is to proceed on the basis that the defendants may well still participate in such conduct." [Para. 16(iii) of his statement of 5 June 2024.]

92. In my judgment it is appropriate to grant injunctive relief in principle against each of the named defendants appearing in in Schedule A. None of the defendants have filed a defence and thus have not sought to challenge the claimant's case that each defendant has been arrested for relevant protest activity at the Terminal and is affiliated with Just Stop Oil and its aims. Indeed, when making their submissions the 8th, 78th and 115th defendants did not seek to dispute their involvement in protest activity at the Terminal nor seek to disavow their support of the aims of Just Stop Oil. Whilst there has been no

protest activity at the Terminal since September 2022, the evidence establishes that Just Stop Oil has continued in disruptive protest activity in other locations. [Para. 8(c) of the statement of Mr Maxey dated 18 January 2024.] In her submissions, the 8th defendant acknowledged an ongoing intention of Just Stop Oil to protest but with a focus on more 'media friendly' opportunities. By that she was referring to protest activity that prompts maximum media attention. The opportunity for headline-making is only too obvious if a fire or explosion occurred at the Terminal. The behaviour of a number of the defendants during the various contempt proceedings also evidences the defendants' collective intention to cause disruption in aid of their cause. Such conduct included many defendants refusing to accept the jurisdiction of the court and some variously telling the court they would not attend future hearings if bailed, refusing to come out of cells to attend court, climbing on dock furniture, gluing body parts to the dock, and removing their clothes when in the dock. There is a clearly a risk that unless restrained the named defendants may engage in future protest activity at or in the locality of the Terminal that endangers the local community.

Is it appropriate to grant injunctive relief against 'newcomer' persons unknown taking into account the requirements outlined in *Wolverhampton*?

93. Any newcomer injunction is a form of without notice injunction and, as recognised by the Supreme Court in *Wolverhampton* at para. 167, only likely to be justified as "a novel exercise of discretionary power" if certain conditions are met.

Compelling need not adequately met by any other measures

94. There is however a compelling need for injunctive relief to protect the inhabitants of North Warwickshire and those who work in or travel through or otherwise visit the area from the more extreme types of protest activity at and in the locality of the Terminal that amount to public nuisance and/or criminal offences. For the reasons discussed in paragraphs 82 to 88 of this judgment, the required protection cannot be met by other measures available to the Council. The ongoing nature of Just Stop Oil's protest activity is such that there is a real risk of future incidences of public nuisance occurring and/or of criminal offences being committed at or in the locality of the Terminal.

Procedural protections

95. Any newcomer injunction must ensure that there are sufficient procedural protections to safeguard the newcomers against draconian nature of a without notice order. The persons unknown defendants have been given notice of this claim, the interim injunctions and the progression of the proceedings to the trial dates by various methods of alternative service. Those steps have included physical signage at the Terminal, use of the Council's website and social media accounts, and direct communications with Just Stop Oil through their email addresses and social media accounts. Persons unknown have therefore already had ample opportunity to participate in these proceedings but have elected not to. Any final injunction against newcomers can also be the subject of stringent alternative service provisions to ensure persons potentially affected are given full information as to the terms and scope of the order, any power of arrest and

the trial papers before the court. The Council has provided details of the steps it proposes to take to publicise an order, power of arrest and documents contained in the trial bundles. Those steps involve making use of signage along the boundary of and at the entrances to the Terminal, posting documents on its website, publicising through the Council's social media, asking local police to publicise through their social media and communicating directly with Just Stop Oil through known email addresses and social media. Such an approach will ensure effective notice can be given to newcomers. Mindful of its obligations to ensure procedural fairness, the Council concedes that any order should have a generous liberty to apply provision enabling any person served with the order or affected by it to apply to the court to vary or discharge the order on 48 hours' notice to the Council. This will ensure any newcomer has the ability to raise any objection even though they have not participated in the trial.

Disclosure duty

96. The Council acknowledges its obligation to comply with its disclosure duty on seeking a remedy against newcomer persons unknown. The Council's skeleton argument, at paragraphs 68 to 73, addresses the Council's duty and considers what arguments defendants might wish to pursue. It has also ensured that the court has before it the interim injunction judgment of Sweeting J at [2023] EWHC 1719 (KB) which discusses the arguments raised by the 73rd defendant and Ms Hardy at the interim hearing. Mr Manning's closing submissions included taking the court through the various new criminal offences introduced by the 2023 Act, and the increased sentencing powers for wilful obstruction of the highway, to ensure full consideration could be given to possible less restrictive alternative measures. I am therefore persuaded that the Council is both alive to its disclosure duty and has complied with the same in putting its case and counter-arguments as fairly as possible.

Territorial and temporal limits

97. The terms of the draft order limit the geographical scope of the injunction to two areas. The first area is defined in paragraph 1 of the draft order as covering the Terminal itself. That area is privately owned land upon which the defendants have no right to access without the permission of the land owner. The land is identifiable in the draft order by reference to boundaries edged in red on a colour plan attached to the order. The plan is drawn to a scale of 1:5000. The geographical limit is thus clear to see. The second area is defined in paragraph 2 of the draft order as being "anywhere in the locality of the Terminal…" The Council acknowledges that the term "locality" is a flexible concept but submits it is one which has the necessary clarity having been endorsed as appropriate for use in injunctive orders by the Court of Appeal in *Manchester City Council v Lawler* [1998] 31 HLR 119. Butler-Sloss LJ (as she then was) noted that "in the locality" was a term adopted by parliament and considered it would be "a question of fact for the judge whether the place in which the conduct occurred was or was not within the locality." I considered the construction of the term in contempt proceedings within this claim (*NWBC v Aylett, Goode & Jordan* [2022] EWHC 2458 (KB) at para. 94-100). I maintain my conclusion that the expression is not unreasonably vague such that it may be susceptible to more than one interpretation. It is an expression adopted by parliament and endorsed

for use in injunctions by the Court of Appeal. Furthermore, a defendant facing contempt proceedings has the additional procedural safeguard arising from the requirement on the Council to establish to the criminal standard of proof that a given place is "within the locality."

98. Any newcomer injunction must also be subject to strict temporal limits. The Council seeks an injunction for a period of three years from trial with annual hearings to review its operation. The interim injunction has itself been in force for over two years, which is longer than anticipated when the claim was first issued. In the context of gypsy or traveller newcomer injunctions, the Supreme Court in *Wolverhampton* (at para. 225) took the view that such injunctions "ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than one year unless an application is made for their renewal." Slightly different considerations apply where an injunction limits only certain types of protest behaviour as the consequences of an order are less draconian than for a gypsy or traveller being deprived of somewhere to site the vehicle in which they live. In *Valero Energy Ltd & others v Persons Unknown* [2024] EWHC 134 (KB) ("*Valero Energy*") Ritchie J granted a newcomer injunction against protestors for a period of five years subject to annual reviews. The claimants in *Valero* owned or had a right to possession of eight oil refinery or oil terminal sites in England and Wales which had been targeted by protest groups including Just Stop Oil. Whilst an annual review is essential to ensure ongoing consideration of the appropriateness of an injunction remaining in force, a term of three years is within appropriate temporal limits. The sustained duration of protest activity between March and September 2022 and the regular ongoing protest activity of Just Stop Oil at other locations demonstrates the need for the term of any order to extend to three years.

Just and convenient

99. The Council seek to protect their inhabitants from unlawful activity in the form of public nuisance and/or the commission of criminal offences. The highly flammable nature of the products stored on and transported to and from the Terminal means that some of the protest activity seen at this location has risked fire or explosion. The balance of convenience falls in favour of granting injunctive relief to protect the local population whilst still permitting the defendants to engage in protest activity in the locality of the Terminal.

100. The terms of the final injunction in *Valero Energy* already provides some protection to the local community as it covers part of the Terminal that is within the control of one of the four operators of the Terminal. I do not take the view that the *Valero Energy* order renders it inappropriate to grant the Council relief. Firstly, the Council does not hold the benefit of that order and would not be able to enforce it. Secondly, the claimants to the *Valero Energy* claim are not local authorities and thus could not rely on s. 27 of the Police and Justice Act 2006 so as to seek a power of arrest. Thirdly, the order does not cover the Terminal as a whole nor the locality of the Terminal.

101. I am therefore persuaded it is appropriate for the court to exercise its discretion to grant injunctive relief against the newcomer defendants.

The terms of the injunction and whether a power of arrest should be attached.

102. For the reasons aforementioned, it is appropriate for an injunction to be granted against all the defendants listed in schedule A for a term of three years from the trial with annual review hearings. The substance of the draft order will be adopted but the court will hear submissions on the detail of the required order after the judgment has been handed down.

103. The Council seeks that a power of arrest be attached to the injunction pursuant to s.27 of the Police and Justice Act 2006. The application of s.27 to the facts of this case was considered by Sweeting J when granting the interim injunction: [2023] EWHC 1719 (KB) at paras. 108 to 115. That analysis is still applicable following the hearing of the evidence. The decision in *Wolverhampton* does not undermine the ability of the court to attach a power of arrest to an injunction against persons unknown. The substance of the injunction will prohibit conduct which is capable of causing nuisance or annoyance to the inhabitants of the Council's area. It remains the case that there is a significant risk of harm for the purposes of s.27(3)(b) given the extreme forms of protest seen at the Terminal, the ongoing protest activity of Just Stop Oil generally and the implications of a fire or explosion at the Terminal. I am therefore satisfied that the Council meets the threshold test imposed by s.27(2) and (3). Whether to then attach a power of arrest becomes an exercise of discretion. As was the position at the interim stage of this case, there remain cogent reasons why a power of arrest is appropriate, indeed an imperative. Firstly, a power of arrest will enable the police to immediately remove a protestor from the scene and thereby reduce or extinguish the risk to others. Secondly, a power of arrest ensures that the Council can take effective enforcement action. A protestor would be arrested, detained, identified and brought before a court within 24 hours. Without such a power, the Council would find it impossible or at least extremely difficult in many cases to ascertain the names and addresses of the perpetrators so as to bring a paper contempt application. That in turn would diminish the desired deterrent effect of the injunction. A power of arrest will therefore be attached to the order.

Required form of order

104. I will hear submissions on the detail of the required order on the handing down of judgment but make the following provisional comments on the latest version of the draft order as supplied by the Council at trial:

i) The description of the protests covered should be extended to mirror the definition adopted in the description of defendants 19A to 19D, namely a protest "against the production of fossil fuels and/or the use of fossil fuels and/or the grant of licences to extract fossil fuels."

ii) The order will cover the Terminal and the locality of the Terminal.

iii) The order will prohibit all protest activity within the Terminal itself but, in respect of the locality of the Terminal, the prohibited activity will be limited to defined actions as particularised in draft paragraph 1(b)(i) to (xi).

iv) The alternative service provisions in Schedule 3 in respect of the persons unknown defendants and those defendants for whom the Council has no contact details requires amendment to ensure that (a) it is clear that all alternative service steps must be undertaken, (b) the relevant documents are publicised widely including signposting from the Council's website landing page and (c) there is no ambiguity as to the size and number of physical signs that will be required.

v) Further case management directions need to be made in respect of the first review hearing.

HHJ Emma Kelly

SCHEDULE A

SCHEDULE OF DEFENDANTS

(2) THOMAS BARBER
(3) MICHELLE CADET-ROSE
(4) TIMOTHY HEWES
(5) JOHN HOWLETT
(6) JOHN JORDAN
(7) CARMEN LEAN
(8) ALYSON LEE
(9) AMY PRITCHARD
(10) STEPHEN PRITCHARD
(11) PAUL RAITHBY
(14) JOHN SMITH
(15) BEN TAYLOR
(17) ANTHONY WHITEHOUSE
(19A) PERSONS UNKNOWN WHO, OR WHO INTEND TO, PARTICIPATE IN PROTESTS WITHIN THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA (THE "TERMINAL") AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS, AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS;
(19B) PERSONS UNKNOWN WHO, OR WHO INTEND TO, PARTICIPATE IN PROTESTS IN THE LOCALITY OF THE TERMINAL, AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS, AND WHO, IN CONNECTION WITH ANY SUCH PROTEST, DO, OR INTEND TO DO, OR INSTRUCT ASSIST OR ENCOURAGE ANY OTHER PERSON TO DO, ANY OF THE FOLLOWING: (A) ENTER OR ATTEMPT TO ENTER THE TERMINAL; (B) CONGREGATE AT ANY ENTRANCE TO THE TERMINAL; (C) OBSTRUCT ANY ENTRANCE TO THE TERMINAL; (D) CLIMB ON TO OR OTHERWISE DAMAGE OR INTERFERE WITH ANY VEHICLE OR ANY OBJECT ON LAND (INCLUDING BUILDINGS, STRUCTURES, CARAVANS, TREES AND ROCKS);

(E) DAMAGE ANY LAND INCLUDING (BUT NOT LIMITED TO) ROADS, BUILDINGS, STRUCTURES OR TREES ON THAT LAND, OR ANY PIPES OR EQUIPMENT SERVING THE TERMINAL ON OR BENEATH THAT LAND; (F) AFFIX THEMSELVES TO ANY OTHER PERSON OR OBJECT OR LAND (INCLUDING ROADS, STRUCTURES, BUILDINGS, CARAVANS, TREES OR ROCKS); (G) ERECT ANY STRUCTURE; (H) ABANDON ANY VEHICLE WHICH BLOCKS ANY ROAD OR IMPEDES THE PASSAGE OF ANY OTHER VEHICLE ON A ROAD OR ACCESS TO THE TERMINAL; (I) DIG ANY HOLES IN OR TUNNEL UNDER (OR USE OR OCCUPY EXISTING HOLES IN OR TUNNELS UNDER) LAND, INCLUDING ROADS; OR (J) ABSEIL FROM BRIDGES OR FROM ANY OTHER BUILDING, STRUCTURE OR TREE ON LAND.
(19C) PERSONS UNKNOWN WHO, OR WHO INTEND TO, ORGANISE, PUBLICISE OR PROMOTE ANY PROTEST WITHIN THE TERMINAL AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS.
(19D) PERSONS UNKNOWN WHO, OR WHO INTEND TO, ORGANISE, PUBLICISE OR PROMOTE ANY PROTEST IN THE LOCALITY OF THE TERMINAL, AGAINST THE PRODUCTION OF FOSSIL FUELS AND/OR THE USE OF FOSSIL FUELS AND/OR THE GRANT OF LICENCES TO EXTRACT FOSSIL FUELS, AT WHICH PROTEST THEY INTEND OR FORESEE OR OUGHT TO FORESEE THAT ANY OF THE ACTS DESCRIBED AS PART OF THE DESCRIPTION OF DEFENDANT 19B WILL BE CARRIED OUT.
(20) JOHN JORDAN
(22) MARY ADAMS
(23) COLLIN ARIES
(24) STEPHANIE AYLETT
(25) MARCUS BAILIE
(28) PAUL BELL
(29) PAUL BELL
(30) SARAH BENN
(31) RYAN BENTLEY
(32) DAVID ROBERT BARKSHIRE
(33) MOLLY BERRY

(34) GILLIAN BIRD
(36) PAUL BOWERS
(37) KATE BRAMFITT
(38) SCOTT BREEN
(40) EMILY BROCKLEBANK
(42) TEZ BURNS
(43) GEORGE BURROW
(44) JADE CALLAND
(46) CAROLINE CATTERMOLE
(48) MICHELLE CHARLESWORTH
(49) ZOE COHEN
(50) JONATHAN COLEMAN
(53) JEANINIE DONALD-MCKIM
(55) JANINE EAGLING
(56) STEPHEN EECKELAERS
(58) HOLLY JUNE EXLEY
(59) CAMERON FORD
(60) WILLIAM THOMAS GARRATT-WRIGHT
(61) ELIZABETH GARRATT-WRIGHT
(62) ALASDAIR GIBSON
(64) STEPHEN GINGELL
(65) CALLUM GOODE
(68) JOANNE GROUNDS
(69) ALAN GUTHRIE
(70) DAVID GWYNE
(71) SCOTT HADFIELD
(72) SUSAN HAMPTON
(73) JAKE HANDLING
(75) GWEN HARRISON
(76) DIANA HEKT
(77) ELI HILL
(78) JOANNA HINDLEY
(79) ANNA HOLLAND
(81) JOE HOWLETT

(82) ERIC HOYLAND
(83) REUBEN JAMES
(84) RUTH JARMAN
(85) STEPHEN JARVIS
(86) SAMUEL JOHNSON
(87) INEZ JONES
(88) CHARLOTTE KIRIN
(90) JERRARD MARK LATIMER
(91) CHARLES LAURIE
(92) PETER LAY
(93) VICTORIA LINDSELL
(94) EL LITTEN
(97) DAVID MANN
(98) DIANA MARTIN
(99) LARCH MAXEY
(100) ELIDH MCFADDEN
(101) LOUIS MCKECHNIE
(102) JULIA MERCER
(103) CRAIG MILLER
(104) SIMON MILNER-EDWARDS
(105) BARRY MITCHELL
(106) DARCY MITCHELL
(107) ERIC MOORE
(108) PETER MORGAN
(109) RICHARD MORGAN
(110) ORLA MURPHY
(111) JOANNE MURPHY
(112) GILBERT MURRAY
(113) CHRISTIAN MURRAY-LESLIE
(114) RAJAN NAIDU
(115) CHLOE NALDRETT
(117) DAVID NIXON
(118) THERESA NORTON
(119) RYAN O TOOLE

(120) GEORGE OAKENFOLD
(121) NICOLAS ONLAY
(122) EDWARD OSBOURNE
(123) RICHARD PAINTER
(124) DAVID POWTER
(125) STEPHANIE PRIDE
(127) SIMON REDING
(128) MARGARET REID
(129) CATHERINE RENNIE-NASH
(130) ISABEL ROCK
(131) CATERINE SCOTHORNE
(133) GREGORY SCULTHORPE
(135) VIVIENNE SHAH
(136) SHEILA SHATFORD
(137) DANIEL SHAW
(138) PAUL SHEEKY
(139) SUSAN SIDEY
(141) JOSHUA SMITH
(142) KAI SPRINGORUM
(145) HANNAH TORRANCE BRIGHT
(146) JANE TOUIL
(150) SARAH WEBB
(151) IAN WEBB
(153) WILLIAM WHITE
(155) LUCIA WHITTAKER-DE-ABREU
(156) EDRED WHITTINGHAM
(157) CAREN WILDEN
(158) MEREDITH WILLIAMS

Neutral Citation Number: **[2024] EWHC 2386 (Ch)**

IN THE HIGH COURT OF JUSTICE **Claim No: PT 2024 000483**

BUSINESS AND PROPERTY COURT

CHANCERY DIVISION

Before Deputy Master Henderson

BETWEEN

QUEEN MARY UNIVERSITY OF LONDON

Claimant

-and-

(1) LSY
(2) MBC
(3) PERSONS UNKNOWN
(IN OCCUPATION OF QUEEN MARY UNIVERSITY OF LONDON)
(4) FDE
(5) JST

Defendants

Counsel and solicitors:

The Claimants represented by Ms Myriam Stacey KC and Ms Galina Ward KC instructed by Pinsent Masons

The 1st and 2nd Defendants represented by Mr Jamie Burton KC, instructed by Foster & Foster

Hearing date: 10th July 2024

Judgment: 20th September 2024

JUDGMENT

1. On 10 July 2024 I heard the adjourned hearing of the Claimant University's claim for possession of its Mile End campus, excepting those parts which were subject to leasehold interests registered to third parties.

2. The claim was settled as between the University and the 1st and 2nd Defendants on the terms of a consent order which I made on 10 July 2024. The consent order included an order that the 1st and 2nd Defendants should give the University possession forthwith of the part of the University's land edged red on the plan attached to the order, being part of

the University's Mile End campus (the "**Plan**"), but excluding the land hatched green on the Plan namely those areas subject to leasehold interests registered to third parties. That left outstanding the University's claim for possession against persons unknown and against two individuals who, additionally to the 1st and 2nd Defendants, the University had identified as being protesters in occupation as such of part of its campus and who were added as 4th and 5th Defendants.

3. Mr Burton KC attended in order to deal with the 1st and 2nd Defendants' informal application to continue anonymity orders in their favour which I had made on 7th June 2024. For reasons given at the hearing, I continued those anonymity orders.

4. The two individuals who, additionally to the 1st and 2nd Defendants, the University had identified as being protesters in occupation of part of its campus, did not seek to make submissions. On the informal application of the University and upon the University's Leading Counsel stating that the University did not intend to seek an order for costs against them, I ordered that the two additionally identified protesters be added as 4th and 5th Defendants. The order for their joinder having made without notice to them, I ordered that they had the right to have it set aside or varied within 7 days after service of it upon them. I was, however, concerned that, like the 1st and 2nd Defendants and for similar reasons, they might wish to apply for anonymity orders. I was anxious not to pre-empt any such application. Accordingly, I ordered that their identities be not published before the expiration of 7 days after the service of the order upon them, and that the permission given to them to apply included permission to apply for anonymity orders. Such an application was made on 17 July 2024 and I made anonymity orders in respect of the 4th and 5th Defendants on 19 July 2024.

5. After reading the evidence and hearing argument from the University's Leading Counsel I was satisfied that the University had served the relevant documents appropriately and within the relevant time limits and that the Defendants had no real prospect of successfully defending the claim, either as a matter or property law or by the invocation of public law or of their rights under the European Convention on Human Rights ("the ECHR"). I gave my decision there and then at approximately 1.00 pm on 10th July so that the University could proceed quickly to obtain and enforce a writ for possession.

6. There was some urgency to the obtaining of possession because graduation ceremonies were due to take place on 18, 24 – 26 and 29 - 31 July 2024, with the expected number of graduates and guests over the 7 days being 4,380 graduates and 11,300 guests.

7. The part of the Mile End campus occupied by the protesters as an encampment, was a lawn area in front of the Queen's Building on that campus. The lawn is the area where photo opportunities are taken of students celebrating the end of their University careers with family and their lecturers outside what one witness described as the "iconic" Queens' Building. Normally, when graduation takes place, the lawn and the tarmac road beside it connects buildings called the Queens' Building and the People's Palace. The Claimant's key venues are in those two buildings. At large events such as Graduation or conferences, the lawn can be used as a reception area. It is somewhere for people to congregate.

8. I formed the view that, having regard to my availability and the time needed for me to prepare a full judgment, if the making of the possession order awaited such a judgment the University's graduation ceremony arrangements would be imperilled. Accordingly I

made the order for possession there and then, and said that I would give my reasons in writing. These are those reasons.

9. The claim was made by Queen Mary University of London ("the University"). Initially it was only against Persons Unknown. It was for possession of the whole of the Mile End campus of the University, but excluding those parts of it which were occupied by other persons under leases from the University.

10. The occupation in respect of which the University seeks relief is occupation by a group of protesters. It is unclear whether the membership of this group is constant or fluctuates.

11. The protests are or are mainly protests in support of Palestine and against Israel. Amongst other things, the protesters aim to persuade the University to disinvest from and to cease using the services of companies which the protesters believe directly or indirectly support the State of Israel, both generally and specifically in relation to its operations in Gaza. They also aim to persuade the University to break off its relations with Israeli universities.

12. The occupation started on 13 May 2024.

13. The brief procedural history of the claim is that:

    13.1. On 5 June 2024 the University issued these proceedings against Persons Unknown under CPR Part 55.

    13.2. On 6 June 2024 Chief Master Shuman, having read the evidence in support and having accepted that the claim was suitable to be dealt with in the High Court and that the normal period of service of the claim form be shortened in view of the risk of damage to property and persons, ordered that:

    > "The claim for possession should be heard before a judge at 10 am on 7 June before a judge to be published in the list. Time for service of the claim, pursuant to Civil Procedure Rule 55.5(2)(b), was to be abridged provided that the defendants were served with claim form, particulars of claim and any witness statements in support by 3 pm on 6 June 2024."

    13.3. The claim was listed for hearing before me in accordance with that order.

    13.4. I was satisfied that the condition as to service was satisfied.

    13.5. By the time of the hearing before me on 7 June, two of the protesters had, through solicitors, instructed leading counsel and junior counsel to represent them at that hearing. I joined those two protesters as the 1st and 2nd Defendants (LSY and MBC).

    13.6. Two lines of defence were advanced on behalf of LSY and MBC.

    13.7. The first was that this was not an appropriate case for a possession order. If any order was to be made it was said that it should be an injunction.

    13.8. The second was that the University was in breach of its public law obligations (the public law point). In particular it was said that the University had acted unfairly in deciding to bring the possession claim because it had not engaged with the protesters.

    13.9. There was also a practical point, now recognised by the University, that certain leases over parts of the Mile End campus meant that the University

was not entitled to a possession order in respect of those parts of the campus.

13.10. Neither Ms Stacey KC for the University nor I were in a position fully to deal with the public law point either on the law or on the facts.

13.11. On the basis of Mr Burton KC's submissions on behalf of LSY and MBC, I was concerned that the public law point might just be so well arguable as to give rise to a real prospect of success on it or, in the language of Part 55 rule 55.8(2) of the Civil Procedure Rules, that the claim was "genuinely disputed on grounds which appear to be substantial."

13.12. I was not satisfied that the public law point had been sufficiently considered to enable me to decide whether or not that was the case on 7 June. I therefore ordered the adjournment of the claim for further consideration of the issues and as to the University's entitlement to an order for possession.

13.13. I gave directions as to the filing and service of further evidence, skeletons and bundles and directed that the adjourned hearing should be listed for 10 am on 10 July with a time estimate of 3 hours, with no live evidence or examination or cross-examination of witnesses.

13.14. My intention was that the adjourned hearing should be just that. That is to say a continuation of the hearing of 7 June but with fuller submissions on the law and with the parties having the opportunity to put in further evidence.

13.15. On 7 June I also made an anonymity order in respect of LSY and MBC which I ordered should remain in force until 10 July 2024 or such date as the adjourned claim was listed for hearing.

13.16. By an application dated 19 June 2024 LSY and MBC sought a variation of my order of 7 June so as (1) to add or substitute an order that they file and serve a defence by midnight on 20 June and (2) for an order listing the case for allocation and a directions hearing.

13.17. It appeared from the contents of the application that it was made under the misapprehension that by my judgment and order of 7 June I had determined that the claim was genuinely disputed on grounds which appeared to be substantial. I had not made such a determination. The transcript of my judgment shows that in it I said that the public law point had not been argued out and that it did seem to me that there was, albeit only just, a real prospect of success on the public law point or, to use the language of Part 55 rule 55.8(2) of the Civil Procedure Rules, that the claim did appear to me to be "genuinely disputed on grounds which appear to be substantial." Read in context, it is clear that what I intended was that I had determined that there might be a real prospect of success on the public law point such that I would not order possession there and then, but would require more facts and argument before determining whether there was such a real prospect of success.

13.18. The information relied upon in support of LSY's and MBC's application dated 19 June also explained that they had not yet received a decision from the Legal Aid Agency and that they had sought an extension of time from the University for complying with certain of the directions in my order of 7 June.

13.19. In the light of the information contained in that application and the information contained in a letter from the University's solicitors to the court dated 20 June, on 24 June I made an order extending time for the taking of certain of the steps specified in my order of 7 June. Unfortunately this order of 24 June is misdated 7th June. It is clear that that is a mistake. I do not have to trouble

with correcting the date shown on that order under the slip rule (CPR 40.12) because nothing turns on whether or not that correction is made.

13.20. By an application dated 20 June 2024 the University sought an order for alternative service, which I granted by an order dated 24 June 2024.

13.21. By an application dated 8 July 2024 the University sought an order for permission to amend its Particulars of Claim to add a reference to a registered title to a part of its Mile End campus which previously had been accidentally omitted. I gave that permission and directed that service of the amended particulars be served in accordance with my order for alternative service dated 24 June.

13.22. As already mentioned, the claim was settled as between the Claimant and the 1st and 2nd Defendants on the terms of a consent order which I made on 10 July 2024, but I still needed to deal with the claim as against the other occupiers.

University Persons

14. The senior persons involved on behalf of the University were:
    14.1. Professor Colin Bailey ("Professor Bailey"), who was the Principal and President of the University.
    14.2. Dr Sharon Ellis ("Dr Ellis"), who was the Chief Operations Officer.
    14.3. Ms Margaret Leggett ("Ms Leggett"), who was the University's Director of External Operations.

Preliminary

15. The hearing on 10 July was a summary hearing of the University's claim under CPR 55.

16. Under CPR 55.8(2) the test for whether to grant possession summarily under CPR 55 is whether the claim is genuinely disputed on grounds which appear to be substantial. This test has been authoritatively equated to the test for summary judgment under CPR 24 of whether there is a real prospect of success and no other compelling reason why the claim should be disposed of at trial (*Global 100 Limited v Maria Laleva* [2021] EWCA Civ 1835, [2022] 1 WLR 1046, per Lewison LJ at paras.13-14).

17. By my order of 7 June I had directed that there would be no live evidence nor any examination or cross-examination of witnesses. Therefore, if there is a relevant conflict of evidence, at this stage I assume that it would be resolved in favour of the Defendants unless there is such compelling evidence, typically documentary evidence to the contrary, as to cause there to be no real prospect of the conflict being resolved in favour of the Defendants. Additionally, by analogy with the approach to summary judgment under CPR 24, I take into account whether there is any real prospect (as opposed to mere hope, speculation or suspicion) of further facts emerging which, if established, would give rise to a good defence to the claim.

18. A large volume of evidence was filed both by the University and by the 1st and 2nd Defendants. Excluding the evidence as to service and the evidence dealing with the University's title and the leases to which parts of the campus were subject, the following witness statements were filed with about 1,000 pages of exhibits:
    18.1. On behalf of the Claimant: 31/5/24 Marc Mooney (enforcement agent)
    18.2. On behalf of the Claimant: 4/6/24 Dr Ellis, 1st statement.

18.3. On behalf of the Claimant: 4/6/24 Dr Ellis, "Supplementary" or 2nd statement.
18.4. On behalf of the Claimant: 4/6/24 Professor Bailey.
18.5. On behalf of the 1st and 2nd Defendants: 19/6/24 Dr Heidi Viterbo.
18.6. On behalf of the 1st and 2nd Defendants: 20/6/24 Poulami Somanya.
18.7. On behalf of the 1st and 2nd Defendants: 20/6/24 Ruth Fletcher.
18.8. On behalf of the 1st and 2nd Defendants: 25/6/24 LSY (the 1st Defendant).
18.9. On behalf of the 1st and 2nd Defendants: 25/6/24 MBC (the 2nd Defendant).
18.10. On behalf of the Claimant: 2/7/24 Dr Ellis, 3rd statement.
18.11. On behalf of the Claimant: 2/7/24 Ms Leggett.
18.12. On behalf of the 1st and 2nd Defendants: 4/7/24 LSY, 2nd statement.
18.13. On behalf of the 1st and 2nd Defendants: 4/7/24 MBC, 2nd statement.
18.14. On behalf of the Claimant: 8/7/24 Mr Vishnu Patel.

19. My analysis of the facts and the law has been assisted by the very recent judgment of Johnson J in *University of Birmingham v Persons Unknown and Another* [2024] EWHC 1770 (KB) ("Johnson J's case").

20. In Johnson J's case the Claimant and an identified student defendant agreed that if the University's decisions to terminate any licence to occupy the campus as a protester were unlawful as a matter of public law or under the Human Rights Act 1998 ("HRA") and the ECHR, then there would be a real prospect of defending the claim. There was no concession to that effect by the University in the case before me, but I did not hear any detailed argument on the question, and for the purposes of my decision and this judgment I assumed, and now assume, that unlawfulness of any relevant decision would be a good ground for not granting a possession order.

21. In my view it is appropriate to analyse the claim by reference to two broad questions:
    21.1. As a matter of property law, the court taking account of the encampment members' ECHR rights in deciding whether to make a possession order, but regardless of any possible unlawfulness of any relevant decision of the University, is there any real prospect of a defence to the possession claim being successful?
    21.2. Is there a real prospect of a relevant decision of the University as to the occupation of the land and the bringing of these proceedings being held to have been unlawful as a matter of public law or for breach of the encampment members ECHR rights or otherwise?

As a matter of property law, the court taking account of the encampment members' ECHR rights in deciding whether to make a possession order and regardless of any possible unlawfulness of any relevant decision of the University, is there any real prospect of a defence to the possession claim being successful?

22. The University is the registered proprietor of its Mile End campus under a number of titles. Generally, it is the registered proprietor of the freehold interest, but part of its Mile End campus is held by it under a leasehold title. Nothing turns on that distinction. Prima facie therefore the University is entitled to possession of its Mile End campus. Generally, when I refer to the University's Mile End campus, I do not refer to those parts of the University's registered titles which are subject to leases in favour of others. The University does not seek possession of those parts.

23. The University's prima facie right to possession of its Mile End campus is subject to such rights by way of licence ("the general licence") as its students may have to be on and to use part or parts of it. I was not provided with detail of the nature and extent of that licence, but I assume in the protesters' favour that it extended so as to permit students of the University to be on and to use the campus in the normal course of their education and student life at the University.

24. In the case of "events" the general licence was subject to the terms of University's Code of Practice on Free Speech ("the Code"). This is an important document in the context of this case. Essentially it required the University's permission for the use of the University's premises for an event. The encampment and its associated rallies and protests on the campus were "events" within the meaning of the Code. The protesters did not have the University's permission to hold the encampment or their protests on its campus. Accordingly, their general licence to be on the campus did not extend to their being on the campus for the purposes of the encampment or of associated rallies or protests. It follows that when the students were on the campus for the purposes of the protest, they were trespassers and the University was entitled to possession as against them.

25. The initial approach of the University when the encampment started on 13 May was to take no immediate action, but to monitor the situation. In my judgment there is no real prospect of it being argued successfully that that approach amounted to the grant of a licence to occupy any part of the Mile End campus for the purposes of the encampment or associated rallies or protests; nor to the giving of permission under the Code for the encampment, rallies or protests.

26. The point is a short one. The University did not agree with the protesters or represent to them that they could place or maintain or hold their encampment, rallies or protests on the Mile End campus. The evidence of the 1st Defendant supports that conclusion. Thus, in the 1st Defendant's first statement the 1st Defendant said:

> "19. [...] From the outset the university have ignored us and provided us with little or no support. They immediately saw us as a problem and decided the encampment needed to be dismantled. Instead, when we met with Colin Bailey on the 14th May 2024, we were told in no uncertain terms that there would be no discussion with us unless we removed the encampment.
>
> 20. We had previously received no response or communication from management concerning our official letter of concern/demands which was sent on 13th of May 2024. There was no attempt to meet with us. They only met with us after we indicated we were going to defend the proceeding. [...]
>
> 21. [...] We did not receive any direct communication from the University stating their position and that they would allow us to remain if we complied with health and safety rules or how we must conduct ourselves. If this was the University's decision, it is strange that they did not communicate this to us. [...]""

27. Even if I was arguably wrong on that point, any such permission or licence was ended by each and every one of the following:

    27.1. The hand delivery of a letter dated 16 May from Dr Ellis to one of the protest organisers coupled with the posting of copies of that letter on the external and public facing façade of the Mile End campus. Dr Ellis's evidence in support of that posting of the 16 May letter is unsatisfactory in that it is insufficiently

attributed hearsay, it being described by Dr Ellis as something of which she was informed of by "security". However, that evidence was not challenged in the evidence of the 1st and 2nd Defendants or their witnesses. The letter of 16 May was addressed to "members of the encampment". The letter refers to an "unauthorised demonstration" that took place inside and outside the Mile End campus in the evening of 15 May. The letter concluded by asking the members of the encampment to disperse.

27.2. The hand delivery of a letter dated 22 May from Professor Bailey to the protesters. Dr Ellis did not say that a copy of this letter was handed to all the protesters. However, her evidence as to the hand delivery of the letter was not challenged in the evidence of the 1st and 2nd Defendants or their witnesses. The letter of 22 May was addressed to "members of the encampment". The letter is in similar terms to the letter dated 16 May. The letter concluded by stating "The encampment is not authorised by the University and must disperse with immediate effect, as previously instructed to you on 16th May."

27.3. The delivery of a letter dated 3 June from Dr Ellis addressed to the "members of the encampment". This letter referred to, amongst other things, the earlier letters of 16 and 22 May. This letter concluded:

"Despite requests made in previous correspondence, the encampment has not been voluntarily dispersed, I now write to you to make it clear that:

1. Any implied permission, licence or consent to enter onto or remain on the University's property, for the purposes of carrying out the ongoing protest, is hereby withdrawn.
2. The continued presence of the encampment on the University's property amounts to a trespass.
3. The University requires that the encampment be dispersed forthwith.

If the encampment is not immediately dispersed, the University will have no option but to take legal action to secure possession of the campus."

Dr Ellis does not say whether or how this letter was served. However, in a letter dated 3 June 2024 from Foster & Foster, solicitors, to Professor Bailey those solicitors state that they note at the time of writing, "yet a further letter has been issued to the encampment dated 3rd June 2024, the contents of which are noted." In their letter of 3 June, Foster & Foster state that they "advise and assist Queen Mary University London Encampment for Palestine ('QMULEP') (hereinafter referred to as "the students") and specifically in relation to the encampment on a small piece of land situated outside the Queen's Building ..." Thus, it is clear and accepted that the University's letter dated 3 June came to the attention of some, if not all, of the students who formed the encampment.

27.4. The service of these proceedings on the members of the encampment. This was effected in accordance with the requirements of CPR 55.6.

28. A copy of a letter dated 24 May from Dr Ellis addressed to "Dear Students" and requiring dispersement of the encampment is exhibited to Dr Ellis's first statement, but there is no evidence as to whether or how this was delivered and I have discounted it. This letter refers to an email from the "Students", but I was not taken to that email.

29. When the case was before me on 7 June, I was concerned that the status of any individual protester could change from minute to minute or from second to second. One second they might be participating in the protest and be a trespasser; the next they might have stopped protesting, albeit perhaps only temporarily, and have become a non-protesting student carrying on normal student activities, such as being on their way to a lecture, with the general licence applying to them and causing them not to be a trespasser. I was concerned that such changes in status would cause difficulties for a High Court Enforcement Officer who, consequent on the making of an order for possession and the issue by the University of a writ of possession, would be trying to enforce that writ of possession by ejecting the persons in occupation of the land. As a practical matter would the Enforcement Officer have to ask each person who he was proposing to eject whether they were on the land in their capacity as a protester or as a student carrying on normal student activities?

30. I was encouraged in that way of thinking by the submissions which Mr Burton made on 7 June to the effect that an injunction rather than a possession order would be the appropriate remedy. In particular I was attracted by his argument that the court's approach to the making of possession orders in such circumstances should change as a result of the decision of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 to the effect that final injunctions can in appropriate circumstances be made against persons unknown.

31. However, despite Mr Burton's encouragement and my initial thoughts on the point, I consider that principle and currently established practice are against the potential changes in status of protesting students being a reason for not granting a possession order.

32. As a matter of principle the potential difficulty in enforcing a possession order should not disentitle the University to a possession order if it is otherwise entitled to such an order. The potential difficulty with enforcement is a potential future problem for the University. In the future, if enforcement of the possession order is problematic, the University may come to regret not having sought an injunction, but that is not in itself a reason for my not ordering possession.

33. I have referred to currently established practice rather than authority, because I was not taken to a case in which the point about the changeable status of the occupiers against whom a possession order was sought was considered by the court. On the other hand there have been several cases in recent years where the courts have made possession orders against students who were protesting on land belonging to universities where the point could have been raised by the defendants or the court, but was not. Johnson J's case is an example.

34. Ms Stacey sought to persuade me that my concern about the possible changeable status of the protesting students would be disposed of by including in the possession order a recital that the possession order was sought by the University in circumstances where the Defendants did not have a right to occupy its land for the purpose of protest and with the intention that the possession order was intended to prevent unlawful occupation for the purposes of protest and not any lawful use of the Claimant's land for academic purposes. In the event such a recital was included in the orders which I made, but I am far from convinced that it avoids the practical problem which possible future changes in

status of the protesting students would cause. However, as explained above, in my view that practical problem was not a reason for my not making a possession order.

35. A second point which concerned me on 7 June was whether it was appropriate to make a possession order in respect of the whole of the Mile End campus, when the protesting students were only occupying part of it. This is a fact sensitive point. The evidence shows that the Mile End campus is in substance a single piece of land, notwithstanding that it is held by the University under a number of different registered titles. The authorities recognise that in such circumstances a possession order can be made in respect not only of the land currently occupied by the protesters, but also in respect of other land belonging to the University (see para.81 of Johnson J's case and the authorities there referred to).

36. In Johnson J's case there was no evidence of any immediate risk that anybody might occupy two other parts of the campus, but nevertheless Johnson J considered that he could and should make a possession order in respect of the whole of the campus. The present case is stronger than Johnson J's case in that regard. The evidence shows that members of the encampment have not restricted their protest activities to the lawn in front of the Queen's Building. Additionally, in a letter dated 13 May from "the members of the encampment" to the University, those members of the encampment who approved the terms of that letter stated, amongst other things, that the encampment would continue "indefinitely until negotiations have reached mutual agreement between negotiators and SET". "SET" was an acronym for the University's Senior Executive Team. Similarly in an email dated 26 June from "QMUL Encampment for Palestine" to Ms Leggett it is stated, incorrectly having regard to the terms of the Code, that the encampment "are aware of our legal right to protest on campus without the need for approval or authorisation." In my judgment those matters meant that there was a real possibility of the protesting students occupying in the future parts of the Mile End campus which they did not currently occupy.

37. Specific instances of protests otherwise than on the lawn outside the Queen's Building are:
    - 37.1. On 20 February 2024 QMUL Action 4 Palestine (the name of the group which set up the encampment) held a rally and ribbon-tying memorial in Library Square on the Mile End campus.
    - 37.2. On 14 May a protest involving some members of the encampment took place in Library Square, the main square outside the University Library.
    - 37.3. On 23 May a conference of the World Association of Sustainable Development which was being held in the University's BIO Innovation building on the University's Whitechapel campus was disrupted by pro-Palestinian demonstrators who included 6 members of the encampment.
    - 37.4. On 31 May some members of the encampment entered the Queen's Building and hung a banner from the 3rd floor of the Queen's Building.
    - 37.5. Photographs in the evidence clearly show encampment related activities such as the holding of a banner and the placement of noticeboards on the road which runs around the lawn
    - 37.6. On 1 July the participants in a rally organised by encampment members left the lawn in front of the Queen's Building. The rally moved from the lawn at the southern edge to the Mile End campus across the campus to Library

Square and on towards the Student Village near the north east corner of the campus.

37.7. On 6 July 6 members of the encampment protested along a similar route to that followed by the 1 July rally.

38. Accordingly I considered that if a possession order was otherwise appropriate, it should extend to the whole of the Mile End campus, except for those parts of it which were subject to leases in favour of third parties.

39. In conclusion on the property law aspect of the case before taking account of the ECHR in deciding whether to make a possession order:

39.1. Under the terms of the Code the protesters required the University's permission to occupy any part of the campus for the purposes of their protest.

39.2. There was no real possibility of its being established that any such permission was ever given either expressly, or impliedly.

39.3. Even if there ever was any implied permission, there was no real possibility of its being established that such permission was not withdrawn before 10 July.

39.4. There was no real possibility of its being established otherwise than that, as at 10 July, the protesters, acting as such, were trespassers on the Mile End campus and that the University was entitled to an order for possession of its Mile End campus.

40. As regards the application of the ECHR by the court in deciding whether to make a possession order, as distinct from a consideration of those rights possibly making a relevant decision of the University unlawful: the relevant articles of the ECHR are Articles 9, 10 and 11 ECHR, possibly supplemented by Article 14, and Article 1 of the First Protocol to the EHCR.

41. Article 9 provides that everyone has the right to manifest their beliefs. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of assembly and to freedom of association with others. In each case the right is qualified; conduct of a public authority (at this stage of my analysis, the court) that interferes with the right may be justified if the conduct is (a) prescribed by law and (b) necessary for the protection of the rights of others.

42. Article 1 of the First Protocol provides that every natural and legal person is entitled to the peaceful enjoyment of his possessions and that 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 University's domestic law rights to possession of its land are possessions within the meaning of this Article. The encampment members' occupation of part of the Mile End campus for the purposes of the encampment interfered with the University's peaceful enjoyment of its land; as also would any use of any part of the campus for events, such as the encampment, which were not authorised pursuant to the Code.

43. In my judgment the making of a summary possession order, did not amount to an unjustified interference with the encampment members' rights under Articles 9, 10 or 11.

44. It is well arguable that the members of the encampment were not exercising Article 9, 10 or 11 rights by camping on the University's land and it is at least well arguable that the

ECHR does not give anyone a right to trespass. However, it is apparent from Johnson J's case that these points are not straightforward and I have not attempted to determine them. I have assumed in the encampment students' favour that the making of a summary possession order does interfere with their rights under articles 9, 10 and 11 of the Convention.

45. Looking at the first qualification to the article 9, 10 and 11 rights of "prescribed by law": The University is the registered proprietor of the land in question. The making of a summary possession order is regulated by Part 55 of the Civil Procedure Rules. The making of a summary possession order, is thus prescribed by law.

46. Looking at the second qualification to the article 9, 10 and 11 rights of "necessary for the protection of the rights of others": the making of a possession order is necessary for the purpose of protecting the University's rights under domestic law and under Article 1 of the First Protocol to the ECHR to occupy its own land, to the exclusion of others. The underlying purpose of a summary possession order, therefore, was "the protection of the rights of others".

47. In order to show that the interference with encampment members' ECHR rights is necessary for the protection of the University's property rights, the measure constituting the interference must be proportionate. That means that (1) the objective of the measure was sufficiently important to justify the limitation of a protected right, (2) the measure was rationally connected to the objective, (3) no less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) balancing the severity of the measure's effects on the encampment members' rights against the importance of the objective, to the extent that the measure would contribute to its achievement, the former did not outweigh the latter.

48. Sufficient importance: The law gives strong protection to the right of a land-owner to possess its own land. That right is "of real weight when it comes to proportionality": *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 per Lord Neuberger MR at [54]. It is a right that has been consistently recognised as being of sufficient importance to justify interference with the qualified Convention rights of students who are seeking to trespass on university premises per Johnson J in his case at [68].

49. Rational connection: There is a direct connection between the measure and the University's objective to secure possession of its land. The measure (a summary possession order) has consistently been recognised as being appropriate in this context: per Johnson J in his case at [69].

50. Less intrusive measure: There may have been other measures that could have achieved the same objective. It might have been open to the University to exercise the remedy of self-help. It might have been open to the University to seek injunctive relief to prevent the trespass. Neither of these measures would have been less intrusive of the encampment members' ECHR rights. They would both have had at least the same impact on those rights as a possession order. Even if the remedy of self-help had been available, it would have been undesirable because of the risk of disturbance and the potential for use of force that was not regulated by a court order. An injunction could have been tailored to suit the circumstances. Any such tailoring which did not result in

the eviction of the encampment members from the land would not, however, have achieved the legitimate aim of enabling the University to recover possession of all of its land. There was no measure that would have been less intrusive of the encampment members' rights that could have achieved the legitimate aim of restoring the land to the University.

51. Balance: It is not for a court to tell anyone how they should exercise their article 9, 10 and 11 rights. Weight should be attached to the Defendants' autonomous choices as to the way in which they wished to manifest their beliefs, or assemble together or express their opinions. The encampment students have advanced reasons as to why they chose to exercise their rights by means of a camp on the lawn. There were, however, many other ways in which the encampment members could have exercised their ECHR rights without usurping to themselves land that belonged to the University albeit, that in their view other ways would not have been as effective.

52. The University showed that it was anxious to ensure that its students were able to exercise their ECHR rights. It had adopted the Code which achieved that end. The students decided not to follow the Code, and not to engage with the University, when they started the encampment. No good reason was given for that decision. The encampment members were trespassers. I have assumed that their rights under articles 9, 10 and 11 of the Convention were engaged, but their conduct in establishing and maintaining the encampment was "not at the core of [those] freedom[s]": *Kudrevičius v Lithuania* (2016) 63 EHRR 34 at [97]. The weight that is to be given to those rights was significantly attenuated by reason of each of those contextual factors.

53. As against that, the University's right to possession of its own land is of real weight (see above). That is all the more so where, by not asking for authority pursuant to the Code until 3 June the protesters disregarded the framework (the Code) that was designed to protect freedom of expression.

54. For those reasons, the severity of the impact on the encampment students' rights did not (by a significant margin) come anywhere close to outweighing the importance of the objective of the University being able to regain possession of its own land. This was a conclusion that could comfortably and confidently be reached on a summary application. Accordingly the encampment students' rights under Articles 9, 10 and 11 of the ECHR did not prevent me from making a summary possession order.

55. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. There is no real evidence that the University made its decisions on a discriminatory basis of that nature. Its evidence and its acts, for example, its initial tolerance of the encampment, are very strongly against its having done so. At most there was speculation that because in the past the University had tolerated unauthorised events by other groups, that indicated that its decisions in the present case were influenced by the University's views of the cause which the encampment members espoused. That speculative allegation might get a small amount of support from the students' allegations as to the implementation of the University's investment policy and its association with Israeli universities, but the link between any of the alleged activities of the University which indirectly supported Israel's conduct in Gaza

and the suggestion that those consideration of those activities influenced the University are so remote as not to give rise to a real possibility of such an influence being established. There is also a suggestion in Foster & Foster's letter of 3 June that there was discrimination by reason of Professor Bailey having attended a meeting with the Prime Minister at which measures relating to encampments at universities were discussed. Foster & Foster say that they "understand" that members of the Union of Jewish Students were at the meeting and that there was no representative from any Muslim or Palestinian group. On the footing that that is correct, it does not follow that Professor Bailey or the University caused that situation to arise or that they were thereby discriminating against pro-Palestinian protesters such as the encampment members either at the meeting with the Prime Minister or when deciding what do about the encampment at the University.

56. Further, my approach to this claim, as expressed when Ms Stacey when she was opening the University's case before me on 7 June, is that so far as the University's right to possession is concerned, it really did not matter what the encampment students were protesting about. What was of concern to me was and remains the effects or possible effects of the encampment on the University and its right to possession of its land.

57. Accordingly in my judgment any possible discriminatory effect of a summary possession order was restricted to the fact, consequential on the making of a summary possession order, that the order affected or more greatly affected persons who were pro-Palestinian and, anti-Israel than others. However, that is a necessary effect of any order for possession made against persons of a particular persuasion, religion or belief and in my judgment does not significantly move the scales of the weighing process outlined above.

58. It follows that the encampment members did not have a real prospect of establishing that, unless a relevant decision of the University was unlawful, the making of a possession order by the court would amount to an unjustified interference with their ECHR rights.

59. Thus, as a matter of property law, the court taking account of the encampment members' ECHR rights in deciding whether to make a possession order, but regardless of any possible unlawfulness of any relevant decision of the University, there was no real prospect of a defence to the possession claim being successful.

60. The second broad question mentioned by me above, was whether there was a real prospect of a relevant decision of the University as to the occupation of the land and the bringing of these proceedings being held to have been unlawful as a matter of public law or for breach of the encampment members' ECHR rights or otherwise. That question was raised by the correspondence written on behalf of the 1st and 2nd Defendants; by their evidence and by the submissions of Mr Burton on their behalf on 7 June. However, as a result of the settlement of the claim as between the 1st and 2nd Defendants and the University there is no submission or application before me challenging the lawfulness of any decision of the University. Nor was or is there an application to adjourn the hearing of the claim pending an application to the Administrative Court. In these circumstances I consider that it is not necessary for me to determine the possible unlawfulness of any relevant decision of the University. That is because until any such decision is challenged it stands and can be relied upon. On that basis this judgment could stop here with my conclusion in the immediately foregoing paragraph. However, in case I am wrong in my

view that it is not necessary for me to consider the possible unlawfulness of any relevant decision of the University, I do so below. Before doing so I explain the Code and its contents in more detail and then the facts in more detail, so that the background and the disputes as to the background against which the University's decisions were made can be properly understood.

The University's Code of Practice on Free Speech

61. In her 1st statement dated 4 June 2024 Dr Ellis said that the University was committed to encouraging and promoting free speech within the law. She said that that was set out in the University's Code of Practice on Free Speech ("the Code").

62. The University adopted the Code to ensure that it acted in accordance with the duties imposed upon it by s.43 Education (No 2) Act 1986, as updated by the Higher Education and Research Act 2017 and the Higher Education (Freedom of Speech) Act 2023.

63. On 10 July 2024, sub-sections (1) – (3) of s.43 Education (No 2) Act 1986 as so updated, provided:

> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
> > (a) the beliefs or views of that individual or of any member of that body; or
> > (b) the policy or objectives of that body.
> (3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out—
> > (a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation—
> > > (i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and
> > > (ii) of other activities which are to take place on those premises and which fall within any class of activity so specified;
> > and
> > (b) the conduct required of such persons in connection with any such meeting or activity; and dealing with such other matters as the governing body consider appropriate."

64. The potentially relevant provisions of the Higher Education (Freedom of Speech) Act 2023 were not in force on 10 July 2024.

65. The most relevant provisions of the Code are the following:

65.1. Section 1.1. This states that the University has a longstanding commitment to promoting and encouraging free debate and enquiry. It states that that commitment is enshrined within the University Charter and sets out the following extract from the Chater:
"*The University shall uphold freedom of speech within the law and academic staff shall have freedom within the law to question and test accepted ideas, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges.*"

65.2. Section 2.1, which provides:
"The purpose of this Code is to ensure that, as far as reasonably practicable, freedom of speech within the law is secured for students and staff of the University, as well as for visiting speakers, and that academic freedom within the law is secured for academic staff of the University."

65.3. Section 3.1, which provides,
"The University has adopted this Code to ensure that it acts in accordance with the duties imposed upon it by Section 43 of the Education (No 2) Act 1986, as updated by the Higher Education and Research Act 2017 and the Higher Education (Freedom of Speech) Act 2023".

65.4. Section 3.7 which provides:
"The Equality Act 2010 places a duty on the University to have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between all members of the University's community. It also imposes obligations not to discriminate on the grounds of the relevant protected characteristics."

65.5. Section 4.1, the relevant parts of which provide:
"This Code is applicable to:
a) the legal personality of the University;
b) [...]
c) all students of the University [...]
d) all live and recorded activities, including events, meetings and all education and research activities, that are held, endorsed, organised, funded or branded by the University or QMSU, or by individuals, groups or societies using the name of the University or QMSU, or that use the University or QMSU managed spaces or digital platforms, whether or not they involve an external speaker (referred to as 'events');
e) [...]"

65.6. Section 5.3 which provides:
"Except where expressly agreed by the Council in line with advancing the University's charitable objects (as defined in the University Charter), the University does not take an institutional position on political, cultural and religious debates to ensure that individuals are mot discouraged from expressing themselves freely within the law."

65.7. Section 5.4 which provides:
"Instead, the University endeavours to provide opportunities to facilitate discourse on contemporary issues by encouraging critical debate within the law, where expression of views within the law by different parties is tolerated."

65.8. Section 5.5 which provides:
"As such, the University encourages a wide range of views which might entail the airing of opinions and ideas that are unpopular, controversial or

provocative and foster an environment where academic freedom and expression is secured within the law."

65.9. Section 6.1 which provides:
"Council is responsible for the approval of this Code and for seeking assurance on its effective operation."

65.10. Section 6.2 which provides:
"Responsibility for the interpretation and implementation of the Code is delegated by the Council to the President and Principal ('the Principal Officer')."

65.11. Section 6.6 which provides:
"For the purposes of procedures for events (Section 7 below), Heads of Schools and Institutes and Directors of Research Institutes are the 'Designated Officer' for events organised or sponsored by their respective school or institute, and the Director of Estates and facilities, or their designated deputy, is the 'Designated Officer' for all other events."

65.12. The whole of Section 7 which provides:

7. Procedure for Events

7.1 The following procedures will apply when arranging all events.

7.2 All spaces used for events will be booked in line with the relevant booking policies and procedures.

7.3 In considering whether to permit its premises and online platforms to be used for, or its name to be associated with, a particular event, the University will uphold free speech within the law. In doing so, the University will consider whether the views or ideas to be put forward, the manner of their expression, or the event in question:

a) constitutes a criminal offence and whether a participant has a previous conviction in relation to their speech;
b) constitutes a threat to public order, including whether a participant is from an organisation that is officially proscribed by the UK Government;
c) constitutes a threat to the health and safety of individuals attending the event or in the locality which cannot be satisfactorily managed;
d) incites others to commit criminal acts;
e) infringes the legal rights of others or breaches legal requirements in respect of non-discrimination;
f) seeks to disrupt an authorised event or activity on University premises or online platforms, noting that any protest must be conducted without infringing the rights of others, including the right to freedom of speech.

7.4 The expression of views which are unpopular, controversial or provocative or which cause offence, shock or disturb do not, if lawful, constitute grounds for refusal or cancellation of an event or an invited speaker.

7.5 The University reserves the right to impose such conditions upon the use of its facilities as are reasonably necessary for the discharge of its obligations relating to the health and safety of its registered students, staff and other persons lawfully upon its premises or for the efficient conduct and administration of its functions. Conditions for events may include, for example, restrictions on access by those outside the University.

7.6 The University reserves the right to decide that practical considerations such as the cost, short notice period or difficulty of providing

the necessary mitigations may require an event to be modified, curtailed, postponed, or exceptionally, cancelled. The University will bear the cost of appropriate security for approved events to uphold freedom of speech within the law.
7.7 The University expects those attending events to respect the values noted in Section 1 above and to show tolerance to all sections of its community. These precepts apply in particular to the way in which views are expressed and the form of events, including any form of protest activity.
7.8 Permission may be withheld only on the grounds indicated in Sections 7.3, 7.5 and 7.6 of this Code, or of the organiser cannot or will not ensure compliance with any conditions set by the Designated Officer. It shall in all cases be open to the Designated Officer to invite the police to be present at any vent on University or QMSU managed spaces.
7.9 It shall be open to the Designated Officer to withdraw permission for an event if, having originally granted permission, they so judge that the event will not in fact conform to this Code.
7.10 It shall be open to the Designated Officer to withdraw permission for an event to be held in association with the University name or brand, whether or not the event is being held on University managed spaces or digital platforms, if it does not conform to the requirements of this Code.
7.11 The University reserves the right to impose conditions on the display of materials, symbols and images on University managed spaces or digital platforms outside the context of education' research and approved events where the display of such materials, symbols and images is in conflict with Section 5.3 of this Code."

66. It is clear from the terms of Sections 4.1 and 7.7 of the Code that protests held on the campus are "events" for the purposes of the Code.

67. It is clear from section 4.1(c) of the Code that it is applicable to students of the university.

68. It is clear from the terms of Sections 7.1, 7.2, 7.3 and 7.4 of the Code that the permission of the University is required for any event which is held on the campus.

69. If an event on the campus has not been permitted pursuant to the Code, then the persons participating in the event are trespassers, even if they would otherwise not be trespassers by reason of the general licence which students have to be on the Mile End campus.

70. In argument on 7 June I mentioned an old case about protesters against grouse or pheasant shooting who protested from a public highway running across land where shooting was taking place. In that case the protesters were not trespassers when they were using the highway as a means for getting from A to B; but when they used it for the purpose of their protest they were trespassers. The name of the case which I had in mind was *Harrison v Duke of Rutland* [1893] 1KB 142. I have since noted that in the case of the use of a public highway for protesting, such user will not always amount to trespass (see *DPP v Jones* [1999] AC 240), but the point holds good in relation to privately owned non-highway land such as the University's Mile End campus. More so where, as in the present case, the use of the land is controlled by a Code, binding on the student occupiers of the land.

The facts in more detail

71. The occupation of the University's land by the protesters started on 13 May 2024.

72. Before then there had been protests in relation to Palestine, Israel and Gaza on parts of the Mile End campus other than the lawn where the encampment became established. Thus, in paragraphs 13 and 14 of the 1st Defendant's 1st statement, the 1st Defendant says:

> "13. QMUL Action 4 Palestine (who set up the encampment) was formed on 12th February 2024 and has been holding protests on campus since. the first of which is a rally and ribbon tying memorial in Library Square on the Mile End campus on 20th February 2024.
>
> 14. The event on 20th February 2024, took place in Library Square at the Mile End campus and consisted of chants and tying ribbons around the area. This was attended by student and staff. This was not met with any opposition by QMUL security at the time. The next day I noticed that the ribbons had been taken down and after 2 further days I was notified of a second protest on February 27th, 2024. The removal of the ribbons which represented the death of women and children, was a heartless act by the university. It also sent out a clear message from the university that even peaceful acts of such significance would not be acceptable to the university."

73. Before 13 May, during the day time the Mile End campus and its buildings were generally open to all, students and public alike. After about 7 – 8 pm entrance and egress was controlled using checks of student identity cards.

74. At about 13:43 on 13 May, a group of people entered the University via a vehicle exit gate near the lawn in front of the Queen's Building. The group started erecting small tents on the lawn in front of the Queen's Building. At 14:07 the group started to set up a marquee. By 16:00 the marquee was completely erected.

75. On 14 May an additional marquee was erected. By 30 May there were about 25 tents and 2 marquees on the lawn in front of the Queen's Building.

76. A copy of an eight page unsigned letter dated 13 May addressed to the "Senior Executive team of Queen Mary University of London" from "Queen Mary University of London encampment for Palestine" was in the evidence. The opening heading and the first four paragraphs of this letter read as follows:

> "**We, the members of the encampment, are writing this letter to:**
>
> - Formally request a meeting with Queen Mary University of London's (QMUL) Senior Executive Team (SET) to discuss the encampment's demands and seek a resolution through a transparent public negotiation process, as the encampment will continue indefinitely otherwise;
> - Draw attention to QMUL's disregard for its students' concerns, especially the inequity faced by its Palestinian students during the ongoing crisis in Gaza;
> - Address the extent of QMUL's involvement in supporting Israeli apartheid and occupation;

- Stress that QMUL's refusal to engage with the encampment and reach a mutual agreement contradicts its own policies and values, revealing its complicity in the oppression and killing of Palestinians in the occupied territories."

77. In the context of the letter, the last of those paragraphs did not refer to a refusal to engage with the question of whether the encampment should have permission to be on the campus, but referred to a refusal to engage with the protesters' demands as to what the University should or should not be doing in relation to the situation in Gaza. Thus:
    77.1. In the first paragraph of the letter under the heading "Background", the authors of the letter explained that as students of the University they were committed to upholding the values of justice and freedom for all. The authors then alleged that the University had "shown bias and disregard" for its Palestinian students and other pro-Palestinian students. They referred to "several" statements issued by the University which they alleged "failed initially to recognise Palestinian identity and consequently, did not condemn the numerous violations of international law by the colonial state of Israel."
    77.2. In the second paragraph of the letter under the heading "Background", the authors stated that "over the past couple of months, multiple societies and individuals, all part of the QMUL community, have proposed concerns over its investments and involvement in supporting the Israeli occupation of Palestine, and the genocide being inflicted upon Palestinians in Gaza." The authors referred to "multiple open letters" which they alleged had been ignored and to "protest dates, vigils and educational campaigns in protest of QMUL's complicity."
    77.3. In the third paragraph of the letter under the heading "Background", the authors stated that "over the past two years, students have passed multiple motions at the Annual Members Meeting aimed at lobbying QMUL to end its complicity.". They alleged that "these motions received support from the majority of the student body, yet the university has failed to respect the student's wishes and act on those requests."
    77.4. In the fourth paragraph of the letter under the heading "Background", the authors referred to a statement released by Colin Bailey, the Principal of the University, on 4 December 2023 calling the notion of boycotting institutions an "unacceptable position [for the university]" and that the University "will always maintain interaction" with Israeli universities. This was said by members of the encampment to be "a complete shirk of concerns" and an alleged insistence "that the University's position cannot be negotiated."

78. I have quoted from the letter of 13 May and have referred to what is said in it, but I have not made any finding as to the accuracy or otherwise of what was said or of the allegations made in it because it is not necessary for me to do so in order to determine the issues in the case. I have referred to what is said in it primarily for the purpose of providing the context for the last sentence of the fourth paragraph of the letter under the heading "Background". That sentence was as follows:
    "These developments have prompted the emergence of an encampment, beginning on the 13th May 2024, and continuing indefinitely until negotiations have reached mutual agreement between negotiators and SET".

79. That sentence shows that the authors of the letter and such other of the protesters (if any) as agreed with its terms were not concerned as to whether or not they had or would

obtain the University's agreement to the existence of the encampment, either pursuant to the terms of the Code or otherwise.

80. On 14 May a protest took place in Library Square, the main square outside the University Library. On that occasion, when Professor Bailey walked through Library Square some protesters chanted demands as he passed them, seeking that Professor Bailey engage with the demands that had been circulated by the encampment. The protesters followed behind Professor Bailey as he made his way down Physics Avenue, the road running alongside the Queen's Building which leads to the gates and the front lawn. The protesters followed behind shouting through a megaphone for a number of minutes before Professor Bailey returned inside.

81. In relation to the incident of 14 May the University received complaints from some students who were sitting exams close by that their exams were disrupted. That there was some disturbance of exams, albeit on 17 not 14 May, was confirmed to some extent by the evidence of the 2nd Defendant who said:

> "20. On one occasion when we realised a rally may have been disturbing an exam, we took immediate action. A rally took place on the 17th of May at 6 pm. Students gathered on one side of the gates, and members of the public on the other side. After the rally began and people had been chanting for about 1 minute, a student noticed a senior member of security waving at the student from the back of the crowd. I am informed the student rushed over and saw that the security guard had a student with him who had raised concerns regarding her friends being in an exam that had not yet finished. The student apologised profusely and admitted that we thought all exams ended at 5:30 pm every day. We forgot to take account of the students who had additional time in exams.
>
> 21. The student made it clear that our intention was not to disrupt exams and he immediately notified the attendees of the rally that we would be postponing it until 6:45 pm. Everyone dispersed peacefully and we contained the noise level immediately. The chanting only lasted around minute or two and it was stopped immediately. There was no frustration or upset from any attendees of the rally despite us postponing it for 45 minutes. This shows the understanding, caring, and accommodating nature of the community that attend our rallies. The impression that the rally attracts an unruly mob could not be further from the truth.

82. In paragraph 15 of her 1st statement of 4 June Dr Ellis said:
> "A white board is erected most day advertising proposed unauthorised events for that particular day. Examples of these white board advertisements can be seen in the photographs attached. "SE7".

83. There were five photographs of a white board headed "QMUL LIBER8ED ZONE". I do not set out the contents of all of the boards shown in the photos. The contents of the first and second serve as examples. The board shown on the first photo reads:
"SCHEDULE
1:15pm - Open Vigil for Nakba day
3pm - Creative workshop: Zine & bookmark making!
5pm - PYM Nakba workshop
6:30pm - Mass Vigil"

84. The board shown on the second photo reads:
"SCHEDULE
11AM - QUIET STUDY SESH
1:30PM - COMMINIST INTIFADA TALK
2:30pm - ORIGAMI FLOWER-MAKING
6:00om - ABOLISHONIST FUTURES TEACH-OUT"

85. Dr Ellis's evidence that the booking of spaces for those and other events as required by the Code has not occurred was not challenged.

86. There was a demonstration, protest or rally on 15 May. Dr Ellis says she became aware of social media posts advertising the encampment and a rally to be held at the University's Mile End campus. She says that the protesters were told "later" on 15 May 2024 that no one from outside the University would be permitted to come on to the campus "as the front gates were locked and security staff were positioned at the gates". Dr Ellis goes on to say in paragraph 17 of her 1st statement of 4 June 2024:
> "These decisions were taken on health and safety grounds and as a result of the encampment not following the established procedures in place to enable the University to comply with all relevant laws and regulations. At the most fundamental level, the University was not given the necessary evidence to undertake required risk assessments for events of this nature."

87. Dr Ellis's 1st statement as to what occurred in respect of the protest or rally in the early evening of 15 May is unsatisfactory from an evidential point of view; it being largely unattributed hearsay. Dr Ellis exhibited as SE8 or "Exhibit 8" to her 1st statement of 4 June 2024 photographs and a redacted security incident report showing a crowd at the University's gate. Unsatisfactorily, the author of the incident report was not identified by name and it is unclear which parts of his or her report were derived from his or her own observations or from what he or she was told by others. The pictures on the last page of Exhibit 8 show a crowd of persons, some holding Palestinian flags, congregated outside and inside the University's front gate. In one of the pictures, the gate is open. Dr Ellis referred to a video taken from Instagram which showed an individual cutting with bolt cutters the chain which had been keeping the gate closed.

88. The 2nd Defendant described the "rally" on 15 May in the following terms, also substantially by way of unattributed hearsay:
> "53. I am informed that on the 15th of May 2024, around 18:30pm, the members of the Encampment held a rally to celebrate the beginning of the QMUL Liberated Zone.
> 54. The members of the public rallied on the Mile End Roadside of the gate, and the members of the encampment rallied on the campus side of the gate.
> 55. I am informed that when members of the public were arriving onto the campus, there was a wave of people and so naturally there was some pushing and shoving. It was in no way at the level as stated within Sharon Ellis's statement within paragraph 24, page 67.
> 56. The encampment members had actually tried to prepare for the protest as the encampment security team and members of the encampment got together as a team and discussed and planned how they would all take safety measures. This was discussed in person.
> 57. The encampment members all agreed that the security team would wear green hi-visibility jackets and would be positioned at certain points so as to maintained

safety of the public as well as planned the prevention of any damage to buildings and other structures. The encampment members wanted to ensure that though they had considered safety precautions for the students and wider public and ensure they respected the Universities grounds.

58. Some attendees at the rally had drawn chalk on the Queens Building, and the security manager on shift at that time requested it was cleaned off and nobody was to draw on the building thereafter. The encampment security team explained this to everybody, and this was cleaned off straight away by members of the encampment, and nobody drew on the building thereafter. With reference to Mr Colin Baileys letter dated 18th June 2024, I want to confirm that this was cleaned off straight away, we wanted to respect the University premises and everybody at the rally understood and did not do it again.

59. A member of the public took it upon themselves to try and use bolt cutters to cut the lock which held the gate to the campus together. The member of the encampment had nothing to do with the attempt to break the lock.

60. I am informed that as soon as this happened, the encampment security team put on their high-vis jackets to begin ensuring that nothing untoward happened. Before all members of the public could enter the campus, QMUL's security closed the broken gate and held it closed as the lock was broken.

61. The members of the public were unhappy with being locked out and began asking to be let in. They were allowed in by the QMUL security. The crowd moved outside of the Queen's Building, still being facilitated and controlled by the encampment who positioned themselves around the crowd and lined the Queen's Building, guarding both the safety of the encampment, the public, and the buildings.

62. I am informed that as they were taking photos and videos of the rally [exhibit MBC 15]. This shows how well-managed the rally was. That although a crowd had entered the campus the rally always remained peaceful and organised.

63. The police arrived, but as it was so well managed, they shortly left. QMUL's security commended the members of the encampment regarding how well the encampment members facilitated the rally and were impressed by the processes that we had put in place.

64. Once the rally finished, the encampment members offered members of the community food that the encampment had been donated so they could all eat together. Otherwise, they left promptly at around 9pm and there was only students and members of the encampment left on campus. The QMUL's security did not have to intervene after the initial phase when the public entered the camp.

65. At the end of the rally when it was just the members of the encampment, Students informed me that they all felt proud and that it was a momentous occasion that would live with them for the rest of my life. QMUL's security privately said that it went well, and the encampment members were organised, and everything ran smoothly, Although the Claimant may want to paint a different picture, we get on well with their security and they always say that we are a good group and that they do not have any problem with the encampment. Sadly, they cannot relay this to the Claimant for fear of losing their job."

89. Dr Ellis said that she was "aware" that the unauthorised occupiers were making comment on social media and inviting others from outside the University community to attend the ongoing protests. She exhibited a copy of an advertisement which she said was addressed to supporters in Tower Hamlets to join in the rally taking place on 17 May. Unfortunately, the quality of the exhibited copy of this advertisement in the hearing

bundle is so poor as to make it illegible in parts and it is unclear whether this rally was intended to take place on or off the campus. It is however some evidence of the encampment on the campus being a focal point for rallies and protests.

90. On 15 May Professor Bailey sent an email to all students and staff. Particularly relevant extracts from that email are as follows:

> "Similar to other universities across the country, on Monday (13 May) a demonstration began which involved an encampment on the lawn outside the Queen's Building [...]
> "The demonstration relates to the ongoing conflict in the Middle East [...]
> "Whilst the demonstration is ongoing, please be ready to show your Queen Mary ID card as you enter the Mile End campus. All University activities will continue as normal and without disruption. We have enhanced our security presence to provide assurance to our staff and students. If anyone has concerns when passing the protesters, please do contact Security [...]
> Universities are precisely the places where difficult and complex issues should be debated, and we have a clear code of practice for free speech to allow staff, students and official visitors to do this with confidence within the law.
> The demonstrators did not seek authorisation to use our campus as required by our code of practice. We are monitoring the impact of the demonstration on our staff and student communities and the regular activities of the University, whilst being mindful of our legislative duty to promote free speech. We will keep this under review in consideration of our wider duties to foster good relations between all members of our communities, assure safety and security of our communities, and the need to ensure all University activities can proceed unhindered."

91. In paragraph 31 of her 1st statement of 4 June, Dr Ellis said:

> "On 16 May 2024, I am informed that the University formed the view that the cumulative incidents, and particularly the events of 15 May 2024, were causing a growing and unacceptable risk to the health and safety of staff, students, the public, and the University grounds. Consequently, Professor Colin Bailey, sent a second email to all staff and students [...]"

92. Dr Ellis did not state who she was informed by or what organ of the University "formed the view" that she refers to. A copy of Professor Bailey's email of 16 May was exhibited. Relevant extracts from it are as follows:

> "I am writing to you following my message yesterday regarding the unauthorised encampment on our Mile End Campus.
> I am sorry to tell you that last night (15 May) a demonstration took place within and outside our Mile End campus which resulted in criminal damage to our property, put the health and safety of our communities are risk, and potentially was a public order offence.
> In light of this we have asked the demonstrators to disperse the encampment with immediate effect.
> [...]"

93. The "criminal damage" was limited to the cutting of the chain which held the gates closed and, just conceivably, to the making of chalk drawings on the Queen's Building. On the evidence, at this stage the main risks to health and safety appeared to be limited to (i) the risk to or from the one demonstrator who had climbed on to one of the gate posts; (ii)

such general risks as were inherent which large numbers of people gathered in a partly enclosed space, especially when they or some of them were moving; and (iii) the generalised allegation of a lack of health and safety risk assessments.

94. On 16 May Dr Ellis wrote a letter to the members of the encampment. Dr Ellis said that it was hand delivered to one of the protest organisers. Dr Ellis also said that she was informed "by security" that copies of the letter were posted on the external and public facing façade of the campus with her name highlighted in red.

95. The 16 May letter was written over Dr Ellis's name as the Chief Operations Officer of the University. Relevant extracts from it are as follows:

> "Dear members of the encampment,
> [...]
> As you are aware, you did not seek authorisation to set up this encampment on our campus. We have explained to you and the wider Queen Mary community that we would continue to monitor the impact on your activities.
> The demonstration last night (15 May) resulted in criminal damage to Queen Mary property, put health and safety of our communities at risk, and potentially was a public order offence.
> We are therefore asking you now to disperse your encampment with immediate effect."

96. Dr Ellis said that a letter dated 22 May was hand delivered to the protesters. This letter of 22 May was written over Professor Bailey's name. It was addressed to the members of the encampment. It referred to the 16 May letter and to the fact that the encampment had not dispersed as requested by the University. It concluded: "The encampment is not authorised by the University and must disperse with immediate effect."

97. Dr Ellis exhibited to her statement of 4 June copies of two "posters" which she said it was believed that members of the encampment were responsible for posting" "on social media". She did not say why that was believed, but the contents of the "posters" supports that hypothesis.

98. In relation to the "Wanted" posters in respect of Professor Bailey and Dr Ellis, the 1st Defendant said:

> "Someone prepared the leaflets as meme and they were not meant to be taken seriously. They circulated in our telegram chat but we do not know how these leaflets came to be distributed as the encampment students have not posted these on our social media."

99. In the 1st Defendant's first statement, the 1st Defendant said that the students on the encampment were not responsible for any of the 'wanted' posters created about the urine spraying incident (see below).

100. The first of the "posters" in respect of Professor Bailey and Dr Ellis has the banner headline "WANTED" in large capital letters. It continues "HAVE YOU SEEN OUR OPERATIONS OFFICER?" there is then a photograph of Dr Ellis. Under the photograph is Dr Ellis's name and the following text:

> "IF FOUND PLEASE DIRECT TO THE ENCAMPMENT OUTSIDE QUEENS BUILDING

P.S. WE WILL **NOT** BE REMOVING OUR MASKS OR TAKING DOWN THE ENCAMPMENT UNTIL OUR DEMANDS ARE MET

Crime:

BEGGING for the removal of all Palestinian flags and sending threatening emails to the students!"

101. I have seen no evidence of Dr Ellis having sent threatening emails to the students. I have seen no evidence that Dr Ellis "begged" for the removal of all Palestinian flags. However, the University and Dr Ellis were concerned that the display of pro-Palestinian material on University property might be viewed as expressions of the University's views, contrary to its policy as set out in section 5.3 of the Code that, except where expressly agreed by the University Council in line with advancing the University's charitable objects, the University does not take an institutional position on political, cultural or religious debates.

102. The second of the "posters" was laid out in a similar way to the first but with different text and with a photograph of Professor Bailey. It read as follows:

WANTED

HAVE YOU SEEN OUR PRINCIPLE? [Sic]

[Photograph of Professor Bailey]

COLIN BAILEY

IF FOUND PLEASE DIRECT TO THE ENCAMPMENT OUTSIDE QUEENS BUILDING

P.S. WE WILL **NOT** BE REMOVING OUR MASKS OR TAKING DOWN THE ENCAMPMENT UNTIL OUR DEMANDS ARE MET

Crime:

Contributing towards the deaths of hundreds of thousands of innocent Palestinian people, and terrorising his students"

103. I have seen no evidence that Professor Bailey terrorised any of his students. I have seen no evidence that Professor Bailey has committed any crime. He may or may not have been involved in the University's decisions as to its holding or continued holding of investments in companies which the students say assist Israel in its operations in Gaza and as to the use or continued use of certain companies which the students say support or assist Israel; but, so far as I am aware, neither of those things would be a crime under English law.

104. Dr Ellis said that as a result of the cumulative actions against Professor Bailey and herself described in her statement, the University was required to undertake personal risk assessments for both of them. Some of the actions described by her are not properly evidenced in accordance with the law of evidence and the CPR. However, some are and, based on the risk assessment, she was advised not to work alone on campus; be accompanied in all areas where protesters might be present; and that she should vary her route to work and time of arrival.

105. The 1st and 2nd Defendants said that Dr Ellis's and Professor Bailey's concerns about their physical safety were greatly exaggerated. They gave examples of where Dr Ellis and Professor Bailey were seen unaccompanied on the campus.

106. An incident occurred on 21 May. The basic facts are not substantially in dispute. In brief two individuals attempted to cut down the Palestinian flag at the encampment. They allegedly squirted urine from bottles at members of the encampment. There was a fight between a member of the encampment and one of the individuals who had been doing the spraying. This was broken up by other members of the encampment. The University's security team called the police, but the members of the encampment chose not to co-operate with the police. The 2nd Defendant says that one of the attackers was an alumnus of the University and the other was a third year student.

107. Subsequently "Wanted" posters were posted in respect of the two sprayers. As I have already mentioned, the 1st Defendant denies that the publication of these posters was the work of the encampment members.

108. In her statement of 4 June Dr Ellis said that the "University" and she believed that there were other safety issues to consider. She did not identify who or what body representing the University, except for herself, had that belief. She referred to a specific concern that members of the encampment had run multiple electricity extension leads from the building adjacent to the encampment called "the People's Palace" without permission "which was considered to be extremely dangerous" (she did not say who by) "and had to be ceased." Further, said Dr Ellis (but without saying who by), "it is considered that this was not only a health and safety risk but a serious fire risk."

109. The 2nd Defendant disagreed with what Dr Ellis said about the extension leads. At paragraphs 10 – 12 of her 1st statement the 1st Defendant said:

> "10. I refer to Sharon Ellis witness statement, in particular paragraph 49 regarding that permission was not given to the encampment members to plug in an extension cable from the People Palace to the Encampment in particular I am informed that this is false.
>
> 11. The People's Palace is a building which has lecture rooms and toilet facilities. The students always ensured they liaised with security regarding plugging in of any extension cables. The encampment members always asked for permission from security. I am informed there was some inconsistency in approach as some security staff members would permit it, and others would not. However, if they did not permit it and told them as such, the encampment members do not use the extension lead. When given permission, the encampment members plugged the cable in with extreme care by running the cable in a controlled and safe manner across the ground, as well as ensuring it was only used in dry weather.
>
> 12. There is a stairway located just outside of the Peoples Palace building which students use to enter in and out of. The encampment members ran the cable from the door at the end of the stairway which was likely to cause the least disruption. The encampment members ran the cable from that door and then around the encampment so that it was out of the way and not a risk. QMUL's security was always aware of how it was laid out and were happy with this. The cable was very visible to minimise the risk of accidental harm."

110. Dr Ellis said that she was aware (she did not say why) that the protesters had placed plastic and paper coverings over spotlights in front of the Queen's Building, "which again is considered a serious fire hazard" (she does not say who by).

111. Dr Ellis referred to an accumulation of wooden pallets on the encampment. She said she had instructed regular health and safety assessments of the campus, which had concluded that the pallets constituted a significant risk and needed to be removed. She said there "is also a concern [she does not say who has that concern, but presumably they included her] that the protesters may carry out additional unauthorised actions which cause further risks to health and safety." She said that she was concerned that, despite the University's best efforts, further fire and safety risks might not be identified in time to prevent serious harm to encampment members, other members of the University, and/or the University grounds.

112. A speech was due to be given on the campus by the Bethnal Green and Bow MP on 18 May. This was cancelled by the MP.

113. Dr Ellis says that a bicycle marking and fixing event on the campus was moved to the Tower Hamlets Town Hall because of access difficulties caused by the encampment and the ongoing protest.

114. On 23 May a conference of the World Association of Sustainable Development was held in the University's BIO Innovation building on the Whitechapel campus. The Whitechapel campus is about a mile to the west of the Mile End campus.

115. Dr Ellis said that she was informed (she did not say who by), that "this conference was completely disrupted in a manner considered to show prior planning and coordination by the protest encampment." Dr Ellis did not say who considered that to have been the case. Dr Ellis' unattributed hearsay evidence of this incident continued as follows:

> "I am aware that this disruption was twofold and detail is as follows:
>
> a. An individual, who appeared to be with an identified QM student was signed into the BIO Innovation Building. They did not present any University ID but were with one of our students and so were issued with a visitor pass. On this basis, I believe the individual was not a University student or member of staff. That individual then opened a secure door allowing 10 – 15 other protesters to enter without identifying themselves. I am further informed that these individuals moved to the conference room in that building and were shouting slogans outside of the room using megaphones such that it was impossible to continue the conference. One such slogan being "from the river to the sea".
> b. I am informed that within the conference, there were two individuals (including one Queen Mary student who had previously requested they be allowed to attend the conference). Upon the slogans being shouted outside the room, these two individuals stood up in the conference and began reading prepared speeches from their phones."

116. The 2nd Defendant's evidence, also by way of unattributed hearsay, described this incident differently, but it did not address Dr Ellis's hearsay evidence as to the opening of a secure door to allow other protesters in or the shouting of slogans using megaphone. The 2nd Defendant said:

"80. I am informed by an encampment member (also a student) that they saw a poster regarding the conference being held and explicitly asked for permission to attend the conference [exhibit MBC 20], and all encampment members were given permission. 6 members of the encampment including the student attended [exhibit MBC 21].
81. They were able to get into the building by virtue of their Claimant ID cards alone as they were students. Once they arrived, I am informed that they were welcomed in by the reception at the BIO Innovation building on the Whitechapel campus. Once the conference started, a member of the encampment stood up and introduced themselves as being part of the QMUL Encampment for Palestine and was asking the members of the conference for their support. The initial response from the QMUL staff member who was running the conference told the encampment member to stop.
82. I am informed that shortly after they stood up to be heard and expressed in calm and controlled manner that holding a conference promoting the UN's sustainability and development goals in a building owned by Queen Mary Claimant of London, an institution which has funded over £1 million pounds in aiding the destruction of all 12 universities in Gaza, is completely hypocritical.
83. A woman who was sitting beside the student at the conference, tapped the students arm and informed the student that she was proud of everybody for what they were doing, and that she thought it was remarkable. The lady may have been on the Senate and the student believes this to be case as the QMUL staff member who hosted the conference, yelled out that there were important people in the room and told the encampment members who they were. The support from this lady demonstrated that all present and invited to the conference were open minded and willing to take their views on board, something which the Claimant themselves have fallen short of.
84. As they were being told to leave, they did so respectfully. They were only at the conference for around 10 minutes.
85. [...]
86. This protest was entirely separate to the existence of the encampment."

117. Dr Ellis said that this event was of particular concern to the University as it occurred at the Whitechapel campus, more than a mile away from the encampment located at the Mile End campus.

118. On 24 and 25 May there were further protests outside the campus, but adjacent to the fence between the lawn and the highway with crowds of several hundred people and a police presence.

119. On 3 June the 1st and 2nd Defendants' solicitors (Foster & Foster) sent a letter to the University, "FAO Professor Colin Bailey". The letter of 3 June is a 22 page document. Its first paragraph reads:

"We advise and assist Queen Mary University London Encampment for Palestine ('QMULEP') (hereinafter referred to as "the Students") and specifically in relation to the encampment of a small piece of land situated outside the Queen's Building on the campus at Queen Mary's University, London. We refer herein to your organisation, Queen Mary's University London, as ('the University')."

120. The first three paragraphs of the letter under the heading "Introduction" summarise much of what follows in the letter. They read:

"The students felt compelled to protest in the manner in which they have to highlight the University's direct and indirect complicity in the war crimes, crimes against humanity, ethnic cleansing and genocide which is being perpetrated by Israel in Gaza and the West Bank.
The students are rightfully exercising their rights enshrined under the law to free speech and freedom of assembly. The University's obvious lack of support and engagement is demonstrative of how it is acting contrary/in breach of its policies and guidelines. Instead, using its policies and guidelines and turning against the students to threaten them with disciplinary action(s).
The University's recent communications to the students dated 15th May 2024, 16th May 2024, 22nd May 2024 and 24th May 2024 fails to recognise and or address the distress the University's actions are causing the students. This is not a proportionate nor a reasonable response from the University in the circumstances."

121. Foster & Foster's 3 June 2024 letter says that the students have taken all steps necessary to ensure that their health and safety together with the health and safety of the other students have been safeguarded. Part of the letter reads:

"The students have taken all steps necessary to ensure that their health and safety together with the health and safety of other students have been safeguarded.
The students have taken the following responsible, reasonable and proportionate measures:
• They have occupied a small piece of land and not any building.
• The students carry out a regular/daily review of the health and safety issues to ensure that they, other students and staff are safe.
• They do not cook on the encampment and have food provided to them from other students, staff or members of the local community.
• They do not allow non-students or staff to stay for any extended period of time or to sleep at the encampment. They do have a very limited number of visitors during the day but they are respectful to the needs of the student and staff population and do not disturb the day-to-day activities of the university.
• They have set up a help desk.
• They will cordon off any area where there are plants or shrubs or bushes so as to ensure there is no damage to them.
• They have adequate supplies of essential products including toiletries.
• They welcome all students and staff irrespective of their race, religion, or beliefs.
• They have made it very clear that they are peaceful.
• The speeches that they make are measured and do not contravene the law.
• The actions of the students do not affect the lectures, exams or any other activity of the university.
• Those on the encampment have invited all other student or staff who wishes to join their encampment or engage with them in dialogue or discussion. It is therefore inclusive.
• The students have been very mindful to any request made by individual students as to any disruption. They ensure that any speeches that have been given a done so after exams have been concluded.
• Most of the students do not wear masks however some are taking extra precautions as they do not want to contract Covid19. The Principal ridiculed the students for wearing masks which is highly insensitive, and demeaning and totally unacceptable.
• Additionally;

- They will instruct an environmental health officer to advise them as to any health and safety concerns.
- The students will ensure that when they finally leave, that the lawn is in the same condition as when they commenced the encampment.

The students are confident that the majority of the students at the University are in favour of the encampment and proud of the commitment and dedication they are showing to accomplish peace for all involved in the conflict."

122. Foster & Foster's letter of 3 June set out their and their clients' cases on a number of matters. Specifically, the letter set out or referred to various matters or allegations under the following headings:

122.1. "Details of the Conflict between Israel and Gaza".
122.2. "International Law and Rulings".
122.3. "Your Legal Obligations". Under this heading there are references to:
122.3.1. Article 9 ECHR.
122.3.2. Article 10 ECHR.
122.3.3. Article 14 ECHR.
122.3.4. S.43 Education (No.2) Act 1986.
122.3.5. The Higher Education and Research Act 2017.
122.3.6. The Equality Act 2010.
122.4. "Breach of University's Policies". Under this heading there are references to:
122.4.1. The Code.
122.4.2. An "Ethical Partnerships Policy".
122.4.3. The University's Investment Policy.
122.4.4. The Students code of discipline.
122.5. "Other Relevant Matters"
122.6. "Going Forward and Next Steps Required".

123. Under the heading "Going Forward and Next Steps Required" the letter read:

"We would urge the University to fulfil its legal obligations and carry out the following acts: -

1. Suspend all investments in the companies identified by the Students in their document dated 13th May 2024.
2. Review the University's investment policy and ensure that you are not investing in any third party which may be directly or indirectly supporting the genocide, war crimes, crimes against humanity and ethnic cleansing and ensure that the policy is amended to reflect this obligation.
3. Provide details of all your investments above £25,000.
4. Review the University's working arrangements to ensure that the University is not engaging with any third party which may be directly or indirectly supporting the genocide, war crimes, crimes against humanity and ethnic cleansing and ensure that the policy is amended to reflect this obligation.
5. Meet with the students on the encampment as a matter of urgency.
6. Set up a formal mediation between the University and the students on the encampment in relation to their reasonable demands.
7. Ensure the students on the encampment have all the necessary facilities required in relation to their health and safety, including shower facilities.
8. Provide reassurances to the students that if they identify themselves to the police following the incident of 21.05.2024 that they will not face disciplinary or any other actions against them for participating in the encampment.

9. If the University is suggesting breaches of policy/law then the Students require written information as to what those breaches may be with specific details rather than the generic statements issued and provide an explanation as to why they constitute a breach.
10. An application by the students for the encampment should be allowed. The students now wish to make a retrospective application for the encampment to be authorised."

We require a substantive reply from the University within 7 days of receipt of this letter. Should proceedings be issued against any of the students on the encampment, they will be vigorously defended."

124. There was a rally on 31 May. Dr Ellis said that on 31 May she witnessed the unauthorised protest encampment become a focal point for local activist groups in the London Borough of Tower Hamlets and beyond, including two known as "The Revolutionary Communist Party" and "Palestine Action".

125. In her Supplemental Statement Dr Ellis said:
"As the University had become aware of this unauthorised event [that with an external speaker on 31 May] a representative from the Univresity approached the protest encampment. Organisers in person were asked over 5 hours before the rally was to commence, about this external speaker and whether they wanted to complete a "speaker request form" that would have enabled us to do our usual risk assessment before deciding whether to allow them on campus. The University needs to undertake these assessments in these circumstances to meet its regulatory obligations with regard to free speech."

126. Dr Ellis continued:
"13. The encampment's organiser's response was to detail that the person's intended presence was "*news to them*" and that "*if they did turn up, they would be outside the gates*" this is despite their Instagram post publicising the speaker's attendance.

127. Dr Ellis exhibited a copy of an Instagram post. This was headed "DAY 19 SCHEDULE". This showed that at 18:00 on 31 May a rally was due to be held and a person whose name had been redacted was due to speak. Dr Ellis said that it was clear from an exhibited video that the unauthorised person proceeded to deliver their speech on University property without approval and that it was not delivered outside the encampment as detailed by the encampment.

128. On 31 May a group of individuals entered the Queen's Building. One of them hung out out of a second floor window of the Queen's Building, with others trying to support the individual. According to Dr Ellis, the University's security manager could not approach the group because they had boxed themselves in with a large table and two benches. The group was hanging a large fabric banner outside the building. Dr Ellis thought that the actions of this unauthorised group were extremely dangerous.

129. The evidence of the 2nd Defendant put a different complexion on what occurred. The 2nd Defendant said that the 2nd Defendant and around 6 members of the encampment walked into the Queen's Building through the back entrance which was usually left open. They went to the third floor staff and student common room. The 2nd Defendant's

statement on this subject did not say whether or not the protesters barricaded themselves in. It said:

> "76. We found a window to safely drop the banner ahead of the Rally. The window was regarded as safe because there were safety locks on the windows and padlocks on others as well. The locks which are 'anti-suicide' locks still made it so that people could put the banner through without any safety concern. We chose this window as we felt it was the safest [exhibit MBC 19]
> 77. The encampment members and I dropped the banner through the window on the far left of the Staff and Student common room on the third floor of the Queens building, without breaking any locks or damaging any property. Pictures of the banner drop are within the Claimant bundle Index, on page 240 which shows a Tower Hamlets Instagram in support post of the rally.
> 78. QMUL's security later came in and explained to us that this was not allowed and asked for us to leave and so we left peacefully. The banner was still hanging, and the security took the banner off themselves. With reference to Mr Colin Baileys letter dated 18th June 2024, I can confirm security explained to us it was not allowed, and therefore took it off themselves, we did not dispute this and respected their instructions. We left the common room straight after this conversation.
> 79. The encampment members and I took extra precaution when hanging the banner, we chose safest windows, and it was purely for the purpose of hanging the banner as when we were told to leave, we adhered to securities instructions. We did not cause any destruction; we didn't break any locks or pose any risk to anyone, nor have we carried a similar protest since."

130. By reason of the existence of the encampment and the additional risks to health and safety which the University perceived to exist as a result of the encampment's presence, the University cancelled its off-campus annual Festival of Communities which was due to be held on 8 June. The costs wasted as result were £101,907.51 out of a total budget for the event of £154,000. The University also considered that as a result of the cancellation it had suffered reputational damage with local community groups which might impact on their willingness to work with the University in the future, including in the furtherance of the University's research and education.

131. The 1st Defendant said that the decision to cancel the Festival was unnecessary. The 1st Defendant said: "Our past rallies have been incredibly peaceful and inclusive, garnering significant support from the Tower Hamlets community. There have never been any allegations of verbal abuse or violence emanating from the encampment toward students, staff or members of the public."

132. Ms Leggett wrote to the encampment on 11 June inviting its members to meet her to discuss how the University's Open Days scheduled for 14 and 15 June could be conducted safely.

133. There was a meeting on 12 June attended by Ms Leggett, two members of the encampment, Mr Ramsamy from the Students' Union, 2 health and safety representatives from Unison and University and College Unions and Mr Vishnu Patel, the University's Assistant Director, Campus Services and FM (which I take to be "facilities manager"). In the course of this meeting one of the encampment members expressed concern about potential hostility to the encampment during Open Days. There was a degree of agreement about the conduct of the members of the encampment during the

Open Days. Specifically, the two members of the encampment gave an assurance that they would not rally on open days, nor would they disrupt or hinder the running of those days. There was a conflict of evidence as to what else, if anything, was agreed.

134. The presence of the encampment on the lawn outside the Queen's Building meant that the University had to make different arrangements for the Open Days from those which it had made in previous years.

135. The University decided that, having regard to the disruption which had occurred at the World Association of Sustainable Development conference, it would cancel an Open Day event called "the Principal's talk". Ms Leggett had been due to give that talk. It would normally have attracted 800 people in the Great Hall and be given twice on each Open Day. The University circulated video content instead, but this only attracted 290 views.

136. The University held its 2 Open Days on 14 and 15 June. Normally in June the University has over 10,000 visitors for its open days. These visitors include a large number of young people (aged 16-17), as well as younger children and family groups. The open days are key recruitment activities for the University.

137. The lawn where the encampment was is usually a focal point for open days. It is the place where most visitors would enter the campus, gather and queue for the University's largest venue, the Great Hall in the People's Palace. Many of the University's publicity shots show the lawn.

138. During the Open Day on 14 June a banner that read "QM FUNDS GENOCIDE" was hung on the perimeter fence bordering the encampment. The banner was taken down by one of the University's groundsmen. The banner was returned to the encampment and then subsequently displayed again at the encampment.

139. On a few occasions during at least one of the Open Days, members of the encampment tried to hand out leaflets on the campus.

140. Whether the existence of the encampment operated to encourage or discourage prospective applicants to the University is unclear and, no doubt, it will have affected different potential applicants differently.

141. On 18 June the University's solicitors wrote a letter of that date to Foster & Foster.

142. In the 18 June letter the University's solicitors stated, amongst other things, that:

142.1. The University did not consider that the continuance of the encampment was a reasonably practicable step required to ensure the freedom of expression for Foster & Foster's clients.

142.2. At that stage (18 June) the University was "minded to again refuse permission for the encampment", but wished to engage with Foster & Foster's clients and members of the encampment in relation to its consideration of their retrospective application for permission for the encampment before it made its decision.

143. On 20 June Dr Ellis and Ms Leggett met with 3 students from the encampment and with Alvin Ramsamy of the Students' Union. At this meeting the students were not in a position to discuss the retrospective application for authorisation of the encampment.

144. At approximately 08.27 on 26 June the University's security team was informed that a rally was intended for later that day. The rally commenced at about 6 pm.

145. The rally of 26 June involved non-encampment members outside the University premises and encampment members inside the University premises. It started at 6.00 pm and finished at 7.10 pm. A photograph was exhibited of a person holding a Palestinian flag and sitting on a gate post.

146. Pursuant to a letter dated 21 June from Ms Leggett addressed to the "encampment members", a meeting between the University and members of the encampment took place on 27 June. The students said that they had made all relevant points in Foster & Foster's letter of 3 June. They chose the front of the Queen's Building as most comfortable for camping given that it was a grass lawn and that they had not considered any other areas of the campus for an encampment.

147. Further rallies were held on 28 June and 1 July. These included encampment members repeatedly scaling gate posts.

148. During the 1 July rally, protesters, including encampment members, paraded through parts of the campus other than the lawn in front on the Queen's Building. The rally headed towards areas of the campus used and occupied by children attending summer school programmes.

149. As at the date of my order for possession on 10 July, the next big event scheduled for the University was Graduation. Graduation ceremonies were scheduled for 18, 24-26 and 29-31 July. The numbers of persons expected for those ceremonies were 4,380 graduates and 11,300 guests.

150. Graduation is an important event for the University. The University recruits heavily from local areas, and from communities where a student will be the first in their family to go to university. The opportunity at graduation ceremonies for parents of the University's students to visit a university, for the first time in many cases, is described by Ms Leggett as "tremendous", as also, she said, was the impact of the word-of-mouth marketing that happened as a result.

151. At large events such as Graduation, in the absence of the encampment, the lawn in front of the Queen's Building can be used as a reception area or as somewhere for people attending events to congregate. The lawn lies between the key venues of the Great Hall in the People's Palace and the Octagon in the Queen's Building. With the encampment in place, movement between those two venues would have been inhibited and alternatives would have had to be adopted.

152. Ms Leggett said that if the encampment remained in situ, thousands of students, their families and guests would not be able fully to enjoy their graduation ceremonies as there would not be access to the lawn where many of the celebrations take place and photographs are taken. Ms Leggett considered that this would be unfair on the students

and would also have a significant impact on the reputation of the University, with a further impact on the number of prospective students who would wish to consider studying at the University.

153. The 1st Defendant had a different view. The 1st Defendant referred to a petition signed by 13 of the attendees at the Open Day who were permitted to by the University to visit the encampment on 13 June. The 1st Defendant said that that was a high proportion of those who visited the encampment. The petition provided, amongst other things, for prospective students to sign it "If the Encampment Makes You More Likely to Come to Queen Mary". The 1st Defendant says that members of the encampment have been "sincerely laudatory about positive elements of our university experience." The 1st Defendant says that the members of the encampment "encountered real enthusiasm from many prospective students toward the encampment, especially among those who visited personally." The 1st Defendant says, "It is also very possible the encampment improved their opinion of Queen Mary's student body and the university experience and thus made them more likely to come to Queen Mary University of London." In my judgment this evidence did not advance a case against the University which is relevant to the issues before me. It is, at least primarily, the University which has to decide how to present itself to prospective students and even if the views of the encampment members were relevant, they are clearly views on things on which different decision makers could reasonably and properly take different views.

154. The University had concluded that there was no viable alternative site for graduation to take place. The presence of the encampment had led to expensive and detailed contingency planning having to be put in place in case the lawn should not be available.

155. Moving forwards: during July and August students vacate their on campus accommodation which is re-let by the University. Typically the rooms are re-let for use by attendees at international summer schools which are held on the campus.

156. The largest contingent of people participating in the summer schools comprises children, usually 11 – 16 year olds. There can be up to 1,500 children staying on the campus during peak periods.

157. The summer schools are typically run on the eastern part of the campus, and as at 2 July most of their activities had not been impacted by the encampment. However, the summer schools also use the Great Hall and smaller lecture theatres in the Peoples' Palace adjacent to the lawn. There is nowhere else on campus that can hold the same number of people. Due to the disruption potentially caused by the encampment, the University decided that the use of the People's Palace for summer school children was too high risk. The 1st Defendant disagrees with that assessment. The 1st Defendant says that there have been no allegations of violence, abuse, or intimidation by the encampment. The 1st Defendant says there have been several instances where groups of young students and their supervisors have walked past the encampment without any sense of inappropriateness.

158. The disruption caused by the encampment has reduced revenue for the University.

159. In addition to its use for summer schools, the University also offers the People's Palace for rent during July and August for large events such as conferences and

presentations. The daily base rental charge for the premises is upwards from £10,000. Typically additional fees would also be paid for things such as catering ad audio-visual equipment.

160. When the encampment was established, the University stopped taking new bookings for the People's Palace for the period until mid-September. That was because the University's commercial proposition, logistical setup and risk profile were dependent on having access to the lawn where the encampment was situated. The lawn was important because it is the most convenient means of entrance to and egress from the People's Palace. Disruption by the encampment to the University's commercial clients would not only result in a monetary loss, but also in a reputational loss. Thus, although none of the existing bookings were cancelled, the booker of a one week-long booking required and was given a £58,500 discount.

161. For events held on the campus generally, as a result of the encampment the University required advance guest lists and the use of wrist bands for invited guests.

162. The University said that the closure of the gates for vehicles to and from the Mile End Road onto and off the campus had interfered with disabled access to the University for students and visitors. The 1st Defendant did not agree. The 1st Defendant said that it was the University that has chosen to close the gates. The 1st Defendant said that the encampment had placed nothing on the road which runs around the lawn. The 1st Defendant said that the University chose frequently to open the gates, for example for rubbish collection.

163. As at 2 July the direct financial impact of the encampment on the University as calculated by it, has been:
    163.1. Additional security costs in May and June: £273,634.
    163.2. Additional Open Day costs: £12,000.
    163.3. Wasted costs as a result of the cancellation of the Festival of Communities: £101,807.51.
    163.4. Discount given for a conference: £58,500.
    163.5. Lost bookings for commercial events: figure not given.

Analysis as to lawfulness of relevant decisions

164. As a consequence of the consent order in respect of the 1st and 2nd Defendants and the absence of any application either in these proceedings or in the Administrative Court to set aside any relevant decisions of the University as unlawful, I can deal with the lawfulness of the University's decisions fairly shortly.

165. The first possibly relevant decision is the decision of the Gold Committee on 16 May to ask the encampment to disperse.

166. The University's Gold Committee is the highest level committee under the University's Emergency Management Plan. Its authority can be invoked on the basis of reputational and health and safety risks.

167. This was based entirely on the Gold Committee's health and safety and public order concerns arising from the rally on 15 May. There is no evidence that on this

occasion the Gold Committee took into account the provisions of the Code or the students' various rights to freedom of expression.

168. At the hearing on 7 June the decision of 16 May was criticised by Mr Burton on the ground that the students had not been given an opportunity to be heard before it was made. It appeared on 7 June that meant that there might be a real prospect of its being established that this decision did not meet the various public law standards required of the University. However, this decision became one with no legal significance. That is because it was overtaken by the subsequent decisions of the University.

169. The second possibly relevant decision is that of the University made on or about 3 June formally to terminate any licence that the encampment members may have had to occupy the lawn; to send the letter of 3 June formally terminating any such licence and stating that if the encampment was not immediately dispersed, the University would have no option but to take legal action to secure possession of the campus.

170. This decision was said by Dr Ellis to have been taken by reference to the events of 15 May as a direct result of the criminal damage to the University's property, the public disorder caused by the encampment and what the University perceived to be the serious health and safety concerns caused by the encampment. The evidence in relation to this decision, in particular the terms of the 3 June letter itself, shows that in making it the University had regard to the lawful exercise by its staff and students of their right to freedom of expression, but was of the view (which undoubtedly was correct) that the members of the encampment did not have authorisation to set up the encampment.

171. There is a difference of view as between the University's witnesses on the one hand and the 1st and 2nd Defendants on the other as to how serious the criminal damage to the University's property was. I assume in the Defendants' favour that it was limited to the not very serious act of cutting the chain which secured the gates and that the damage was not done by student of the encampment. However, in my judgment there is no real prospect of its being established that the University was unreasonable in taking the view that the damage was serious.

172. In relation to public disorder, I assume in the Defendants' favour that the Defendants' evidence is accurate to the broad effect that it was not the protesting students who were disorderly or who cut the chain. However, the encampment undoubtedly was a focal point and cause for the participation in the 15 May rally or protest by persons other than encampment members and that at least those other persons were disorderly. In my judgment there was no real prospect of establishing otherwise than that the University was reasonable in forming the view that cutting a chain off a gate adjoining a highway and the invasion of the University's property by a crowd of persons potentially amounted to a public order offence.

173. In relation to health and safety, the University was obliged to consider health and safety on its campus. I assume in favour of the Defendants that the members of the encampment took health and safety seriously and had made their own health and safety arrangements as set out in more detail above. However, the encampment undoubtedly restricted the ability of the University to make what it perceived to be its

own necessary health and safety assessments of and arising out of the encampment. In my judgment there is no real prospect of establishing otherwise but that the University was reasonable in forming the view that health and safety concerns were an important reason for attempting to cause the encampment to disperse and for bringing possession proceedings.

174. There is no evidence that, in relation to its decision of 3 June, the University considered all the possible nuances of the encampments members' rights to freedom of speech or their rights under the Equality Act or the ECHR. However, in my view all those rights are substantially covered by the Code and there is no real prospect of its being established that in deciding to enforce its property rights, any failure by the University adequately to consider the encampment members' rights made the decision unlawful at common law. I follow Johnson J's case, *SOAS v Persons Unknown* [2010] EWHC 3977 (Ch) and *Appleby v United Kingdom* (2003) 37 EHRR 38.

175. Complaint was made that the University had not given the encampment members an opportunity to make a case to the University for the establishment and maintenance of the encampment. In my judgment, having regard (i) to the encampment members' failure to request permission under the Code or otherwise; (ii) to what the University reasonably perceived to be the circumstances and risks arising from the encampment and (iii) to the urgency of the situation, the University acted reasonably in making its decision of about 3 June without giving the members of the encampment an opportunity to make a case to the University for the establishment and maintenance of the encampment.

176. Further, the University did not attempt to evict the encampment members without a court order. The encampment members had the opportunity to make such a case as they could against the making of a possession order at the hearing of the application for the possession order.

177. The 1st and 2nd Defendants suggested that the University was motivated by its dislike of their cause or by third parties. There was no real evidence to support that suggestion. The students' allegations as to the implementation of the University's investment policy and its association with Israeli universities if established would lend some slight support to the first part of that suggestion, but the link between any of the alleged activities of the University which indirectly supported Israel's conduct in Gaza and the suggestion that consideration of those activities influenced the University are so remote as not to give rise to a real possibility of such an influence being established. The 1st and 2nd Defendants referred to Professor Bailey having attended a meeting at 10 Downing Street. However, there is no evidence that pressure or undue pressure was put on the University at that meeting or otherwise.

178. Accordingly in my judgment there is no real prospect of the University's decision of about 3 June being successfully challenged on public law grounds. Further, even if there was, that decision, like the earlier decisions, was overtaken by a later decision. Specifically, the decision of the University's Gold committee on 28 June not to grant retrospective permission to the encampment students to hold or to continue to hold the encampment. This was the third possibly relevant decision of the University.

179. On 28 June the University's Gold Committee met to consider the retrospective application for permission. On this occasion the Gold Committee comprised:
    179.1. Professor Bailey.
    179.2. Dr Ellis.
    179.3. Jonathan Morgan (Chief Governance Officer and University Secretary).
    179.4. Ms Leggett.
    179.5. Louise Lester (Director of Human Resources).
    179.6. Sarah Morgan (Chief of Staff).

180. It is material that the Gold Committee included Professor Bailey because under section 6.2 of the Code responsibility for the interpretation and implementation of the Code was delegated to him. The members present did not include the Director of Estates and Facilities who, under section 6.6 of the Code prima facie was the "Designated Officer" in respect of events such as the encampment and protests or rallies from whom authority might be sought. However, (i) the 1st and 2nd Defendants complained about there being no process for a request by them for organisation, so they could scarcely complain about a decision being made by a body other than the Designated Officer and (ii) implementation of the Code could be effected by Professor Bailey.

181. An email contains a note of the meeting of 28 June prepared by Thomas Shaw (Legal Counsel) which Dr Ellis treats as accurate and which I have no reason to think is otherwise than accurate. From this note it appears that the concluding resolution of this meeting was to reject the retrospective application for permission.

182. It is implicit from the continuation of the possession proceedings after that decision of the Gold Committee that the University also decided to continue to pursue or at least not to discontinue the possession claim. There was no evidence about any such decisions except for what was apparent from the settling of the claim with the 1st and 2nd Defendants and the continued pursuit of a possession order by the University before me on 10 July. I did not and do not see the lack of such evidence as being a relevant gap in the University's evidence. That is because by the time of the Gold Committee decision on 28 June the University's possession proceedings were already on foot and were progressing towards the hearing on 10 July. For the reasons set out above, the University clearly had an unanswerable case to a possession order, subject only to the public law, ECHR and other non-property law points which had been raised. For the reasons I give below, in my judgment the 28 June Gold Committee decision disposed of all the non-property law points, with the consequence that having made the 28 June decision, there was no need for the University to make any further decision about whether or not to continue the proceedings, it could simply allow them to continue which, except for agreeing the settlement with the 1st and 2nd Defendants, it did.

183. Mr Shaw's email note of the Gold Committee meeting of 28 June records, amongst other things, that:
    183.1. The meeting noted the broader context of the issues, including: the deeply held, divergent, and genuine views held by some students, staff and members of the wider community relating to the Gaza conflict; the importance of freedom of expression; the University's obligations re the same; the Code; the engagement with the encampment representatives on 20 and 27 June;

the complexity of the issues and the importance of balancing the needs and rights of all members of the University community.

183.2. The matters considered or relied upon were:

183.2.1. Criminal damage to the University's property arising from the 15 May rally.

183.2.2. That the encampment had become a focal point for numerous uncontrollable activities, whether initiated by the encampment, against the encampment, or by third parties supporting the encampment. Examples given were:

183.2.2.1. Distribution of staff and student "wanted" posters.

183.2.2.2. The intimidation of Queen Mary security staff.

183.2.2.3. The incident of 21 May which, at the time, was still under investigation by the University.

183.2.2.4. Disruption of University events such as the sustainability conference at the Bio Innovation Centre.

183.2.2.5. Actions taken during the Open Day, contrary to what had been agreed.

183.2.2.6. The encampment's creation of its own security team independent of the University's oversight.

183.2.2.7. Claims by encampment members widely distributed on social media that there will be "*no business as usual*" at the University.

183.2.3. The encampment's location had caused, and would continue to cause, considerable disruption (e.g. open days, graduation events, commercial bookings and disabled access).

183.2.4. The encampment has "also variously:" not followed or circumvented standard University procedures for undertaking events or organising speakers on campus, the University being required by law to have such policies; and, except once, not availed themselves of alternative authorisation channels offered directly to encampment members.

183.2.5. The University often found out about proposed rallies via social media.

183.2.6. The encampment asserted a right to hold activities on the University's grounds without University permission.

183.2.7. The encampment asserted a right to undertake activities on University premises without University authorisation.

183.2.8. The encampment had broadly not coordinated with the University on health and safety, which impacted on the University's ability to meet its own requirements. This included: not accepting help when ambulances were called; not providing the encampment's risk assessment; and continuing to climb on fence pillars after having been asked not to.

183.2.9. The encampment had caused sustained risk and uncertainty outside of University tolerance.

183.2.10. The University had had to incur considerable expense; additional security staff and processes; replanning, altering or cancelling events (Festival of Communities, Open Days and Graduation); not offering the People's Palace for commercial hire; and reallocation of staff time.

183.2.11. The nature of the above matters meant that they could not be sufficiently mitigated regardless of the encampment's location.

183.2.12. Moving the encampment would cause additional location-specific issues. For instance if the encampment were closer to the summer

school activities in the northeast residential areas of the campus, there would be additional safeguarding concerns and disruption to residents after the summer period; there were several construction sites on campus; areas of the campus from Graduate square through Geography and Library squares, to the residential areas on the west of campus were required to be free for emergency ingress and egress.

184. Consequently, records Mr Shaw's email: "it was resolved to reject the retrospective application."

185. The fact of or nature of several of the matters considered or relied upon were disputed by the 1st and 2nd Defendants and in correspondence. Specifically:

185.1. The criminal damage which involved the cutting of a lock off the gates on 15 May was said not to have been the work of any of the students on or from the encampment.
185.2. There is an issue as to whether any intimidation of Queen Mary security staff took place and, if so who by.
185.3. Whether the students on the encampment were at fault in respect of the incident of 21 May.
185.4. The extent, if any of the disruption of the sustainability conference at the Bio Innovation Centre.
185.5. Whether actions were taken during the Open Day, contrary to what had been agreed.
185.6. Whether and if so to what extent the encampment's location had caused, and would continue to cause, considerable disruption to open days, graduation events, commercial bookings and disabled access.
185.7. Whether there was non-acceptance of help when ambulances were called and if so whether it was justified.
185.8. Whether the incurring by the University of considerable expense; additional security staff and processes was necessary or reasonable.

186. I have assumed against the University that there was a real prospect that the University was incorrect or mistaken on all those points. However, the Gold Committee was not attempting to resolve those issues as if at a trial. In my judgment the Gold Committee's view of those things was not such that there is a real prospect of successfully establishing that its perception of them was such that no reasonable Gold Committee could have formed the views that they did or that, in forming the views which it did, the Gold Committee took into account things which it ought not to have done, or failed to take into account things which it ought to have done. I repeat that the Gold Committee was not trying the issues. It would have been disproportionate for it to have attempted to have done so. It was, as Mr Shaw's email records, attempting to balance the needs and rights of all members of the University community. That was a decision for it, as also was the route by which it came to that decision, provided that the route chosen was a reasonable one, which, in my judgment it so clearly was, that there was no real prospect of the contrary being established.

187. Foster & Foster's 3 June letter referred to Articles 9, 10, 11 and 14 ECHR. It was submitted in that letter that the fact that the University was threatening the encampment and asking the protesters to disperse was a breach of Article 10. In the 3 June letter it

was submitted that the request to disperse was not a proportionate or necessary response to the encampment. It was submitted that the students' encampment was exercising the right to peaceful assembly under Article 11 and that the University by taking a unilateral and unqualified stance of simply asking the encampment to be dispersed was in breach of Article 11. Under Article 14 it was said that the students' position was that they were "being treated less favourably compared to some other Students" and were being unfairly discriminated against.

188. The University may or may not be a public authority, and may or may not have been exercising public functions when it acted or made decisions in relation to the encampment. I do not make any finding on those points, but I have assumed for the purposes of my decision that the University was exercising public functions when it acted or made decisions in relation to the encampment.

189. It is unlawful for a public authority to act in a way which is incompatible with an ECHR right: section 6(1) of the Human Rights Act 1998.

190. The rights and freedoms set out in Articles 9, 10 and 11 ECHR are each ECHR rights: section 1(1)(a) of the 1998 Act.

191. Article 9 provides that everyone has the right to manifest their beliefs. Article 10 provides that everyone has the right to freedom of expression. Article 11 provides that everyone has the right to freedom of assembly and to freedom of association with others. In each case the right is qualified. Conduct of a public authority that interferes with the right may be justified if the conduct is (a) prescribed by law and (b) necessary for the protection of the rights of others: article 9(2), 10(2), article 11(2).

192. In my judgment the Gold Committee's decision of 28 June and the decision to seek a possession order (see below), as with the making of a summary possession order as discussed above, did not amount to unjustified interferences with the encampment members' rights under articles 9, 10 or 11.

193. My analysis and conclusions in the context of the Gold Committee's decision are essentially the same and for essentially the same reasons as those explained by me above in relation to the making of the possession order. Looking at the first qualification to the article 9, 10 and 11 rights of "prescribed by law": The University is the registered proprietor of the land in question. On the footing that the Gold Committee's decision did not amount to unlawful discrimination, a breach of the public sector equality duty or a breach of section 43 of the 1986 Act, as to all of which, see below, the decision was not unlawful. The University's entitlement to possession and the measure of seeking to evict the encampment members and recover possession of its land by obtaining a summary possession order pursuant to Part 55 of the Civil Procedure Rules was prescribed by law.

194. Looking at the second qualification to the article 9, 10 and 11 rights of "Necessary for the protection of the rights of others": The decision of 27 June not to grant retrospective authority for the encampment and the decision to seek a possession order were made for the purpose of protecting the University's right to possession of its own land, to the exclusion of others. The underlying purpose, therefore, was "the protection of the rights of others" than the encampment members.

195. Sufficient importance: as above, the law gives strong protection to the right of a land-owner to possess its own land which is a right "of real weight when it comes to proportionality" which has been consistently recognised as being of sufficient importance to justify interference with the qualified Convention rights of students who are seeking to trespass on university premises.

196. Rational connection: as above, there is a direct connection between the measure and the University's objective to secure possession of its land.

197. Less intrusive measure: as above, there may have been other measures that could have achieved the same objective, but there is no measure that would have been less intrusive of the encampment members' rights that could have achieved the legitimate aim of restoring the land to the University.

198. Balance: as above, it is not for a court to tell anyone how they should exercise their article 9, 10 and 11 rights. Weight should be attached to the defendants' autonomous choices as to the way in which they wish to manifest their beliefs, or assemble together or express their opinions. The encampment students have advanced reasons as to why they chose to exercise their rights by means of a camp on the lawn. There were, however, many other ways in which the encampment members could have exercised their ECHR rights without usurping to themselves land that belonged to the University albeit, that in their view other ways would not have been as effective.

199. To repeat what I have said above in the context of the court's decision: the University showed that it was anxious to ensure that its students were able to exercise their ECHR rights. It had adopted the Code which achieved that end. The students decided not to follow the Code, and not to engage with the University, when they started the encampment. No good reason was given for that decision. The encampment members were trespassers. I have assumed that their rights under articles 9, 10 and 11 of the Convention were engaged, but their conduct in establishing and maintaining the encampment was "not at the core of [those] freedom[s]". The weight that is to be given to those rights was significantly attenuated by reason of each of those contextual factors.

200. As against that, again as above, the University's right to possession of its own land is of real weight.

201. For those reasons, the severity of the impact on the encampment students' rights did not (by a significant margin) come anywhere close to outweighing the importance of the objective of the University being able to regain possession of its own land. This was a conclusion that could comfortably and confidently be reached on a summary application.

202. I have considered Article 14 above and my analysis and conclusions in relation to it as there set out apply equally in the present context.

203. It follows that the encampment students did not have a real prospect of establishing that a possession order would amount to an unlawful interference with their ECHR rights. They therefore had no real prospect of successfully defending the claim on that basis.

204. Foster & Foster's 3 June letter referred to the Equality Act 2010; s.43 Education Act (No.2) 1986; and the Higher Education and Research Act 2017. The analysis under

these Acts can to some extent be shortened because the relevant parts of them are all taken account of or incorporated into the Code and, provided that the University has complied with its obligations under the Code, it would have complied with its obligations under these Acts.

205. Foster & Foster alleged that the University was in breach of the Code by refusing to say that it would not take disciplinary action against students who were participating in the encampment or otherwise supporting it. Foster & Foster argued that the University was in breach because the threat of disciplinary action prevented or discouraged the encampment students from exercising the academic freedom and free speech which the Acts and the Code encourages and protects. In my judgment, those arguments were irrelevant to the question of possession of the campus and were not a bar to the making of a possession order.

206. The University's decisions in relation to possession of the campus did have the effect of barring one way in which the students might choose to exercise their academic freedom and freedom of speech, but as with the ECHR rights discussed above, the academic freedom and free speech mentioned in the Code were not absolute; the right to enjoy them was subject to the terms of the Code. The University took those freedoms into account and gave effect to the Code when it made its decision of 28 June not to authorise the encampment and, implicitly, to continue the possession proceedings. The creation and maintenance of the encampment was only one of many ways in which the students could enjoy their academic freedom and freedom of speech. The decisions not to authorise the encampment; to take possession proceedings and to obtain a possession order did not interfere in any substantial way with those freedoms.

207. Yet further, the point about the University refusing to say that it would not take disciplinary action against students who were participating in the encampment or otherwise supporting it, if it ever had any force, fell away to a large extent because by a recital to the consent order against the 1st and 2nd Defendants of 10 July the University confirmed that, in relation to the involvement in setting up the encampment and/or remaining in the encampment having been instructed by the University to disperse, (i) there would be no disciplinary action against any student who was graduating this summer and (ii) any disciplinary action against any student who had no previous disciplinary history would result in a maximum sanction of a warning and/or restrictions on use of the campus the consequences of such outcomes to be in line with the University's ordinary policies, processes, and procedures.

208. Foster & Foster's 3 June letter alleged that the University was in breach of an "Ethical Partnerships policy" which stated that the University was committed to operating ethically across the full range of its activities, thereby safeguarding its reputation as well as that of the higher education sector. In the letter it was submitted that pursuant to that policy, the University should support "the aims and objectives of the student encampment which actively promotes peace in Israel's war on Gaza" and that "the University is acting unlawfully as it is not complying with this policy and working with organisations whose conduct is clearly unethical and in breach of humanitarian law" (quotes from the letter). Reasonable individuals may have different views as to what is and what is not ethical. It is not necessary for me to attempt to decide whether or not the University was or was not acting ethically. Even if it was not, these allegations are one stage removed from the

questions of whether the protesters were or are trespassers and of whether the University was acting properly in deciding to take step to end the encampment.

209. There was a speculative suggestion in Foster & Foster's letter of 3 June that the University had had "considerable pressure placed upon it by third parties." There is no evidence before me that it has.

210. The letter alleges breaches by the University of its investment policies. Even if there were such breaches, the existence of such breaches would be one stage removed from whether the University was acting properly in deciding to take steps to end the encampment.

211. By "one stage removed" I mean that the University might be acting in breach of its ethical or investment policies, but the fact or possibility that it is does not go to the lawfulness of the encampment's occupation of the University's property or in substance to the lawfulness of the University's decision to end that occupation. On the last point, if the University's reasons for deciding to end the encampment included the desirability of preventing attention being drawn to the alleged breaches of its policies, then the decisions might be susceptible to public law challenge, but there is no evidence that the University's decisions included any such reasons.

212. Finally, I mention the content of the relatively short statements of Dr Hedi Viterbo, Dr Poulamis Somanya Ganguly and Dr Keren Weitzbergwere and Ms Ruth Fletcher which were filed on behalf of the 1st and 2nd Defendants:

212.1. Dr Viterbo is a Jewish-Israeli Senior Lecturer in law at the University. He says that to the best of his knowledge the encampment does not pose any threat whatsoever to Jews. On the contrary says Dr Viterbo, "many Jewish members of the university strongly support students' right to set up an encampment as part of their freedom of expression." He continues: "Similar views have been publicly expressed by dozens of thousands of Jewish and other staff and students across the country as detailed below." I do not set out that detail. With respect to Dr Viterbo, his support for the students' right to set up an encampment as part of their freedom of expression begs the questions of whether they have such a right and, if so, what the nature of that right might be.

212.2. Dr Ganguly is a member of staff at the University employed as a postdoctoral research assistant at the School of Mathematical Studies. Dr Ganguly says she was present on the Mile End campus on 13 May when the encampment was set up. She participated in that evening's rally. She says the rally was "inspiring and peaceful, and created a truly welcoming space on campus." She describes support from large parts of the local community and the University for the aims of the encampment. She says the students "have been steadfast in their commitment to keeping the university campus a safe and welcoming space for all". She says the University's additional ID checks and extra security, although "ostensibly" to keep the QMUL community safe, in reality "only serve management in increasing surveillance of students and staff, adding to an already existing climate of repression on campus." She gives her "unequivocal support to the encampment". All I need to say about that is that Gr Ganguly's views differ from the reasonable views of the University's Gold Committee.

212.3. Dr Weitzberg describes herself as a Jewish British-Israeli Senior Lecturer in the School of Politics and International Relations at the University. She says that to the best of her knowledge the encampments do not pose any threat whatsoever to Jewish people. Dr Weitzberg refers to an open letter dated 31 May 2024 which was sent by her and other Jewish and/or Israeli members of staff at the University to the University's senior management expressing their solidarity with the activists in the encampment and their demand to bring the University's financial and academic commitments in line with the values of the University. Dr Weitzberg refers to several open letters by Jewish and/or Israeli members of staff across UK universities and by other academics supporting their local student encampments. Dr Weitzberg considers that evicting the encampment would "constitute an unprecedented infringement of freedom of expression within UK higher education." Dr Weitzberg seeks to distinguish and, apparently, to attempt to justify her use of the phrase "unprecedented infringement of freedom of expression" firstly on the ground that "some" of the cases involving encampments at universities of which she was aware at the time of her statement involved students taking over university buildings, which the Queen Mary University encampment did not; and that at some universities there "might have been allegations that students involved in the encampments directly caused harm." That some such cases did involve the students taking over buildings, does not mean that a possession order against those that did not take over buildings would be unprecedented. Firstly, in Johnson J's case the students were encamped on open land. Secondly, there is no difference in principle so far as the law of trespass is concerned, though as I understand Dr Weitzman, she does not challenge that, only saying, in effect that where the trespass was not to buildings, the seeking and making of a possession order would be disproportionate. As regards the doing of harm, Dr Weitzman says that, to the best of her knowledge, the University senior management had not accused the encampment students of causing harm. This depends on what is meant by "harm". Very little physical damage has been caused by the encampment. The inevitable slight damage to the grass from the pitching and use of tents is insignificant. However, the University considered that the encampment was doing harm to the University in other ways.

Overall Conclusion

213. My above analysis and conclusions on the various possible grounds for denying the University summary possession show that there was no real prospect of a defence to the claim for summary possession being successful on any of those grounds. In my judgment there was no other compelling reason why the claim should be disposed of at trial. The order for possession was made accordingly.

DEPUTY MASTER HENDERSON

20th September 2024

Neutral Citation Number: [2024] EWHC 2557 (KB)

Case No: KB-2024-001765

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between:

(1) LONDON CITY AIRPORT LIMITED
(2) DOCKLANDS AVIATION GROUP LIMITED

Claimants

and

PERSONS UNKNOWN WHO, IN CONNECTION WITH THE JUST STOP OIL OR OTHER ENVIRONMENTAL CAMPAIGN, ENTER OCCUPY OR REMAIN (WITHOUT THE CLAIMANTS' CONSENT) UPON THAT AREA OF LAND KNOWN AS LONDON CITY AIRPORT (AS SHOWN FOR IDENTIFICATION EDGED RED ON PLAN 1) BUT EXCLUDING THOSE AREAS OF LAND AS FURTHER DEFINED IN THE CLAIM FORM

Defendants

- -
- -

Yaaser Vanderman (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: **20 June 2024**

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Approved Judgment

This judgment was handed down remotely at 10:30 on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. On 20 June 2024 in the Interim Applications Court I granted the Claimants' without notice application for a precautionary injunction to restrain anticipated protests at London City Airport (the Airport) by environmental campaigners and others falling within the description of the Defendants on the order. The planned action would amount to nuisance and trespass. Having read the evidence in advance of the hearing and after hearing Mr Vanderman on behalf of the Claimants, I was satisfied they were entitled to the order they were seeking. These are my reasons for granting the order.

2. The injunction is the sort of 'newcomer injunction' which have been granted by the courts in protest and other cases in recent years. The evolution of this sort of injunction, and the relevant legal principles, were set out by the Supreme Court in *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2024] 2 WLR 45. I will refer to this as *Wolverhampton Travellers* case.

3. Recent examples of such injunctions are: *Jockey Club Racecourses Ltd v Persons Unknown* [2024] EWHC 1786 (Ch); *Exolum Pipeline System Ltd and others v Persons Unknown* [2024] EWHC 1015 (KB); *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB); *Multiplex Construction Europe Ltd v Persons Unknown* [2024] EWHC 239 (KB); *High Speed 2 (HS2) Limited v Persons Unknown* [2024] EWHC 1277 (KB); and *Wolverhampton City Council v Persons Unknown* [2024] EWHC 2273 (KB). The legal basis for newcomer injunctions, and the principles which guide whether they should be granted in a particular case, are therefore now firmly established.

Without notice

4. The application before me was made without notice. I was satisfied this was appropriate for the following reasons.

5. Ordinarily, the Claimants would be required to demonstrate that there were 'good' (as required by CPR r 25.3(1)) or 'compelling' (Human Rights Act 1998, s 12(2)(b) (if it applies here, which the Claimants say is does not, a point I will return to) reasons for bringing an application without notice. Those requirements do not technically apply here as they only affect applications brought against parties to proceedings. In the present case, which relates only to Persons Unknown who are newcomers, there is no defendant: *Wolverhampton Travellers*, [140]-[143]. Nonetheless, I proceeded on the basis that the relevant tests had to be satisfied.

6. I was and am satisfied that there are good and compelling reasons for the application to have been made without notice.

7. In particular, the Claimants were justifiably concerned about the severe harm that could result if Persons Unknown were to be notified about this application. As I shall describe, there have been repeated serious threats about the scale and

sort of direct action planned, and this will pose a serious risk of physical harm, financially injurious disruption and huge public inconvenience. The damage caused would for the most part be irreparable. There was plainly a risk that would-be protesters would trespass upon the Airport before the application was heard and carry out the threatened direct action, thus partially defeating the purpose of the junction.

8. I carefully considered the Convention rights of the Defendants. However, the Airport is private land, and for the reasons I explained in *High Speed Two (HS2) Limited v Persons Unknown* [2022] EWHC 2360 (KB), [131], these Convention rights are not therefore engaged. Persons unknown have no right to enter the Airport (save for lawful and permitted purposes) or to protest there. The position is therefore different from injunctions or laws restricting assembly and protest on the highway or public land, where the Convention is engaged: cf. *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505; *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB).

Background

9. The application was brought by the Claimants on the basis of their belief that the Defendants are or were organising and had widely publicised a nationwide campaign of direct action to disrupt airports during the summer of 2024 (the Airports Campaign). The Claimants' application for injunctive relief was to restrain such threatened acts of trespass and nuisance at London City Airport. The whole of the site covered by the injunction is private land. (I should also add that a few weeks after I heard the Claimants' application, I heard an application for, and granted, a similar injunction in respect of Heathrow Airport on much the same basis).

10. The evidence is principally contained in the witness statements of Alison FitzGerald, the CEO of London City Airport and a director of each of the First and Second Claimants, and Stuart Wortley, of the Claimants' solicitors, and their exhibits.

11. Just Stop Oil is one of a number of groups which is recent years have become prominent for staging public protests. Each of these organisations shares a common objective of reducing the rate of climate change and each of them has used acts of civil disobedience to draw attention to the climate crisis and the particular objectives of their organisation.

12. Just Stop Oil's website refers to itself as:

> "a non-violent civil resistance group demanding the UK Government stop licensing all new oil, gas and coal projects."

13. In his witness statement at [32]-[41], under the heading 'Just Stop Oil – 2024 Threat to Disrupt Airports' Mr Wortley describes how in spring 2024 Just Stop Oil announced a nationwide summer campaign targeting airports in order to 'put the spotlight on the heaviest users of fossil fuels and call everyone into action with us'. At [32] he said this:

“32. The on-line edition of The Daily Mail for 9 March 2024 included a story about an undercover journalist who had successfully infiltrated a JSO meeting in Birmingham earlier that week. Apparently the meeting had been attended by over 100 activists. The following text is an extract from that story:-

“At the meeting, which was attended by an undercover reporter, JSO co-founder Indigo Rumbelow was greeted by cheers as she told the audience:

> 'We are going to continue to resist. We're going to ratchet it up.
> '
> We're going to take our non-violent, peaceful demonstrations to the centre of the carbon economy. We're going to be gathering at airports across the UK.'

Ms Rumbelow, the 29-year-old daughter of a property developer, has previously been arrested for conspiracy to cause public nuisance during the King's Coronation and made headlines last year when Sky News host Mark Austin had to beg her to 'please stop shouting' during an interview.

Outlining a blueprint for causing travel chaos, she advocated:

● Cutting through fences and gluing themselves to runway tarmac;

● Cycling in circles on runways;

● Climbing on to planes to prevent them from taking off;

● Staging sit-ins at terminals 'day after day' to stop passengers getting inside airports.

Miss Rumbelow told the crowd:

> 'We're going to be saying to the Government: 'If you're not going to stop the oil, we're going to be doing it for you.’

> She cited similar protests to use as inspiration for their action, including Hong Kong students 'gathering in sit-ins in the entrances to airports, closing and disrupting them, day after day' during their protests against Chinese rule in 2019."

14. At [35] he referred to an article in the *Evening Standard*:

> "35. The Evening Standard article referred to another meeting (also attended by an undercover journalist) and which included the following text:-
>
> "… Just Stop Oil's Phoebe Plummer reportedly warned of 'disruption on a scale that has never been seen before' at a meeting attended by an undercover journalist. The group has been critical of the airline industry over its carbon footprint.
>
> She said: 'The most exciting part of this plan is that [it's] going to be part of an international effort. Flights operate on such a tight schedule to control air traffic that with action being caused in cities all around the world we're talking about radical, unignorable disruption.'
>
> She added: 'It's time to wake up and get real – no summer holiday is more important than food security, housing and the lives of your loved ones. Flying is also a symbol of the gross wealth inequality that's plaguing our society and if we want to create change we need to adopt a more radical demand.'
>
> Just Stop Oil is planning an alliance with Europe-based A22 Network to cause disruption at major international airports."

15. Other evidence cited by Mr Wortley is published material from Just Stop Oil stating that:

    a. "We need bold, un-ignorable action that confronts the fossil fuel elites. We refuse to comply with a system which is killing millions around the world, and that's why we have declared airports a site of nonviolent civil resistance."

    b. "We'll work in teams of between 10-14 people willing to risk arrest from all over the UK. We need to be a minimum of 200 people to make this happen, but we'll be prepared to scale in size as our numbers increase."

    c. "Our plan can send shockwaves around the world and finish oil and gas. But we need each other to make it happen. Are you ready to join the team?"

d. "We're going so big that we can't even tell you the full plan, but know this — Just Stop Oil will be taking our most radical action yet this summer. We'll be taking action at sites of key importance to the fossil fuel industry; super-polluting airports."

e. "This summer's actions across multiple countries will go down in history.

16. At [41] he quotes an email sent by Just Stop Oil to supporters:

> "On 6 June 2024, JSO sent an email to subscribers in the following terms:-
>
> "This is the most exciting email I've ever sent. As many of you already know, this summer Just Stop Oil is taking action at airports.
>
> That's exciting right? Well, there's more.
>
> We won't be taking action alone.
>
> Resistance groups across several countries in Europe have agreed to work together. That means this summer's actions will be internationally Coordinated."

17. I was shown, and also read, evidence about earlier disruptive protests at London City Airport. In 2019 Extinction Rebellion carried out similar direct action at the airport, namely:

a. A large group of individuals blocked the main entrance to the Airport.

b. A large group of individuals occupied the DLR station adjoining the Airport.

c. One individual climbed onto the top of an aircraft and glued himself onto it.

d. One individual boarded a flight and refused to take his seat.

18. In her witness statement at [28] Ms Fitzgerald explains that there are:

> "28. … a number of unusual features of London City Airport which make it an obvious target for protestors including environmental protestors. These include the following:-
>
> 28.1. the airport is close to the centre of London (and therefore easily accessible);
>
> 28.2. the runway is immediately adjacent to (and accessible directly from) Royal Albert Dock and King George V Dock;

28.3. the distance between the Main Terminal Building and the runway is short; and

28.4. there are no physical barriers between the Main Terminal Building and the aircraft stands (such as air-bridges which most airports use and which provide an useful means of preventing trespass by protestors).

29. Given that we do not have air bridges, all passenger movements between the terminal building and the aircraft stands (which involve crossing the access road which is used by multiple vehicles which service the airport) are carefully supervised by our ground-staff."

19. Also in relation to Extinction Rebellion, on 2 June 2024, environmental activists blocked access to Farnborough Airport. It was reported that more than 100 individuals took part and several were arrested.

20. As Mr Wortley describes at [25]-[31], this actual and intimated campaign of nationwide direct action has echoes of the direct action taken against the energy sector in spring 2022, which resulted in substantial disruption and hundreds of arrests.

21. In short, I was and am satisfied on the evidence that there is and was evidence of a genuine threat to the Airport's operations by environmental protesters.

22. I turn to the nature of that threat.

Risk of harm

23. In this case the risk of harm is not just to the Airport and passengers by virtue of the planned disruption. There is also a direct risk of harm to the protesters and others.

24. The risks of harm posed by the Airports Campaign are significant and are set out by Ms FitzGerald in her statement at [27]-[32] and [36]. In particular, there are the health and safety risks of untrained and unsupervised trespassers carrying out direct action on a taxiway and runway. These risks affect not just the trespassers themselves, but also airport and airline staff as well as the emergency services.

25. The risks include serious injury and even death arising from:

    a. Coming too close to a jet engine (a person coming too close to an operating engine can be sucked in and killed).

    b. People being struck by landing, departing or other aircraft as well as those aircraft having to take evasive action in order to avoid injuring trespassers.

    c. Being struck by other vehicles travelling between the terminal building and aircraft stands as well as those vehicles having to take evasive action to avoid injuring trespassers.

d. Falling from a height if trespassers climb on top of aircraft or onto the roofs of buildings and have to be removed.

The Site

26. Plan A in the bundle shows the land owned/leased by the Claimants. The Claimants between them hold the freehold or leasehold title to the land shown on the Plan. There is a tenancy at will on one parcel of land.

27. Plan 1 and Plans 2-8 in the bundle shows the extent of the land sought to be covered by the injunction, and the areas excluded. As I have said, all of the affected land is private land.

Legal principles

28. I recently reviewed some of the relevant case law in this area in my judgment in *Wolverhampton City Council v Persons Unknown* [2024] EWHC 2273 (KB), to which the reader is referred.

Precautionary relief

29. The test for precautionary relief of the type sought by the Claimants is whether there is an imminent and real risk of harm: *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [34(1)] (Court of Appeal) and the first instance decision of Morgan J: [2017] EWHC 2945 (Ch), [88]. See also *High Speed Two (HS2) Limited*, [99]-[101]. 'Imminent' in this context simply means 'not premature': *Hooper v Rogers* [1975] Ch 43, 49. I was satisfied that this application were not premature and that, for the reasons I have gave earlier, there is more than a real risk of harm.

'Newcomer' or 'Persons Unknown' injunctions

30. As I explained earlier, the law in relation to this type of injunction was set out by the Supreme Court in *Wolverhampton Travellers.* In *Valero*, [58], and *Multiplex,* [11], Ritchie J set out a list of factors to be satisfied in the protest context (albeit in the former case the context of a summary judgment application).

31. As Mr Vanderman pointed out in his Skeleton Argument, [22], the present application is for injunctive relief against pure trespassers on private land. It is, therefore, unlike, for example, *Wolverhampton Travellers*, which involved injunctive relief sought by local authorities against Travellers (in respect of whom they have statutory duties) on local authority land; *Valero*, which involved injunctive relief against protesters, on both private and public land, and which therefore materially engaged Article 10 and 11 ECHR rights; and (I might add) the *Abortion Services* case, which concerned protests on public land.

32. Notwithstanding this, many of the *Valero* and *Multiplex* factors are still relevant to this application, which involves Persons Unknown who are newcomers, and I propose to analyse the Claimants' case by reference to them.

Discussion

33. I am satisfied that the *Valero* and *Multiplex* factors are satisfied here for the following reasons. I have italicised the factors.

34. *There must be a civil cause of action identified*: here, the causes of action are nuisance and trespass. In relation to trespass, Persons Unknown are threatening, by the Airports Campaign, to carry out the commission of intentional acts which result in the immediate and direct entry onto land in the possession of another without consent. All that needs to be shown is that the Claimants have a better right to possession than the Defendants: *High Speed 2* (*HS2) Ltd*, [77]. That is plainly the case here. In addition, Persons Unknown have no licence to enter the Land for the purpose of carrying out protest or direct action.

35. To make this clear, the Claimants have published a notice on its website confirming this. In addition, such conduct is prohibited under Byelaw 3(12) of the London City Airport Byelaws 1988 (made under *inter alia* s 63 of the Airports Act 1986 and s 37 of the Criminal Justice Act 1982). This makes it a criminal offence 'to enter or remain at London City Airport for the purpose of carrying out a protest or taking part in any demonstration, procession or public assembly'. The same notice has also been affixed at various locations around the Airport: see Ms FitzGerald, witness statement, [17].

36. In relation to nuisance, Persons Unknown are also threatening undue and substantial interference with the Claimants' enjoyment of their land, amounting to a private nuisance.

37. *Sufficient evidence to prove the claim*: I am satisfied that there is sufficient evidence to prove the claims as set out above. There is more than a 'serious issue to be tried'. It is overwhelmingly certain that the Claimants would prevail at trial.

38. *Whether there is a realistic defence to the claims*: I do not consider that there is or can be a realistic defence to the claims. As explained earlier, I do not consider that the Convention has any application in case.

39. *The balance of convenience and compelling justification*: in *Multiplex*, [15], Ritchie J said:

> "It is necessary for the Court to find, in relation to a final injunction, something higher than the balance of convenience, but because I am not dealing with the final injunction, I am dealing with an interlocutory injunction against PUs, the normal test applies. Even if a higher test applied at this interlocutory stage, I would have found that there is compelling justification for granting the *ex parte* interlocutory injunction, because of the substantial risk of grave injury or death caused not only to the perpetrators of high climbing on cranes and other high buildings on the Site, but also to the workers, security staff

> and emergency services who have to deal with people who do that and to the public if explorers fall off the high buildings or cranes."

40. In the case before me, there is more than a real risk of grave injury and death, as I explained earlier.

41. *Whether damages are an adequate remedy*: this criterion is plainly not applicable in the present case, where Claimants seek to restrain conduct which has caused and is capable of causing considerable non-pecuniary harm to many people.

42. *Procedural requirements relating to the conduct*: these are, principally, that: (a) the persons unknown must be clearly identified by reference to the tortious conduct to be prohibited; and (b) there must be clearly defined geographical boundaries. I am satisfied that these requirements have been fulfilled.

43. *The terms of the injunction must be clear*: the prohibited conduct must not be framed in technical or legal language. In other words, what is being prohibited must be clear to the reader. I am satisfied this requirement is made out. The prohibitions have been set out in clear words.

44. *The prohibitions must match the pleaded claim(s)*: I am satisfied that this requirement has been fulfilled.

45. *Temporal limits/duration*: the injunction is time limited to five years and provision is made for annual reviews. Furthermore, there is always the right of any person affected to come to court at any time to seek a variation or discharge of the injunction: *High Speed 2* (*HS2) Limited v Persons Unknown* [2024] EWHC 1277 (KB), [58]-[59]. As the claim is being brought against Persons Unknown only, no return date hearing or final hearing is required.

46. *Service of the order*: this is an especially important condition. I am satisfied that the service provisions contained in the order will be sufficient to bring the injunction to the attention of the public.

Other matters requiring consideration

47. Cross-undertaking in damages: the order contains an appropriate cross-undertaking.

48. As some of what the order prohibits is criminal by virtue of the Airport's Byelaws (see above) I considered whether the injunction was necessary. In *Wolverhampton Travellers,* [216]-[217], the Supreme Court said that if byelaws are available to control the behaviour complained of then consideration must be given to them as a relevant means of control in place of an injunction.

49. I was and am satisfied that the existence of byelaws is not a sufficient means of control and that an injunction is necessary. They were not sufficient to stop the Extinction Rebellion protests at the Airport in 2019, described earlier. Although

handed down after the hearing in this case, I would also adopt my reasoning in *Wolverhampton City Council,* [35]-[43], on when it is appropriate to grant an injunction in support of the criminal law. I am satisfied the relevant tests are satisfied here.

50. In his Skeleton Argument at [26] in accordance with his duty of full and frank disclosure, Mr Vanderman set out some arguments that could be made against their application for an injunction.

51. Firstly, he said it could be argued that there is no justification for this application to have been made without notifying Persons Unknown. I addressed this earlier.

52. Second, he said it could be argued that there has been no direct threat against the Airport in particular, such that a precautionary injunction ought not to be granted. In other words, that there is not a sufficiently imminent risk. For the reasons set out above, I was satisfied there was the necessary imminence. It is not necessary to wait for the necessary harm to have occurred before applying for injunctive relief.

Conclusions

53. It was for the substance of these reasons I granted the injunction.

Neutral Citation Number: [2024] EWHC 2895 (Ch)

Case No: PT-2024-000893

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 25 November 2024

Before:
Mr Justice Thompsell

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

Between:

THE UNIVERSITY OF LONDON — **Claimant**

- and -

(1) ABEL HARVIE-CLARK
(2) TARA MANN
(3) HAYA ADAM
(4) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, ENTER OR REMAIN WITHOUT THE CONSENT OF THE CLAIMANT UPON ANY PART OF THE LAND (DEFINED IN SCHEDULE 1)
(5) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, OBSTRUCT OR OTHERWISE INTERFERE WITH ACCESS TO AND FROM ANY PART OF THE LAND (DEFINED IN SCHEDULE 1)
(6) PERSONS UNKNOWN WHO, IN CONNECTION WITH BOYCOTT, DIVESTMENT, AND SANCTIONS PROTESTS BY THE 'SOAS LIBERATED ZONE FOR GAZA' AND/OR 'DEMOCRATISE EDUCATION' MOVEMENTS, ERECT ANY TENT OR OTHER STRUCTURE, WHETHER PERMANENT OR TEMPORARY, ON ANY PART OF THE LAND (DEFINED IN SCHEDULE 1) — **Defendants**

Mr Kester Lees KC and Miss Taylor Briggs (instructed by **Pinsent Masons LLP**) for the **Claimants**
The First, Second and Third Defendants appeared **in person** at the hearing

Hearing dates: 29 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mr Justice Thompsell:

Introduction

1. This case concerns an application made by the Claimant, the University of London, by means of a Claim Form dated 14 October 2024. The application is for an interim precautionary injunction to restrain threatened ongoing acts of trespass on certain land owned by the Claimant and identified on the Claim Form.

2. The Defendants to this claim are three identified persons and three categories of persons unknown. The Defendants were given notice of the claim by means of various forms of alternative service ordered by Adam Johnson J through his order of 16 October 2024.

3. The Claimant is seeking this order because of a history of protest action taking place on its land and because there are threats that this will continue. The protests in question have been taking place firstly under the slogan "Boycott, Divestment and Sanctions" to protest against alleged involvement by the School of Oriental and African Studies ("**SOAS**") in making investments, and having other links that are said to support the State of Israel in its military operations in Gaza and secondly under the slogan "Democratise Education" to protest against the treatment of students who have taken up this stance and have faced disciplinary action by SOAS.

4. Whilst these protests are against SOAS, and SOAS is a different legal entity to the Claimant, the protests have in very large part taken place on the Claimant's land and the Claimant has, in my view, a well-founded belief that further protests may take place on its land.

5. This is the second occasion on which the Claimant has sought an order in relation to this series of protests. In response to original protest action, the Claimant obtained a Possession Order dated 2 August 2024 against the three named Defendants in the present action and another named Defendant as well as Persons Unknown for possession of a certain part of its land. This was in response to the establishment by the protesters of an encampment on this land (the "**Original Encampment**") and, because the Claimant has witness evidence that, while the Original Encampment was *in situ*, there were various instances of criminal damage and other anti-social behaviour. Some of this account is challenged by the named Defendants but they have not put any evidence before the court to substantiate this challenge. The Possession Order dealt with the land on which the encampment had been situated, and an adjacent plot of land also in the ownership of the Claimant.

6. In response to the Possession Order, the protesters vacated the land that was subject to the Order, but some or all of them relocated and established a second encampment on other land owned by the Claimant that was not the subject of the Possession Order.

7. Following use by the Claimant of enforcement agents, the protesters dispersed from the second encampment but then immediately move to a third encampment on nearby land owned by the local authority, Camden.

8. Since then, the protesters have used their encampment at Camden as a base from which they have conducted further protests on the Claimant's land which the Claimant says are trespasses as no permission was given for them.

9. The Claimant avers that it is not seeking to prevent protests being carried out on its land. It supports the principle of free speech. It has adopted a Code, alongside Visitor Regulations that allow for planned protests to take part on its land. What it objects to is uncontrolled protests that take a form that is intended to, or at least, has had, and is likely to have again, the effect of disrupting the users of the site at which the Claimant's land is located, and which give rise to health and safety and security concerns.

Representation and Evidence

10. At this hearing the Claimant was represented by Mr Kester Lees KC and Miss Taylor Briggs of counsel.

11. The three named Defendants each appeared representing themselves.

12. Before this hearing I had the opportunity to review a Skeleton Argument, Hearing Bundle, and Bundle of Authorities prepared by the Claimant. I did not receive any Skeleton Argument or evidence on behalf of the Defendants or any of them.

13. The Hearing Bundle included a witness statement of Mr Alistair Jarvis, who is the Pro-Vice-Chancellor (Partnerships and Governance) of the Claimant University and (with his express permission) another witness statement by him which was used in connection with the earlier hearing. I was also provided with witness statements from Mr Connor Merrifield, a solicitor representing the Claimant, which exhibits updated evidence of the protests and evidence of service being properly made.

14. As well as seeing evidence in the form of witness statements to this effect, I have seen photographs, screenshots and videos which provide an idea of the sense of scale of the protests and of the determination of the protest organisers that the protests should continue.

The Order sought

15. The claim this time around is for an interim precautionary injunction forbidding the Defendants from undertaking any or all of the following activities:

    a. entering onto any part of the Land for the purpose of protesting thereon without first complying with the terms of the Code and the Visitor Regulations, specifically:

        i) by notifying one of the Appointed Officers immediately if they consider that the Code applies to the planned protest and, thereafter, complying with the procedure laid down therein, and

        ii) by notifying the Claimant's Head of Hospitality and Conferencing Services at least 72 hours in advance of the planned demonstration in accordance with Regulation 15.2, and

iii) by complying with any conditions imposed on any such demonstration by the Claimant pursuant to Regulation 15.2, and

iv) only upon receipt of written confirmation from one of the Appointed Officers that permission for the protest is granted.

b. obstructing or otherwise interfering with access to or from the Land,

c. erecting any tent or other structure, whether permanent or temporary, on any part of the Land,

d. causing, assisting or encouraging any other person to do any act prohibited by sub-paragraphs (a) to (c) above, and

e. continuing any act prohibited by sub-paragraphs (a) to (c) above."

16. The Application is, in part, brought against persons unknown. The Court's jurisdiction to grant injunctions binding on persons unknown (so-called "newcomer" injunctions) has been recently considered, and clarified, by the Supreme Court in *Wolverhampton CC v London Gypsies and Travellers and others* [2024] 2 WLR 45. The Supreme Court recognised (at [167]) that there is 'no immoveable obstacle', whether in terms of jurisdiction or principle, in the way of granting injunctions against "newcomers" on an essentially without notice basis, whether for the purposes of an interim or final injunction.

17. Care is needed in applying principles in this case that in a protest case such as the one before me since, as was noted at [235], the case was considering gypsy and traveller cases, rather than protest cases. However, it is clear that the Supreme Court considered that protest cases may, depending on the circumstances, justify the grant of an injunction against persons unknown, including newcomers and that:

> "any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has banned newcomer Gypsies and Travellers".

18. In *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), Ritchie J, dealing with an application for a final injunction to be granted by way of summary judgment, explained that, following *Wolverhampton*, the guidance previously promulgated by the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (at [82]) remains good law, albeit that some further guiding principles have been added. At [58] of *Valero Energy*, Ritchie J helpfully distilled the guidance promulgated in these cases into a mixture of substantive and procedural requirements (as to which, see below). In *Multiplex Construction Europe Limited v Persons Unknown* [2024] EWHC 239 (KB) Ritchie J considered similar grounds in relation to the grounds for granting a final prohibitory injunction.

19. As is clear from the cases that I have mentioned and from the further judgment of Ritchie J in *High Speed Two (HS2) Ltd v Persons Unknown* [2024] EWHC 1277 (KB), (see at [35]) precautionary injunctions against persons unknown, relating to private land owned or possessed by a claimant, are:

> "different beasts from old fashioned injunctions against known defendants which need to be taken to trial. They do not "hold the ring pending trial". They are an end in themselves for the short or the medium term and may never lead to service of defences from the PUs, whether or not the PUs become crystallised as Defendants."

20. Hence, Ritchie J described (at [40]) a number of principles (enumerated below) as:

> "the requirements for granting and, where necessary, continuing an interim injunction".

21. Given the findings of the Supreme Court in *Wolverhampton* as to the special nature of precautionary injunctions of this type, and the lack of any principled distinction between interim injunctions and final injunctions (as, in effect, both are being made without notice as regards to newcomers), the matters for the court to consider before granting final precautionary injunctions and before granting interim injunctions are for the most part the same or similar.

22. The principles identified by Ritchie J fall into two categories, substantive requirements and procedural requirements and I consider these below.

Substantive Requirements

23. The first requirement is that the Claimant must have cause of action. In this case the cause of action is trespass. The protesters do not have any right to occupy the land. The Claimant allows occupation, including for the purposes of protest, but only subject to its Code and Visitor Regulations. The Defendants challenge this as they had regarded the property as being public land, but this is simply not correct. They also challenge on the basis that the Claimant is singling them out, as it has allowed other demonstrations and the setting up of other temporary structures on the land. If and when this matter goes for final determination, they can provide evidence on this point, and this may be relevant to the balance of convenience as discussed below and perhaps also to the question of breaches to the rights of free speech and of freedom of assembly. However, the court can only go on the evidence before it and on the evidence before it these points are not made out.

24. The second requirement noted by Ritchie J in *Valero Energy* was full and frank disclosure. This remains important, even though in this case the Defendants have been given notice of the proceedings, and an opportunity to make contrary case, because the proposed Order will be binding on persons unknown, and they have not had that opportunity. I am satisfied, however, that the Claimant has satisfied this requirement in that it has put forward potential defences that might be available to a Defendant, and these are discussed below.

25. The fourth point noted by Ritchie J, but one which I think considers logically comes before the third, and so I will deal with it first, was that there should be sufficient evidence to prove the claim.

26. The Claimant submits that there is sufficient evidence to prove that there is a serious issue to be tried and also that the Claimant has a realistic prospect of success. I consider that the Claimant is correct. The serious issue arises because the Defendants have established three different encampments in the same general area, relocating twice. If they face eviction as regards their third encampment by Camden, it is highly likely that they would relocate to other land owned by the Claimant close to SOAS. Further, the Claimant has put forward evidence that there have been numerous incidents of disruptive trespassory protests on the Claimant's land and there is no sign of these slowing down or stopping. The Defendants challenge accusations that their prior occupation or any demonstrations have caused disruption but have not produced any witness statement or evidence to challenge the Claimant's evidence. Finally, I have regard to the Defendants' statements on social media which I take to be strongly indicative of their intention to continue their protest activity until SOAS meets their demands and/or the resolution of the conflict in Gaza. In my view, there is ample evidence to justify finding that the Claimant is justified in its fear of future unlawful trespass on its land. Also, anyone who has seen videos of the protest can be in no doubt of the determination of the leaders of these protests.

27. The third point noted by Ritchie J was that there should be no realistic defence. No defence is likely to succeed based on property rights. The Claimant's title to the relevant land is clear, and there can be no suggestion that the Claimant is not entitled to control occupation of the Land in accordance with its Visitor Regulations and Code.

28. I should however, consider the potential for defences on Human Rights grounds. Similar issues arose and were considered and dismissed by Johnson J, in two possession cases *University of Birmingham* [2024] EWHC 1770 (KB) and *University of Nottingham* [2024] EWHC 1771 (KB) and I consider that the facts and analysis are not materially different in this case.

29. Peaceful protest falls within the scope of the rights of freedom of speech and freedom of assembly, which are guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights respectively.

30. However, as the Claimant points out, these rights are not absolute; they are qualified. By virtue of Arts 10(2) and 11(2), interferences with rights to freedom of speech and assembly can be justified if they are prescribed by law and necessary in a democratic society in the proportionate pursuit of prescribed legitimate aims (including the protection of the rights and freedoms of others). In this regard, the Claimant points out that it also has a right to peaceful enjoyment of its private property as a Convention right, enshrined in Art 1 of the First Protocol ("A1P1").

31. An important point in this analysis is that, Arts 10 and 11 do not bestow any "freedom of forum" on the Defendants. The Claimant has drawn my attention to *Appleby v UK* [2003] 37 EHRR 38 (and see also *DPP v Cuciurean* [2022] EWHC 736(Admin); [2002] 3 WLR 446, in which the Divisional Court (at [40]) drew 'much assistance' from *Appleby*). The rights to free speech and to freedom of association do not generally include any right to trespass on private property: *Boyd v Ineos Upstream Ltd* [2019] 4 WLR 100 at [36]. At [45], the Divisional Court in *Cuciurean* held that there was:

> "… 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."

32. The Claimant acknowledges that in '*rather unusual or even extreme circumstances',* 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. An example of this (given by the Strasbourg Court itself in *Appleby*) would be a corporate town where the entire municipality is controlled by a private body.

33. The named Defendants in oral argument made a case that this exception might apply. They pointed out that the University land to which the draft interim injunction would apply was fairly extensive and included the exterior space that was close to SOAS, the main target of their demonstrations.

34. The Claimant made the contrary argument that nevertheless there was no prevention to effective exercise of the freedoms of expression and assembly because:

    i) the injunction did not rule out protests continuing on the land, it merely requires the protestors to submit to its Visitor Regulations and Code, both of which exist for proper purposes so as to protect the interests of all legitimate users of the land;

    ii) the Defendants would not be prevented by the injunction from protesting within any of the buildings on the land (other than an unoccupied former student residence in the ownership of the Claimant) including on any of the buildings leased to SOAS;

    iii) other forms of protests such as via social media would remain possible.

35. The named Defendants did not accept this. In particular, they were suspicious of the willingness of the Claimant to grant permission for protests under terms that they might find acceptable. They considered the possibility of protesting on land or buildings belonging or leased to SOAS as remote, as a number of students had faced disciplinary action for doing so.

36. Whilst this matter can be reviewed again with evidence when and if this matter goes to determination for a final injunction, on the basis of the evidence before me at this stage I consider I should accept the Claimant's submissions and evidence on this point. At present it appears to me that, just as was so in the *University of Birmingham* case, there remain many other ways in which the Defendants could exercise their Convention rights without usurping to themselves land that belongs to the University. Not only can they use social media, or demonstrate elsewhere, but the Claimant's proposed order keeps alive the possibility of orderly protest on the Claimant's land provided that this is done in accordance with its Visitor Regulations and Code. The court would need to see real evidence of the Visitor Regulations and Code being abused if it was not to place any real weight on this last point.

37. Therefore I accept the Claimant's submission that, any assertion that the grant of injunctive relief in the terms sought would constitute a breach of the Defendant's rights under either Article 10 or 11 would be bound to fail.

38. The final substantive issue is to show that damages would not be an adequate remedy. This, I consider it is clear. the potential effect of further occupation of their land is likely to be damaging to the Claimant's reputation and operation as a University in ways that will not readily be compensated in damages as well as increasing costs in relation to security and cleaning up any mess and fixing any damage that might occur in any future occupation by the protesters (and for which there is evidence that this has occurred in the past). In any case the Claimant is extremely unlikely to be able to obtain damages from the Defendants.

39. A linked issue not mentioned by Ritchie J but to which the courts also have regard is the question of whether there is any other remedy that the Claimant could pursue so that the injunction is not necessary. Whilst there is the possibility of the Claimant using private means (as it did do in relation to the second occupation), I do not see this as being a more appropriate remedy than that now sought by the Claimant. Private security guards operating without the backing of a court are likely to face considerable resistance and the results of any reliance on this are likely to be ugly.

Procedural requirements

40. Turning to the procedural requirements, the first is that the persons unknown who may be affected by the injunction must be *'clearly and plainly identified'*. I consider that the persons who will be subject to this injunction are clearly and plainly identified by reference to the tortious conduct to be prohibited and the clearly defined geographical boundaries. This method of identifying them follows what was done in other cases including *HS2* and the *University of Birmingham* case and is entirely appropriate.

41. The second procedural requirement is that the terms of the prohibitions should be set out in clear words and not framed in legal technical terms. I consider that this is the case with the proposed order. I have, however, in settling the Order made some small amendments to the wording suggested by the Claimant to address legitimate concerns raised by the named Defendants as to what sort of acts might amount to "protest", in particular to make it clear that individual action such as wearing a T-shirt or a badge with a slogan, would not count as protest; that protest meant concerted or public protest (rather than, for example, a private conversation); and that what was being prohibited

was protest on the land, not crossing the land with a view to protesting elsewhere (such as within the SOAS buildings).

42. Thirdly, the prohibitions must match the pleaded claim. This requirement is met. The pleaded claim is for a final injunction and the prohibitions in the interim injunction are in similar terms to those proposed for the final injunction.

43. The fourth matter described as a procedural requirement in *HS2* was that there should be defined geographic boundaries. I am not sure that this is a separate requirement – it seems to me it was already dealt with under the first procedural requirement, but in any case, the point is clearly met under the terms of the order.

44. The fifth matter is temporal boundaries variations or extensions. The duration of any final injunction should be such as is reasonably necessary to protect the Claimant's legal rights in the light of the evidence of past tortious activity and the future feared tortious activity. The Claimant seeks an injunction until determination of its case for a final injunction, and has asked for directions to allow the hearing of that case. This, in my view is appropriate, but to avoid the possibility of delay in the hearing of that case I considered that the order should include a long stop date of one year, unless the order is subsequently extended by the court. This is appropriate as it would cover the rest of this academic year, as well as the start of the next academic year.

45. The sixth matter is service. I have been satisfied that service of the claim has been undertaken in accordance with the order of Adam Johnson J and there can be no complaint about this. The proposal is for service of the order to be undertaken in broadly the same way and this seems to me also to be broadly appropriate circumstances, although in settling the final form of the order I have included some additional stipulations.

46. The seventh matter is that the order should make provision for affected persons to be able to apply to set aside or vary the injunction on notice. The draft order makes appropriate provision for this, so I see no objection based on this point.

47. The eighth procedural point to consider is review. This would be a concern if it was proposed that the order would be kept in place for a period longer than a year, but I agree with the Claimant that this is not necessary under the terms of the proposed order, which will last only 12 months unless extended by the court. The requirement for the court to approve any such extension meets any requirement for review.

Balance of convenience

48. The final point for the court to consider when deciding to approve an order such as is proposed here is the balance of convenience before allowing an injunction. Here it is appropriate that I consider the approach discussed in *DPP v Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 at [17] and at [55] to [61] and [73] to [78].

49. In considering this balance I take account of the point that as far as I can see (but I make no determination on the matter, as this may be a matter for further evidence when it comes to determining whether a final order should be granted) the protests to date have been largely peaceful and orderly. There has been violence where there have been

clashes with security personnel looking to evict. There has been some illegality in the form of deliberate criminal damage in the form of daubing slogans on the walls of a building and pavements (aggravated by interfering with the clean-up) but this has largely been minimal. The named Defendants make the point that much of the conduct complained of by the Claimant took place within SOAS, rather than on the Claimant's land. This may be so, but nevertheless it is appropriate for the court to consider such conduct as it cannot assume that next time round similar conduct may not take place on the Claimant's land.

50. Also whilst the rights and wrongs of the matters over which the protestors are protesting is a much bigger topic than the one before the court, and it would not be right for the court to express any opinion on them, I think I can observe that the motivations of the protestors spring from a deeply-held sense of injustice and it is a good thing that young people do take notice and seek to call out what they see as injustice. As noted in *City of London Corp v Samede* [2012] PTSR 1624 at [41] the court can take into account the general character of the view that Convention is being invoked to protect.

51. However even taking full account of these points, in my view the balance of convenience is clear in this case. If the injunction is not granted then there is a real risk that the Claimant will face a realistic threat that there will be further unauthorised and unplanned invasions of its land, giving rise to cost, reputational damage, and damage to the educational needs of students of the University.

52. Conversely, if the injunction is granted then the loss of the Defendants is small. They will still be able to protest. It is true that the requirements within the Code and Visitor Regulations may mean that protests will need to be planned in advance, constraining the ability to react quickly to events by means of a protest on the Claimant's land, but they will still have other ways of protesting. Further, if they are able to show any cost, the Claimant has offered the usual indemnity. Also, and importantly, if circumstances change, for example, if it proved that the Claimant was being wholly unreasonable in the way that it dealt with applications to protest on the land that properly in accordance with Visitor Regulations and Code, any of the Defendants would have the ability to come back to the court to seek changes to the order.

53. I therefore consider that the court should grant the interim precautionary injunction in the terms sought, with the minor amendments discussed during the hearing and including directions as to further steps to take forward the application for a final precautionary injunction as discussed at the hearing.

54. As regards costs, the Claimant has suggested that costs be reserved. This seems to me to be appropriate. As I explained to the Defendants this means that the matter of costs will be heard when this matter goes to final. It is not for me to fetter the discretion of the judge hearing the matter at that stage, but I will observe that the named Defendants were not represented and did not have legal training and learnt only of the full case that they were facing around a week before the hearing, and it may be that the judge determining costs at the final hearing will take account of this, in the context of the further actions of the parties as the case progresses.

Neutral Citation Number: [2025] EWHC 331 (KB)

Case No: QB-2021-003094

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2025

Before:

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between:

(1) MBR ACRES LIMITED
(2) DEMETRIS MARKOU
(for and on behalf of the officers and employees of MBR Acres Ltd, and the officers and employees of third party suppliers and service providers to MBR Acres Ltd pursuant to CPR 19.8)
(3) B & K UNIVERSAL LIMITED
(4) SUSAN PRESSICK
(for and on behalf of the officers and employees of B & K Universal Ltd, and the officers and employees of third party suppliers and service providers to B & K Universal Ltd pursuant to CPR 19.8)

Claimants

- and -

JOHN CURTIN **Defendant**

And in the matter of an application by the Claimants for a *contra mundum* injunction to restrain certain activities at the Wyton Site

- -
- -

Caroline Bolton and **Natalie Pratt** (instructed by **Mills & Reeve LLP)** for the **Claimants**
John Curtin appeared in person, save for the hearing on 23 June 2023 when he was represented by **Jake Taylor** (instructed by **Birds Solicitors**)
"Persons Unknown" did not attend and were not represented
Jude Bunting KC and **Yaaser Vanderman** filed written submissions on behalf of **Liberty**

Approved Judgment

The Honourable Mr Justice Nicklin :

1. This judgment is divided into the following sections:

A: Introduction

2. This is the final judgment in this civil claim brought by the Claimants against both known and unknown individuals. The common link between the Defendants is that, at one time or another, they have engaged in some form of protest against the activities of the First Defendant at its site at Wyton, Cambridgeshire.

3. Whilst the claim has been pending before the Courts, the law – as it applies to "Persons Unknown" – has been in a state of flux. The decision of the Supreme Court in ***Wolverhampton City Council & others -v- London Gypsies and Travellers & others*** **[2024] AC 983** (heard on 8-9 February 2023 with judgment handed down on 29 November 2023) clarified but also significantly changed the law as it concerns the grant of injunctions against "Persons Unknown" where that target class is protean and the injunction applies to what has been termed 'newcomers'.

4. Whilst the evidence relating to this claim was heard at a trial between 24 April 2023 to 23 May 2023, the trial was adjourned to await the Supreme Court decision in ***Wolverhampton***. Further hearings were fixed on 26 March 2024 and 7 May 2024 for the Court to consider whether, in light of the Supreme Court's decision, the Claimants should be given an opportunity to file any further evidence and to consider final submissions of law consequent upon the ***Wolverhampton*** decision.

5. At the hearing on 26 March 2024, I directed that the final hearing in the claim should be fixed for 7 May 2024. I directed that the Claimants must file their final submissions by 30 April 2024 and that, in addition to publicising the date of the final hearing on notices at the Wyton Site, and online, the written submissions must be served on Liberty and Friends of the Earth, who had intervened in the ***Wolverhampton*** case

("the Interested Parties"). I gave the Interested Parties an opportunity to file written submissions for the final hearing.

6. I received written submissions from Counsel instructed by Liberty, dated 3 May 2024.

7. I also received a letter, dated 30 April 2024 from Friends of the Earth ("FoE"). FoE expressed concern, due to their limited resources, of the risk that an adverse costs order might be made against them. In their letter, FoE stated that it had made an application for a Protective Costs Order in a civil claim brought in 2019 against "Persons Unknown" in a fracking protest case. The application was rejected, and FoE were ordered to pay £4,500 in costs. Because of these funding concerns, and also because FoE's campaigning objectives do not embrace the protest at the Wyton Site, FoE did not file written submissions. They did, however, send a copy of the written submissions, and a witness statement of David Timms, FoE's Head of Political Affairs, dated 25 November 2022, which had been filed with the Supreme Court in the ***Wolverhampton*** case. In their covering letter, FoE said:

> "In ***Wolverhampton***, the Supreme Court rejected our submissions as to the availability of persons unknown injunctions as a matter of principle, but our submissions may include relevant considerations for the Court in terms of criteria and the procedural safeguards for persons unknown injunctions in the protest context. In particular, the evidence of Mr Timms refers to our own experience of the serious chilling effect of these injunctions, in terms of their deterrence of lawful protest including lawful, peaceful, direct action protest. We would stress that the latter is a recognised and legitimate part of freedom of speech and assembly protected by the common law and Articles 10/11 ECHR."

8. I am very grateful to both Liberty and Friends of the Earth for their submissions, which I have considered in writing this judgment.

9. I consider the ***Wolverhampton*** decision in Section M of this judgment ([333]-[362] below). In brief summary, prior to ***Wolverhampton***, the previous method of attempting to restrain the activities of 'newcomers' depended upon the 'newcomer' becoming a party to existing litigation by doing some act that brought him/her within one or more categories of defendant who were party to the litigation and upon whom the Claim Form had been deemed to be served by some method of alternative service authorised by the Court. The Supreme Court swept this away and instead sanctioned the use of *contra mundum* injunctions in limited circumstances.

10. Following the ***Wolverhampton*** decision, at the hearing on 7 May 2024, the Claimants sought an injunction against various categories of "Persons Unknown" or, alternatively, a *contra mundum* injunction, to restrain certain acts. In some respects, the ***Wolverhampton*** decision allows the Court to adopt a more straightforward approach and an opportunity to make any injunction the Court grants much clearer and easier to comprehend (see [353]-[362] below).

11. Finally, this judgment also resolves a contempt application brought by the Claimants against the only remaining individual defendant, John Curtin, which was heard on 23 June 2023 (see Sections D(3), G and O(3); [52]-[53], [109]-[120], [247]-[253] and [400]-[407] below).

B: Background and parties

12. There have been several previous interim judgments in the claim:

    (1) [2021] EWHC 2996 (QB) (10 November 2021) ("the Interim Injunction Judgment");

    (2) [2022] EWHC 1677 (QB) (31 March 2022) ("the Conspiracy Amendment Judgment");

    (3) [2023] QB 186 (16 May 2022) ("the First Contempt Judgment");

    (4) [2022] EWHC 1715 (QB) (20 June 2022) ("the First Injunction Variation Judgment");

    (5) [2022] EWHC 2072 (QB) (2 August 2022) ("the Second Contempt Judgment"); and

    (6) [2022] EWHC 3338 (KB) (22 December 2022) ("the Second Injunction Variation Judgment").

    The background to this case – and the key procedural steps – are set out in these judgments, but as this is the final judgment in the claim, and for ease of reference, I will set out again some of the key facts.

(1) The Claimants

13. The First and Third Claimants are subsidiaries of the Marshall Farm Group Ltd, incorporated in the US and trading as Marshall Bioresources. The First and Third Claimants breed animals for medical and clinical research at sites in Cambridgeshire and Hull.

14. The First Claimant is licensed by the Secretary of State, under ss.2B-2C Animals (Scientific Procedures) Act 1986, to breed animals for supply to licensed entities authorised to conduct animal testing and research. It is presently a legal requirement, in the United Kingdom, that all potential new medicines intended for human use are tested on two species of mammal before they are tested on human volunteers in clinical trials.

15. The Second Claimant is an employee of the First Claimant acting in these proceedings to represent the officers and employees of the First Claimant, third-party suppliers, and service providers to the First Claimant pursuant to (what is now) CPR 19.8.

16. The Fourth Claimant is an employee of the Third Claimant and is its Site Manager & UK Administration & European Quality Manager. The Fourth Claimant represents the officers and employees of the Third Claimant, third-party suppliers, and service providers to the Third Claimant pursuant to CPR 19.8.

(2) The Wyton Site

17. The Wyton Site is in countryside, about 2 miles to the northeast of Huntingdon, very close to RAF Wyton. The only entrance to the Wyton Site is situated on a straight

section of the B1090. The road is a single carriageway with verges on either side. Vehicles arriving or leaving from the Wyton Site pass through outer and inner mechanical gates. This facilitates what has been termed an 'airlock' between the two gates enabling the First Claimant's security personnel to control access to the Wyton Site. The outer gate is set back about 1 metre from the boundary of the First Claimant's registered freehold title. This means that anyone standing immediately in front of the outer gate is on the First Claimant's land. The perimeter of the Wyton Site is protected by high outer and inner wire fences. As well as the First Claimant, another biotechnology company is situated within the Wyton Site.

18. A grass verge separates the gated entrance to the Wyton Site from the main carriageway of the Highway. A short tarmacked single lane road, of approximately 8.7 metres length, runs perpendicular to the B1090 over the grass verge and to the gated access at the Wyton Site to enable access to the Highway from the Wyton Site, and vice-versa. This road has been referred to as the "Access Road" in the proceedings. All movements into and out of the Wyton Site (whether vehicular or on foot) must pass along the Access Road. Some, but it transpired during the proceedings, not all, of the Access Road falls within the extent of the adopted Highway.

19. In or around March 2019, the First Claimant installed a new gate, because lorries kept on hitting a post that was part of the old gate was. The new gate was installed about a metre or so back into Wyton Site. Therefore, the area measuring approximately 1 metre in front of the Gate is within the boundary of the Wyton Site and the freehold ownership of the First Claimant. That area has been referred to as the "Driveway" in these proceedings.

20. The boundary of that area, and therefore the Wyton Site as defined, is marked on the ground by a metal strip that runs the full width of the Access Road. That metal strip was left behind when the old gate was removed, and the new Gate was installed.

21. The Claimants originally believed that the full extent of the Access Road had been adopted by the local Highways Authority. During the proceedings, it was discovered that the adopted highway did not extend to the full area.

22. On 4 August 2022, apparently without prior warning to, or consultation with, the First Claimant, a representative of the Local Highway Authority attended the Wyton Site and painted a yellow line halfway up the Access Road. The yellow line ran along the lip of the ditch closest to the Highway over which the Access Road ran. The distance between the yellow line and the metal strip that marks the edge of the Driveway is 2.85 metres. In a letter dated 16 November 2022, the Local Highway Authority confirmed to the First Claimant that the yellow line marked where it considered the extent of the adopted highway to end. The letter explained the basis on which the Local Highways Authority had reached this conclusion.

23. Having taken separate advice, the First Claimant's position is that it agrees with the decision of the Local Highways Authority as to the extent of the adopted highway. The effect of this, which has not been challenged in these proceedings, is that the land between the metal strip and the yellow line, that is not adopted highway, is land owned by the First Claimant. This has been referred to as the "Access Land".

(3) The Defendants

24. When originally issued, the Claimants brought claims against the first two Defendants as "*unincorporated associations*": "*Free the MBR Beagles*" and "*Camp Beagle*". The Third and Fifth Defendants were sued as representatives of these two "*unincorporated associations*". In the Interim Injunction Judgment ([52]-[67]), I refused to allow claims to be brought against the First and Second Defendants on a representative basis, and I stayed the claim against these two Defendants. The Claimants have made no application to lift that stay.

25. As the proceedings have progressed, the Claimants have sought, and generally been granted, permission to add further Defendants. A full list of the Defendants to the claim is set out in Annex 1 to this judgment. Apart from Mr Curtin, the claims against named individuals have all been settled. The one against the Twentieth Defendant, Lisa Jaffray, was settled early in the trial. In most instances, the relevant individual has given undertakings as to his/her future activities regarding the Claimants and the Wyton Site.

26. By the end of the trial, the claim was proceeding only against Mr Curtin, as a named Defendant, and various categories of Person(s) Unknown Defendants identified in Annex 1.

(4) The protest activities

27. It will be necessary to go into the detail of specific incidents later in the judgment, but the following summary will suffice by way of introduction.

28. This litigation concerns protest and its lawful limits. Since around June 2021, a fluctuating number of individuals have been protesting outside the Wyton Site. There is a small semi-permanent camp of protestors on the edge of the carriageway about 20-30 metres from the entrance to the Wyton Site. Mr Curtin, who has been protesting since the outset, is a semi-permanent resident of this camp. There have been isolated other incidents away from the Wyton Site, for example, in August 2021, there were some limited protests outside the B&K Site, but the main focus of the protest activity – and most of the Claimants' evidence – concerns protest activities at the Wyton Site.

29. The Claimants do not challenge that Mr Curtin, and the other protestors, have a sincerely and firmly held belief that animal testing is wrong. In terms of overall objective, the protestors probably share a common aim that animal testing should be prohibited. By extension, most protestors at the Wyton Site would like to see the First (and Third) Claimants put out of business. These objectives are not unlawful, and, subject to acting lawfully, Mr Curtin and others, may campaign and protest in their efforts to attempt to achieve a change in the law that would see their objective achieved.

30. The main complaints raised by the Claimants in this litigation are (1) incidents of trespass onto the Wyton Site, including the flying of a video-equipped drone around and above the Wyton Site, which is said to amount to trespass on the First Claimant's land; (2) repeated incidents of obstruction of the highway outside the Wyton Site, said to constitute a public nuisance, and specifically obstruction of people and vehicles entering and leaving the Wyton Site; and (3) specific incidents involving confrontation with individual employees when they arrive at or leave the Wyton Site, which are said to amount to harassment.

31. Although it is more complicated than this, the issue at the heart of the litigation is broadly whether the method of protest that the Defendants use (or threaten to use) is lawful. Ultimately this is an issue of striking the proper balance between the protestors' rights of freedom of expression and demonstration against the Claimants' rights to go about their lawful business. The law does not require a person exercising the right to demonstrate or to protest to demonstrate that s/he is "right" (whatever that would mean), and Mr Curtin is not required to persuade the Court that he is "right" to oppose animal testing.

C: The Interim Injunction

(1) The interim injunction granted on 10 November 2021

32. The Claimants were granted an urgent interim injunction on 20 August 2021 by Stacey J ("the Interim Injunction"). The return date was fixed for 4 October 2021. I handed down judgment on 10 November 2021. The Interim Injunction Judgment set out my reasons for modifying the terms of the injunction that had previously been granted. The protest activities that had led to the grant of the Interim Injunction are set out in [13]-[23]. In [18], I summarised the evidence as follows:

> "A clear picture emerges from the evidence, that the central complaint of the Claimants is the protestors' activities when people (particularly employees of the First Claimant) enter or leave the Wyton Site. At these times, protestors, including the named Defendants, have surrounded and/or obstructed the vehicles. Their ability to drive off is not only impaired by the physical obstruction of the protestors, but also because placards have been used, on occasions, to obstruct the view that the driver of the vehicle has of the road and whether it is safe to pull out. These incidents have frequently led to confrontation between the protestors and those inside the vehicles, allegedly leaving them feeling harassed and intimidated."

33. As a temporary solution, I prohibited trespass on the First Claimant's land and imposed an exclusion zone around the entrance to the Wyton Site ([116]-[119]) ("the Exclusion Zone"). I refused to grant an injunction to prohibit the flying of drones over the Wyton Site, which was alleged to be a trespass ([111]-[115]). The Interim Injunction did not restrain alleged harassment whether by named Defendants or "Persons Unknown" ([118]), and I refused to grant any orders to control the methods of protest adopted by the Defendants ([122]-[128]).

34. So far as concerns trespass and the Exclusion Zone, the material parts of the Interim Injunction, granted on 10 November 2021, were as follows. Paragraph 1 of the Injunction provided:

> "The Third to Ninth, Eleventh to Fourteenth, and Fifteenth to Seventeenth Defendants **MUST NOT**:
>
> (1) enter into or remain upon the following land:
>
> a. the First Claimant's premises known as MBR Acres Limited, Wyton, Huntingdon PE28 2DT as set out in Annex 1 (the 'Wyton Site'); and

> b. the Third Claimant's premises known as B&K Universal Limited, Field Station, Grimston, Aldborough, Hull, East Yorkshire HU11 4QE as set out in Annex 2 (the 'Hull Site')
>
> (2) enter into or remain upon the area marked with black hatching on the plans at Annex 1 … (the 'Exclusion Zone'), save where … accessing the highway whilst in a vehicle, for the purpose of passing along the highway only and without stopping in the Exclusion Zone, save for when stopped by traffic congestion, or any traffic management arranged by or on behalf of the Highways Authority, or to prevent a collision, or at the direction of a Police Officer.
>
> (3) park any vehicle, or place or leave any other item (including, but not limited to, banners) anywhere in the Exclusion Zone;
>
> (4) approach and/or obstruct the path of any vehicle directly entering or exiting the Exclusion Zone (save that for the avoidance of doubt it will not be a breach of this Injunction Order where any obstruction occurs as a result of an emergency)."

35. Definitions, set out in Schedule A to the Interim Injunction, provided:

> "The 'Exclusion Zone' is… for the purpose of the Wyton site, the area with black hatching at Annex 1 of this Order measuring 20 metres in length either side of the midpoint of the gate to the entrance of the Wyton site and extending out to the midpoint of the carriageway…"

36. Annex 1 to the Injunction was a plan of the Wyton Site marked with the Exclusion Zone around the entrance to the First Claimant's premises. Annex 1 included boxes containing annotations. One of those provided:

> "Exclusion Zone in black crosshatched area is 20 metres either side of the centre of the Gate to the Wyton Site marked by posts on the grass verge up to the centre of the carriageway."

(2) Modifications to the Interim Injunction

37. The terms of the Interim Injunction, and the persons it restrains, have been modified during the proceedings.

38. Orders of 18-19 January 2022 and 31 March 2022 added new Defendants to the claim, both named and further categories of "Persons Unknown". Those new Defendants became bound by the Interim Injunction, the material terms of which remained unchanged.

39. By Order of 2 August 2022, Paragraph (4) of the Interim Injunction (see [34] above) was replaced with the following restrictions:

> "(2) The Third to Ninth and Eleventh to the Twenty-Fourth Defendants **MUST NOT** within 1 mile in either direction of the First Claimant's Land, approach, slow down, or obstruct any vehicle which is believed to be travelling to or from the First Claimant's Land at the Wyton Site.

(3) The Seventeenth Defendant **MUST NOT** within 1 mile in either direction of the First Claimant's Land, approach, slow down, or obstruct any vehicle:

(a) for the purpose of protesting and/or campaigning against the activities of the First and/or Third Claimant; and

(b) where the vehicle is, or is believed to be, travelling to or from the First Claimant's Land at the Wyton Site.

(4) The Third, Twelfth, Fifteenth, Twentieth and Twenty-Second Defendants **MUST NOT** cut, push, shake, kick, lift, climb up or upon or over, damage or remove, or attempt to remove any part of the perimeter fence to the Wyton Site, as marked in red on the attached plan at Annex 1."

40. In the Second Injunction Variation Judgment, I explained why I had amended the Interim Injunction in these terms:

> [10] In respect of obstruction of vehicles (the subject of the new sub-paragraphs (2) and (3)), evidence of events following the grant of the injunction, particularly that which had been filed by the Claimants in relation to the contempt applications against the Twelfth and Thirteenth Defendants (see [2023] QB 186), showed that some protestors had adopted tactics of surrounding and/or obstructing vehicles that were travelling to or from the Wyton Site further along the carriageway of the B1090. It had also become apparent that the earlier formulation – prohibiting approaching/obstruction of any vehicle "directly" entering or exiting the exclusion zone – had the potential to catch behaviour that the injunction was not designed to prevent. A particular example was an occasion in which a police vehicle was about to exit the exclusion zone when it was obstructed by protestors who wanted to ascertain what was happening to a person who had been arrested. The exclusion zone has always been recognised to be an expedient, justified because it is the best way of avoiding the flashpoints that have occurred between the protestors and those coming and going to/from the Wyton Site. However, the Court will keep the terms of the any interim injunction under review – and in appropriate cases will make changes to the terms of the order – to ensure that they are not having an unintended effect. The revised restrictions now more directly focus on the obstruction of vehicles travelling to/from the Wyton Site where that obstruction is for the purpose of protesting.
>
> [11] Sub-paragraph (4) contained a new prohibition upon interfering with and/or damaging the perimeter fence of the Wyton Site. I was satisfied on the Claimants' evidence that the relevant Defendants had been damaging or interfering with the fence. Such actions are tortious, are not an exercise of a right to protest and the balance of convenience clearly favoured an interim prohibition. The Claimants had asked for a 1 metre exclusion zone to be imposed around the entire perimeter of the Wyton Site. I refused to make such an order. The correct way of targeting this particular wrongdoing is by making a direct order that prohibits that behaviour, not an indirect order that would also restrict lawful activities. The Claimants do not own the land over which they were seeking the imposition of this further exclusion zone, so I was not persuaded that there was an adequate legal basis upon which to impose the wider restriction that they had sought.

(The reference to obstruction of a police vehicle in [10] is to an incident on 12 May 2022, which featured as an allegation of breach of the Interim Injunction made in the Contempt Application against Mr Curtin – see [248]-[254] below.)

41. I refused to grant other amendments to the Interim Injunction sought by the Claimants: see Section E of the Second Injunction Variation Judgment ([58]-[80]). The Claimants had originally sought to revisit the question of whether the Interim Injunction should prohibit the flying of drones, but they abandoned that part of the application (see [16]).

D: Alleged breaches of the Interim Injunction

42. The Claimants have pursued several contempt applications, against both named Defendants and against a person alleged to fall within a category of "Persons Unknown", alleging breaches of the Interim Injunction.

(1) The First Contempt Applications

43. Contempt applications were issued against the Twelfth and Thirteenth Defendants ("The First Contempt Applications"). Both Defendants were alleged to have breached the Interim Injunction in the contempt application issued on 17 December 2021. A second contempt application, alleging further breaches of the Interim Injunction, was issued against the Thirteenth Defendant on 16 February 2022. They were heard on 6-7 April 2022. In the First Contempt Judgment, handed down on 16 May 2022, I dismissed the 17 December 2021 contempt application brought against the Thirteenth Defendant. Both Defendants were found guilty of contempt of court in respect of admitted breaches of the Interim Injunction.

44. On 17 June 2022, a further contempt application was made against the Twenty-Third Defendant.

45. On 2 August 2022, I imposed penalties for contempt of court on the Defendants. The Twelfth Defendant was given a sentence of imprisonment of 3 months and the Thirteenth Defendant was given a sentence of imprisonment of 28 days. Both periods of imprisonment were suspended for 18 months. The periods of suspension have now ended. I imposed no sanction on the Twenty-Third Defendant, who had admitted a breach of the Interim Injunction, although she was ordered to pay a sum in costs. None of these Defendants has been alleged to be guilty of a further breach of the Interim Injunction.

(2) The Second Contempt Application

46. On 4 July 2022, the Claimants issued a further contempt application against Gillian Frances McGivern, a solicitor ("the Second Contempt Application"). Ms McGivern was alleged to have breached the Interim Injunction, as a "Person Unknown", on 4 May 2022 by, variously, parking her car in the Exclusion Zone, entering the Exclusion Zone, trespassing on the First Claimant's land (by approaching the entry gate) and approaching and/or obstructing vehicles directly exiting and/or entering the Exclusion Zone.

47. The Second Contempt Application was heard on 21-22 July 2022. In the Second Contempt Judgment, handed down on 2 August 2022, I dismissed the contempt

application and declared it to be totally without merit. It is necessary, for the purposes of this judgment to recall some of the paragraphs of the Second Contempt Judgment.

> [94] I have found it very difficult to understand the motive(s) behind the Claimants' tenacious pursuit of Ms McGivern and the way that the contempt application has been pursued. First there is the delay in commencing the proceedings. Then there is the failure to send any form of letter before action to Ms McGivern giving her the opportunity to give her response. Next, the Claimants' response to the evidence of Ms McGivern, provided first in a position statement and then in a witness statement, both verified by a statement of truth. The contempt application was pursued in the face of this evidence. The Claimants did so on a somewhat speculative basis relying upon the evidence of PC Shailes (inaccurately trailed first in the email from Mills & Reeve to the Court on 15 July 2022 – see [39] above) and which was only obtained after serving a witness summons, on the eve of the Contempt Application. Finally, the Claimants persisted in a cross-examination of Ms McGivern in which allegations of the utmost seriousness were made suggesting, not only that had she, a solicitor, had deliberately breached a court injunction, but that she had brazenly and repeatedly lied for over a day in the witness box. The evidential support for this line of cross-examination was tissue thin.
>
> [95] In his skeleton argument, Mr Underwood QC submitted that the contempt application was an abuse of process. Certainly, allegations were made by some of the unrepresented Defendants that action had been taken against Ms McGivern because she was a lawyer helping some of the protestors. That would be the form of abuse of process by using proceedings for a collateral purpose. I can understand why they might suspect this, but Mr Underwood QC did not put any such suggestion to Ms Pressick when she gave evidence. I am unable to reach a conclusion as to the Claimants' motives for pursuing Ms McGivern. All I can say is I find them very difficult to understand.
>
> [96] In my judgment this contempt application has been wholly frivolous, and it borders on vexatious. The breaches alleged were trivial or wholly technical. Apart from a technical trespass, it is difficult to identify any civil wrong that was committed by Ms McGivern. At worst, obstructing the vehicles for a short period might be regarded as provocative, but there were no aggravating features. As the Claimants must have appreciated, this was not the sort of conduct that the Injunction was ever intended to catch. The Court does not grant injunctions to parties to litigation to be used as a weapon against those perceived to be opponents. At its commencement, this contempt application was based almost entirely upon deemed notice of the terms of the Injunction by operation of the alternative service order. Once Ms McGivern had provided evidence confirmed by a statement of truth that she had no knowledge of the Injunction, the Claimants should have taken stock as to the prospect of success of the contempt application and, particularly, whether there was a real prospect of the Court imposing any sanction for the alleged breaches. Instead of doing so, the Claimants embarked on what proved to be a hopeless attempt to impeach Ms McGivern's transparently honest evidence by witness summonsing a police officer. This was not a proportionate or even rational way to approach litigation of this seriousness.

> [97] Ms Bolton's final submission was that the Claimants were "*entitled*" to bring the contempt application against Ms McGivern; "*entitled*" to spend two days of Court time and resources pursuing an application that, on an objective assessment of the evidence, was only ever likely to end with the imposition of no penalty; and "*entitled*" to put a solicitor through the ordeal of a potentially career-ending contempt application and all the disruption that it has caused to Ms McGivern's work and the impact it has had on this litigation. There is no such "*entitlement*". The contempt application against Ms McGivern will be dismissed and will be certified as being totally without merit.

48. I was satisfied that, in the circumstances of this litigation, and particularly given the risk of abuse of "Persons Unknown" injunctions, it was necessary to impose a requirement that the Claimants must obtain the permission of the Court before instituting any contempt application against someone alleged to have breached the Interim Injunction as a "Person Unknown". I explained my reasons for doing so:

> [101] For the reasons I have explained in this judgment, depending upon its terms, a "Persons Unknown" injunction can have the potential to catch in its net people that were never intended by the Court to be caught. Ms McGivern is an example, but others were discussed at the hearing, including the passing motorist who stops temporarily in outside the gates of the Wyton Site and who inadvertently obstructs a vehicle that is leaving the premises. By dint of the operation of the definition of "Persons Unknown" and the deemed notice of the terms of the Injunction under the alternative service order, that motorist, like Ms McGivern, ends up potentially having to face a contempt application. In ordinary cases, the Court might usually expect that a litigant who had obtained such an injunction would consider carefully whether it was proportionate and/or a sensible use of the Court's and the parties' resources for contempt proceedings to be brought against someone who had inadvertently contravened the terms of the injunction. The Claimants have demonstrated that, even with the benefit of professional advice and representation, the Court cannot rely upon them to perform that task appropriately.
>
> [102] I am satisfied that the Court does have the power, ultimately as part of its case management powers to protect its processes from being abused and its resources being wasted, to impose a permission requirement. I reject the submission that the Court is powerless and must simply adjudicate upon such contempt applications that the Claimants seek to bring. "Persons Unknown" injunctions are recognised to be exceptional specifically because they have the potential to catch newcomers. I do not consider that it is an undue hardship that these Claimants should be required to satisfy the Court that a contempt application they wish to bring (a) is one that has a real prospect of success; (b) is not one that relies upon wholly technical or insubstantial breaches; and (c) is supported by evidence that the respondent had actual knowledge of the terms of the injunction before being alleged to have breached it.
>
> [103] Although the conditions for the making of a limited civil restraint order are not met, the imposition of a requirement that the Claimants must obtain the permission of the Court before bringing any further contempt applications

> against "Persons Unknown" is not a limited civil restraint order, it restricts only this specific form of application. The Claimants will remain free to issue and pursue applications in the underlying proceedings. I am satisfied that the imposition of a targeted restriction on the Claimants' ability to bring such contempt applications is a necessary and proportionate step to protect the Court (and the respondents to any future contempt applications) from proceedings that have no real prospect of success and/or serve no legitimate purpose.
>
> [104] I will therefore make an order requiring the Claimants to obtain the permission of the Court before they bring any further contempt application against anyone alleged to be in the category of "Persons Unknown" and to have breached the Injunction.

49. The order, on 2 August 2022, dismissing the Second Contempt Application therefore included the following provisions ("the Contempt Application Permission Requirement"):

> "3. Any further contempt application against any person, not being a named Defendant in the proceedings, may only be brought by the Claimants with the permission of the Court.
>
> 4. An application for permission under Paragraph 3 above, must be made by Application Notice attaching the proposed contempt application and evidence in support. The Court will normally expect the Claimants to have notified the proposed Respondent in writing of the allegation(s) that s/he has breached the injunction order. Any response by the Respondent should be provided to the Court with the application to bring a contempt application. Unless the Court otherwise directs, any such application will be dealt with by the Court on the papers."

50. I refused an application by the Claimants for permission to appeal against the imposition of the Contempt Application Permission Requirement. The Claimants did not renew their application for permission to appeal to the Court of Appeal.

51. I returned to the issue of potential abuse of "Persons Unknown" injunctions in the Second Injunction Variation Judgment, where I said this ([12]):

> "The operation of the interim injunction over the last 12 months has given cause for concern about whether the order is being used by the Claimants as a 'weapon' against the protestors or their supporters. The contempt application against Ms McGivern was dismissed. I found that the breaches alleged against Ms McGivern were trivial: see [the Second Contempt Judgment] [96]. The Claimants well know, and fully understand, the basis on which the exclusion zone has been imposed. It is not to be used by the Claimants as an opportunity to take action against protestors for trivial infringements that have none of the elements that led to the grant of the interim injunction and are not otherwise unlawful acts. Ultimately, if there were to be any repetition of contempt applications being brought for trivial infringements, then the Court might have to reconsider the terms of the interim injunction order that should remain in place pending trial".

(3) The Third Contempt Application

52. On 17 June 2022, the Claimants issued a contempt application against Mr Curtin ("the Third Contempt Application"). Some of the breaches of the Interim Injunction alleged against Mr Curtin were also relied upon as causes of action in the claim against him. As a result, the Claimants' evidence against Mr Curtin, both in relation to the claim against him and the Third Contempt Application was heard at a further hearing, on 23 June 2024, at which Mr Curtin was represented for the purposes of the Contempt Application.

53. I deal with the Third Contempt Application in Sections G and O(3) of this judgment (see [109]-[120], [247]-[253] and [400]-[407] below).

E: Alternative service orders in respect of "Persons Unknown"

54. Prior to the decision of the Supreme Court in ***Wolverhampton***, on 12 August 2021, the Court granted permission for alternative service of the Claim Form on the "Persons Unknown" Defendants. The order provided:

> "Pursuant to CPR Part 6.14, 6.15, 6.26 and 6.27 the Claimants have permission to serve the Tenth Defendant, Persons Unknown, by the following alternative forms of service:
>
> (1) Affixing copies (as opposed to originals) of the Claim Form, the Injunction Application Notice, draft Injunction Order and this Order permitting alternative service, in a transparent envelope on the gates of the First and Third Claimants' Land and in a prominent position on the grass verge at the front of the First and Third Claimant's Land.
>
> (2) The documents shall be accompanied by a cover letter in the form set out in Annexure 2 explaining to Persons Unknown that they can access copies of
>
> (a) the Response Pack;
>
> (b) evidence in support of the Alternative Service and Injunction Applications; and
>
> (c) the skeleton argument and note of the hearing of the Alternative Service Application
>
> at the dedicated share file website at: [Dropbox link provided]"
>
> (3) The deemed date of service for the documents referred to in (1) to (3) above shall be two working days after service is completed in accordance with paragraphs (1) to (3) above.

55. The Defendants (including those in the category of "Persons Unknown") were required to file an Acknowledgement of Service 14 days after the deemed date of service. No Acknowledgement of Service has been filed by any person in any of the categories of "Persons Unknown".

56. Similar orders have been made for service of the Claim Form by an alternative method on the additional categories of "Persons Unknown" Defendants as they have been added

to the claim. Following the imposition of the Exclusion Zone in the Interim Injunction granted 10 November 2021, the location at which the relevant documents were to be displayed was moved to a noticeboard opposite the entrance of the Wyton Site.

F: The claims advanced by the Claimants

57. As a result of some narrowing down of the Claimants' focus during the trial, the claims finally advanced by the Claimants against Mr Curtin and the "Persons Unknown" Defendants at the conclusion of the trial were: (1) trespass (including alleged trespass as a result of the flying of drones over the Wyton Site); (2) public nuisance on the highway; and (3) interference with the First Claimant's common law right of access to the highway from the Wyton Site. Although the Claimants had included a claim for harassment against both Mr Curtin and Persons Unknown, that claim was only pursued against Mr Curtin at the end of the trial. It was not pursued as a basis for the grant of relief against Persons Unknown. It is appropriate here to analyse the causes of action relied upon by the Claimants.

(1) Trespass

(a) Physical encroachment onto the Wyton Site

58. This claim is straightforward.

59. Trespass to land is the interference with possession or the right to possession of land. It includes instances in which a person intrudes upon the land of another without legal justification. The key features of trespass are:

    (1) it is a strict liability tort: a defendant need not know that s/he is committing a trespass to be liable;

    (2) the tort is actionable without proof of damage; and

    (3) the extent of the trespass is irrelevant to liability: ***Ellis -v- Loftus Iron Company* (1874-75) LR 10 CP 10, 12**: "… *if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.*"

60. A person does not commit a trespass where s/he enters upon, or remains on the land, if s/he has permission (or licence). That permission (or licence) can be express or implied.

61. However, a person who enters land pursuant to a licence, but who proceeds to act in such a way that in exceeds the scope of that licence, or who remains on the land after the expiration of the licence, commits a trespass: ***Hillen -v- ICI (Alkali) Ltd* [1936] AC 65, 69**; ***Jockey Club Racecourse Limited -v- Persons Unknown* [2019] EWHC 1026 (Ch)** [15].

(b) Trespass to the airspace above the Wyton Site

62. This claim is not straightforward.

63. The First Claimant claims that the act of flying a drone directly over the Wyton Site is a trespass. In the early phase of this litigation, I refused to grant an interim injunction to restrain drone flying (see Interim Injunction Judgment [111]-[115]).

64. The only authority cited by the Claimants in support of the claim that flying a drone over land amounts to trespass is the first-instance decision of ***Bernstein -v- Skyviews & General Ltd*** **[1978] QB 479**. The case concerned an aircraft that the defendant flew over the claimant's land for the purpose of taking a photograph the claimant's country house which was then offered for sale to him. The claimant alleged that, by entering the airspace above his property to take aerial photographs, the defendant was guilty of trespass (alternatively that the defendant was guilty of an actionable invasion of his right to privacy by taking the photograph without his consent or authorisation). The claim failed. The Judge held that an owner's rights in the airspace above his/her land were restricted to such height as was necessary for the ordinary use and enjoyment of the land and structures upon it, and above that height s/he had no greater rights than any other member of the public. Accordingly, the defendant's aircraft did not infringe any rights in the claimant's airspace and thus did not commit any trespass by flying over land for the purpose of taking a photograph.

65. Griffiths J considered the authority of ***Kelsen -v- Imperial Tobacco Co.*** **[1957] 2 QB 334**, which concerned a sign that was overhanging the claimant's land by about 8 inches. He quoted part of the judgment of McNair J which held that the overhanging sign was a trespass to the claimant's airspace above his land, and held (at **486E-487A**):

> "I very much doubt if in that passage McNair J was intending to hold that the plaintiff's rights in the air space continued to an unlimited height or 'ad coelum' as [the plaintiff] submits. The point that the judge was considering was whether the sign was a trespass or a nuisance at the very low level at which it projected. This to my mind is clearly indicated by his reference to *Winfield on Tort*, 6th ed. (1954) in which the text reads, at p. 380: 'it is submitted that trespass will be committed by [aircraft] to the air space if they fly so low as to come within the area of ordinary user.' The author in that passage is careful to limit the trespass to the height at which it is contemplated an owner might be expected to make use of the air space as a natural incident of the user of his land. If, however, the judge was by his reference to the Civil Aviation Act 1949 and his disapproval of the views of Lord Ellenborough in ***Pickering -v- Rudd*** **(1815) 4 Camp 219**, indicating the opinion that the flight of an aircraft at whatever height constituted a trespass at common law, I must respectfully disagree.
>
> I do not wish to cast any doubts upon the correctness of the decision upon its own particular facts. It may be a sound and practical rule to regard any incursion into the air space at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance. Adjoining owners then know where they stand; they have no right to erect structures overhanging or passing over their neighbours' land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours about which there may be much room for argument and uncertainty. But wholly different considerations arise when considering the passage of aircraft at a height which in no way affects the user of the land."

66. Griffiths J then noted that, in both ***Pickering -v- Rudd*** and ***Saunders -v- Smith*** **(1838) 2 Jur 491**, the Court had rejected a submission that sailing a hot air balloon over

someone's land could amount to trespass. The Judge also quoted from Lord Wilberforce's speech in ***Commissioner for Railways -v- Valuer-General*** **[1974] AC 328, 351** in which he noted that: "*In none of these cases is there an authoritative pronouncement that 'land' means the whole of the space from the centre of the earth to the heavens: so sweeping, unscientific and unpractical doctrine is unlikely to appeal to the common law mind.*"

67. Griffiths J could find no support in the case law for the contention that a landowner's rights in the air space above his property extend to an unlimited height (**487G-H)**:

> "In ***Wandsworth Board of Works -v- United Telephone Co. Ltd.*** **(1884) 13 QBD 904** Bowen LJ described the maxim, *usque ad coelum*, as a fanciful phrase, to which I would add that if applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the uncritical and literal application of the maxim... I accept their collective approach as correct. The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public."

68. On the facts, there had been a "*fierce dispute*" between the parties as to the height at which the plane had flown to take the photograph, and the Judge found only that it had flown "*many hundreds of feet above the ground*" (**488C**). He added:

> "… it is not suggested that by its mere presence in the air space it caused any interference with any use to which the plaintiff put or might wish to put his land. The plaintiff's complaint is not that the aircraft interfered with the use of his land but that a photograph was taken from it. There is, however, no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass."

69. In a passage that perhaps echoes some of Ms Bolton's submissions in this case, Griffiths J noted, but rejected, the argument that photographs of the claimant's property obtained from the air could be used for nefarious purposes (**488E-F**):

> "… [Counsel for the plaintiff], however, conceded that he was unable to cite any principle of law or authority that would entitle Lord Bernstein to prevent someone taking a photograph of his property for an innocent purpose, provided they did not commit some other tort such as trespass or nuisance in doing so. It is therefore interesting to reflect what a sterile remedy Lord Bernstein would obtain if he was able to establish that mere infringement of the air space over his land was a trespass. He could prevent the defendants flying over his land to take another photograph, but he could not prevent the defendants taking the virtually identical photograph from the adjoining land provided they took care not to cross his boundary, and were taking it for an innocent as opposed to a criminal purpose."

70. For my part, I would respectfully disagree that proof that photographs of a property, captured from adjoining land, were taken for a "*criminal purpose*" would render photographer liable for trespass upon the land of the property-owner. If there is to be a remedy against taking such photographs, it is to some other area of the law that the aggrieved property-owner would have to turn.

71. Griffiths J therefore dismissed the claimant's claim for trespass, but he concluded his judgment with this observation (**489F-H**):

> "… I [would not] wish this judgment to be understood as deciding that in no circumstances could a successful action be brought against an aerial photographer to restrain his activities. The present action is not founded in nuisance for no court would regard the taking of a single photograph as an actionable nuisance. But if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief. However, that question does not fall for decision in this case and will be decided if and when it arises."

72. The decision does not appear to deal expressly with the claim for breach of privacy. Perhaps that reflects the reality that, in 1977, there was no recognised right of privacy, so-called (a submission the defendant made – see p.481 in the report). Griffiths J's observations about whether repeated photographing of a person's property, amounting effectively to surveillance, might ground a cause of action were very much rooted in the notion that such behaviour might be found to be an actionable nuisance (cf. ***Fearn -v- Board of Trustees of the Tate Gallery*** **[2024] AC 1** [188]).

73. The law has developed significantly since 1977. A claimant who is subjected to the sort of surveillance that Griffiths J described might well now consider, in addition to a claim for nuisance, claims for misuse of private information, potential breaches of data protection legislation and harassment. For the purposes of this judgment, it is important to note that, as against "Persons Unknown", the Claimants have not advanced their claim for injunctive relief to restrain further drone usage on any of these bases; the claim is advanced solely as an alleged trespass. I can well see that pursuing claims for these additional torts might not be straightforward (and the omission to advance such claims may reflect an appreciation of those difficulties by the Claimants). For present purposes, it is sufficient to note that not only have the Claimants have not pursued such claims, but they have also not provided the evidence necessary to demonstrate that the historic drone usage (and apprehended future use) would amount to any of these further torts. For the purposes of the Claim against "Persons Unknown" I will therefore consider, only, whether the Claimants' evidence of drone usage amounts to trespass. For the claim against Mr Curtin, personally, I must additionally consider whether his use of a drone on 21 June 2022 was part of a course of conduct involving harassment of the First Claimant's employees (and others in the Second Claimant class) – see [255]-[274] below.

(2) Interference with the right of access to the highway

74. The common law right of access to the highway was described by Lord Atkin, in ***Marshall -v- Blackpool Corporation*** **[1935] AC 16, 22** as follows:

> "… The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway."

75. An interference with this right is actionable *per se*: ***Walsh -v- Ervin*** **[1952] VLR 361**. The right is separate from the land-owner's right, as a member of the public, to utilise the highway itself: ***Ineos Upstream Ltd -v- Persons Unknown*** **[2017] EWHC 2945 (Ch)** [42]. This private right ceases as soon as the highway is reached and any subsequent interference with access to the highway is actionable, if at all, only if it amounts to a public nuisance. In ***Chaplin -v- Westminster Corporation*** **[1901] 2 Ch 329, 333-334**, Buckley J explained:

> "The right which [the claimants] here seek to exercise is a right which they enjoy in common with all other members of the public to use this highway. They have an individual interest which enables them to sue without joining the Attorney-General, in that they are persons who by reason of the neighbourhood of their own premises use this portion of the highway more than others. They have a special and individual interest in the public right to this portion of the highway, and they are entitled to sue without joining the Attorney-General because they sue in respect of that individual interest; but the right which they seek to exercise is not a private right, but a public right. A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on to the highway, and is using the highway, what he is using is not a private right, but a public right."

76. The reference to the Attorney-General is to the important principle that an individual cannot, without the consent of the Attorney-General, seek to enforce the criminal law in civil proceedings: ***Gouriet -v- Union of Post Office Workers*** **[1978] AC 435, 477E-F**. Obstruction of the highway is a criminal offence. It does not create a civil cause of action unless the obstruction of the highway amounts to a public nuisance.

77. Ms Bolton submits that the First Claimant, as the owner of the Wyton Site, has an immediate right to access the highway from the Wyton Site to the B1090. Obstruction of this right of access gives rise to a private law claim.

78. I can readily accept that acts of the protestors which deliberately blockade the Wyton Site, preventing vehicles gaining access to or from the highway, would be an infringement of this private right.

79. However, Ms Bolton goes further. She argues that there is no protest right that can justify any interference with the access to the highway. She contends that there is no right to obstruct, slow down or hinder the passage of vehicles exiting the Wyton Site.

80. Put in those absolute terms, I reject this part of Ms Bolton's submission. As is clear from the passage I have quoted from ***Marshall*** (see [74] above), such private law right

of access to the highway that the First Claimant has is "*subject to the rights of the public*". At its most prosaic, the right of access to the highway cannot be absolute because people leaving the Wyton Site would have to give way to traffic on the B1090. In heavy traffic, or if there was significant congestion or a traffic jam, a person exiting the Wyton Site might have to wait for some time before s/he could access the highway. Another example, directly linked to the protest activities, would be if the protestors organised a march or procession along the B1090 (with due notification being given to the police under s.11 Public Order Act 1986). For the time it took for the procession to pass the entrance of the Wyton Site, it would interfere with the First Claimant's right of access to the highway. The First Claimant has no right to ask the Court to prohibit lawful use of the highway by the protestors on the grounds that it would interfere – for a short period – with the First Claimant's right of access to the highway. Under s.12 Public Order Act 1986, if certain requirements are met, the police can impose conditions on processions. In that way a proper balance can be struck between the protestors' right to demonstrate, and the First Claimant's right of access to the highway.

(3) Public nuisance

81. When these proceedings were commenced, it was an offence at common law to cause a public nuisance. From 28 June 2022, the offence of public nuisance has been put on a statutory footing in s.78 Police, Crime, Sentencing and Courts Act 2022, and the old common law offence has been abolished. The new s.78 provides:

> "(1) A person commits an offence if—
>
> (a) the person—
>
> (i) does an act, or
>
> (ii) omits to do an act that they are required to do by any enactment or rule of law,
>
> (b) the person's act or omission—
>
> (i) creates a risk of, or causes, serious harm to the public or a section of the public, or
>
> (ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
>
> (c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
>
> (2) In subsection (1)(b)(i) "serious harm" means—
>
> (a) death, personal injury or disease,
>
> (b) loss of, or damage to, property, or
>
> (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.

> (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.
>
> (4) A person guilty of an offence under subsection (1) is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding he general limit in a magistrates' court, to a fine or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.
>
> …
>
> (6) The common law offence of public nuisance is abolished.
>
> (7) Subsections (1) to (6) do not apply in relation to—
>
> (a) any act or omission which occurred before the coming into force of those subsections, or
>
> (b) any act or omission which began before the coming into force of those subsections and continues after their coming into force.
>
> (8) This section does not affect—
>
> (a) the liability of any person for an offence other than the common law offence of public nuisance,
>
> (b) the civil liability of any person for the tort of public nuisance, or
>
> (c) the ability to take any action under any enactment against a person for any act or omission within subsection (1).
>
> (9) In this section "enactment" includes an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978."

82. The Act retains civil liability for the tort of public nuisance: s.78(8)(b). That reflects the position that used to apply under the common law and the authors of *Clerk & Lindsell on Tort* (§19-179, 24th edition, Sweet & Maxwell, 2023) consequently suggest: "*it is clear that the previous common law decisions on liability for public nuisance continue to provide guidance on the scope of civil liability in highway cases*".

83. Consideration of the law relating public nuisance arising from an obstruction of the highway must start with the following basic propositions:

(1) simple obstruction of the highway is a criminal offence under s.137 Highways Act 1980;

(2) a threatened or actual offence under s.137 *cannot* ground a civil claim (without the consent of the Attorney-General): ***Gouriet*** – see [76] above);

(3) if the conditions of s.78 Police, Crime, Sentencing and Courts Act 2022 (or, prior to enactment, the common law offence of public nuisance) are met, obstruction of the highway *may* amount to public nuisance; and

(4) a threatened or actual public nuisance *can* ground a civil claim upon proof of special damage.

(a) Obstruction of the highway: s.137 Highways Act 1980

84. So far as material, s.137 Highways Act 1980 provides:

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

85. Any occupation of part of a highway which interferes with people having the use of the whole of the highway is an obstruction; and unless the obstruction is so small that it is *de minimis*, any stopping on the highway is *prima facie* an obstruction. However, the prosecution must also prove that the person responsible for the obstruction was acting unreasonably. Resolving that issue depends on all the circumstances, including the length of time of the obstruction, the place where it occurs, the purpose for which it is done, and whether it does in fact cause an actual obstruction as opposed to a potential obstruction: ***Nagy -v- Weston*** **[1965] 1 WLR 280**; ***Hirst -v- Chief Constable of West Yorkshire*** **(1987) 85 Cr App R 143, 151** .

86. These principles were approved by the Divisional Court in ***DPP -v- Ziegler*** **[2020] QB 253** (and not subject to adverse comment in the Supreme Court **[2022] AC 408**).

87. The law resolves the tension between the criminal offence of obstruction of the highway, under s.137, and the right to protest (protected by Articles 10 and 11 of the ECHR) by recognising that some protest activities, that create an obstruction on a highway, can be defended on the basis that the right to protest provides a lawful excuse for the obstruction. That was the effect of ***Ziegler*** and Lord Reed gave the following summary in ***Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill*** **[2023] AC 505** ("***Northern Ireland Abortion Services***"):

> [22] Section 137 and the equivalent predecessor provisions have a long and specific history, and have been the subject of a great deal of judicial consideration. The approach adopted to section 137 and its predecessors for over a century prior to ***Ziegler*** was rooted in authorities which treated the question to be decided under the statute as similar to the question to be decided in civil nuisance cases of an analogous kind. On that basis, it was held that it was necessary for the court to consider whether the activity being carried on in the highway by the defendant was reasonable or not: see, for example, ***Lowdens -v- Keaveney*** **[1903] 2 IR 82, 87** and **89**. That question was treated as one of fact, depending on all the circumstances of the case: ***Nagy -v- Weston*** **[1965] 1 WLR 280, 284**; ***Cooper -v- Metropolitan Police Commissioner*** **(1985) 82 Cr App R 238, 242** and **244**. That approach accorded with the general treatment in the criminal law of assessments of reasonableness as questions of fact. In cases where the activity in question

> took the form of a protest or demonstration, common law rights of freedom of speech and freedom of assembly were treated as an important factor in the assessment of reasonable user: see, for example, ***Hirst -v- Chief Constable of West Yorkshire*** **(1986) 85 Cr App R 143**. That approach was approved, *obiter*, by members of the House of Lords in ***Director of Public Prosecutions -v- Jones*** **[1999] 2 AC 240, 258-259** and **290**. Lord Irvine of Lairg LC summarised the position at p 255: 'the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage'. The same approach continued to be followed after the Human Rights Act entered into force: see, for example, ***Buchanan -v- Crown Prosecution Service*** **[2018] EWHC 1773 (Admin)**; **[2018] LLR 668**.

88. Lord Reed did criticise some aspects of the approach adopted by the Divisional Court in ***Ziegler*** ([23]-[25]), but recognised that the Supreme Court's decision in ***Ziegler*** governed the proper approach to the interpretation of s.137 in protest cases:

> [26] … it was agreed between the parties, and this court accepted [in ***Ziegler***], that section 137 has to be read and given effect, in accordance with section 3 of the Human Rights Act, on the basis that the availability of the defence of lawful excuse, in a case raising issues under articles 10 or 11, depends on a proportionality assessment carried out in accordance with the approach set out by the Divisional Court: see [10]-[12] and [16]. As that question is not in issue in the present case, we make no comment upon it.
>
> [27] One of the issues in dispute in the appeal was whether there can be a lawful excuse for the purposes of section 137 in respect of deliberate physically obstructive conduct by protesters, where the obstruction prevented, or was capable of preventing, other highway users from passing along the highway. Lord Hamblen and Lord Stephens concluded that there could be (***Jones*** was neither cited nor referred to). Lady Arden and Lord Sales expressed agreement in general terms with what they said on this issue.
>
> [28] In the course of their discussion of this issue, Lord Hamblen and Lord Stephens stated at [59]:
>
> > "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case".
>
> One might expect that to be the usual position at the trial of offences charged under section 137 in circumstances where articles 9, 10 or 11 are engaged, if the section is interpreted as it was in ***Ziegler***; and that was the only situation with which Lord Hamblen and Lord Stephens were concerned…

89. Lord Reed's quarrel with ***Ziegler*** was with the suggestion – in [59] – that the Supreme Court had been stating a principle of universal application relevant to all contexts in which protest rights were engaged. It was this submission that Lord Reed rejected: [29]ff.

(b) Public nuisance by obstructing the highway

90. Assuming that a claimant can demonstrate commission of a public nuisance by the defendant(s), then s/he can bring a civil claim if s/he can prove (1) that s/he has sustained particular damage beyond the general inconvenience and injury suffered by the public as a result of the public nuisance; (2) that the particular damage which he has sustained is direct, not consequential; and (3) that the damage is substantial, "*not fleeting or evanescent*": ***Jan De Nul (UK) Ltd -v- N.V. Royale Belge*** **[2000] 2 Lloyd's Rep 700** ("***N.V. Royale Belge***") [42] relying upon ***Benjamin -v- Storr*** **(1874) LR 9 CP 400**.

91. Relying upon ***East Hertfordshire DC -v- Isobel Hospice Trading Ltd*** **[2001] JPL 597**, Ms Bolton submitted that "*it is well-established law that it is a public nuisance to obstruct or hinder the free passage of the public along the highway*". That is not an accurate statement of the law and the decision upon which she relied is not authority for that proposition. The case was a judicial review of the dismissal (by a Magistrates' Court, and then on appeal) of a local authority's complaint under s.149 Highways Act 1980 after several large wheelie bins had been placed on a highway. The Council had served a notice on the defendant to remove the wheelie bin that it had placed on the highway. The defendant did not comply with the notice and proceedings were then brought in the Magistrates' Court. The Magistrates dismissed the complaint, and the Council appealed. The Crown Court dismissed the appeal. The Crown Court was satisfied that the wheelie bin was situated on the highway, but that it could not be said to be a nuisance or, if it was, "*it was a nuisance of such a piffling nature that it did not warrant the intervention of any court*".

92. The High Court quashed the decision of the Crown Court. The Judge found that the wheelie bin was an obstruction of the highway that was not temporary. It was not relevant that people could navigate around it. The Judge concluded that the Crown Court had been wrong to hold that the positioning of the wheelie bin on the highway did not in law amount to a nuisance under s.149 ([32]), and remitted the case for redetermination: [38]. The case is not authority for what obstructions of the highway amount to a public nuisance; it is not a case about public nuisance at all.

93. The leading case concerning the common law offence of public nuisance is ***R -v- Rimmington*** **[2006] 1 AC 459**. In it, Lord Bingham identified ***Attorney General -v- PYA Quarries Ltd*** **[1957] 2 QB 169** as the modern authority on what amounts to a public nuisance [18]:

> "This was a civil action brought by the Attorney General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council to restrain a nuisance by quarrying activities which were said to project stones and splinters into the neighbourhood, and cause dust and vibrations. It was argued for the company on appeal that there might have been a private nuisance affecting some of the residents, but not a public nuisance affecting all Her Majesty's liege subjects living in the area. In his judgment Romer LJ reviewed the authorities in detail and concluded, at p.184:
>
> > 'I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of

> a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.'

Denning LJ agreed. He differentiated between public and private nuisance at p.190 on conventional grounds: '*The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals.*' He went on to say, at p.191:

> 'that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.'"

94. Ms Bolton's submissions on behalf of the Claimants have very much proceeded on the assumption that *every* threatened or actual obstruction of the highway is amounts to an actionable public nuisance. That is not correct. Whether a public nuisance is caused by an obstruction of the highway is a question of fact and degree: see e.g. ***N.V. Royale Belge*** [40].

95. The criminal offence of obstruction of the highway can embrace behaviour ranging from the obstruction of a single vehicle on a minor 'B' road at 3 o'clock in the morning, to a massive blockage of the M25 motorway during rush hour. The former, even if it amounts to a criminal offence under s.137 Highways Act 1980, would not remotely constitute a public nuisance, whereas the latter probably would.

96. In her submissions, Ms Bolton referred to and relied upon ***DPP -v- Jones*** **[1999] 2 AC 240**, ***Ziegler*** and ***Northern Ireland Abortion Services***. Whilst these authorities do contain important statements of principle, they have limited direct application to the issues that I must resolve. Each of those cases was concerned with the way in which the criminal law accommodates protest rights. None of the cases concerned the torts relied upon by the Claimants. ***DPP -v- Jones*** was a case about trespassory assembly, contrary to s.14A Public Order Act 1986; ***Ziegler*** concerned the offence of obstructing the highway, contrary to s.137 Highways Act 1980; and ***Northern Ireland Abortion Services*** concerned the legislative competence of the Northern Ireland Assembly to enact provisions that would prohibit certain activities within "*safe access zones*" adjacent to the premises where abortion services were provided.

97. Several of Ms Bolton's submissions, based upon ***Northern Ireland Abortion Services***, I consider to be wrong. For example, she argued that the case was authority for the proposition that ***Ziegler*** is not to be applied universally to cases concerning obstruction of the highway, "*and the approach is that set out by Lord Irvine in* ***Jones****, namely 'the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage'*". I reject that submission. ***Northern Ireland Abortion Services*** could not, and did not, overrule the authority of ***Ziegler*** on the proper interpretation of s.137. Lord Reed did not doubt the correctness of the Supreme Court's decision in ***Ziegler*** as it applied to the offence of obstructing the highway, indeed he

noted that it represented the position that was both well-established by earlier authorities and necessary given the parameters of the offence (see [87] above). He rejected the submission that the principle from ***Ziegler*** applied to all cases involving protest rights. He held that the answer to whether determination of the proportionality of an interference with Convention-protected protest rights required a fact-specific evaluation of the circumstances in the individual case depended upon the nature and context of the particular statutory provision. Even in relation to other offences that provide for a defence of lawful or reasonable excuse, it did not necessarily mean that the Court is required to carry out an individual proportionality assessment, "*the position is more nuanced than that*": [53] (and see [58]).

98. It is not necessary to consider the other arguments that Ms Bolton advanced based on ***Northern Ireland Abortion Services*** because the case has only tangential relevance to the Claimants' case against the Defendants in this claim. This case is not about, for example, whether it would be lawful for Cambridgeshire County Council to impose a Public Spaces Protection Order to prohibit certain protest activities in a designated zone around the Wyton Site (c.f. ***Dulgheriu -v- London Borough of Ealing*** **[2020] 1 WLR 609**). Nor is this case concerned with alleged offences of obstructing the highway. Even if the Claimants could establish that such an offence had been committed on one or more occasions, that could not be used as the basis for a civil claim against these Defendants. At the stage of liability, the case is about whether the Claimants can demonstrate: (1) that Mr Curtin (and others) have (a) trespassed on the Wyton Site; (b) obstructed access between the Wyton Site and the public highway; and/or (c) obstructed the carriageway in such a way as to cause a public nuisance; (d) (against Mr Curtin alone) that he has pursued a course of conduct involving the harassment; and/or (2) threaten to do one or more of these acts unless restrained by injunction.

(4) Harassment

99. The Protection from Harassment Act ("the PfHA"), s.1 provides, so far as material:

> "(1) A person must not pursue a course of conduct —
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.
>
> (1A) A person must not pursue a course of conduct —
>
> (a) which involves harassment of two or more persons, and
>
> (b) which he knows or ought to know involves harassment of those persons, and
>
> (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
>
> (i) not to do something that he is entitled or required to do, or
>
> (ii) to do something that he is not under any obligation to do.

> (2) For the purposes of this section …, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
>
> (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows -
>
> (a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

100. A breach of ss.1(1) and/or (1A) is a criminal offence: s.2. Sections 3 and 3A PfHA provide that any actual or apprehended breach of ss.1(1) and (1A) may be the subject of a civil claim by anyone who is or may be the victim of the course of conduct.

101. A corporate entity is not a "person" capable of being harassed under s.1(1): s.7(5) and ***Daiichi UK Ltd -v- Stop Huntingdon Animal Cruelty*** **[2004] 1 WLR 1503**. However, a company may sue in a representative capacity on behalf of employees of the company if that is the most convenient and expeditious way of enabling the court to protect their interests: ***Emerson Developments Ltd -v- Avery*** **[2004] EWHC 194 (QB)** [2]. Alternatively, claims for an injunction under s.3A may be brought by a company in its own right: ***Harlan Laboratories UK Ltd -v- Stop Huntingdon Animal Cruelty*** **[2012] EWHC 3408 (QB)** [5]-[9]; ***Astrellas Pharma -v- Stop Huntingdon Animal Cruelty*** **[2011] EWCA Civ 752** [7].

102. Section 7 provides, so far as material:

> "(2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A 'course of conduct' must involve—
>
> (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or
>
> (b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.
>
> (3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—
>
> (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
>
> (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation

> to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
>
> (4) 'Conduct' includes speech.
>
> (5) References to a person, in the context of the harassment of a person, are references to a person who is an individual."

103. A defendant has a defence if s/he shows: (i) that the course of conduct was pursued for the purpose of preventing or detecting crime; and/or (ii) that in the particular circumstances the pursuit of the course of conduct was reasonable (s.1(3)).

104. Assessing whether conduct amounts to or involves harassment, and whether any defendant has a defence under s.1(3), can be difficult and is always highly fact specific. In ***Hayden -v- Dickenson*** **[2020] EWHC 3291 (QB)** [44], I reviewed the relevant authorities and identified the following principles (with citations mostly omitted):

> "(i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; '*a persistent and deliberate course of targeted oppression*'…
>
> (ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2… A course of conduct must be grave before the offence or tort of harassment is proved…
>
> (iii) The provision, in s.7(2) PfHA, that '*references to harassing a person include alarming the person or causing the person distress*' is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it… It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results…
>
> (iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective… '*The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant*'…
>
> (v) Those who are '*targeted*' by the alleged harassment can include others '*who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it*'…

(vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that they felt offended or insulted…

(vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes '*alarming the person or causing the person distress*'. However, Article 10 expressly protects speech that offends, shocks and disturbs. '*Freedom only to speak inoffensively is not worth having*'…

(viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality… The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the '*ultimate balancing test*' identified in ***In re S*** [17] …

(ix) The context and manner in which the information is published are all-important… The harassing element of oppression is likely to come more from the manner in which the words are published than their content…

(x) The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amount to harassment…

(xi) Neither is it determinative that the published information is, or is alleged to be, true… '*No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do*'… That is not to say that truth or falsity of the information is irrelevant… The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under s.1(3)), particularly when considering any application interim injunction… On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger… The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.

(xii) Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional…"

105. That summary of the law was approved by the Divisional Court in ***Scottow -v- CPS*** **[2021] 1 WLR 1828** [24], to which Warby J added [25(1)]:

> "A person alleging harassment must prove a 'course of conduct' of a harassing nature. Section 7(3)(a) of the PfHA provides that, in the case of conduct relating to a single person, this 'must involve … conduct on at least two occasions in relation to that person'. But this is not of itself enough: a person alleging that conduct on two occasions amounts to a 'course of conduct' must show 'a link between the two to reflect the meaning of the word "course"': ***Hipgrave -v- Jones*** **[2004] EWHC 2901 (QB)** [62] (Tugendhat J). Accordingly, two isolated incidents separated in time by a period of months cannot amount to harassment: ***R -v- Hills (Gavin Spencer)*** **[2001] 1 FLR 580** [25]. In the harassment by publication case of ***Sube -v- News Group Newspapers Ltd*** **[2020] EMLR 25** I adopted and applied this interpretative approach, to distinguish between sets of newspaper articles which were 'quite separate and distinct'. One set of articles followed the other 'weeks later, prompted, on their face, by new events and new information, and they had different content': [76(1)], [99] (and see also [113(1)])."

106. Factors (vi) to (ix) from ***Hayden*** are likely to have equivalent resonance in protest cases, which similarly engage Article 10 (and Article 11). It is relevant to consider the speech that is alleged to amount to or involve harassment. Any attempt to interfere with political speech requires the most convincing justification, and the most anxious scrutiny from the Court: ***Hourani -v- Thomson*** **[2017] EWHC 432 (QB)** [212]; ***Hibbert -v- Hall*** **[2024] EWHC 2677 (KB)]** [154]. The objective nature of the assessment of whether the conduct amounts to or involves harassment (***Hayden*** factor (vi)) is critical to ensuring proper respect for Article 10.

107. The course of conduct, viewed as a whole, must be assessed objectively. It is not necessary for each individual act that comprises the course of conduct to be oppressive and unacceptable. Individual acts which, viewed in isolation, appear fairly innocuous, may take on a different complexion when viewed as part of a bigger picture: ***Hibbert -v- Hall*** [152].

108. Finally, the claim of harassment pursued against Mr Curtin, at trial, does not allege that Mr Curtin has breached s.1(1) of the PfHA. It is not alleged that he has targeted any individual. The claim alleges a breach of s.1(1A). As such, the Claimants must also demonstrate, not only that Mr Curtin pursued a course of conduct, which involved harassment of two or more persons, which he knew or ought to have known involved harassment of those persons, but also, under s.1(1A)(c) that he intended, by that harassment, to persuade any person (which could include either those who were harassed or the First Claimant) not to do something that s/he/it was entitled or required to do, or to do something that s/he/it was under no obligation to do.

G: The Third Contempt Application

109. As already noted (see [52] above), the Third Contempt Application, against Mr Curtin, was issued by the Claimants on 17 June 2022. It was supported by the Sixth Affidavit of Ms Pressick and the Second Affidavit of Mr Manning. The evidence was heard

during the trial, with a further hearing, after the trial, on 23 June 2023. Mr Curtin was represented at this hearing, and he gave evidence.

(1) Allegations of breach of the Interim Injunction

110. The contempt application alleged that Mr Curtin had breached the Interim Injunction, in the terms imposed on 31 March 2022, as follows ("the Grounds"):

(1) On 26 April 2022, at 03.08, Mr Curtin entered the Exclusion Zone, in breach of Paragraph 1(2) of the 31 March 2022 order.

(2) On 26 April 2022, at 03.55 and in the period immediately thereafter, Mr Curtin twice approached and/or obstructed the path of a white van that was directly exiting the Exclusion Zone, in breach of Paragraph 1(4) of the 31 March 2022 order.

(3) On 12 May 2022, at 10.57, Mr Curtin entered the Exclusion Zone, in breach of Paragraph 1(2) of the 31 March 2022 order.

(4) On 12 May 2022, at 11.56, Mr Curtin instructed and/or encouraged an unknown and unidentifiable person to enter the Exclusion Zone, in breach of Paragraph 1(2) of the 31 March 2022 order.

(5) On 12 May 2022, at 15.13, Mr Curtin entered the Exclusion Zone, in breach of Paragraph 1(2) of the 31 March 2022 order.

(6) On 12 May 2022, between 15.24 and 15.27, Mr Curtin approached and/or obstructed the path of a Police van, such that the van was unable to exit the Exclusion Zone, in breach of Paragraph 1(4) of the 31 March 2022 order.

(2) Evidence relied upon

111. Principally, the evidence upon which the Claimants relied to prove the alleged breaches is video footage. The affidavits of Ms Pressick and Mr Manning do little more than produce this video evidence and then comment upon what it shows.

112. Grounds 1 and 2 relate to an incident, on 26 April 2022, when a white van left the Wyton Site at just after 3am. Police were in attendance. The protestors clearly believed that dogs were being transported from the Wyton Site in the vehicle.

113. Grounds 3 to 6 concern various separate incidents on 12 May 2022.

(a) Ground 1

114. The video footage relied upon shows that a person, alleged to be Mr Curtin, stands and walks through an area which is alleged to be within the Exclusion Zone. The person is alleged to be in the Exclusion Zone for no more than 9 seconds.

(b) Ground 2

115. The video footage relied upon shows, from several different viewpoints, that a person, alleged to be Mr Curtin, approached and/or obstructed the path of a white van that was

directly exiting the Exclusion Zone. Specifically, it is alleged that Mr Curtin approached the white van when it was inside, attempting to exit, and immediately upon its exit from, the Exclusion Zone. Essentially, the white van left the Wyton Site by the main gate and attempted to turn right. As it did so, several protestors, including Mr Curtin, stood in front of and around the vehicle. Albeit temporarily, the vehicle was obstructed by Mr Curtin (and others) as it attempted to leave the Exclusion Zone.

(c) Ground 3

116. The video evidence shows that, at around 10.57 on 12 May 2022, a protestor throws a plastic box into the carriageway which is within the Exclusion Zone. Mr Curtin crosses the central line of the carriageway and kicks the plastic box away from the road. In doing so, Mr Curtin is within the Exclusion Zone for possibly 2 seconds.

(d) Ground 4

117. At 11.53 on 2 May 2022, an unidentified person, dressed as a dinosaur described by Mr Manning as a "*tyrannosaurus-rex costume*", enters the Exclusion Zone. The dinosaur ambles around the verge of the carriageway to the left of entrance to the Wyton Site. Another protestor appears to film the dinosaur without entering the Exclusion Zone. At 11.56, the dinosaur approaches Mr Curtin, who appears to have been filming him/her, and engages in conversation. Mr Curtin remains outside the Exclusion Zone. Mr Curtin then can be seen to take off and give his footwear to the dinosaur. Thereafter, Mr Manning says that the dinosaur "*seems to be doing little more than messing around on the driveway area… showing off for the CCTV cameras and the protestors who are cheering*". Mr Manning speculates that the dinosaur was looking for a lost drone. Mr Manning concludes: "*the CCTV of the t-rex incident clearly shows Mr Curtin assisting the t-rex's breach of the Exclusion Zone, as he lends his shoes to the person in the costume*". It is not alleged that, at any point, the itinerant dinosaur trespassed on the First Claimant's land or committed any other civil wrong.

(e) Ground 5

118. Later, on 12 May 2022, from around 15.08, the video evidence shows a convoy of vehicles leaves the Wyton Site, largely unobstructed. There is a significant police presence. On occasions, protestors can be seen to step over the mid-point of the carriageway into the exclusion zone. Police officers can be seen to gesture at the white lines, which I take to be a reminder of the Exclusion Zone. The protestors then step back.

119. At 15.13 a police van pulls up in front of the gates to the Wyton Site. It stops in the Exclusion Zone. A man, dressed in black, appears to have been arrested. Mr Curtin and another protestor approach the police vehicle, and in doing so enter the Exclusion Zone for a couple of seconds. Following a search, at 15.16, the detained man is placed into the van.

(f) Ground 6

120. This incident follows closely on from the Ground 5. A second police van can be seen to be stationary on the carriageway to the left of the Wyton Site. Police officers get into the van at around 15.18 and appear to be about to leave. However, their route is

obstructed by several protestors. At 15.24, Mr Curtin joins the protestors who are standing in front of the police van. A police officer gets out of the van and speaks to the protestors. The protestors disperse by 15.28 and the van drives off. Mr Manning states that the video evidence shows that Mr Curtin was in front of the van for a little over a minute. Arguably, the actions of the protestors were an obstruction of the highway, but the police did not take any action, perhaps in view of the very short-lived extent of the obstruction.

H: The parameters of the Claimants' claims

(1) The case against Mr Curtin

121. At an earlier stage of the proceedings, I made directions that the Claimant must plead, separately, the allegations that they made against each of the named Defendants in their Particulars of Claim. This was to ensure fairness. It was not fair to expect litigants in person to have to grapple with extensive Particulars of Claim – containing allegations directed at "Persons Unknown" – to attempt to identify what, if anything, was being alleged against them specifically. For the purposes of trial, Defendant-specific bundles were required to be provided by the Claimants. Each bundle contained only the allegations and evidence relevant to that Defendant.

122. By the time we reached the end of the trial, Mr Curtin was the only named Defendant who remained. The parameters of the case against him are set by what is pleaded in his Defendant-specific Particulars of Claim.

123. In their pleaded case, the Claimants allege that Mr Curtin, on various occasions, has been guilty of trespass, public nuisance on the highway, interference with the First Claimant's common law right of access to the highway from the Wyton Site and, finally a course of conduct involving harassment of the First Claimant's employees (and others in the Second Claimant class).

124. As I will come on to consider (see Section J(2) below), the Claimants advanced allegations against Mr Curtin, both in the witness evidence and at trial, that went beyond the case pleaded against him in the Particulars of Claim.

125. The Claimants' pleaded case against Mr Curtin relies upon the incidents I shall identify and address in the next section of the judgment when I deal with the evidence. I shall deal with each incident, chronologically, setting out the evidence and stating my conclusions, including, where necessary, resolving any disputed aspects of that evidence.

(2) The case against "Persons Unknown"

126. Although the pleaded case against the various categories of "Persons Unknown" included other claims, by the end of the evidence and in their closing submissions following the Supreme Court decision in ***Wolverhampton***, the Claimants had narrowed the claims advanced against "Persons Unknown" to a claim for an injunction against various categories of "Persons Unknown" or, alternatively, a *contra mundum* injunction, to restrain: (1) trespass (including prohibiting drone flying below 100 metres); (2) public nuisance caused by obstruction of the highway; and (3) interference with the First Claimant's right of access to the public highway. The Claimants did not

pursue a claim for harassment against "Persons Unknown" (or *contra mundum*) at the end of the trial.

I: The evidence at trial: generally

127. Before turning to the evidence relating to specific incidents, I should set out the evidence that was adduced at the trial and deal with some general issues. Some of the most important evidence at the trial were extracts of CCTV footage of various incidents. At the time the evidence for trial was prepared, the Wyton Site had 30 CCTV cameras in various locations. The security team are also equipped with body-worn cameras in certain situations.

128. The following witnesses were called by the Claimants at trial: (1) Susan Pressick; (2) Wendy Jarrett; (3) David Manning; (4) Demetrius Markou; (5) Employee A; (6) Employee AF; (6) Employee B; (7) Employee F; (8) Employee G; (9) Employee H; (10) Employee J; (11) Employee L; (12) Employee V; and (13) the Production Manager.

129. Anonymity orders were made for some of the witnesses. This was to protect the relevant witnesses from the risk of reprisal. The evidence has demonstrated that a small minority of individuals (not Mr Curtin) have sought to target those whom they identify as being employees of the First Claimant. At the trial, the anonymised witnesses gave their evidence via video link, in public, but with their identity protected. That was achieved by the Court, initially, sitting temporarily in private, during which the witness appeared on screen and was sworn. The screen was then deactivated, and the Court went back into open Court for the witness to be questioned on his/her evidence.

130. Some of the witnesses were not anonymised. For some, their names were well known to the protestors so anonymising them would have served no real purpose. Nevertheless, I have decided to adopt a cautious approach to naming them in this judgment. That is because, once handed down, this judgment, will become a public record.

131. The Claimants also relied upon witness statements of four witnesses, as hearsay, who were not called to give evidence: Employee C; Employee I; Employee P; and Jane Read.

132. Finally, Mr Curtin gave evidence at the trial. This largely consisted of his being cross-examined by Ms Bolton over three days.

133. The existence and availability of extensive CCTV recordings of the incidents means that there are no material disputes of fact that require me to decide between accounts given in the oral evidence. When I deal in the next Section of the judgment with the various incidents relied upon by the Claimants, I will refer to the evidence of the Claimants' witnesses. Before that, I should refer to the key witnesses for the Claimants who gave evidence relevant to the claim as a whole.

(1) Susan Pressick

134. Ms Pressick has provided many witness statements (and several Affidavits) during the litigation. She is employed by the Third Claimant as the Site Manager & UK Administration & European Quality Manager for the UK subsidiaries of Marshall Farm

Group Ltd. Ms Pressick has been closely involved in the litigation on behalf of the Claimants. Although she is based in Hull, Ms Pressick confirmed that she attends the Wyton Site most weeks. Her direct evidence of events is therefore limited, but she has played a significant role in the coordination of the evidence gathering process for the Claimants. Her witness evidence has been used as the primary vehicle for the introduction of the video evidence upon which the Claimants rely in relation to events at the Wyton Site.

135. Ms Pressick confirmed that, on occasions, she had been shouted at by protestors when she has visited the Wyton Site. In cross-examination she accepted that the protestors were not shouting at her, personally, but because she was perceived to be an employee of the First Claimant. One of the things that Ms Pressick recalled being shouted was "*puppy killer*". Questioned by Mr Curtin, Ms Pressick said that she did not understand why the protestors shouted that at people going to and from the Wyton Site. Mr Curtin put it to her that it was because dogs were euthanised at the site in a process that was termed "*terminal bleeding*". Ms Pressick accepted that on occasions that happened, but she maintained that being called a "*puppy killer*" was not a pleasant experience. Mr Curtin asked Ms Pressick about the impact of this upon her:

> Q: Do you take it personally, or do you take it 'They're calling me that because I work here?' …
>
> A: You take it personally, because we do everything we can do correctly…
>
> Q: Have you ever been specifically pointed out, 'That's the puppy killer'?
>
> A: No, as I described before, it's all of us, when we're moving around on and off site.
>
> Q: And in a form of legitimate protest, can you have any understanding… of why that would be a legitimate thing for a protestor to shout outside a very controversial beagle breeding establishment?
>
> A: I can understand the peaceful protest and the need for emotion to explain what the protestors are saying. It's still difficult to accept being shouted at.

136. In her witness evidence, Ms Pressick dealt with the, very limited, protest activity at the B&K Site in Hull.

137. Following the ***Wolverhampton*** decision, the Claimants were given the opportunity to file further evidence relevant to their claim for a *contra mundum* 'newcomer' injunction. Ms Pressick provided a further witness statement, dated 19 March 2024.

(2) Wendy Jarrett

138. The Claimants filed a witness statement for trial, dated 25 January 2023, from Wendy Jarrett, who attended to give evidence. Ms Jarrett is the Chief Executive of Understanding Animal Research ("UAR"). Ms Jarrett explained that UAR is a not-for-profit organisation that exists to explain to the public and policymakers why animals are used in medical and scientific research. UAR is funded by Marshall BioResources, the parent company of the First and Third Claimants; the Medical

Research Council and other bodies including the Wellcome Trust, the British Heart Foundation and Cancer Research.

139. Whilst Ms Jarrett's evidence was generally helpful in explaining the current UK legislation regarding animal research, I struggled to see the relevance that it had to the issues I must decide. Ms Bolton suggested that it was evidence that would explain the harm to medical research in this country were the First (and Third) Defendant to cease trading, thereby interrupting or curtailing the supply of beagles for clinical trials.

140. It was a feature at the trial that it was necessary, on several occasions, to remind Mr Curtin that he was not required (not was it relevant for him) to prove that the use of animals in medical research was "wrong". I appreciate why he feels the need to do so. That is a product of the adversarial process in which Mr Curtin feels the need to defend his actions. But the Claimants do not dispute that he, and the other protestors, have a sincerely held belief that animal testing – and the First and Third Claimant's role in supplying dogs for animal testing – is wrong (see [29] above). By the same token, it is equally irrelevant for the Claimants to attempt, in these proceedings, to show that animal testing is "*right*" or that Mr Curtin's beliefs are "*wrong*". Most of Ms Jarrett's evidence falls into this category, and is irrelevant to the issues that I must decide.

141. Even on the narrow issue identified by Ms Bolton – the consequences to medical research were the First (and Third) Defendants to be put out of business – I struggle to see its relevance. If the Defendants' protest activities are lawful – yet they lead to the First and Third Defendants going out of business – the harm that that might cause (which is highly speculative in any event) is not a basis on which the Court could curtail or limit otherwise lawful acts of protest. If the Defendants' protest activities are unlawful, then the Court will grant appropriate remedies to provide adequate redress whether or not harm might be caused to medical research in this country.

(3) David Manning

142. Mr Manning is employed by the First Claimant. He is a security guard at the Wyton Site. Although Mr Manning has only been employed by the First Claimant since June 2022, he has been a security guard at the site since 2014, having been previously employed by a contractor that used to provide security services at the Wyton Site. The contractor continues to provide other security guards at the site, but Mr Manning is now employed directly by the First Claimant to supervise the security team. As a result of that history, Mr Manning has had a direct involvement with the activities of the protestors from the start. If there is one employee of the First Claimant who has been in the 'front line', it is Mr Manning.

143. In his evidence, Mr Manning noted that because of the escalation of the protests, there is now a need for him to be supported by a security team of between four and ten guards. Mr Manning carries out a risk assessment on a day-to-day basis to determine how many of his team he will need. He also reviews CCTV footage and uses the cameras to monitor the protestors. In his witness statement, Mr Manning has identified the key incidents relied upon by the Claimants by reference to the CCTV footage that is available.

J: The evidence at trial against Mr Curtin

144. Before turning to the individual incidents alleged against Mr Curtin, it is necessary to set them in their context and the overall questioning of Mr Curtin.

145. The protest activities fall, broadly, into what can be called pre- and post-injunction periods. Before the Interim Injunction was granted, the hallmark of the main protest activities was the obstruction, and usually surrounding, of vehicles entering or leaving the Wyton Site. That was done largely to enable the protestors to confront those accessing the Wyton Site with the protest message they wanted to deliver. Mr Curtin described this as the 'ritual'. As part of the 'ritual', protestors would routinely delay entry or exit from the site. The extent of the delay varied. In the worst, pre-injunction incidents, the workers were prevented from accessing the Wyton Site for several hours, but typically the delay was only some minutes. In the Interim Injunction Judgment, I described this as the "*flashpoint*" in the protest activities.

146. After the Interim Injunction was granted, the phenomenon of protestors surrounding vehicles and delaying their access to/from the Wyton Site was largely brought to an end. This was achieved by the imposition of the Exclusion Zone as a temporary measure. After the Interim Injunction, although there are instances where it is alleged that Mr Curtin and others have obstructed vehicles entering or leaving the Wyton Site, it is nothing on the scale of what had been happening prior to the grant of the Interim Injunction.

(1) The pleaded allegations against Mr Curtin

13 July 2021

147. The Claimants allege that Mr Curtin (and others) trespassed on the Access Land and obstructed vehicles driven by the First Defendant's employees at the Wyton Site, whilst using a loudhailer to shout at those in the vehicles. Employee F was driving a white Mercedes A Class car, Employee Q was driving a black Volkswagen Polo, Jane Read was driving a green Vauxhall Mokka, and Employee AA was driving a white Seat Ibiza.

148. It is further alleged that Mr Curtin (and others), by their obstruction of the vehicles, interfered with the First Claimant's common law right of access to the highway from the Wyton Site and caused a public nuisance by obstructing the same vehicles on the public highway.

149. The obstruction of the vehicles and Mr Curtin's use of the loudhailer is alleged to be part of a course of conduct involving harassment of the employees involved, in particular it is alleged that Mr Curtin shouted at Ms Read: "*leave this place… are you seriously thinking that this time next year you want to be working at this hellhole… it's your choice*".

150. Although witness statements had been filed for Employees AA and Q, they did not give evidence at trial.

151. Employee F gave evidence at trial, and in doing so gave his name because he had been identified by some protestors. For the reasons I have explained, I have decided not to use Employee F's name in this judgment.

152. Employee F had worked at the Wyton Site since around 2015, including for the company that operated the site prior to the First Claimant. In his witness statement, Employee F gave some general evidence about the effect upon him/her of the demonstrations. One of the problems in this case is that the evidence – perhaps naturally – tends to focus upon the actions of "*the protestors*", as a general group, and without always being careful to identify the acts of specific individuals. An individual protestor does not lose the right to demonstrate because of unlawful acts committed by others in the course of the demonstration if the individual in question behaves lawfully: ***Canada Goose -v- Persons Unknown*** **[2020] 1 WLR 417** [99(8)].

153. In one particular paragraph, Employee F stated:

> "During the summer of 2021, the protests outside the Wyton Site became more intense, and it was not possible to enter or exit the Wyton Site safely. In particular, the staff cars trying to enter and exit the Wyton Site were frequently obstructed and surrounded by large groups of protestors. The abuse on particular days and threats and conduct of the Defendants towards me and others working at MBR is referred to in more detail below. It was, however, a terrifying experience entering and exiting the Wyton Site at this time, with protestors standing in front of and surrounding my vehicle on a daily basis, preventing me from freely accessing the Highway from the Wyton Site, or the Wyton Site from the Highway, whilst threatening me and abusing me in an angry and intense manner."

154. Although the wording used in this paragraph of Employee F's witness statement is very similar to that used by Mr Manning, and other witnesses who gave evidence – a point that Mr Curtin highlighted in cross-examination of some of the witnesses – I have no difficulty in accepting that it is an accurate description of what was happening at the Wyton Site in the summer of 2021, before the Interim Injunction was granted. During that period, there were occasions when the protestors were effectively dictating the terms on which people could access and leave the Wyton Site. I also accept that the experience of having their vehicles surrounded by protestors who were shouting at the occupants was frightening for Employee F and others. It is important, however, to isolate the allegedly harassing conduct for which Mr Curtin is responsible.

155. Employee F in his/her witness statement said this about the incident on 13 July 2021:

> "On 13 July 2021 at 15.56 onwards, [various protestors including John Curtin], stood on the Highway and obstructed my vehicle as I sought to travel along the Access Road to the main carriageway of the Highway, having exited the Wyton Site. [John Curtin and two other protestors] stood to the front and side of my car, which prevented me driving freely along the Access Road as there was no clear pathway for my car through the protestors… Two protestors stood on the Access Road directly in front of my car, so that I had to stop for around 45 seconds. While my car was on the Access Road… John Curtin continually shouted at me through a megaphone… [Another protestor] continually shouted at me, leaning into my passenger side window. [A further protestor] held a placard reading: 'STOP ANIMAL TESTING' and took a video recording of my vehicle and those travelling inside. [This protestor] then moved to the front passenger window and continued to take a video recording of those of us travelling inside my car. I have seen the video that [this protestor] was live streaming and, while speaking to those watching his Facebook live video, he can be heard to say 'Do you recognise these

> people? Look.' I understand this statement and recording to be an attempt to identify myself and those travelling with me in my car…"

156. Employee F then described an incident with another protestor in which the protestor represented that the law required Employee F to ask him/her to move out of the way. That was a misapprehension as to the law, but it was one that a police officer in attendance appeared to adopt. Employee F continued:

> "The protestors obstructing my vehicle, filming me and trying to film inside my vehicle and shouting at us made me feel intimidated and anxious and is a huge distraction from concentrating on the road while driving… I felt annoyed that the protestors were delaying me getting home, especially whilst making demands that I gesture to them to move and insisting to the police that they needed to ask me to do that. I also felt stressed prior to leaving the Wyton Site because I knew I would get delayed trying to get out of the Wyton Site, as I usually had to wait for the police to move the protestors out of the way. The protestors were scaring, threatening and intimidating me, and I believe their aim is to stop me coming back to the Wyton Site and to make me get a different job."

157. Employee F was cross examined by Mr Curtin. Employee F was a careful and impressive witness. S/he generally gave considered answers to the questions s/he was asked. I accept his/her evidence. Both in his/her witness statement, and confirmed in cross-examination, Employee F said that, in respect of the pre-injunction phase, s/he was frustrated by the lack of police action and thought that the police could have done more to help the employees entering and leaving the Wyton Site. Mr Curtin asked Employee F about his/her being terrified by the actions of the protestors. Employee F said: "*there's always the aspect of terror because, as far as I'm concerned, the behaviour of the protestors is uncertain*".

158. In cross-examination, Employee F confirmed that, at some point prior to the injunction being granted, anti-terrorism police came to the First Claimant and gave a presentation to the staff. The talk covered issues including car and letter bombs and was designed to support staff and raise awareness. Employee F confirmed that s/he found the information alarming and distressing.

159. In his/her witness statement, Employee F had identified thirteen protestors, including Mr Curtin, by name, whom he was able to identify as having been involved in the protests. S/he said that there were "*other protestors at the Wyton Site who [s/he] recognise by sight, but who are just making their views known, and not doing anything especially 'wrong' (for example, they have never surrounded or obstructed [his/her] car*". Mr Curtin asked Employee F what s/he thought that Mr Curtin had done wrong. Employee F said that there had been times when Mr Curtin had "*verbally abused [him/her] and other colleagues*" by "*name-calling*". Employee F gave as examples of "*monster*" and "*puppy killer*". Employee F believed that this was behaviour was "*wrong*". Mr Curtin asked Employee F whether s/he could appreciate that, in the context of a demonstration, such terms as "*puppy killer*" could be regarded as legitimate. Employee F agreed that "*everyone's entitled to their own opinion*". Nevertheless, Employee F maintained that s/he took the comment personally.

160. Mr Curtin established the following matters with Employee F. Employee F was aware that under the terminal bleeding procedures, some dogs did die at the Wyton Site.

Employee F accepted that Mr Curtin was not responsible for publishing Employee F's photograph online and that he was not responsible for sending abusive messages to Employee F.

161. In her witness statement, relied upon as hearsay evidence by the Claimants, Ms Read described the incident on 13 July 2021 as follows:

> "On 13 July 2021 at 15:56, protestors stood in the Access Road and obstructed the convoy of staff vehicles as we sought to leave the Wyton Site, as shown in Video 24. I was in my green Vauxhall, which was third in the convoy. [Two protestors] stood directly in front of my car as I sought to exit the Wyton Site, causing me to need to stop on the Driveway for around 50 seconds before I was able to slowly pass them; the incident prevented me having free passage along the Access Road and to the main carriageway of the Highway. [One of these protestors] was yelling 'shame on you'. I found [this protestor] very intimidating as he was so in my face and so close to my car. I was shaking by the time I got past him. I just did not know what to expect from him given his behaviour, and I feared for my safety. I also found [the other protestor] very intimidating, as he was so worked up, and seemed to be ranting, and kept making reference to whether I was 'proud' of my job. He did not appear to be acting rationally, so I was worried about what he would do. John Curtin was also standing to the side of my car, whilst using a loudhailer to shout at me. He can be heard yelling 'leave this place...are you seriously thinking that this time next year you want to be working at this hellhole...it's your choice'. I was just trying to ignore him and just drive safely.
>
> In another video of the same incident (Video 22), I can see [another female protestor] standing near the bell mouth of the Access Road and to the side of my car (once I have been able to reach that point) and holding posters to my windows and touching my car. I had to stop the car because of her presence. I was thinking of the traffic ahead, because I was trying to join the main carriageway of the Highway, and that this was a road traffic accident waiting to happen, and I was hoping that [she] would move. I then managed to get away. I remember not being able to see because of all the protestors crowding around my car, and the parked cars at the entrance to the Access Road.
>
> In Video 21, [another protestor] can be seen stepping back and forth in front of my car, looking like he was moving to the side and then stepping back in front of me; his movements made it very difficult to drive past him.
>
> There was also a woman in a baseball cap… standing to the front and side of my car, with a placard."

162. Although Mr Curtin was not able to cross-examine Ms Read, I readily accept the description she gives of the incident because it is corroborated by the video footage.

163. Mr Curtin was cross-examined about this incident by reference to the video footage. Police officers were present during the incident. Mr Curtin disputed that he was obstructing the vehicles leaving the Wyton Site, but I am quite satisfied that – together with the other protestors involved in the incident – he was. Indeed, an essential part of the 'ritual' was delaying and confronting those entering and exiting the Wyton Site with the protestors' message; that was the hallmark of the pre-injunction period. As Mr Curtin accepted in cross-examination, when the vehicles were slowed down or

stopped for a period when leaving or entering the Wyton Site the occupants became a "*captive audience*" to the protest message. He denied that he was intending to harass any of the employees of the First Claimant. He had not threatened any of them. Mr Curtin accepted that he was using a loudhailer. Ms Bolton put it to him that he was "*directing abuse directly at Employee F's car*". Mr Curtin disputed that it was abuse; he stated that he was communicating the protest slogans.

164. Mr Bolton put it to Mr Curtin that he was confronting the employees with his protest message, using a loudhailer, to try and get them to leave their jobs. Mr Curtin answered: "*If they were to leave their job, I'd be pleased for them, but there's no coercion, there's no intimidation, absolutely none*".

165. The video evidence shows that passage out of the Wyton Site was not free. As well as being delayed by those protestors who were standing in front of or near to the vehicles, in turn, each driver, would have had his/her view of the carriageway obstructed by people standing next to his/her vehicle. Mr Curtin accepted in cross-examination that, in this respect, he was inferring with each vehicle's access to the highway. He made clear that that had not been his intention at the time. This was Mr Curtin's reflection upon being asked this question in cross-examination. He said:

> "I'm there, and because I'm there, if I'm standing there as a protestor and I'm in some way impairing a perfect view it I wasn't there, then yes. But these thoughts were not in my mind, and they're more likely – they should have been in the mind of the police officer really… If it had been pointed out to me, I would have been more than happy – because my job that day was to protest and it wasn't to endanger anyone. I wouldn't have wanted that."

And a little later, in answer to Ms Bolton putting to him that he was standing in position which would have obstructed the driver's view to the right when entering the carriageway, Mr Curtin replied:

> "I accept – I don't want to be funny – I'm accepting I'm not transparent. The driver would have to – might have to move their neck out or their head… they should not move onto a highway if they can't see. And if that had been relayed to anyone at the time, it would have been part of the police liaison procedure… My aim here is to protest, and only protest, and do it safely and do it legally and do it well."

166. On closer analysis of the video footage of this incident, it appears that Ms Bolton's point on obstruction of Employee F's view along the carriageway is more theoretical than real. I asked her to identify the moment, on the CCTV, at which she alleged that Mr Curtin was blocking Employee F's view along the carriageway. At the point she identified, a police officer, who was attempting the guide Employee F's vehicle out of the Wyton Site was standing in front of the vehicle. The reality of this situation is that whilst Mr Curtin might have been obstructing, for a matter of moments, Employee F's view down the carriageway, the reality is that his/her attention would have been on the police officer in front of his vehicle. The point had not been explored in Employee F's evidence, so it is difficult to reach any firm conclusions beyond the fact that any obstruction of Employee F's view along the carriageway could only have been for a matter of moments.

167. Mr Curtin also made the point that it was never suggested by any of the police officers present that there was a problem with the way he was demonstrating. He also stated that he was not wilfully obstructing the drivers' view down the carriageway. He was demonstrating. He accepted that the performance of the 'ritual' meant that the cars were held up leaving the Wyton Site.

168. My findings in relation to the pleaded 13 July 2021 incident are:

(1) Mr Curtin trespassed, for a short period, on the Claimant's land.

(2) Mr Curtin (with others) obstructed the vehicles leaving the Wyton Site from gaining access to the highway. As such, Mr Curtin interfered with the First Claimant's common law right of access to the highway by being part of a group of protestors who stood around and at times in front of the vehicles as they attempted to leave the Wyton Site. The obstruction was short-lived; being no longer than a few minutes. It will have caused only minor inconvenience. Insofar as it is relevant, I am not satisfied that Mr Curtin intended to obstruct vehicle access to the highway when he stood to the side of vehicles. He frankly accepted in cross-examination, that his standing in that position on the carriageway, close to the vehicles, may have meant that the driver of the vehicle's view of the carriageway was temporarily impaired, but I am unable to reach a firm conclusion about that. In any event, had this been the sole basis for the alleged interference with access to the highway, I would have rejected it. But this incident must be considered as a whole and, with others, Mr Curtin did directly obstruct the vehicles leaving the Wyton Site that day. It was the usual 'ritual'.

(3) To the extent that there was any obstruction of the highway in this incident, it did not amount to a public nuisance, particularly having regard to the limited role played by Mr Curtin. The obstruction was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only a few private individuals rather than the public generally. The only people affected by the obstruction were the employees of the First Claimant who were leaving the Wyton Site.

(4) The issue of whether Mr Curtin has engaged in a course of conduct involving harassment must be assessed by considering the full extent of the acts upon which the Claimants rely (and I do so below), but in this individual incident the protest message delivered by Mr Curtin was not, either in the words used or the manner in which it was delivered, inherently harassing. Ms Read simply tried to ignore him and did not say that she was caused distress or alarm either by what Mr Curtin shouted at her, or that his method of address was itself harassing. Employee F did not appreciate being called names – like "*monster*" and "*puppy killer*" – by Mr Curtin but he did not suggest that this name-calling had caused him/her distress or alarm. The alarming part of the protestors' behaviour, in Employee F's eyes, was the physical actions of surrounding the vehicles and their general unpredictability; in other words, more a fear of what they *might* do, rather than what that had actually done.

169. In cross-examination, Ms Bolton asked Mr Curtin questions about alleged obstruction of vehicles arriving at the Wyton Site in the morning of 13 July 2021. This was not included in the Claimants' pleaded allegations against Mr Curtin.

17 July 2021

170. The Claimants allege that Mr Curtin (and others) trespassed on the Access Land and again obstructed vehicles driven by the First Defendant's employees at the Wyton Site, whilst using a loudhailer to shout at those in the vehicles. A former employee was driving a yellow Ford Ka and Employee F was driving a white Mercedes A class.

171. It is further alleged that Mr Curtin (and others), by their obstruction of the vehicles, interfered with the First Claimant's common law right of access to the highway from the Wyton Site and caused a public nuisance by obstructing the same vehicles on the public highway. The obstruction of the vehicles is also alleged to be part of a course of conduct involving harassment of the relevant employees by Mr Curtin.

172. Whilst there is CCTV footage of the events, Employee F is the only witness who gave evidence about the incidents on 17 July 2021. Mr Curtin did not challenge Employee F on the detail of his/her account. Employee F stated that Mr Curtin was one of several identified protestors who had obstructed Employee F's vehicle (the second of two vehicles) when he was attempting to leave the Wyton Site. The first vehicle was held up for around 2 minutes before it could pass along the Access Road and onto the highway. Once the leading vehicle had left, the protestors, including Mr Curtin, stood in the middle of the Access Road in front of Employee F's vehicle, causing him to have to stop. He was held there for about a minute after which he was able to edge his vehicle forward – surrounded by protestors – and out onto the highway. During the incident, another protestor identified by Employee F, shouted at him/her "*get another job, get another job… problem solved*". Employee F interpreted this as the protestor threatening him/her and suggesting that s/he should leave his/her job so that s/he would not have to deal with the protestors when coming in and out of work. Mr Curtin is not alleged to have said anything threatening or intimidating to Employee F (or the employee driving the other vehicle) during this incident.

173. Mr Curtin was cross-examined based on the CCTV evidence. This was another pre-injunction incident, and it has the same features of the 'ritual' in action. Mr Curtin accepted that he stood in the path of the vehicles, temporarily preventing them from leaving the Wyton Site. In doing so, he also accepted that he trespassed on the Claimant's land for a brief period. It was clear from Mr Curtin's answers in evidence that, at this stage, he did not believe that he was doing anything wrong in temporarily obstructing the exiting vehicles as part of the 'ritual'. It was clear from his evidence that Mr Curtin did believe, however, that although the 'ritual' did delay the departure of vehicles, it ultimately facilitated their leaving. The alternative, in the early days of the protest, would have been that other protestors would either have blockaded them into the Wyton Site, or totally prevented them from gaining access. To have taken that step, Mr Curtin clearly believed, would simply have invited action by the police, so, in his eyes, the 'ritual' represented a compromise between the protestors and those attempting to gain access to/from the Wyton Site.

174. My findings in relation to the pleaded 17 July 2021 incident are:

(1) Mr Curtin trespassed, for a short period, on the First Claimant's land.

(2) Mr Curtin (with others) obstructed the vehicles leaving the Wyton Site from gaining access to the highway. As such, Mr Curtin interfered with the First

Claimant's common law right of access to the highway by being part of a group of protestors who obstructed the vehicles as they attempted to leave the Wyton Site. The obstruction was short-lived; being measured in a few minutes. It will have caused only minor inconvenience.

(3) To the extent that there was any obstruction of the highway in this incident, it did not amount to a public nuisance, particularly having regard to the limited role played by Mr Curtin. The obstruction was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only a few private individuals rather than the public generally. The only people affected by the obstruction were the employees of the First Claimant who were leaving the Wyton Site.

(4) The issue of whether Mr Curtin has engaged in a course of conduct involving harassment must be assessed by considering the full extent of the acts upon which the Claimants rely (and I do so below – see [298]-[308]), but in this individual incident the Claimants rely only on the alleged obstruction as involving harassment, not any shouting at any of the employees by Mr Curtin.

20 July 2021

175. The Claimants allege that Mr Curtin trespassed on the Driveway and banged on the Gate and shouted, "*open the fucking gate to get the workers in*".

176. In cross-examination, Mr Curtin did not dispute that during this incident he did set foot on the First Claimant's land. As such, he has admitted an incident of trespass on the First Claimant's land.

25 July 2021

177. The Claimants allege that Mr Curtin caused a public nuisance on the highway by parking a Vauxhall Corsa on the Access Road, such that the Access Road was impassable for vehicles, including those driven by the First Claimant's staff. The obstruction of the vehicles is also alleged to be part of a course of conduct involving harassment of the relevant employees by Mr Curtin and to have interfered with the First Claimant's common law right of access to the highway from the Wyton Site.

178. On this occasion, as is apparent from the CCTV footage, a large number of dog crates can be seen piled up in front of the gates to the Wyton Site causing an obstruction to those entering or leaving. It is right to note that police officers are in attendance, and they did not think that action needed to be taken in respect of the dog crates.

179. Mr Curtin was cross-examined about this incident by reference to the CCTV footage. Mr Curtin accepted that he was driving the Vauxhall Corsa, and that it was parked on the Access Road between 12.01pm and 4.45pm, and then again from 4.57pm to 5.52pm. Mr Curtin denied that his vehicle, and where it was parked, caused an obstruction of the highway. He made the point that, had he obstructed the highway, the police would have intervened. He said that if anyone had asked him to move the vehicle he would have done so.

180. My findings in relation to the pleaded 13 July 2021 incident are:

(1) By parking his car on the Access Road, Mr Curtin did obstruct the highway. However, this was wholly technical. There is no evidence that anyone was *actually* obstructed by the vehicle. The placing of the dog crates on the Access Road was arguably more of an obstruction in this incident, and I am surprised that the police allowed this to take place. Nevertheless, even the placing of the dog crates represented only a temporary obstruction. The Claimants do not hold Mr Curtin responsible for the alleged obstruction created by the placing of the dog crates on the Access Road.

(2) To the extent that there was any obstruction of the highway in this incident, it did not amount to a public nuisance. The obstruction was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), there is no evidence that anyone was actually obstructed still less that the obstruction affected the public generally.

(3) The incident did not involve any arguable harassment of the First Claimant's employees.

9 August 2021

181. The Claimants allege that Mr Curtin (and others) trespassed on the Access Land and obstructed vehicles leaving the Wyton Site. A white Nissan Duke, driven by a contractor, was obstructed.

182. It is further alleged that Mr Curtin (and others), by their obstruction of the vehicles, interfered with the First Claimant's common law right of access to the highway from the Wyton Site and caused a public nuisance by obstructing the same vehicles on the public highway. The obstruction of the vehicles is also alleged to be part of a course of conduct involving harassment of the relevant employees by Mr Curtin.

183. Mr Curtin was not cross-examined about this incident. I make no findings about it.

12 August 2021

184. The Claimants allege that Mr Curtin (and others) stood on, and slow walked along, the Access Road and the main carriageway and obstructed vehicles driven by the First Claimant's staff; a white Vauxhall Astra, driven by Employee V; a black Volkswagen Polo, driven by Employee Q, a white Ford car, driven by Employee P; and a white Mercedes A Class, driven by Employee F.

185. It is further alleged that Mr Curtin (and others), by their obstruction of the vehicles, interfered with the First Claimant's common law right of access to the highway from the Wyton Site.

186. Employee F gave evidence about this incident. On this occasion, Mr Curtin had what was described as a tambourine-style drum. By reference to the CCTV footage, Employee F gave the following description:

> "Each of [the] protestors stood in the Access Road so as to block the convoy of cars in which I was driving the fourth and last car. The protestors then slow walked, and occasionally stopped, along the Access Road and the highway so that the convoy could only pass along the highway at a very slow speed… Once we had

> travelled about 30 meters along the highway, we were able to drive past the protestors and travel home). Police officers formed a line either side of the convoy of cars to stop protestors from approaching staff cars from the side and rear, and walked the cars out onto the highway. It felt surreal having a police escort; it was like being in a film. The police escort was out of the ordinary, and not something that would usually happen during the protests, so it made me feel uncomfortable as this clearly was not an ordinary event, but on the other hand, their presence also enhanced the sense that this was not a safe situation to be in. The feeling of danger from the protestors makes me feel anxious and stressed. I just wanted to get out of the situation and go home so I did not have to deal with it anymore."

187. Mr Curtin put to Employee F that the protestors had mimicked a slow-paced funeral march when the employees left the Wyton Site. Employee F agreed with the description. Mr Curtin asked Employee F whether his/her emotion on this occasion was between terror and frustration. Employee F answered: "*Again, terror is still there in the back of your minds. We were unaware of how they could behave at any point… frustration played a big part it in because we just wanted to go home*". Employee F said that the number of police present on this occasion did not reduce the level of terror; s/he said it made it more surreal. Mr Curtin asked whether, at the point Employee F was giving evidence, some 20-22 months further on, the level of terror had diminished. Employee F replied: "*Since the injunction has been in place, I would say that my level of terror has dropped, yes, but there is still the thought something could happen…*"

188. Employee F, in his/her evidence, spoke more generally of the impact of the injunction, granted on 10 November 2021, which imposed an exclusion zone around the entrance to the Wyton Site:

> "The change in the protestors' behaviour since the grant of the November 2021 Injunction has been, at times, limited. Although the introduction of an exclusion zone did reduce the quantity of protestors on the Access Road and around the Gate, it also meant that the obstructing of cars just happens outside of the exclusion zone. Often protestors wait on the boundary of the exclusion zone, or slightly further along the main carriageway of the Highway and intercept cars there instead. It feels like protestors believe that, once staff vehicles are out of the exclusion zone, they can do whatever they like. The exclusion zone is a safety zone and once me and the other MBR staff are out of it, we are fending for ourselves…"

189. Ms Bolton cross-examined Mr Curtin about this incident. Ms Bolton suggested to Mr Curtin that his actions, with the other protestors, had delayed the employees leaving the Wyton Site getting out onto the carriageway. Although Mr Curtin stated that this was part of the 'ritual' he did not disagree with Ms Bolton. He said: "*I make no apologies for the funeral march… and I think it's a good thing we did the funeral march. The protest happened and the workers got home safely*". Again, it became apparent in his cross-examination that Mr Curtin believed that the limited obstruction of the employees leaving the Wyton Site was an accommodation that enabled them, ultimately, to leave the site albeit with some minor delay. In answer to a question from Ms Bolton that he and the other protestors had interfered with the First Claimant's employees' free passage along the highway, Mr Curtin answered:

> "There is a protest by its nature that interferes with the surrounding area by being there, but it's – the idea of the funeral march was exactly to have as free passage

> as possible, without unruly demonstrators kicking cars or doing something off their own bat. There's a joint enterprise here between the police [and] the protestors… even though it's slower, it's better than driving through a mob".

190. Ms Bolton put to Mr Curtin that the staff could not simply pass by the protest, he (and others) had held them up and they had to endure the protest. Mr Curtin answered: "*For a temporary and relatively tiny amount of time*".

191. My findings in relation to the pleaded 12 August 2021 incident are:

(1) Mr Curtin (with others) obstructed the vehicles leaving the Wyton Site from gaining access to the highway. As such, Mr Curtin interfered with the First Claimant's common law right of access to the highway by being part of a group of protestors who stood around and at times in front of the vehicles as they attempted to leave the Wyton Site. The obstruction was short-lived; being measured in a few minutes. It will have caused only minor inconvenience.

(2) To the extent that there was any obstruction of the highway in this incident, it did not amount to a public nuisance. The obstruction was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only a limited number of private individuals rather than the public generally. The only people affected by the obstruction were the employees of the First Claimant who were delayed leaving the Wyton Site for a few minutes.

15 August 2021

192. The events that took place on 15 August 2021, although significant in relation to the claim against "Persons Unknown", were not relied upon by the Claimants to advance any specific claim against Mr Curtin. Mr Curtin had relied upon this incident as demonstrating his role in attempting to calm the demonstrators and to ensure that they kept their protest within lawful bounds. By the 15 August 2021, Mr Curtin accepted, it was generally known amongst the protestors that the Claimants were intending to apply for an interim injunction.

193. As usual, there is video evidence available to demonstrate what happened on 15 August 2021. It was an event of a different order and scale from the 'rituals', as Mr Curtin called them. A large demonstration had been arranged for 15 August 2021, organised by Free the MBR Beagles (see Interim Injunction Judgment [22(10)]. It lasted most of the day, finishing at between 4-5pm. At its height, it was estimated to have been attended by around 250 demonstrators. There was a suggestion that up to 5 people had been arrested by the police (see Interim Injunction Judgment [17(17)]).

194. The number of people in attendance at this protest meant that, at times, the carriageway outside the Wyton Site was blocked and became impassable; indeed, for some period it may have been closed by the police. The morning arrival of the staff in the usual convoy of vehicles was being managed by the police, who had held back the vehicles some distance from the Wyton Site. Mr Curtin's evidence was that his intention was to facilitate the arrival of the staff at the Wyton Site. In one section of the recordings, Mr Curtin can be heard asking other protestors to show discipline. Ms Bolton put it to him that he was doing so because of the impending injunction application. Mr Curtin disagreed that was the sole reason, but accepted that it was a factor:

> "What I am dealing with there is we've got loads of volatile people around. It's going to be a big demo day, let's get the workers in… [The injunction] is a factor. We've got a lot of people coming today, a lot of people who have maybe never been there. I wanted to show … each other that we're able to not act as everyone for themselves, an unruly mob. There's many factors why I said that and the injunction is only one of those factors…"

195. The vehicles of the staff were guided into the Wyton Site by the police. Mr Curtin can be seen to be using a loud hailer trying to clear the way.

196. Ms Bolton then played the footage of the vehicles leaving at the end of the day. In contrast to the arrival of the vehicles, the protestors engaged in a substantial obstruction, and it took significant police intervention and a long time to enable the vehicles to leave. Vehicles were struck and apparently damaged by protestors. Mr Curtin said that, by this stage of the day, he had withdrawn and gone back to his tent. He had become disillusioned with some of the protest activities, and he had also been unable to communicate with the police. He said that he had attempted to speak to two of the usual police liaison officers, but that they had told him that it was out of their hands, and was being handled by a senior officer. Mr Curtin said he was not supportive of what some protestors had done that afternoon.

197. It was not apparent to me, given the absence of any allegation made against Mr Curtin in the Claimants' case against him, the purpose of the cross-examination of Mr Curtin. I asked Ms Bolton whether she challenged Mr Curtin's evidence that he was not present in the afternoon when the protestors effectively blockaded the Wyton Site for perhaps up to 2 hours and then used physical violence towards the vehicles when they did exit. Ms Bolton said that she was suggesting that Mr Curtin had failed to take a role in facilitating the staff leaving the Wyton Site in a similar way that he had done for their arrival earlier in the day. I do not find that criticism has any force. Mr Curtin is not responsible for the actions of other protestors. It is unreal to suggest that, on this day, Mr Curtin could have prevented what the police were unable to prevent. He did not join with or encourage the violent actions of a very small minority of the protestors. I accept Mr Curtin's evidence that he did not support them and that he thought they were counterproductive. As the Claimants do not allege any wrongdoing on the part of Mr Curtin, there is nothing more that I need to add.

198. The relevance of the events on 15 August 2021 is to the claim made in relation to "Persons Unknown" (see [325] below). This was a rare instance where the evidence does show that the scale and duration of the obstruction of the carriageway outside the Wyton Site may arguably have amounted to a public nuisance.

4 September 2021

199. The Claimants allege that Mr Curtin trespassed on the Driveway and approached the open Gate where he is alleged to have shouted abuse at the First Claimant's security staff.

200. In cross-examination, Mr Curtin accepted that he set foot again on the First Claimant's land. He disputed that he knew he was trespassing at the time, but as trespass does not require any particular state of mind, no purpose is served by resolving this further issue.

201. My finding in relation to the pleaded 4 September 2021 incident is that Mr Curtin trespassed, for a few moments, on the First Claimant's land.

6 September 2021

202. The Claimants allege the Mr Curtin (and others) repeatedly trespassed on the Access Land and obstructed a white van attempting to enter the Wyton Site.

203. Further, it is alleged that Mr Curtin (and others) caused a public nuisance by obstructing the white van's passage along the carriageway. The obstruction of the vehicle is also alleged to be part of a course of conduct involving harassment of the driver by Mr Curtin.

204. Although this incident was witnessed by Mr Manning, the principal evidence relied upon by the Claimants is the video footage, captured by CCTV.

205. Mr Manning called the police to ask for assistance at 13.38. Mr Manning told the driver of the van that the police had been called. There is no evidence from the driver of the vehicle. There is no suggestion that he was subject to any abuse.

206. The video evidence shows the arrival of the white van at the gates of the Wyton Site. Mr Curtin quickly arrives on the scene. At some point, prior to the grant of the Interim Injunction, the protestors had taken to placing banners (with protest messages) around the entrance to the Wyton Site. On some occasions, and visible in the forage for this incident, a banner was placed across the front of the gates, which would have needed to be removed before any vehicle could gain access to the Wyton Site.

207. Ms Bolton cross-examined Mr Curtin about the incident. Mr Curtin stated that the protestors were always concerned when white vans turned up, as the vehicles used to transport the dogs were often white vans. Mr Curtin said that he would usually want to inquire with the van driver who s/he was and what s/he was doing. He accepted that protestors were standing in front of the van. Mr Curtin said that he would often offer a leaflet to the drivers of vehicles who were not employees of the First Claimant to attempt to spread the message about the protest. Mr Curtin accepted that the length of time that a vehicle might be held up at the gate might depend on the attitude of the driver. He also accepted that, on this occasion, the vehicle had been obstructed from entering the Wyton Site. On the evidence, that was for about 6 minutes. Mr Curtin was, however, frank that he could not prevent vehicles accessing the site. He thought that, if he did that, he would get arrested. He wanted to avoid arrest because that would put him at risk of being subject to bail conditions that might include a prohibition on his attending the Wyton Site, which would have curtailed his ability to protest. The best he said he could achieve was to delay the arrival, to attempt to find out the purpose of the person's visit and to hope to convey information about the protest, either by conversation or by handing over a leaflet. To Mr Curtin's mind, there was no question that the vehicle would end up going into the Wyton Site, but he would attempt to engage the driver in conversation.

208. In answer to some questions from me, Mr Curtin confirmed that the banners were a regular fixture at this stage of the protest, although on occasions the police might ask them to remove some banners if they were obstructing the view down the highway. He said that the banner, "*Gates of Hell*", which was placed across the main gate was

taken down each time a vehicle needed to gain access to/from the Wyton Site. I asked Mr Curtin whether the First Claimant had ever asked the protestors to remove the banner that was placed across the main gate. He answered that it had not. Ms Bolton challenged this. It is not a point I need to resolve.

209. My findings in relation to the pleaded 6 September 2021 incident are:

(1) Mr Curtin trespassed, for a short period, on the First Claimant's land.

(2) Mr Curtin (with others) obstructed the white van seeking to enter the Wyton Site. The obstruction was short-lived; lasting about 6 minutes. At worst, it could have caused only minor inconvenience to the driver of the vehicle, but there is no evidence that he was inconvenienced at all.

(3) To the extent that there was any obstruction of the highway in this incident, it did not amount to a public nuisance. The obstruction was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only one individual rather than the public generally.

(4) The incident is not even arguably capable of amounting to harassment, applying the legal test I have set out above.

8 September 2021

210. The Claimants allege that Mr Curtin (and others) trespassed on the Access Land and obstructed vehicles seeking to enter the Wyton Site. Mr Curtin is alleged to have obstructed a white Volvo XC60, driven by the First Claimant's Production Manager ("the Production Manager"); a white Vauxhall Astra, driven by Employee V; a silver Kia Sorento, driven by Employee B; a white Skoda Fabia, driven by Employee AA; a grey Vauxhall Corsa, driven by Employee J; a white Ford motor car, driven by Employee P; a blue Ford Kuga; and a grey Honda Civic, driven by Employee I ("the First Incident").

211. It is further alleged that Mr Curtin (and others), by their obstruction of the vehicles in the First Incident, interfered with the First Claimant's common law right of access to the highway from the Wyton Site and caused a public nuisance by obstructing the same vehicles on the public highway.

212. Later that same morning ("the Second Incident"), the Claimants allege that Mr Curtin (and others) caused a further public nuisance by obstructing a grey pickup truck towing a trailer, being driven by an employee of the First Claimant. The vehicle was delivering dog crates to the Wyton Site, and it is alleged that Mr Curtin obstructed the vehicle by approaching the front driver's side of the vehicle, causing it to stop. It is alleged that a further public nuisance was caused when Mr Curtin (and others) obstructed the same vehicle as it attempted to exit the Wyton Site a little time later. The obstruction of the vehicles, on both occasions, is also alleged to be part of a course of conduct involving harassment of the drivers of the relevant vehicles by Mr Curtin.

213. In the final incident that day, in the afternoon, the Claimants allege that Mr Curtin (and others) caused a further public nuisance by obstructing the highway for several vehicles driven by the Production Manager, Employee AA and Employee A which were

attempting to leave the Wyton Site ("the Third Incident"). The obstruction of the vehicles is also alleged to be part of a course of conduct involving harassment of the relevant employees by Mr Curtin and an interference with the First Claimant's common law right of access to the highway.

214. The Production Manager and Employees B, J and V gave evidence at trial. The Claimants relied upon the evidence of Employees I and P in relation to this incident as hearsay.

215. In respect of the First Incident:

(1) the Production Manager's witness statement does not contain any evidence relating to an alleged obstruction of his/her vehicle entering the Wyton Site on 8 September 2021;

(2) Employee AA's witness statement does allege that Mr Curtin was part of the group of protestors involved in the First Incident. The evidence is limited to the allegation that Mr Curtin held a placard inches from his/her vehicle and shouted abuse, the content of which is not specified. Employee AA's evidence does not state, in terms, that Mr Curtin obstructed his/her vehicle; and

(3) Employees B, I, J, P and V's witness statements also allege that Mr Curtin was part of the group of protestors involved in the First Incident. Employee B was driving the third vehicle in the convoy. S/he states that Mr Curtin stood on the Access Road with a placard "*to the front and side of my car*". Employee I states that s/he was obstructed by Mr Curtin and another protestor both of whom stood "*to the front and side of my vehicle as I drove along the Access Road*" towards the gate. Employee I felt intimidated by the protestors' actions. Employee P was the fifth car in the convoy. S/he said that Mr Curtin had held a placard in front of his/her window as s/he drove by. Employee V was driving the second vehicle in the convoy and said that s/he felt frightened during the incident.

216. Mr Curtin was cross-examined about most of these incidents. In respect of the First Incident, Mr Curtin accepted that he had trespassed on the First Claimant's land, but stated that he was not aware that he was trespassing at the time. Ms Bolton did not ask Mr Curtin any questions in cross-examination about the alleged obstruction of vehicles entering the Wyton Site during the First Incident.

217. In relation to the Second Incident, the CCTV evidence shows that the van is forced to stop on the highway. Mr Curtin stood next to the vehicle and other protestors were standing either in the main carriageway or in the Access Road. Mr Curtin can be seen talking to the driver of the vehicle. The driver has not given evidence. Mr Curtin thought that he would simply have been engaging the driver in the usual conversation about the purpose of his/her visit and whether s/he was aware of the business of the First Claimant.

218. About 10 minutes later, the same van then attempts to leave the Wyton Site. Mr Curtin accepted that he and a few other protestors had obstructed the exit of the vehicle from the Wyton Site. Mr Curtin made the point that he had disconnected the banner to allow the vehicle to leave. He said that he had personally stood in the front of the vehicle only because he was concerned about a risk to the dog that was present. Mr Curtin accepted

that he had again tried to engage the driver in conversation as s/he left when another protestor stood in front of the vehicle.

219. In relation to the Third Incident, Mr Curtin accepted that he had been part of the protestor group who had obstructed vehicles leaving the Wyton Site as part of the daily 'ritual'. The evidence shows that the effect of the obstruction was short-lived and – after a few minutes of delay – the vehicles made their way off along the highway. There is no evidence that anything harassing was shouted at the employees on this occasion.

220. My findings in relation to the three pleaded incidents on 8 September 2021 incident are:

(1) During the First Incident, Mr Curtin trespassed on the First Claimant's land and (with others) obstructed the vehicles of several employees who were attempting to enter the Wyton Site. The obstruction was short-lived; being measured only in minutes. At worst, it could have caused only minor inconvenience to each driver.

(2) The two occasions of obstruction of the grey truck entering and later leaving the Wyton Site that make up the Second Incident were also short-lived, measured only in minutes. Again, if it caused any inconvenience to the driver (as to which there is no evidence) it could only have been trivial. The obstruction on these occasions could not remotely be described as harassing conduct (whether on its own or in combination with any other of the acts alleged against Mr Curtin).

(3) During the Third Incident, Mr Curtin (with others) obstructed the vehicles leaving the Wyton Site from gaining access to the highway. As such, Mr Curtin interfered with the First Claimant's common law right of access to the highway by being part of a group of protestors who stood around and at times in front of the vehicles as they attempted to leave the Wyton Site. The obstruction was short-lived; being measured in a few minutes. It will have caused only minor inconvenience. I do not accept that the actions of Mr Curtin in obstructing the vehicles were inherently harassing in nature (or had any elements that would mark them out as harassing)

(4) To the extent that there was any obstruction of the highway in any of these incidents, on no occasion did the obstruction amount to a public nuisance. The obstruction on each occasion was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only the specific individuals involved rather than the public generally.

13 September 2021

221. The Claimants allege that Mr Curtin (and others) trespassed on the Access Land and obstructed vehicles attempting to leave the Wyton Site. Employee C was driving a black Kia Sportage and Employee B was driving a silver Kia vehicle.

222. About an hour later, it is alleged that Mr Curtin (and others) trespassed on the same land and obstructed further vehicles, attempting to leave the Wyton Site: a white Volvo XC60 driven by the Production Manager, a white Skoda car driven by Employee AA and a blue Volkswagen driven by Employee A.

223. Both incidents are alleged to be an interference with the First Claimant's common law right of access to the highway and part of a course of conduct involving harassment of the relevant employees.

224. In addition to the CCTV footage, the Production Manager and Employees A and B gave evidence at the trial. The Claimants relied upon the evidence of Employee C as hearsay.

225. The Production Manager was the driver of one of the vehicles whose exit from the Wyton Site was obstructed by the protestors on this day. The Production Manager identified Mr Curtin as one of the protestors and said that s/he felt that Mr Curtin's pointing at him/her was threatening: "*I was scared that he might know who I was, and he was attacking me personally (even though I was wearing a balaclava and sunglasses…)*". The Production Manager said that Mr Curtin's actions made him/her feel anxious about his/her safety.

226. Employee A stated that Mr Curtin stood to the front and side of his/her vehicle, pointed at Employee A and shouted through a loudhailer "*Shame on you! Where do you tell people you work?*". Mr Curtin's actions of pointing at Employee A made him/her feel worried for his/her safety. The sound of the loudhailer so close to the car's window was alarming.

227. Employee B stated that, as s/he was attempting to leave the Wyton Site, protestors blocked the road. Employee B recognised Mr Curtin, who had a loudhailer. Mr Curtin and another protestor stood in front of the car in front of Employee B's vehicle, causing both vehicles to stop. Employee B said that s/he felt "*very scared and shaky*" as s/he was worried about what the protestors were going to do to the vehicles. S/he found it stressful and intimidating, particularly because there were no police or security personnel present. Employee B recalled hearing Mr Curtin shout, using the loudhailer: "*here comes the shit shovellers… hold them back*". He was also yelling: "*shame on you!*".

228. Employee C was attempting to leave the Wyton Site on the same occasion. S/he was unable to do so for a time because his/her exit was blocked by the protestors, one of whom was Mr Curtin. Employee C considered that Mr Curtin was organising the protestors because, as the vehicles were waiting to leave the Wyton Site, Mr Curtin used his loudhailer to address the other protestors and he said: "*For those who haven't been here before, the workers are coming out now. The shit shovellers. And … because of an injunction and the police, the idea is to stand here, hold them back, keep moving and they'll get to the road, and they'll go off.*" Mr Curtin then removed the banners that were placed over the main gate and a line of protestors then stood in the path of the vehicles. Mr Curtin used his loudhailer to address the protestors: "*Move back!*" and then addressing the employees in the vehicles: "*Puppy killers… Shame on you. You're scandalous! Have you noticed, have you noticed what everyone thinks about you now the secret's out… Where do you tell people you work, puppy killer!*"

229. Employee C said that s/he felt intimidated during the incident: "*I was hostage to the protestors in front of my car*".

230. After the incident, Employee C made a report to the police complaining that Mr Curtin had struck her car. Mr Curtin was apparently prosecuted, and Employee C attended to

give evidence. Little further information is given about the charge, but Employee C confirmed in his/her witness statement that Mr Curtin was acquitted.

231. Ms Bolton cross-examined Mr Curtin about this incident. She suggested to him that, in his address to the other protestors, he had made plain that the purpose was to obstruct the workers leaving the Wyton Site. Mr Curtin accepted that, as part of the 'ritual' they were going to be held up "*to some degree*" but there was not going to be a blockade: "*We're going to have a demonstration. They're going to look at our banners, and they're going to go home*". He wanted the other protestors to observe the 'ritual', rather than lashing out at the employees' vehicles. Mr Curtin accepted that the video evidence showed him standing in front of a vehicle. Mr Curtin accepted that he hoped that the protest activities against the First Claimant would lead to it being closed down. He denied that his protest was targeting workers to get them to leave their jobs. He denied that the protest methods adopted by him and others at Camp Beagle had sought to target individual employees.

232. In cross-examination, Ms Bolton did not pursue the allegation that Mr Curtin was guilty of trespass in this incident.

233. My findings in relation to the incident on 13 September 2021 are:

(1) Mr Curtin (with others) obstructed the vehicles leaving the Wyton Site from gaining access to the highway. As such, Mr Curtin interfered with the First Claimant's common law right of access to the highway by being part of a group of protestors who stood around and at times in front of the vehicles as they attempted to leave the Wyton Site. The obstruction was short-lived; being measured in a few minutes. It will have caused only minor inconvenience.

(2) The obstruction of the highway in this incident did not amount to a public nuisance. The obstruction on each occasion was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only the specific individuals involved rather than the public generally.

(3) I state my conclusions below ([298]-[308]) on whether, taken with other incidents, the events on 13 September 2021 amount to a course of conduct by Mr Curtin that involves harassment of the employees of the First Defendant. However, looked at in isolation, I am not persuaded that Mr Curtin's behaviour in this incident crossed the line from unattractive, even unreasonable, to that which is oppressive and unacceptable.

22 September 2021

234. The Claimants allege that Mr Curtin (and others) caused a public nuisance by obstructing the highway for an Anglian Water vehicle that was attempting to leave the Wyton Site. Specifically, Mr Curtin is alleged to have stood in front of the vehicle and instructed other protestors to do similarly. The obstruction of this vehicle is also alleged to be part of a course of conduct involving harassment of the driver by Mr Curtin and an interference with the First Claimant's common law right of access to the highway.

235. Apart from the narrative in Ms Pressick's witness statement (which is simply a commentary on the CCTV footage) the evidence relating to this incident comes solely

from the CCTV footage. There is no evidence from the driver of the Anglian Water van.

236. Mr Curtin was cross-examined about this incident. Mr Curtin agreed that he had stood in front of the vehicle as it attempted to leave the Wyton Site. He explained that he had wanted to give the driver of the vehicle a leaflet about the protest. The video footage shows that once the vehicle had stopped, Mr Curtin approached the driver's window. As he did so, another protestor stood in front of the vehicle to prevent it from driving off. The driver refused to lower his window. Mr Curtin's recollection was that the driver was not interested in taking a leaflet. The incident then appears to escalate, with more protestors being drawn towards the vehicle. It appears from the footage that another protestor then places what may well be a leaflet under the windscreen wiper of the vehicle. Mr Curtin accepted that he could not force the driver to accept a leaflet, but he also recognised that the incident "*got out of hand*". It is apparent that the driver wants to leave, and the vehicle moves incrementally forward. Mr Curtin said that the driver was revving his engine, being obnoxious and "*winding people up*". This, Mr Curtin said, inflamed the situation. Mr Curtin can be heard saying "*take a leaflet, you buffoon*" at some point. Mr Curtin stood in front of the vehicle and used a phone to photograph or record the driver. He said, in evidence, "*I'm wound up by his behaviour. So, I'm allowed to be a human being too. I can get wound up with someone's obnoxious behaviour, what I consider obnoxious… I had no intention whatsoever of holding an Anglian Water man up for any longer than a second to take the leaflet.*"

237. The incident did not end there. Confronted by the protestors, who refused to move, the driver of the Anglian Water van then reversed back into the Wyton Site. Mr Curtin said that this was not his intention: "*My little plan to give the guy a leaflet ended up as a bit of a ten-minute debacle*". Mr Curtin said that the incident had escalated because another protestor had claimed that the driver had attempted to run her over, and word had spread amongst the protestors: "*Things like this can really quickly escalate*".

238. My findings in relation to the incident on 13 September 2021 are:

    (1) Mr Curtin (with others) obstructed the Anglian Water vehicle leaving the Wyton Site from gaining access to the highway. This was a more significant obstruction than had become typical in the 'ritual', and it forced the driver of the vehicle to retreat. It is perfectly apparent from the footage that the incident escalates. The protestors – including Mr Curtin – bear some responsibility for this escalation. Mr Curtin appeared to accept his responsibility this part when he gave evidence; he clearly regretted that things had got out of hand. Nevertheless, the driver of the Anglian Water vehicle also plays a part in the escalation, principally in the manner he edged his vehicle forward when there were protestors standing in front of the vehicle. That act significantly contributed to the escalation, with the protestors feeling aggrieved at what they perceived to be an aggressive act. Standing back, and judging the matter objectively, this incident is fairly trivial. In total, the driver of the Anglian Water vehicle was delayed for 10-15 minutes leaving the Wyton Site. There was some shouting. There is no evidence of any damage having been caused to the vehicle, and the Claimants have called no evidence from the driver as to whether he was caused distress or alarm in the incident. No-one apparently considered that the incident should be reported to the police.

(2) Such obstruction of the highway as there was in this incident did not amount to a public nuisance. Although the obstruction of the vehicle on this occasion was longer than had typically been the case in the 'rituals' it was temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only a single driver rather than the public generally.

(3) Although this incident has been pleaded against Mr Curtin as part of a course of conduct involving harassment, in my judgment it is incapable of supporting the harassment claim. There is no evidence from the driver of the vehicle that Mr Curtin's conduct caused him distress or alarm. I am not persuaded that Mr Curtin's behaviour in this incident crossed the line from unattractive, even unreasonable, to that which is oppressive and unacceptable. At worst, Mr Curtin's role in the episode can be described as regrettable, as I think he accepted when he gave evidence.

10 April 2022 and 7 May 2022

239. I shall take these two incidents together, because they amount, essentially, to a single complaint. The Claimants allege that, on 10 April 2022, Mr Curtin placed a CCTV camera (or similar device) on a mast erected outside the Wyton Site and, on 7 May 2022, Mr Curtin (and another unidentified male) placed a CCTV camera (or similar device) on a container within Camp Beagle. It is alleged that these cameras were positioned and used to monitor the activities of the First Claimant's staff. Mr Curtin's activities are alleged to be part of a course of conduct involving harassment of the First Claimant's staff.

240. The Claimants' evidence as to the positioning of the cameras in these incidents is CCTV footage, and Mr Curtin does not dispute that he was one of those who was involved in the siting of the relevant camera in each incident.

241. None of the Claimants' witnesses gave evidence regarding the siting of and use of the cameras in the two incidents complained of by the Claimant. There is therefore no evidence that any of them was caused distress or alarm at what Mr Curtin was alleged to have done. Instead, the Claimants relied upon the evidence of several witnesses as to their fears about being filmed/photographed. In her closing submissions, Ms Bolton identified the following:

(1) Mr Markou said:

> "Around this time (summer 2021) the protestors were very active on social media and would upload videos from their protests at the Wyton Site, as well as 'live stream' from outside the Wyton Site on Facebook. As I explain below, it was very invasive and caused me distress that images of my (albeit covered) face and vehicle were being uploaded to public social media sites where I could then potentially be identified and targeted. I knew (from reading articles online and speaking to other colleagues) that some of the protestors ([one] in particular [not Mr Curtin]) had criminal records in relation to activities that they had undertaken in the course of earlier protests, and this made me fear for my own safety even more as I didn't know what they were capable of. I have taken every single step I can to protect my identity, and I fear for my own safety if I am recognised by the protestors.

> Since the protests began, I have always been really worried about being identified by the protestors and then being targeted outside of work at my own home. Sadly, targeting at home has happened to a few of my colleagues who have been identified by the protestors, including Employee L (who had their house vandalised), Employee Q (who had their car vandalised outside of their parents' house), Employee K (who also had their car vandalised) and Dave Manning (who has been approached and abused in public, and had his house vandalised as well). I fear that the same will happen to me if I am identified by the protestors.
>
> As I set out below, I was also followed by protestors on 1 August 2021, a protestor took a photo of me through my car window whilst I was stationary at traffic lights. This image was then uploaded to the Camp Beagle Facebook group but thankfully the image quality was not very good, and the image could not reasonably be used to identify me. Nonetheless, this was a scary experience and has caused me a significant amount of anxiety about being recognised ever since."

(2) Ms Read said:

> "When driving to and from the Wyton Site, I would wear particular clothes and accessories to disguise my identity. I would wear dark glasses, a face mask, and have my hood up. I wore these clothes and accessories so that the protestors could not identify me. The Production Manager and I also advised staff to cover up as much as possible, to disguise their identity.
>
> I was anxious to disguise my identity because I did not want my face posted on social media. On 22 April 2021, the Production Manager and I identified that the protestors had published on social media footage of staff the Wyton Site whilst they working, which appeared to be taken from a camera hidden in the fence line at the Wyton Site. This behaviour continued, with the protestors then trying to film or photograph us as we entered and exited the Wyton Site every day, and posting images and videos on social media for anyone to identify us. The most prudent thing is to cover yourself from head to toe.
>
> Even though I have experienced many protests at the Wyton Site, I have never worn a disguise before, as I did not feel as at risk with previous protestors that protested at the Wyton Site. The historic protestors would usually notify police in advance of a big protest, so we could plan accordingly. Now the protests are 24/7 and can never be avoided. In the historic protests, the protestors were not interested in the staff as individuals, and they would not harass or target individual people like the current protestors do. Social media was not existent or not as prevalent as it currently is, so the protestors were not able to as easily share the identities of employees. Now the protestors seem to be protesting not only against MBR as a company, but also against the specific individuals that work for the company."

(3) Employee A said:

> "Initially, when arriving in convoy, we would drive in our own cars. However, on a date I cannot remember, we started to car share to reduce the

> number of cars entering and exiting the Wyton Site. Car sharing also meant that we could provide physical and emotional support to each other, and I felt more comfortable and slightly safer by having more people in the car with me, rather than being isolated on my own and in my car…
>
> Car sharing was helpful as when I was in my own car, and the protestors surrounded me (which happened often), it was incredibly scary, intimidating and harassing. I felt nervous and bullied. The intimidation and feeling of being personally targeted was heightened by the protestors holding the car captive by surrounding it, making a lot of noise, by playing drums and shouting threateningly, and filming me. I was scared that the protestors might smash the windows of the car, slash the tyres or damage the car in some way. It was helpful to have the emotional support of those with me in the car."

242. Whilst this evidence gives an insight into the fears of some of the employees, it provides little (if any) support for the particular claim advanced against Mr Curtin concerning his siting of the two cameras. First, the evidence of these three witnesses, particularly that of Ms Read, fails to distinguish between Mr Curtin's actions and the methods practised by different protestors. The evidence shows that *some* protestors have adopted a strategy of filming or photographing the employees. Others have not. Of those that have, some of them – a small minority – appear to have posted a small number of images on social media. Not all protestors adopt these methods. Only some protestors – again a small minority – have directed their protests at individual workers. Importantly, the Claimants do not suggest that Mr Curtin has adopted any of these tactics. Mr Curtin is not to be judged by the conduct of other protestors. If there is a complaint about such conduct, it is better dealt with on a direct basis by seeking to identify and take steps against the individuals concerned. I appreciate that many of the workers *feel* that they are being personally targeted by the protestors, but save for a few isolated incidents – which in all probability amount to criminal offences – the vast majority of protestors are not targeting any individual worker. Perhaps of most importance for the case against Mr Curtin, the Claimants do not allege that he has been targeting individual workers.

243. Mr Curtin was cross-examined about the allegations that his act of siting these two cameras was part of a campaign of harassment against the employees. In relation to the camera positioned outside the main gate of the Wyton Site, Mr Curtin said that it had been the idea of another protestor to place a camera. He had hoped that it might enable the footage to be "*beamed across the world*". The device was a "Ring" camera and this apparently meant that anyone with the relevant password could log in and view the livestream from the camera. Mr Curtin said that there were several cameras. One faced the gate and others pointed in the direction of the carriageway. The "Ring" camera provided a fixed view. Other cameras could be controlled to point in different directions. Ms Bolton suggested to Mr Curtin that "*if the target of the protest wasn't the staff, there would be no need to have a camera facing the gate, would there?*" Mr Curtin disagreed, and he rejected the suggestion that the camera was installed to intimidate the workers. Mr Curtin said that the cameras had been removed after there had been some falling out in the camp.

244. In relation to the later incident of siting a camera on a container within Camp Beagle, Mr Curtin again rejected Ms Bolton's suggestion that it had been placed there to "*capture … the staff arriving in the morning and leaving*". Mr Curtin said that camera

was not capable of doing that and that he had tried to use it as a way of alerting the camp to the movement of vehicles into and out of the Wyton Site, but it had not worked. The protestors, he said, had been concerned that there had been some night-time movement of vans which the "Ring" camera had not detected.

245. Ms Bolton suggested to Mr Curtin that the cameras were used to identify vehicle number plates and then put them on social media, as a means of targeting the employees. The Claimants had no evidential basis to make that assertion. Ms Bolton clarified that she was not suggesting that Mr Curtin had done this but that the footage could be used for this purpose. There followed this exchange:

> Q: It's reasonable, isn't it, that when [the employees] see cameras pointed at the gates, as they come and go, that that's going to cause them distress that yet again they are being recorded and that that could be for the purposes of identifying them, stopping them in the road, working out where they live. That's foreseeable, isn't it, that that's going to cause them distress?
>
> A: They live in Britain. They live in a place where they know damn well the controversial nature… they know how sensitive it is. They can now expect people to be watching their movements because they are so controversial. So a person of reasonable firmness – unless you want the protest to absolutely like I said, vaporise, once the secret is out – they were happy enough when nobody knew it was there and the local people didn't know it was there. Now it's out, a reasonable person kind of has to accept some sort of… well people watching them. They know it."
>
> …
>
> Q: It's right, isn't it, Mr Curtin, that whilst the employees have accepted there will be a degree of protest, it's quite a different thing, isn't it, for them to have to experience the distress of knowing that, if they don't put on a disguise to drive in and out of work everyday, that they could be picked up on cameras and that information may be shared and they may be identified? That's going to cause them distress, isn't it.
>
> A: Not all of the workers cover their faces… If there are fears – there have been some incidents – where people have been outed publicly. If these cameras went along with parallel, with say like the rogues' gallery, then yes there's like 'The cameras are going to mean we're going to be put on some site and they are going to generate hate for us'. That hasn't happened, that hasn't materialised, apart from some – there have been no incidents with individuals. The campaign has not gone down that road.

246. My conclusions in relation to these allegations are as follows:

(1) These two incidents cannot, and do not, support the Claimants' case that Mr Curtin is guilty of a course of conduct involving harassment.

(2) Mr Curtin accepts that he was involved in the siting of the two cameras. The Claimants have adduced no evidence as to the footage that was actually captured by either of these devices. They have not challenged Mr Curtin's evidence that, in relation to the camera sited in Camp Beagle (not opposite the

gate), that it did not work as intended (i.e. as an early warning device to alert the camp to vehicle movements).

(3) No witness has said that s/he was caused distress or alarm or otherwise felt harassed by the siting of the cameras. It may be that none of them noticed one or other of the cameras, or that they were more concerned by the hand-held recording of them by individual protestors, but this would be to speculate about evidence I do not have. The short – and simple – point is that the Claimants have adduced no evidence that the siting of these cameras caused any distress/alarm/upset to any employee. In the absence of that evidence, the cross-examination of Mr Curtin (see [245] above) was conducted on a hypothetical basis.

26 April 2022 and 12 May 2022: the Third Contempt Application

247. The Claimants allege that, on 26 April 2022, Mr Curtin (and others) caused a public nuisance by obstructing the highway for an Impex delivery vehicle after it had left the Wyton Site. Specifically, Mr Curtin is alleged to have stood in front of the vehicle.

248. The Claimants allege that, on 12 May 2022, Mr Curtin (and others) caused a public nuisance by obstructing the highway for a police van that sought to move off from a stationary position on the carriageway outside the Wyton Site. Specifically, Mr Curtin is alleged to have stood in front of the vehicle.

249. As these allegations were the subject of contempt proceedings against Mr Curtin (the Third Contempt Application), the evidence (and submissions) were dealt with at a separate hearing, following the trial, on 23 June 2023. Mr Curtin had been granted legal aid for the Third Contempt Application, and he was represented by Mr Taylor.

250. At an earlier directions hearing in November 2022, the Claimants indicated that they would not be pursuing Ground 3 (kicking the box) and Ground 4 (assisting someone in a dinosaur costume). At the commencement of the hearing on 23 June 2023, Ms Bolton indicated that the Claimants had agreed also not to proceed (as an allegation of contempt) with Grounds 1 and 5 (entry into the Exclusion Zone) and Ground 6 (obstruction of the police van leaving the Exclusion Zone). That left Ground 2 as the only allegation of breach of the Interim Injunction pursued by the Claimants. On behalf of Mr Curtin, Mr Taylor indicated that Mr Curtin accepted the breach of the Interim Injunction in Ground 2.

251. As noted already, Mr Curtin gave evidence at the hearing on 23 June 2023. He stated that he had been campaigning against vivisection for 40 years. He hoped that, by protesting, he would draw attention to the activities of the First Defendant and he wanted the law to be changed to prohibit testing on animals. Mr Curtin accepted that he was aware of the terms of the Interim Injunction. In light of that, Mr Curtin was asked by Mr Taylor about the events in the small hours of 26 April 2022, which gave rise to Ground 2 of the contempt application. Mr Curtin said this:

> "We had some information that night-time – shipments of dogs at night-time had already happened, a number. They'd sneak the vans in and out. We had an assurance from the police liaison officer that the police were not prepared to cover night-time actions. That was the understanding, and I couldn't believe this

> information we received. I was shocked. So we began to have a night-time shift and, hey presto, the van turned up without any police escort and now my intention –once I'm there, apart from the shock of, 'Oh my God, they're actually doing this', there hadn't been a daytime shipment… for 40 days. I tried to bring it up in court, why are there no more shipments anymore? It wasn't – I don't believe it was because of the protestors. They have the police to facilitate that. There was another reason. So I was in shock, it was at night-time, I feel the police had broken their word... They're sneaking in at night and that's all. There was no intention to ever stop a van. Other people were always having a go at me, 'We've got to stop the vans'; 'The police will stop you stopping the vans, the injunction will stop you stopping the vans'… When I spoke to Caroline Bolton after the last hearing, 'Are we going ahead with this contempt?', I said, 'Where's the obstruction?', and she said 'Approaching'. That word 'approaching', even I'd sat through the entire injunction, it hadn't and it still hasn't –– I don't think it's filtered into anyone's mind actually. What does 'approaching' mean? I didn't have on that night I'm not going to approach a van as in 'Shame on you' because that's breaking the injunction, isn't it, if we're going to use the English language? But not to block any van, not to – no."

252. Mr Curtin confirmed that, as can be seen in the video evidence, he was using his mobile phone to film the incident so that he could post it as evidence to a wider audience. He said saw the injunction as imposing a sort of "*force field*" and he would "*just work around it*". By that he meant that he was content to observe the terms of the injunction because it enabled Camp Beagle to maintain a presence at the site and he just needed to avoid the Exclusion Zone.

253. I am satisfied, based on the circumstances of the events that gave rise to Ground 2 and Mr Curtin's evidence, that Mr Curtin had not deliberately flouted the Interim Injunction. It is clear from the audio from the various recordings that emotions were running high early that morning because the nocturnal movement of the dog vans was an unexpected and unwelcome development, so far as the protestors were concerned. Mr Curtin got partly carried away by those emotions. As a result, he approached, and fleetingly obstructed, the van leaving the Wyton Site. That, as he accepts, was a breach of the injunction. I will deal with the penalty for this breach of the Interim Injunction below (see Section O(3): [400]-[407] below).

254. For the purposes of the civil claim against Mr Curtin, his obstruction of the van leaving the Wyton Site in the early hours of 26 April 2022 and his obstruction of the police van on 12 May 2022 were both temporary and, applying the test of what amounts to "public nuisance" (set out in [93] above), it affected only the specific individuals involved rather than the public generally. Insofar as there was any obstruction of the highway on these two occasions, neither amounted to a public nuisance. The police were present on both occasions, and they did not take any action against Mr Curtin, or others, involved in alleged obstruction of the highway. Almost certainly, that reflects the fact that any obstruction was very short-lived and required no police intervention.

21 June 2022

255. The Claimants allege that, on 21 June 2022, Mr Curtin flew a drone directly over the Wyton Site, at a height of less than 150m and/or 50m, without the permission of the

First Claimant. The footage obtained was posted to the Camp Beagle Facebook page the same day.

256. They flying of the drone is alleged by the Claimants to be (a) a trespass; and (b) part of a course of conduct involving harassment of the First Claimant's staff.

257. Although some of the Claimants' witnesses give general evidence of drone usage over the Wyton Site, the evidence relating to this specific incident – as it relates to Mr Curtin – is solely video, drawn largely from footage obtained from the drone that was posted on the Camp Beagle Facebook page. The drone is equipped with a camera, that clearly has the ability to zoom in and magnify the image of the terrain below it.

258. Ms Pressick, in her witness statement, gave a narrative commentary on drone usage based on the video evidence available to her. Ms Pressick purports to give evidence as to the height at which the drone was being flown on each occasion. However, much of the evidence she gives is (a) vague and imprecise (e.g. "*at a height I estimate was below 150 and/or 50 meters*" (which appears to embrace a range between 1 to 150m); and (b) expert evidence which she is not qualified to give. The only reliable evidence as to the height at which any drone was being flown, on any occasion, comes from instances where the height of the drone is shown as part of the footage (e.g. the footage posted to Camp Beagle's Facebook page on 16 June 2022 which records the height as being 50 metres). Finally, much of Ms Pressick's witness statement about generic drone usage is irrelevant to the claim in trespass. Her contention, for example, that, in one example, "*the drone is being used to monitor business activity*" is not relevant to the claim in trespass. Either the drone is trespassing on the relevant occasion, or it is not. Absent any suggestion of implied licence (of which there is none), the purpose of a drone's alleged trespass is not relevant.

259. Ms Pressick was questioned about Mr Curtin's use of a drone. She stated that, in around April/May 2022, staff had been forced to transport dogs around the site in a van rather than in crates because of the drone. Mr Curtin disputed that this was a regular practice. Ms Pressick accepted that the workers might still move the dogs in crates, even when the drone was around the site. Ms Pressick said that she had personally seen the drone whilst she had been on site. Asked at what height it was being flown, Ms Pressick said that it was "*above building height*". Ms Pressick stated that her main objection to the drone use was the fact that it was filming. It was that aspect, rather than any annoyance caused by the drone operations, that was the concern. Ms Pressick said that she understood why the protestors wanted to monitor the activities on site which was linked to their protest activities: "*It's what the feel they need to do*".

260. Potentially relevant evidence was provided by several witnesses who spoke of their direct experience of drones flying over the Wyton Site (emphasis added):

(1) Mr Manning stated:

> "In general, I do not have an issue with the use of drones if they are flown in the right manner and they are not being used to invade people's privacy. However, there are a number of occasions when I have experienced the protestors flying their drones in a dangerous manner. For example, sometimes they are very erratically flown downwards, and then from side to side quickly. Sometimes the drones are also flown really low, **to about the**

> **height of a one storey building**, which I would say happens about 20–40% of the time I see a drone flight over the Wyton Site. Very occasionally, they come down **very low, so it feels like I could reach up and grab the drone**. It is very concerning when the low and erratic flights happen, as they drop them suddenly from quite a height. I fear for my safety on these occasions as a drone dropped from such a height could potentially cause physical harm to me or one of my colleagues. I am often concerned for the safety of the staff when the protestors are flying the drones. Typically, the pilot will be sitting in the tent outside the Gate, and will not have a clear view of where the drone is flying. If they were to lose video signal on the drone, they would not be able to see what they were doing and someone could be injured.
>
> I have also noticed the protestors fly the drones directly overhead the Wyton Site, and over areas that cannot be observed from the fence line of the Site; I believe that the drones are flown there so they can see what the staff are doing every step of the way during the day. In this respect, there is no privacy.
>
> Due to the nature of my role, I spend a lot of time working outside on the Wyton Site, making sure the site is secure and checking the fence, so I have seen a lot of the drones being flown around the site. I do not like being outside when the drones are being flown, because I find them dangerous for the reasons outlined above. However, I have no choice to be outside, as part of my job is keeping an eye on what is going on around the Wyton Site. I am responsible for logging whenever there is a drone sighted on site. I log the date and time each time a drone goes up and is brought down by the protestors. I also try to locate who the pilot is by looking around outside the perimeter of the Wyton Site, and into their camp to see who goes to retrieve the drone when it lands. The security staff undertaking the nightshift follow the same process, and write it on a whiteboard for me to review when I return to work the next day. I then update a central spreadsheet, which I started keeping in September 2022… The CCTV sometimes captures the use of the drones, but they are very small and move around so quickly that they can be hard to spot on CCTV footage."

(2) Employee A stated:

> "Previously, when the protestors were flying a drone flying over area of the Wyton Site on which I was working, my colleagues used to stop carrying out tasks outside; we did not want to be identified by the protestors or have footage of us posted online (which the protestors do regularly). Stopping outdoor tasks whilst drones were flying meant that anything we needed to do was delayed. For example, part of my role is taking the electric meter reading in the generator room, which involves walking across the car park. On the occasions when I have heard from my colleagues that the protestors are flying the drone, I will delay undertaking the task until I have heard that the drone has come down.
>
> I often hear the drones flying, even from inside the office, however as I am not often outside I do not know how low they fly. If I ever do go outside, such as when moving between buildings or during my breaks, to prevent the drone camera capturing images of my face and being identified as a result, I put a mask on and make sure that my face is covered.

I am aware that the drones are flown by the protestors a few times a week as I can either hear them, or a member of staff will notify all other staff members about it on the internal radios. If a drone is up, I will try not to go outside. I feel like we are constantly under surveillance, and it is quite a suffocating environment to be in. It feels like an invasion of privacy.

On four or five occasions (but I cannot recall when) I have been outside at the Wyton Site when a drone was being flown, and have been scared of it and being identified by it that I turned and faced a wall until it was gone.

I will never get used to the sound of a drone for the rest of my life. If I hear one in my personal life, I am worried it is the protestors' and that they have found me. This happened recently when a neighbour flew a drone over my garden. I panicked and went and hid indoors."

(3) Employee B stated:

"The use of drones by the protestors over the Wyton Site has affected my day-to-day activities when at work. It feels like I am being watched 24/7. I wear a cap, balaclava, mask and sunglasses now when working outside at the Wyton Site, because I do not want the drones to video my face and for the protestors to then know my identity. Even though the protestors might know what my name is (for which, see below), they currently do not know what I look like. I do not want to be harassed by protestors who recognise my face. I go outside to empty the bins and I have to wear a disguise just to protect myself.

When drones are being flown, we have to adopt a different procedure on how we move around the site, and how we move the animals around the site. We minimise staff working outside to avoid exposing them to the drones, and transport the animals in van instead of in an open air trolley. These different procedures add time to our tasks and means we cannot perform our tasks efficiently.

When I hear the drones, it makes me feel uneasy.

The drones do fly very low on occasion. One has come within 10 feet of my head before. It does not feel very safe when a remotely controlled drone is flying that close to me."

(4) Employee G stated:

"In addition to the harassment as we arrive and leave the Wyton Site, the staff also have to deal with invasive filming by overhead drones. These are now a daily occurrence. I understand from my colleagues that most staff can hear the drones as they buzz overhead, but I have hearing difficulties and will only be aware they are there if I see them. I therefore look up before I leave the buildings to check for drones and make sure that I am covered up with my hat, snood and glasses. **The drones often fly really low, sometimes little higher than the single storey buildings on the Wyton Site**.

When there is a drone overhead and I am outside, I don't look up. Whilst I am covered up, I really don't want to be recognised for the reasons I detail

above. In order to ensure that I am not recognised I have to carry my hat, snood and glasses with me everywhere I go in case I have to go outside. I also wear these, just to get to the car park in case I am filmed walking to my vehicle. I have seen footage of myself taken by the drones online. The footage shows me moving the animals around site. I believe I saw the footage posted on the Facebook page of Camp Beagle. I recognised myself from the hat I was wearing in the footage and for the activity that I was involved in."

(5) Employee I stated, by way of hearsay evidence:

"I remember drones first started appearing over the Wyton Site sometime in 2021, around the time the protests started increasing in intensity in June.

Sometimes the drones come as low as the height of our buildings (which are only one storey high), and one time I remember a drone looking through our tea room window. If we are doing something outside, like moving dogs, the drones seem to come lower.

The presence of the drones makes me feel like I am constantly being watched, so that the protestors can find more ammunition against us. I can usually hear the drones when I am working outside. They make me feel on edge, and I second guess everything I am doing. The lower the drone is, the more I second guess myself, and whether anything I am doing could be captured by the drone and the footage used by the protestors in a negative light. When the drone is higher, I do not feel as stressed, as it does not feel like the drone is focusing on me as much.

Because of the drones, when I am working outside I wear a facemask, a jumper, and I tie my hair up in a bun, to avoid being identified. Photos taken of me by the drones moving animals have been shared on social media but, because of my disguise, I cannot be identified from those photographs."

(6) Employee P stated, by way of hearsay evidence:

"The protestors fly drones over the Wyton Site and film staff working or moving on site. When I was first filmed by a drone, I was moving dogs around the Wyton Site. Given the use of the drones, we had started moving the dogs by van to prevent footage of the dogs being captured but, on this occasion, the Production Manager asked me to carry a small number of dogs between buildings. I was carrying a dog across the field when the drone came overhead. I could hear the buzz of the drone. I was wearing a facemask and sunglasses to protect my identity while carrying the dog. After the incident I saw the footage of me on the Camp Beagle Facebook page, being followed by the drone.

Being filmed by the drone was really invasive. It made me feel scared and anxious. The drones have become more common and they are spotted almost every day. I do not normally leave the buildings unless I have to because of the drones. If I do leave the buildings, I always wear a face mask."

(7) Employee V stated:

> "**The lowest I have seen a drone flying at the Wyton Site is approximately 3ft above the ground to capture information from dog travel boxes.**
>
> I am constantly concerned for my safety when drones are flown by the protestors, as a drone could cause a bad injury if it were to crash into something or someone. I hear the drone nearly every day, and on **average the drone flies at a 2-storey building height**. The protestors used to fly the drone much lower than this, but a couple of months ago this changed and it started to fly higher (but, as I say, it is still about the height of a 2-storey building).
>
> To stop the drones filming through windows, I have installed protective measures in all windows of the Wyton Site, for example frosting the glass, installing one way glass laminate or installing curtains.
>
> When there is a drone over the Wyton Site, I used to stop carrying out tasks outside, which meant that anything I needed to do was delayed. Now, as it was not possible to carry out the outside tasks required in the time the drone was not up, I have to wear my concealment clothing when working outside at the Wyton Site, as well as driving in and out. I do this to prevent the drones from capturing footage identifying me to the protestors, for the reasons that I have set out above. Having to cover up like this when working is particularly uncomfortable in summer time due to the heat.
>
> The drone sound has had a real effect on my mental health. I was once on holiday sitting on the beach and heard a stranger's drone. I thought that the protestors had found me and as a result I was concerned for my safety. I believe the use of drones is another form of psychological intimidation tactics used by the protestors. I used to immediately report the drones to security, now I just try to ignore it. The drones have a psychological and physical impact on my health."

261. I note the following things about this evidence:

(1) None of the evidence concerns (or supports) the single allegation of drone trespass made against Mr Curtin. None of the witnesses links his/her evidence to the use of a drone on any particular occasion. In relation to the harassment claim made against Mr Curtin, therefore, none of the witnesses says that the incident of the drone use on 21 June 2022 caused him/her distress or upset, or why it did on this particular occasion.

(2) Insofar as the witnesses complain of low-flying drones (see sections marked in bold), this cannot relate to the incident alleged against Mr Curtin as the drone was being flown by him at 50m.

(3) As the Claimants are not pursuing a harassment claim against "Persons Unknown" in relation to drone flying, the evidence from these witnesses about the impact on them is not relevant to trespass claim. Equally, whilst understandable, the concerns expressed about privacy infringement are equally irrelevant in the absence of a pleaded cause of action to which this evidence might have been relevant.

262. In short, the evidence of these witnesses, is not relevant to the claim brought against Mr Curtin personally.

263. When he was cross-examined, Mr Curtin agreed that, on 21 June 2022, he had operated a drone above the Wyton Site, and he had used it to observe what some of the workers were doing on site. The drone, he said, weighed 249 grammes and was flown by him at a height of 50m. His evidence was that it was better to fly the drone at a height at which it was not noticed by anyone at the Wyton Site. He said he can tell the height of the drone from its controls. The weight, Mr Curtin said, was important because there are regulations which govern the flying drones that weigh more than that. Those regulations were not explored at the trial. Mr Curtin said that his primary interest in using the drone was to monitor what was going on at the Wyton Site and specifically the movement of the dogs. Mr Curtin also accepted that, in the past, there had been occasions when the drone had crashed on the site.

264. In response to questions asked by me, Mr Curtin confirmed that he knew of 4 or 5 other people who had regularly flown drones over or in the vicinity of the Wyton Site and there were possibly between 30-50 people who had flown drones occasionally the identity of whom he did not know. He said that he did not start flying a drone until about a year into the protest activities (i.e. around June 2022).

265. Rather than concentrating on this single alleged incident on 21 June 2022, Ms Bolton's cross-examination ranged widely and included putting to Mr Curtin evidence from the Claimants' witnesses about use of drones generally. That was not helpful, not least because Mr Curtin is not the only person who has flown drones over the Wyton Site. It confused general evidence – which is only potentially relevant to the claim made for relief against "Persons Unknown" – and the specific evidence relating to Mr Curtin's drone use. Ms Bolton indicated that the Claimants do not have any evidence – beyond that relating to the incident on 21 June 2022 – of Mr Curtin operating a drone on any other occasion.

266. I accept that, as a matter of principle, it is legitimate for Ms Bolton to explore not only the past incident of drone usage on 21 June 2022 alleged against Mr Curtin but also whether, absent an injunction, Mr Curtin threatens to fly drones in the future that would amount to a civil wrong. But even that exercise needed to focus clearly upon the acts of Mr Curtin which give rise to the credible risk that, without an injunction, he will commit a civil wrong. What is impermissible is to attempt to advance a case against Mr Curtin based on historic drone usage when the Claimants cannot establish that the relevant incident was one in which he was operating the drone. The Claimants cannot, for example, establish that Mr Curtin was the person responsible for the incidents of drone flying – reported in the general evidence given by some of the witnesses (see [260] above) – where the drone was alleged to have been flown as low as head height.

267. On the contrary, Mr Curtin's evidence, which I accept, is that he typically flies the drone at 50 metres, not least because he hopes that, at that height, it goes unnoticed. In the Claimants' general evidence, advanced against "Persons Unknown", Ms Pressick produced evidence relating to a further drone incident where an image obtained from the camera on the drone was posted on the Camp Beagle Facebook page. That image showed some information which included "H 50m", which she interpreted (I believe correctly) that the drone was being flown at a height of 50 metres.

268. In answer to the Claimants' claim that flying the drone – generally – amounted to harassment of the workers at the Wyton Site, in cross-examination, Mr Curtin made the point that at no stage has footage from the drone been used to attempt to identify workers or images placed on the Camp Beagle website in a sort of 'rogues gallery'. And, indeed, the Claimants have adduced no evidence of the drone footage being used for that purpose. Again, on this point, the concerns of the employees are directed at what might happen rather than what has happened. At a prosaic level, if the workers are concerned about the risks of being potentially photographed whilst they are going about their duties outdoors at the Wyton Site, then that threat is ever-present because they could be photographed by someone standing at the perimeter fence or by a drone not flying directly over the Wyton Site. For the purposes of the case against Mr Curtin, the short point is that there is simply no evidence that Mr Curtin has been flying drones, or taking photographs, as part of an exercise to identify employees at the Wyton Site. I accept Mr Curtin's evidence that he has not sought to do so.

269. Mr Curtin accepted that footage from drones has been posted on the Facebook page of Camp Beagle. Mr Bolton suggested to Mr Curtin in cross-examination that his posting of drone footage of the Wyton Site might provide an opportunity for someone to learn more about the layout of the site and that this knowledge might assist someone who wanted to break into the site. Mr Curtin's immediate response to this suggestion was "*that's stretching it*", but he accepted that it might assist such a person. This section of cross-examination was hypothetical and not helpful – or relevant – to the issues I must decide.

270. As the Claimants have submitted – correctly – in relation to the main claim for trespass, the tort is simple and one of strict liability. The decision to be made is whether the flying of the drone is a trespass or not. What Mr Curtin hopes to achieve by flying the done, and the risks that might arise from publication of footage obtained from the use of the drone, are simply irrelevant. It is either a trespass or it is not. I identified the potential limits of the law of trespass – as it concerns drone use – in the Interim Injunction Judgment ([111]-[115]). Despite having ample opportunity to seek to amend their claim to do so, the Claimants have chosen not to seek to advance any alternative causes of action that might more effectively have addressed the concerns they have over drone use.

271. The final part of Ms Bolton's cross-examination was taken up with Mr Curtin being asked questions about other drone footage for which the Claimants had not alleged he was responsible. With the benefit of hindsight, and particularly considering the exchanges that followed (which consisted of little more than Mr Curtin being asked to comment on extracts from the drone footage and what it showed), I should have stopped the cross-examination. It quickly became speculative and, insofar as it was attempting to ascertain whether Mr Curtin was responsible for further drone flights beyond the specific example alleged against him, potentially unfair to him. I had wanted to ensure, in fairness to the Claimants, that they had an opportunity to develop as best they could their case (a) as to the threat of Mr Curtin carrying out further acts of alleged trespass/harassment with the drone; and (b) against Persons Unknown.

272. The Claimants have sought to adduce no expert evidence relating to drone usage, for example, based on the photographs and footage captured by the drones that have been put in evidence (a) at what height was the drone flying; and (b) whether the drone was immediately above the Wyton Site. Ms Bolton attempted to make up for this lack

of expert evidence by asking Mr Curtin to offer his view as to the height at which the relevant drone was being flown. That will not do. Mr Curtin may be a drone user, but he is not an expert qualified to comment on other drone use. He cannot offer an expert opinion, from a photograph or footage, as to how high the drone was flying when it was taken. I raised the issue of the need for expert evidence on the critical issue of the height at which drones were being flown during at least one interim hearing. The Claimants have chosen not to seek to advance any expert evidence in support of this aspect of their claim. Again, that is their choice.

273. The state of the evidence, at the conclusion of the trial, is that, in relation to the claim for trespass by drone usage against "Persons Unknown", I have no reliable evidence as to the height at which the drones were being flown in the incidents complained of in the evidence. In respect of the claim against Mr Curtin for trespass and/or harassment arising from his use of a drone on 21 June 2022, the only evidence that is available as to the height at which the drone was being flown is that given by Mr Curtin; i.e. at or around 50 metres.

274. Returning to the central issue, the question is whether Mr Curtin's flying of the drone on 21 June 2022 was a trespass on the land or alternatively part of the course of conduct involving harassment. My conclusions on this are as follows:

(1) Mr Curtin's use of the drone on 21 June 2022 was not a trespass.

(2) Based on the authority of ***Bernstein*** (see [64]-[71] above), the question is whether the incursion by Mr Curtin's drone into the air space above the Wyton Site was at a height that could interfere with the ordinary user of the land. Mr Curtin's drone was flying at or around 50 metres. To put that in context, a building that is 50 meters tall is likely to have between 15-16 storeys. Did flying a drone the size of Mr Curtin's drone, for a short period, at the height of a 15-16 storey building interfere with the First Claimant's ordinary user of the land. In my judgment plainly it did not. It is not possible – on the evidence – to conclude whether Mr Curtin's drone, flying at 50m on 21 June 2022, could even have been seen by the naked eye from the ground. Mr Manning's evidence was that it was very difficult to see smaller drones higher in the sky.

(3) On analysis, and in reality, the Claimants' real complaint is not about trespass of the drone at all. If the drone had not been fitted with a camera, the Claimants would not be pursuing a claim for trespass (or harassment). The Claimants have attempted to use the law of trespass to obtain a remedy for something that is unrelated to that which the law of trespass protects. The real object has been to seek to prevent filming or photographing the Wyton Site. The law of trespass was never likely to deliver that remedy (even had the claim succeeded on the facts), not least because it is likely that substantially similar photographs/footage of the Wyton Site could be obtained either by the drone avoiding direct flight over the site, flying at a greater height, or, even, the use of cameras on the ground around the perimeter. As I have noted (see [73] above), the civil law may provide remedies for someone who complains that s/he is effectively being placed under surveillance by drone use, but adequate remedies are unlikely to be found in the law of trespass.

(4) Turning to the harassment claim, the position is straightforward. There is no evidence that anyone was harassed by Mr Curtin's flight of the drone on 21 June 2022. It cannot therefore form any part of the alleged course of conduct involving harassment.

(5) Finally, considering whether the Claimants' evidence shows that, unless restrained, Mr Curtin is likely to use the drone to harass in the future, I am not persuaded on the evidence that the Claimants can demonstrate a credible threat that he will. I have accepted Mr Curtin's evidence that he flies the drone at 50 metres. Flown at that height, there is no credible basis to contend that future flights of the drone are likely to amount the harassment of any of the employees. There is no evidence that Mr Curtin is carrying out surveillance of individual employees, for example to be able to identify them. I appreciate that several witnesses expressed the fear that this was one of the objectives of the drone flights. But these are their subjective fears; they are not objectively substantiated on the evidence.

11 July 2022

275. The Claimants allege that Mr Curtin (and others) caused a public nuisance by obstructing the highway for a vehicle driven by Ms Read that had left the Wyton Site. Specifically, it is alleged that Mr Curtin stepped in front of and walked in front of the vehicle causing the vehicle to slow.

276. The incident is captured on CCTV. In her witness statement, Ms Read described the incident as follows:

> "On 11 July 2022 at 15.04, [Mr Curtin] walked in front of my car as I was driving along the main carriageway of the Highway… The incident happening as I was leaving the Wyton Site for the day; I left a few minutes later than everyone else on this day. I saw [Mr Curtin] walk across the Highway to the tent, and linger about, I had a feeling as I drove towards him that he was going to step out in front of me. [Mr Curtin], as I approached him in my car, he then walked in front of my car, causing me to slow down to avoid hitting him. He looked at me, and it felt like he was goading me – as if he was thinking 'I can do what I want away from the Access Road'. I found [Mr Curtin's] conduct very intimidating and I was fearful, as I did not know what he was planning to do."

277. Ms Read was not called to give evidence, and her evidence has been relied upon as hearsay by the Claimants. It is perhaps unfortunate that her evidence on this incident could not be explored and tested in cross-examination, particularly having regard to what can be seen of the incident from the CCTV recording. What that footage shows is little more than Mr Curtin crossing the B1090 road some 100 yards from the entrance to the Wyton Site.

278. Mr Curtin was cross-examined by Ms Bolton. She put to him that he had deliberately walked out in front of Ms Read's car because she had come from the Wyton Site. Mr Curtin disagreed, and maintained that he was simply crossing the road.

279. My conclusions in relation to this incident are as follows:

(1) In the CCTV footage, Mr Curtin can be seen to be crossing the road. There is nothing more to this incident than that. It caused Ms Read slightly to slow her vehicle. She did not stop, and she was caused no obstruction. There was no obstruction of the carriageway. There was no public nuisance

(2) I cannot accept Ms Read's evidence in relation to this incident. Having reviewed the footage – as apparently Ms Read also did when making her statement – I conclude that an element of paranoia must have contributed to Ms Read's perception of this incident. Like some other witnesses, Ms Read is clearly fearful of what Mr Curtin *might* do, rather than rationally assessing what he has *actually* done. There was nothing remotely intimidating in Mr Curtin's action of crossing the road. Objectively, there was nothing in the incident that should have caused her any fear.

(3) The inclusion of this incident in the Claimants' claim against Mr Curtin is remarkable. The evidence simply does not demonstrate, even arguably, any wrongdoing by Mr Curtin. Based on the evidence available to the Claimants, this allegation should not have been pleaded or pursued.

(2) Unpleaded allegations against Mr Curtin

280. There are three further incidents of alleged harassment that were raised in the Claimants' evidence and pursued in cross-examination with Mr Curtin that did not form part of the Claimants' pleaded case against him. I raised the lack of pleaded allegations with Ms Bolton during Mr Curtin's cross-examination. I expressed the provisional view that, if they were to be relied upon as part of the course of conduct alleged to amount to harassment against Mr Curtin, then they ought to be pleaded. Ms Bolton did not return to the issue until addressing the issue in her closing submissions. No application to amend was made by the Claimants.

281. In her closing submissions, Ms Bolton said that it was "*regrettable*" that the details of these three incidents had not been pleaded, they had only come to light when draft witness statements were received. The Claimants' position – as advanced in their closing submissions – is that "*whilst no 'claim' is brought in relation to these incidents, it is submitted that they are important incidents that should inform the Court's view of the strength of the pleaded harassment claim against Mr Curtin, and the likelihood of further acts of harassment occurring*".

282. I will return below to how I intend to deal with these unpleaded allegations after summarising them and the evidence that has been presented during the trial.

7 September 2021

283. This was an incident concerning Mr Manning. In his witness statement, Mr Manning said this:

> "… on 7 September 2021, [Mr Curtin] approached me at the Gate and said he had some personal details I would not want anyone else to see, which [Mr Curtin] had been given by a member of staff or security who passed it to [Mr Curtin] through the car window. He would not tell me what the details were or what he would do with them, but said that he could contact me at any time and that I would

> find out what he had at some point. I reported this incident to the police, and I felt really shaken up by it. Later that day, he approached me again, when I was by the perimeter fence. He said he would pass a piece of paper that was in his pocket with personal details of mine. I asked him to show the piece of paper. He looked through his pockets and said he thought it was in a folder. I walked away".

284. Mr Curtin did ask Mr Manning some questions about this incident when he was cross-examined. Mr Manning could recall few details. Mr Curtin suggested to Mr Manning that he had told him on this occasion that he had been given Mr Manning's telephone number by another security officer. Mr Manning replied that Mr Curtin had not told him what the information was.

285. As this is not a pleaded allegation against Mr Curtin said to form part of the alleged course of conduct involving harassment, I can deal with this shortly. Objectively judged, what Mr Curtin did (as described by Mr Manning) lacks the necessary qualities to amount to harassment. The incident has not been repeated, and therefore it sheds no light on whether, if the Claimants can prove a case of actual or threatened harassment against Mr Curtin, they can credibly suggest that this incident shows that there is need for an injunction to restrain future acts of harassment by Mr Curtin.

8 July 2022

286. The incident on 8 July 2022 concerned Mr Curtin and Employee V, a maintenance engineer at the Wyton Site. There was footage of the incident recorded by Mr Curtin. In his/her witness statement, Employee V stated that on 8 July 2022, s/he had been tasked with repairing a hole in the perimeter fence around the Wyton Site. As s/he was operating outside the perimeter, s/he was accompanied by a member of the First Claimant's security team. Mr Curtin followed Employee V, and the security officer, and Employee V alleged that Mr Curtin intimidated and harassed him/her whilst s/he undertook the repairs. Mr Curtin recorded the incident and livestreamed it to the Camp Beagle Instagram and Facebook pages. The video of the incident goes on for some 15-20 minutes, but the key parts, identified by Employee V in his/her witness statement, were the following:

(1) Mr Curtin said "*we are going to do our darndest to make sure some workers go to prison from here you deserve it you really do deserve it*". Employee F said that this upset him/her, because s/he had not done anything illegal.

(2) Mr Curtin said, "*how low can you go working here?*" Employee V regarded this as a "*psychological intimidation tactic*" as s/he was "*not working in a 'low job'*". Employee V felt that Mr Curtin was attempting to make him/her feel bad for what s/he did at the Wyton Site.

(3) Mr Curtin called Employee F a "*freak*". Employee V said that this upset him/her, as it portrayed him/her to be something that s/he was not.

(4) At one point during this incident, Employee V said that Mr Curtin was so close to him/her that he was nearly touching his/her face with his phone whilst livestreaming. Employee V said that s/he felt "*really threatened and uncomfortable*".

(5) Employee V said s/he felt "*constantly scared*" that Mr Curtin would pull down his/her mask and reveal his/her identity.

(6) Employee V felt that Mr Curtin's actions of being close to him/her, and abusing him/her for 15 to 20 minutes as s/he carried out his/her job was "*overwhelming*". S/he was "*very distressed*" after the incident and believed that it led to a deterioration in his/her mental health. "*I think this was a reaction to feeling so vulnerable (i.e. without a fence or car between me and [Mr Curtin]) and feeling degraded by not being able to retaliate or respond, as we have been advised by the police*".

287. In cross-examination, Employee V confirmed that s/he knew that Mr Curtin was livestreaming the encounter. In relation to the comment that s/he was a "*freak*", Employee V accepted that Mr Curtin had been reading out comments that had been received from people watching the livestream. Mr Curtin put to Employee V that the context of the encounter was him making a livestream during which he was offering a general commentary about the First Claimant. Employee V replied:

> "… you intensified your livestream to intimidate me. You got very close to me. I do agree you did not touch me, but at one point you became very close and you did everything possible to slow my work down."

288. In questioning, Employee V accepted that s/he had carried out research on Mr Curtin and this had coloured the impression s/he had of him. Employee V considered Mr Curtin to be one of the main leaders of the camp, who advised the other protestors on their tactics. S/he described the protestors as seeming to be very fanatical in their beliefs. Employee V said s/he had carried out internet research on the tactics used by protestors. This appears to have generated in Employee V a significant fear based not so much on what the protestors had actually done, but what Employee V believed they might be capable of doing.

289. This is not a pleaded allegation of harassment against Mr Curtin, so I intend to state my conclusions on this incident quite shortly.

290. It was clear from his/her evidence as a whole that Employee V had been significantly affected by the protests at the Wyton Site and not just this encounter with Mr Curtin. S/he was concerned that s/he might become a target away from the Wyton Site and expressed a fear, shared by several employees, at what the protestors might be capable of doing. I do not doubt that the particular encounter with Mr Curtin did upset him/her. I accept his/her evidence as to how s/he felt and how it affected him/her, but, in part, his/her sense of concern appears to have been elevated by his research on Mr Curtin rather than anything that Mr Curtin had actually done, whether during the incident or before.

291. Employee V appeared to me also to lack insight. S/he did not appreciate why protestors called the workers, generically, "*puppy killers*". S/he approached the issue simply on the basis that, as s/he personally had not been involved in the killing of any of the animals, it was wrong for the allegation to be made. That is to take literally the words used, and to fail to recognise that this was a protest message directed at the First Claimant's operation at the Wyton Site.

292. It is very important that Employee V was aware that Mr Curtin was livestreaming the encounter. To that extent it should have been immediately apparent to Employee V that this was not a normal conversation; there was an obvious element of performance by Mr Curtin that Employee V should have appreciated. I think it is likely that Employee V failed to appreciate this because of his/her elevated anxiety towards Mr Curtin and fears of what he might do. Whilst I recognise that, subjectively, Employee V did feel intimidated by the encounter, there was a significant element to which these fears were self-generated rather than being based on what Mr Curtin actually did or any threat that he realistically presented. Objectively judged, I am not persuaded that Mr Curtin's behaviour crossed the line between conduct that is unattractive, even unreasonable, and conduct which is oppressive and unacceptable.

293. Ms Bolton has relied upon this incident not as part of the alleged course of conduct involving harassment but as demonstrating Mr Curtin's propensity towards harassing behaviour, and therefore, supportive of the need for some form of injunctive relief. I will come on to consider the harassment claim advanced against Mr Curtin by the Claimants in due course, but I can reject now that this incident provides any evidence of "propensity". Far from demonstrating a tendency to act in a particular way – and compared to the repetitive incidents of obstructing the vehicles of employees leaving the Wyton Site in the 'ritual' – the incident with Employee V was a one off. It was the product of a particular set of circumstances, that had a unique dynamic. The only thing that really links it to the other activities about which the Claimants complain is that it could be said to be loosely part of the broader protest activities. But the issues raised in this incident are wholly different.

19 August 2022

294. This act of alleged harassment by Mr Curtin concerns an incident that took place on 19 August 2022 outside the Wyton Site, near to the notice board erected by the First Claimant. Mr Manning describes the event in his witness statement as follows:

> "… as I and another member of staff was [sic] putting the notice back up following it needing to be cleaned due to it being spray painted (and to put up new documents) on 19 August 2022 from 14.04 onwards [Mr Curtin] approached me and my colleague to film us, and came very close to me, almost touching me, multiple times. If someone came that close to me outside of work, I would tell them to get out of my personal space."

295. The incident is captured on CCTV. The footage does not support Mr Manning's description of Mr Curtin's physical proximity. Mr Manning must have misremembered how closely Mr Curtin came to him during this incident. From the video footage, there is nothing intimidating or harassing in Mr Curtin's physical closeness. I appreciate that, particularly given the long period over which Mr Manning has been dealing with Mr Curtin (and the other protestors), Mr Manning regards Mr Curtin as an irritant whose presence is not appreciated. But, judged objectively, Mr Curtin's behaviour on this occasion does not pass the threshold to amount to harassment under the law.

296. In cross-examination, Ms Bolton put to Mr Curtin that this incident was "*another example… of you targeting the staff as part of your actions to persuade the staff to leave MBR Acres*". Mr Curtin rejected that. I would simply note, by way of finding, that the incident does not remotely support the Claimants' characterisation of it.

297. As this is not a pleaded allegation against Mr Curtin said to form part of the alleged course of conduct involving harassment, I can deal with this shortly. Objectively judged, what Mr Curtin did (as described by Mr Manning and shown on the footage) lacks the necessary qualities to amount to harassment. The incident has not been repeated, and therefore it sheds no light on whether, if the Claimants can prove a case of actual or threatened harassment against Mr Curtin, they can credibly suggest that this incident shows that there is need for an injunction to restrain future acts of harassment by Mr Curtin.

(3) Conclusion on the claim of harassment against Mr Curtin

298. As noted above ([108]), the harassment claim brought against Mr Curtin is brought under s.1(1A) PfHA.

299. In the section above, I have stated my conclusions in respect of each of the acts alleged by the Claimants to constitute a course of conduct involving harassment of those in the Second Claimant class. I have not found that any of them, individually, were serious enough to amount to harassment applying the principles I have identified (see [99]-[108] above).

300. Nevertheless, I must step back and consider whether, taken together, these incidents do reach the required threshold of seriousness to amount to harassment. I am quite satisfied that they do not.

301. Although, in the pre-injunction phase, the repeated surrounding of vehicles of those entering and leaving the Wyton Site, has an element of repetition that might supply the necessary element of oppression, the same element of repetition meant that those in the vehicles should, objectively, quickly have become used to it. The 'ritual' did not change much. Although it was inconvenient, caused delay, and upset some employees, the 'ritual' was predictable and could not have failed to have been understood to be an expression of protest. Objectively, it was not targeted at any individual employee. Several witnesses were more concerned about what the protestors *might* do, rather than what they actually did.

302. As I am dealing with the claim made against Mr Curtin, it is necessary to concentrate on the evidence about what Mr Curtin did, not the actions of other protestors. At its height, the Claimants' evidence demonstrates that Mr Curtin participated in several 'rituals' and he expressed his protest message. It goes no further than that. Ms Bolton, in her final submissions, placed no reliance on the content of what Mr Curtin shouted at the employees.

303. I am not persuaded that this crosses the threshold between unattractive or unreasonable behaviour to that which is oppressive and unacceptable. In a democratic society, the Court must set this threshold with the requirements of Articles 10 and 11 clearly in mind. It would be a serious interference with these rights if those wishing to protest and express strongly held views could be silenced by actual or threatened proceedings for harassment based on subjective claims by individuals that they were caused distress or alarm. The context for alleged harassment will always be very important. In terms of whether the conduct supplies the necessary element of oppression to constitute harassment, there is a big difference between an employee of the First Claimant having to encounter, and withstand, a protest message with which s/he is confronted on his/her

journey to/from work and having the same protest message shouted through his/her letterbox at home at 3am.

304. My findings mean that the Claimants have failed to demonstrate the element of the tort required under s.1(1A)(a). In consequence, the claim in harassment brought against Mr Curtin will be dismissed.

305. In any event, I would also have found that the Claimants had failed to demonstrate the element of the tort required under s.1(1A)(c).

306. As part of the harassment claim against Mr Curtin, it is the Claimants' case that Mr Curtin's intention behind, or the underlying purpose of, the alleged acts of harassment of the First Claimant's employees (and others in the class of the Second Claimant) was to get them to sever their connection with the First Claimant (for employees to leave, for suppliers to cease business etc). Mr Curtin rejected this allegation on the several occasions when it was put to him during his long cross-examination.

307. I shall give one example of the answers he gave when this allegation was put to him, in the context of the unpleaded allegation of harassment of Mr Manning on 7 September 2021 (see [283]-[285] above):

> Q: … it was an attempt to intimidate [Mr Manning] because you want to persuade the officers, staff, workers of MBR not to work there, in pursuit of your goal to get MBR shut down?
>
> A: The case against me – you haven't spent millions of pounds to stop me trying to persuade people. I'm allowed to persuade people. It's a legal right for me to --- it's what protesting is, persuasion.
>
> Q: Your attempt to persuade Mr Curtin is done by intimidation?
>
> A: It's absolutely not my intention the way to close down MBR is to get Mr Manning to leave and then the maintenance man. That's not – that has never been the thrust of what's driven me behind my campaigning. It's going to be a lot more complicated than that to shut MBR down."

308. I accept Mr Curtin's evidence. I am not concerned with the evidence of what other protestors have done. Mr Curtin, in the protest methods he adopted, did not pursue the sort of crude intimidation of the First Claimant's staff that Ms Bolton ascribed to him. He was quite candid in accepting that he wished to see the First Claimant shut down, but he was equally clear about the ways in which that objective could be achieved.

K: The evidence at trial against "Persons Unknown"

(1) Trespass on the Wyton Site

309. It would be disproportionate to set out the evidence of all the incidents where "Persons Unknown" have trespassed on the First Claimant's land prior to the grant of the Interim Injunction. By dint of the fact that the First Claimant owns the Driveway at the Wyton Site and part of the Access Land, hundreds of people have potentially been guilty of trespass on this land. Basically, anyone who seeks to use the entry phone outside the

main gate could only do so by standing on the Driveway. Without a defence of implied licence, each and every person doing so would be a potential trespasser.

310. In addition, and during the currency of the proceedings, the understanding of where the public highway ended, and the First Claimant's land began significantly changed (see [22]-[23] above). This means that the number of unidentified individuals who arguably have trespassed on the First Claimant's land whilst protesting increases yet further. At the time of this alleged trespass, neither the individuals standing on the Access Land nor the Claimants would have been aware that this was an arguable trespass.

311. The incidents of more serious trespass – i.e. people accessing the Wyton Site by going beyond the entry gates or over the perimeter fence are very few. There were significant trespass incidents on 19-20 June 2022. On the first occasion, 25 people broke into the Wyton Site. On 20 June 2022, an unknown number of unidentified individuals broke into the Wyton Site and stole five dogs. There were several arrests.

312. Since the grant of the Interim Injunction, and specifically the imposition of the Exclusion Zone, the incidents of alleged trespass have significantly reduced (although not eliminated entirely). The Claimants' evidence shows that there have been isolated incidents of "Persons Unknown" entering the Exclusion Zone and/or trespassing on the First Claimant's land. For example, on 13 July 2022, 2 unidentified individuals chained themselves to the gate of the Wyton Site, delaying the departure of a van carrying dogs, and on 24 September 2022, 4 unidentified individuals glued themselves to the gate to the Wyton Site. They were removed by the police.

(2) Trespass by drone flying over the Wyton Site

313. I have dealt above with the specific allegations made against Mr Curtin relating to drone flying. The Claimants also maintain a claim, and seek a *contra mundum* injunction to prevent drone flying over the Wyton Site.

314. In the Claimants' pleaded case, the claim is advanced as follows

> "[Persons Unknown have]**,** without the licence or consent of the First Claimant, committed acts of trespass by flying drones:
>
> (1) directly over the Wyton Site; and/or
>
> (2) below 150 metres over the airspace of the Wyton Site; and/or
>
> (3) within 150 metres of the Wyton Site; and/or
>
> (4) below 50 metres over the airspace of the Wyton Site; and/or
>
> (5) within 50 metres of the Wyton Site; and/or
>
> (6) at a height that was not reasonable and interfered with the First Claimant's ordinary and quiet use of the Wyton Site.

315. Although this pleading is difficult to follow, the Claimants' position, at the end of the trial, was that they sought a *contra mundum* injunction to prohibit "*fly[ing] a drone or other unmanned aerial vehicle at a height of less than 100 meters over the Wyton Site*".

316. The claim in respect of alleged drone trespass can only be maintained in respect of direct *overflying*. The First Claimant has no arguable right, under the law of trespass, to prevent drones flying other than directly over the Wyton Site. For drones flown directly over the Wyton Site, the question is at what height does flying a drone represent a trespass on the land below (see [62]-[73] above).

317. The Claimants allege in the Particulars of Claim that "Persons Unknown" have flown a drone over the Wyton Site on 25 and 27 July 2021, 25 and 27 August 2021, 17 March 2022, 6 and 16 June 2022. Save for the incident on 27 July 2021, the allegation made in the Particulars of Claim is that the drone was flown "*at a height that was below 150m and/or 50m*". On 27 July 2021, the Claimants allege that the drone was flown "*at a height that was below 50m*". Again, for a sense of scale, the 'Walkie Talkie' building at 20 Fenchurch Street in London is 160m tall, with 38 floors. I have already summarised the Claimants' evidence about general drone usage (see [260] above).

318. In her witness statement of 19 March 2024, Ms Pressick provided some further evidence of drone use by "Persons Unknown":

> "Drones flown by the protestors are known to have crash landed on MBR's land on 5 occasions (10 May 2022, 12 May 2022, 3 July 2022, 3 February 2023, and 19 September 2023). This is indicative of drones being flown outside their operational parameters and/or by unsafe piloting. Where the drone has been recovered by the security team, it has been handed over to the police.
>
> I asked the security team to consider drone usage over a 5-month period, and this was closely monitored between 1 July and 30 November 2023. This is something that we had not done consistently previously. Staff tried to monitor use of the drone, noting days it was flown and the duration of the flight time over the Wyton Site. In that 5-month period, the security noted that at least 184 drone flights took place over the Wyton site, with an overall flight duration of at least 2,097 minutes (nearly 35 hours). I assume, but do not know, that the protestors filmed and recorded throughout each flight. During this period, there has been a notable increase in drone usage. There have been more drone flights, and the flight time appears to have increased over this period.
>
> In the period looked at in detail (1 July to 30 November 2023), the security team have tried to identify the protestors that fly the drone. Of the 89 flights noted by the security team, it has not been possible to identify a drone pilot in respect of 59 flights (this is equivalent to around 66% of the observed flights). Mr Curtin has been identified as the drone pilot on 18 occasions (or around 20% of the observed flights). The security team have identified a protestor known as [name redacted] as being the drone pilot on 12 occasions (or roughly 13.5% of the observed flights). It is generally understood from previous observations, and the footage uploaded to the Camp Beagle Facebook page, that Mr Curtin is the primary drone pilot…"

319. The evidence that Ms Pressick has included about Mr Curtin's drone flying I will not take into account in the claim against him. The opportunity to file further evidence was limited to the Claimants' claim for a *contra mundum* 'newcomer' injunction. It was not

an opportunity to supplement the evidence against Mr Curtin. The evidence against him was presented at the trial. Even had I taken this evidence into account, it would not have made any difference to my conclusions in relation to this aspect of the claim against Mr Curtin. He does not deny flying a drone. His evidence is that he flies it no lower than 50 metres. Ms Pressick's further evidence therefore takes the claim against him no further.

320. The evidence satisfies me that there is a risk that "Persons Unknown" may in the future fly drones over the Wyton Site. However, beyond the particular evidence of drone having crashed, the Claimants have failed to adduce reliable evidence as to the height at which any drone has been flown (or is likely in the future to be flown). Without that, it is impossible to conclude that there is a credible risk of trespass by drone flying.

(3) Threatened trespass at the B&K Site

321. In her witness statement, Ms Pressick included a section headed "*Protest activities at the B&K Hull Site*". She recognises, immediately, that the scale of protest activities has been much reduced at the B&K Site. Between June-July 2021, staff at the B&K Site received what Ms Pressick describes as "*threatening calls*" and there was a protest event held at the B&K Site on 15 August 2021 which was attended by some 40 people. The Claimants make no complaint about this demonstration. Much of Ms Pressick's evidence concerning the B&K Site was considered in the Interim Injunction Judgment (see [22]-[23]). At that stage, the evidence was being advanced in support of a claim for an interim injunction to restrain harassment. I refused to grant any injunction on that basis: [129(4)]. The Claimants have adduced no evidence that there has been any trespass at the B&K Site. Ms Pressick states in her evidence:

> "[The Third Claimant], its staff and myself apprehend that the protestors may focus, or refocus, on the B&K Site. Given that [the First and Third Claimants] are sister companies, there would be real benefit in the final injunction applying to both sites so that injunctive relief over the Wyton Site does not simply move the acts of unlawful protest over to the B&K Hull Site…
>
> [The Third Claimant] continues to receive nuisance calls. I understand from the staff on the switch board that sometimes the callers are silent and, on occasion, they express a negative view of the work that B&K does. It is therefore clear that the B&K Hull Site is still on the radar of animal rights protestors, and that it is reasonable for the Claimants to apprehend that acts of protest similar to those occurring at the Wyton Site may occur at the B&K Hull Site."

322. This evidence is very tenuous and involves a significant leap between the willingness of unidentified people to register displeasure with the activities of the Third Claimant in messages and calls and a real risk that, without an injunction, "Persons Unknown" will trespass upon the B&K Site. As I have noted, there is no evidence at anyone has trespassed at the B&K Site since the protests began in the summer of 2021. On the evidence, I am not satisfied that there is a credible threat of trespass at the B&K Site by "Persons Unknown".

(4) Interference with the right of access to the highway

323. Again, it would be disproportionate to identify all the occasions on which vehicles entering or leaving the Wyton Site had been obstructed prior to the grant of the Interim

Injunction. The 'ritual' was a regular and, at the height of the protests, almost daily occurrence. This inevitably meant that vehicles were obstructed getting from the Wyton Site to the highway.

324. On the evidence, I am satisfied that there is a real risk that "Persons Unknown" who are protesting about the activities of the First Claimant will engage in the obstruction of vehicles as they enter or leave the Wyton Site.

(5) Public nuisance by obstruction of the highway

325. Before the grant of the Interim Injunction, some large-scale demonstrations took place outside the Wyton Site. There were also some further isolated incidents of significant obstruction of the highway, primarily targeted at those going to or from the Wyton Site. The key events have been as follows:

(1) On 9 July 2021, a demonstration was attended by between 150-200 protestors. It lasted for nearly 2 hours.

(2) On 1 August 2021, there was another large-scale demonstration, numbering up to 260 protestors. The Claimants allege that the police struggled to contain the protestors and that reinforcements were required. Four protestors were arrested.

(3) On 13 August 2021, a convoy of staff cars was intercepted on the main carriageway around 70 metres from the entrance to the Wyton Site. It took 40 minutes for the vehicles to travel along the highway and to enter the Wyton Site.

(4) On 15 August 2021, approximately 250 people attended a large demonstration (see [192]-[198] above).

(5) On 1 July 2023, approximately 50 people attended the two-year anniversary of Camp Beagle. Ms Pressick described this as "*a relatively quiet event considering its significance*". Although she identified several alleged incidents of breach of the Interim Injunction (trespass and entry into the Exclusion Zone), there was no large scale obstruction of the highway.

326. There was also a significant protest event, on 20 November 2021, after the grant of the Interim Injunction. On that occasion, there was a significant obstruction of the highway. This incident was one of those included in the First Contempt Application, and it led subsequently to the variation of the Interim Injunction (see [39]-[40] above).

327. Whether any of these events amounted to a public nuisance is difficult to determine on the evidence. Perhaps because of their belief that any obstruction of the highway was a public nuisance, the Claimants have not provided evidence of the wider impact of the obstruction of the carriageway in each of the incidents I have identified above. On the evidence I have I can, I think, properly draw the inference that the incident on 15 August 2021, in terms of the length of the obstruction of the highway and its likely community impact, was a public nuisance. But the other incidents are not as clear cut, and, on the evidence, the Claimants have not proved that they were a public nuisance.

328. It is also important to note that in each of these incidents there was a significant police presence. In none of the incidents did the police seek to intervene or use their powers

to clear the obstruction of the highway. It appears to me that, in the incident on 15 August 2021, the police had closed the road. I am not criticising the decisions of the police in these incidents. It is an important part of policing demonstrations for police officers (both individual officers on the ground and senior officers in their strategic decision-making) to assess the extent to which the police need to use their undoubted powers to control what are essentially public order issues.

329. In summary, the evidence shows that this is some risk, perhaps diminished since the height of the demonstrations in 2021, that "Persons Unknown" will congregate in such numbers outside the Wyton Site that they cause a public nuisance. I will deal below whether the Court's response to that risk, in these proceedings, should be to grant any form of *contra mundum* order.

L: Evidence from the police

330. At an earlier stage of the proceedings, evidence was provided to the Court by a senior police officer, Superintendent Sissons, who was responsible for policing the protest activities at the Wyton Site. I set out this evidence in the Second Injunction Variation Judgment on 22 December 2022 [43]-[51] and Appendix.

331. Based in part on Superintendent Sissons evidence, I declined to vary the Interim Injunction:

> [76] … unless the Claimants can demonstrate a clear case for an injunction, in my judgment it is better to leave any alleged wrongdoing to be dealt with by the police. Officers on the ground are much better placed to make the difficult decisions as to the balancing of the competing rights (see Injunction Judgment [85] and [96]).
>
> [77] The evidence from Superintendent Sissons shows that this is precisely what the police are doing. There is no complaint from the Claimants that the police are failing in their duties or that the targeted measures taken by the police have been ineffective. Arrests are being made of some protestors, including it appears those engaged on protests at Impex, and several people have been charged. Appropriate use of bail conditions or, upon conviction, restraining orders will restrict further unlawful acts of individuals more effectively and on a targeted basis.
>
> [78] Arrests for offences under s.14 Public Order Act 1986 suggest that the police have already utilised their powers to impose conditions on public assemblies. I appreciate that the Claimants contend that, notwithstanding the efforts of the police, some people are continuing to break the law. The issue for the Claimants is that, before meaningful relief can be granted by way of civil injunction, it is necessary to identify the alleged wrongdoers so that they can be joined to the proceedings.

332. The Claimants' evidence at trial has not demonstrated that the police are failing to respond appropriately to any threats posed by the protestors. In my judgment, and as I have observed before, proportionate use, by police officers making decisions based on an assessment 'on-the-ground', of the powers available to them, adjudged to be necessary and targeted at particular individuals, is immeasurably more likely to strike the proper balance between the demonstrators' rights of freedom of

expression/assembly and the legitimate rights of others, than a Court attempting to frame a civil injunction prospectively against unknown "protestors".

M: *Wolverhampton* and its impact on this case

(1) Background

333. The context of the litigation that gave rise to the Supreme Court decision in ***Wolverhampton*** was a preponderance of cases in which Courts had granted injunctions against "Persons Unknown" (and in at least one case a *contra mundum* injunction) to restrain trespass on the land of local authorities by Gypsies and Travellers. The facts are set out in the first instance decision: ***LB Barking & Dagenham -v- Persons Unknown* [2021] EWHC 1201 (QB)**. Four issues of principle were resolved by me, the most significant being whether a "final injunction" against "Persons Unknown" could bind people who were not parties to the action at the date the injunction was granted (the so-called 'newcomers').

334. Based on established authorities, principally the decisions of the Supreme Court in ***Cameron -v- Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471** and the Court of Appeal in ***Canada Goose UK Retail Ltd -v- Persons Unknown* [2020] 1 WLR 2802**, I decided that it could not: [161]-[189]. I reached that conclusion based on the application of conventional principles of civil litigation and the established limits of those who were made subject to the Court's orders.

335. I also considered the question of whether *contra mundum* injunctions might provide an answer for restraining the actions of 'newcomers', but held that *contra mundum* orders were wholly exceptional and were reserved for cases (like those decided under the *Venables* jurisdiction) where the Court was effectively compelled to grant a *contra mundum* order to avoid a breach of s.6 Human Rights Act 1998: [224]-[238].

(2) The Court of Appeal decision

336. The Court of Appeal reversed my decision: [2023] QB 295. Disapproving the previous Court of Appeal decision in ***Canada Goose*** and applying ***South Cambridgeshire District Council -v- Gammell* [2006] 1 WLR 658**, the Court of Appeal held that that s.37 Senior Courts Act 1981 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. The Court held that there was no difference in jurisdictional terms between an interim and a final injunction, particularly in the context of those granted against "Persons Unknown". Where an injunction was granted, whether on an interim or a final basis, the court retained the right to supervise and enforce that injunction, including bringing before the court parties violating the injunction who thereby made themselves parties to the proceedings.

(3) The Supreme Court decision

337. Despite there being no defendants to appeal the Court of Appeal's decision, the Supreme Court nevertheless heard an appeal brought by the interveners.

338. The appeal from the Court of Appeal's decision was dismissed, but the Supreme Court disagreed with the Court of Appeal's reasoning. The Supreme Court held that the Court

had jurisdiction to grant a *contra mundum* injunction that restrained newcomers. The judgment concluded with this summary of the decision [238]:

> "(i) The court has jurisdiction (in the sense of power) to grant an injunction against 'newcomers', that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.
>
> (ii) Such an injunction (a 'newcomer injunction') will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect *contra mundum*, and is not to be justified on the basis that those who disobey it automatically become defendants.
>
> (iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:
>
> (a) That equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.
>
> (b) That equity looks to the substance rather than to the form.
>
> (c) That equity takes an essentially flexible approach to the formulation of a remedy.
>
> (d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.
>
> (e) These principles may be discerned in action in the remarkable development of the injunction as a remedy during the last 50 years.
>
> (iv) In deciding whether to grant a newcomer injunction, the application of those principles in the context of trespass and breach of planning control by Travellers will be likely to require an applicant:
>
> (a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.
>
> (b) to build into the application and into the order sought procedural protection for the rights (including Convention rights) of the newcomers affected by the order, sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them. Those protections are likely to include advertisement of an intended application so as to alert potentially affected Travellers and bodies which may be able to represent their interests at the hearing of the application, full provision for liberty to persons affected to apply to vary or discharge the order without having to show a change of

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

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

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

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

(a) The *Gammell* principle disapproved as the basis for newcomer injunctions

339. As noted in paragraph (ii) of the Supreme Court's summary, the 'newcomer' injunction it recognised was a *contra mundum* order. In disagreement with the Court of Appeal, the Supreme Court disapproved of the previous basis upon which 'newcomer' injunctions had been granted using the principle from ***Gammell*** to treat 'newcomers', by their conduct, as having become defendants to the proceedings and bound to comply with the injunction: [127]-[132].

340. Ms Bolton submitted that the species of injunction newly sanctioned by the Supreme Court was "*analogous*" to a *contra mundum* injunction. Whilst the Supreme Court did use the word "*analogous*" in discussion of 'newcomer' injunctions ([132]), the new form of order that it ultimately approved is not analogous to a *contra mundum* order; it *is* a *contra mundum* order. That is plain from [238(ii)].

(b) The key features of, and justification for, a *contra mundum* 'newcomer' injunction

341. The Supreme Court identified the "*distinguishing features*" of a 'newcomer' injunction as follows [143]:

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

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

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

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

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

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

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

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

342. Paragraph (iii) has particular importance in relation to some of the torts that are relied upon in relation to protest cases; e.g. public nuisance arising from an obstruction of the highway, interference with the right of access to the highway and harassment.

343. The Supreme Court was also very clear that this new form of *contra mundum* 'newcomer' injunction – "*a novel exercise of an equitable discretionary power*" – was only likely to be justified in the following circumstances [167]:

"(i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other

statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

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

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

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

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

344. The Supreme Court described the need to demonstrate a "*compelling justification*" for the order sought as an "*overarching principle that must guide the court at all stages of its consideration*" of such orders: [188].

(c) Protest cases

345. Necessarily, the factors identified by the Supreme Court were directed at the particular issue of unlawful encampments of Gypsies and Travellers on local authority land. So far as their potential application of *contra mundum* 'newcomer' injunctions in protest cases, the Supreme Court said only this:

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

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

346. Whilst the matters addressed by the Supreme Court were specific to the particular context of Gypsies and Travellers' encampments (see [190]-[217]), what emerges is that, before *contra mundum* 'newcomer' injunctions are granted, the Court must consider "*whether the [applicant] has exhausted all reasonable alternatives to the grant of an injunction*". Of course, in the context of the problems of unlawful encampments of land, a local authority has a range of other options available to it – ranging from byelaws, public space protection orders to directions made under s.77 Criminal Justice and Public Order Act 1994.

347. Private litigants, such as the Claimants in this case, do not have access to similar powers. The fact that an applicant for a *contra mundum* 'newcomer' injunction can demonstrate infringements of the civil law does not mean that they can have immediate recourse to a *contra mundum* 'newcomer' injunction. Consideration of both whether the applicant has demonstrated a compelling justification for the remedy and whether it is just and convenient to grant such an order will require the Court to consider what other (and potentially better) solutions may be available, particularly in the context of protests.

348. In the context of protest cases, the Court is entitled to and must have regard to (a) the extensive powers the police have to deal with protest activities, including, from 28 June 2022, the new statutory offence of public nuisance in s.78 Police, Crime, Sentencing and Courts Act 2022 (see [81] above); and (in relation to potential exclusion zones) (b) the powers of local authorities to impose public space protection orders under the Anti-social Behaviour, Crime and Policing Act 2014 (see ***Wolverhampton*** [204]).

349. In ***Canada Goose -v- Persons Unknown*** **[2020] WLR 417**, a protest case, I said this:

> [100] The evidence in the current case shows that there have been few arrests by the police of demonstrators prior to the grant of the injunction. I was told at the hearing that the Claimants know of no prosecutions of any protestors. Evidence before Teare J suggested that the cost of policing the demonstrations was around £108,000. Of course, individuals and companies are entitled to pursue such private law remedies as are available to them and to seek interim injunctions where appropriate, but this case (and ***Ineos*** and ***Astellas*** – see [119] below) perhaps demonstrate the

difficulties and limits of trying to fashion civil injunctions into quasi-public order restrictions.

[101] When considering whether it is *necessary* to impose civil injunctions (even if they can be precisely defined and properly limited to prohibit only unlawful conduct) the Court must be entitled to look at the overall picture and the extent to which the law provides other remedies that may be equally if not more effective.

[102] The police play an essential and important role in striking the appropriate balance between facilitating lawful demonstration and preventing activities that are unlawful. Consistent with the proper respect for the Article 10/11 rights (see [99(viii)] above), it is only those engaged upon or intent on violence (or other criminal activity) who are liable to arrest and removal, leaving others to demonstrate peacefully. The police have available an extensive array of resources and powers to keep protests within lawful bounds, including:

i) their presence; often itself a deterrent to unlawful activities;

ii) the power of arrest, in particular for breach of the peace, harassment, public order offences (under Public Order Act 1986), obstruction of the highway (see [107] below), criminal damage, aggravated trespass (contrary to s.68 Criminal Justice and Public Order Act 1994) and assault;

iii) the use of dispersal powers under Part 3 of the Anti-social Behaviour Crime and Policing Act 2014;

iv) the imposition of conditions on public assembly under s.14 Public Order Act 1986; and/or

v) an application for a prohibition of trespassory assembly under s.14A Public Order Act 1986.

[103] Selected and proportionate use of these powers, adjudged to be necessary and targeted at particular individuals, by police officers making decisions based on an assessment 'on-the-ground', is immeasurably more likely to strike the proper balance between the demonstrators' rights of freedom of expression/assembly and the legitimate rights of others, than a Court attempting to frame a civil injunction prospectively against unknown "protestors".

[104] Parliament has also provided local authorities powers to make public space protection orders which can restrict the right to demonstrate. Chapter 2 of the Anti-Social Behaviour, Crime and Policing Act 2014 empowers local authorities to make such orders if the conditions in s.59 are met: see ***Dulgheriu -v- London Borough of Ealing*** **[2020] 1 WLR 609**.

350. The Court of Appeal in ***Canada Goose*** **[2020] 1 WLR 2802** [93] agreed:

"… 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."

351. Although the Supreme Court in ***Wolverhampton*** disagreed with the Court of Appeal's decision in ***Canada Goose*** (see [133]-[138]), that was on the ground that Court of Appeal was wrong to find that a final injunction could not bind 'newcomers'. The Supreme Court did not specifically address – or contradict – the Court of Appeal's identification of the problems of attempting to use civil injunctions to control public protest. The decision found that *contra mundum* 'newcomer' injunctions can, as a matter of principle, be granted in protest cases, but says nothing (beyond what is noted in [235]-[236]) about the particular issues that arise in such cases, other than to acknowledge the different issues that will call for decision and that, with all *contra mundum* 'newcomer' injunctions, a compelling justification for the order must be demonstrated.

(d) The need to identify the prohibited acts clearly in the terms of any injunction

352. The Supreme Court set out the requirements of any *contra mundum* 'newcomer' injunction:

> [222] It is always important that an injunction spells out clearly and in everyday terms the full extent of the acts it prohibits, and this is particularly so where it is sought against persons unknown, including newcomers. The terms of the injunction – and therefore the prohibited acts – must correspond as closely as possible to the actual or threatened unlawful conduct. Further, the order should extend no further than the minimum necessary to achieve the purpose for which it was granted; and the terms of the order must be sufficiently clear and precise to enable persons affected by it to know what they must not do.
>
> [223] Further, if and in so far as the authority seeks to enjoin any conduct which is lawful viewed on its own, this must also be made absolutely clear, and the authority must be prepared to satisfy the court that there is no other more proportionate way of protecting its rights or those of others.
>
> [224] It follows but we would nevertheless emphasise that the prohibited acts should not be described in terms of a legal cause of action, such as trespass or nuisance, unless this is unavoidable. They should be defined, so far as

> possible, in non-technical and readily comprehensible language which a person served with or given notice of the order is capable of understanding without recourse to professional legal advisers.

(4) Other consequences of *contra mundum* litigation

353. There are further implications of the move to *contra mundum* orders. In despatching the ***Gammell*** principle as the jurisdictional basis to bind newcomers, the Supreme Court did away with the notion that the people bound by a 'newcomer' injunction are parties to the litigation. They are not bound as a party; they are bound because the injunction is framed as a prohibition generally on the identified act(s) that, subject to notice of the injunction, binds everyone: "*anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they have been served with the proceedings*": [132].

354. The Supreme Court did not really address the issue of service of a Claim Form in a wholly *contra mundum* claim (i.e. one in which there are no named defendants). All that was said was [56]:

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

355. In litigation brought solely *contra mundum* there can be no expectation or requirement to serve the Claim Form on the putative defendant. In *contra mundum* litigation, "*there is, in reality no defendant*": ***Wolverhampton*** [115]. There is therefore no one upon whom the Claim Form can be served. If, exceptionally, the Court is satisfied that it is appropriate to proceed to without a defendant, the Court can dispense with the service of the Claim Form under CPR 6.16. That was the course adopted in ***In the matter of the persons formerly known as Winch*** **[2021] EMLR 20** [31].

356. The absence of any defendant(s) also means that, whilst the Court must ensure that the terms of any *contra mundum* injunction are (a) clear as to what conduct is prohibited (see [352] above), and (b) compellingly shown to be necessary, there is now no need carefully to define the category of "Persons Unknown" who are to be defendants to the claim; there are no defendants in such a claim.

357. I note that the Supreme Court said the following about the description of those who are to be restrained by a *contra mundum* 'newcomer' injunction:

> [132] … Although the persons enjoined by a newcomer injunction should be described as precisely as may be possible in the circumstances, they potentially embrace the whole of humanity…
>
> [221] The actual or intended respondents to the application must be defined as precisely as possible. In so far as it is possible actually to identify persons to whom the order is directed (and who will be enjoined by its terms) by name or in some other way, as Lord Sumption explained in ***Cameron*** **[2019] 1 WLR 1471**, the local authority ought to do so. The fact that a precautionary injunction is also sought against newcomers or other persons unknown is not of itself a justification for failing properly to identify these

> persons when it is possible to do so, and serving them with the proceedings and order, if necessary, by seeking an order for substituted service. It is only permissible to seek or maintain an order directed to newcomers or other persons unknown where it is impossible to name or identify them in some other and more precise way. Even where the persons sought to be subjected to the injunction are newcomers, the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention) should be explored and adopted if possible."

358. Of course, every case will have to be decided on its facts. In a case of unlawful encampment on land, it may very well be possible to identify, if not to name, (a) those currently on the land; (b) those immediately threatening to move onto the land; and (c) newcomers who might at some future point move onto the land. I read the Supreme Court's guidance as a reminder that the fact that the injunction sought includes a *contra mundum* 'newcomer' injunction against (c), does not relieve the local authority for taking such steps as are available to identify, and serve the Claim Form upon, those in categories (a) and (b) (if necessary, by an alternative service order).

359. But there can be no question of service of a Claim Form on those in category (c). These people cannot be identified. They cannot be served, not even under the terms of an alternative service order. As against them, the *contra mundum* 'newcomer' injunction is made, necessarily, without notice. For persons in category (c), the Supreme Court regarded their interests adequately safeguarded by their ability to apply to vary or discharge the order.

360. Ms Bolton had advanced, as an alternative to the *contra mundum* order, what might be regarded as the pre-***Wolverhampton*** form of "Persons Unknown" injunction. Reflecting the need to identify, clearly, the categories of "Persons Unknown" defendants (c.f. ***Canada Goose*** [82(4)]), the injunction sought restrain particular categories of defendants. Following ***Wolverhampton***, this is no longer necessary, nor appropriate for *contra mundum* 'newcomer' injunctions. Indeed, one benefit of the ***Wolverhampton*** decision is that the form of the injunction order, if granted, can be much simplified. The experience that I have gained in this case suggests that, if there is an opportunity to simplify injunction orders directed at those who are not parties to the proceedings, it should be grasped.

361. The form of the Interim Injunction Order that has been in force since 2 August 2022 lists a total of 33 Defendants, of which there are 10 separate categories of "Persons Unknown" (the various descriptions can be seen in Annex 1). It is not until page 4 of the 8-page document that a person reading it would get to the actual terms of the injunction. Even then, s/he would have to refer back to the defined categories of "Persons Unknown" to understand (a) whether s/he now fell (or, if s/he did an act prohibited by the injunction, would fall) within this category; and, if so (b) what s/he was therefore prohibited from doing. During these proceedings, I have become increasingly concerned that the Interim Injunction Order in this case has become an impenetrable legal thicket, likely to be beyond the comprehension of most ordinary people. That was an unavoidable product of the complicated legal basis on which "Persons Unknown" injunctions were granted. Courts should always strive to ensure that its orders are clear, but in a case concerning protest, it is especially important to avoid uncertainty as to what is and is not permitted. Such uncertainty is likely to chill lawful exercise of important rights under Articles 10 and 11.

362. Now that the Supreme Court has despatched the legal thicket, in favour of *contra mundum* 'newcomer' injunctions, all of these historic complications can (and in my view should) be swept away. I would also suggest, and it will be the practice I shall adopt in this case, that the *contra mundum* 'newcomer' injunction should be contained in a separate order from any injunction made against parties to the litigation. In that way, the terms of the *contra mundum* 'newcomer' injunction can state, clearly and simply, what acts the Court is prohibiting by *anyone*. It is particularly important that injunctions that place limits on a citizen's right to demonstrate must be spelled out in clear and readily comprehensible terms so that there is no inadvertent chilling effect.

(5) *Contra mundum* injunctions as a form of legislation?

363. In ***LB Barking & Dagenham*** (the first instance decision in ***Wolverhampton***), I had expressed the concern that, by granting *contra mundum* injunctions, the Court risked moving from its constitutionally legitimate role of resolving disputes raised by the parties before it, to an arguably constitutionally illegitimate role of using injunctive powers effectively to legislate to prohibit behaviour generally [260]:

> "If these established principles and the limits they impose on civil litigation are not observed, the Court risks moving from its proper role in adjudicating upon disputes between parties into, effectively, legislating to prohibit behaviour generally by use of a combination of injunctions and the Court's powers of enforcement. There may be good arguments - and Mr Anderson QC's submissions made points that could have been made by all of the Cohort Claimants - as to why such behaviour ought to be prohibited, but it is not the job of the Court, through civil injunctions granted *contra mundum*, to venture into that territory. Stepping back, the injunction that Wolverhampton was granted, with a power of arrest attached, effectively achieved the criminalisation of trespass on the 60 or so sites covered by the injunction. In a democracy, legislation is the exclusive province of elected representatives. A court operating in an adversarial system of civil litigation simply does not have procedures that are well-suited or designed to prohibit, by injunction, conduct generally…"

364. The view the Court of Appeal took as to the availability of "Persons Unknown" injunctions meant that the point did not arise.

365. The appellants in the Supreme Court did argue that *contra mundum* orders were objectionable on the ground that they were, effectively, a form of legislation (see [154]). The Supreme Court rejected the argument:

> [169] We have already mentioned the objection that an injunction of this type looks more like a species of local law than an in personam remedy between civil litigants. It is said that the courts have neither the skills, the capacity for consultation nor the democratic credentials for making what is in substance legislation binding everyone. In other words, the courts are acting outside their proper constitutional role and are making what are, in effect, local laws. The more appropriate response, it is argued, is for local authorities to use their powers to make byelaws or to exercise their other statutory powers to intervene.
>
> [170] We do not accept that the granting of injunctions of this kind is constitutionally improper. In so far as the local authorities are seeking to

> prevent the commission of civil wrongs such as trespass, they are entitled to apply to the civil courts for any relief allowed by law. In particular, they are entitled to invoke the equitable jurisdiction of the court so as to obtain an injunction against potential trespassers. For the reasons we have explained, courts have jurisdiction to make such orders against persons who are not parties to the action, i.e. newcomers. In so far as the local authorities are seeking to prevent breaches of public law, including planning law and the law relating to highways, they are empowered to seek injunctions by statutory provisions such as those mentioned in para 45 above. They can accordingly invoke the equitable jurisdiction of the court, which extends, as we have explained, to the granting of newcomer injunctions. The possibility of an alternative non-judicial remedy does not deprive the courts of jurisdiction.
>
> [171] Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one…

366. I note that in ***Valero Ltd -v- Persons Unknown*** **[2024] EWHC 124 (KB)** [57]**,** Ritchie J described *contra mundum* injunctions as "*a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future*".

367. As a first instance Judge, my obligation is clear. I must faithfully follow and apply the law as declared by the Supreme Court. But I remain troubled by the Courts seeking to set the boundaries upon lawful protest by *contra mundum* injunctions. I remain concerned that, constitutionally, the prohibition of conduct by citizens generally, with the threat of punishment (including imprisonment) for contravention, ought to be a matter for Parliament.

368. Prior to ***Wolverhampton***, the grant of *contra mundum* injunctions was limited to exceptional cases where the court was "*driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act*": ***Wolverhampton*** [110]. As that duty was imposed by Parliament, by s.6 Human Rights Act 1998, there could be no suggestion that by granting the order, the Court was arrogating to itself a power of legislation that was exclusively the province of Parliament.

369. As recognised by Richie J in ***Valero***, the reality of the imposition of *contra mundum* injunction, with the threat of sanctions including fines and imprisonment for breach, is that it is akin to the creation of a criminal offence. It is a prohibition on conduct generally that has been imposed by a Court, not by the democratic process in Parliament.

370. Further, a *contra mundum* injunction is a prohibition, the alleged breach of which has none of the safeguards that are present in the criminal justice process. If a protestor is alleged to have broken the criminal law, unless exceptionally the prosecution is brought privately, it falls to the Crown Prosecution Service to decide whether to institute criminal proceedings against the protestor and to decide what charge(s) s/he should face. That involves the independent assessment of the evidence and an independent

decision whether it is in the public interest to prosecute. Those important safeguards – in addition to the safeguards in the substantive criminal law – ensure that in our society proper respect is afforded to protest rights under Article 10/11. Even if a private prosecution were brought in a protest case, the Director of Public Prosecutions has the power to take over and discontinue the prosecution.

371. In protest cases, there are additional reasons to be concerned at the risk of abuse. The Court may well grant the injunction (and its enforcement) to a private individual, often the very person against whom the protest is directed.

372. These concerns are not speculative. As the experience in this case has demonstrated, the risks of abuse are real. In the Second Contempt Application, the Claimants actively sought the imposition of a sanction on Ms McGivern, a solicitor, as a "Person Unknown", for behaviour that was either not a civil wrong at all, or a breach of the civil law that was utterly trivial. Yet, because of the terms of the Interim Injunction Order, and the imposition of the Exclusion Zone, the Claimants were able to pursue contempt application against her leading to a 2-day hearing. In the contempt application against Mr Curtin – the Third Contempt Application – the Claimants brought an application that sought to punish Mr Curtin for lending his footwear to a person in a dinosaur costume whom Mr Curtin was alleged to have encouraged to enter the Exclusion Zone. Such a claim would be laughable, if it did not have such serious implications. Apart from Ground 2, the other grounds advanced against Mr Curtin were trivial. None of actions alleged against Mr Curtin amounted to civil wrongs.

373. Had the Crown Prosecution Service been responsible for deciding whether to bring criminal proceedings against Ms McGivern or Mr Curtin for causing or authorising a person in a dinosaur costume to enter the Exclusion Zone, I am confident that a decision would have been made that it was not in the public interest to prosecute. The Claimants, however, are not subject to any analogous requirement to consider whether it is necessary or proportionate to bring a contempt application. On two separate occasions, therefore, they have shown themselves incapable of exercising any sense of proportionality in launching and pursuing the contempt applications in respect of alleged breaches of the Interim Injunction. As a result of the Second Contempt Application, the Court imposed the Contempt Application Permission Requirement (see [49] above) to protect against the abuse of using the Interim Injunction as a weapon.

374. All but one of the allegations brought in the Third Contempt Application against Mr Curtin were trivial. This immediately raises the question as to why the Claimants would pursue trivial breaches of the Interim Injunction. As the Claimants have not had an opportunity to address this specific issue, I shall leave its final resolution, if necessary, to the hearing at which this judgment will be handed down and the Court makes all consequential orders.

M: The relief sought by the Claimants

(1) Against Mr Curtin

375. The Claimants do not seek damages against Mr Curtin.

376. The terms of the final injunction order sought by the Claimants against Mr Curtin are set out in Annex 2 to the judgment.

(2) *Contra mundum*

377. The terms of the *contra mundum* 'newcomer' injunction sought by the Claimants are set out in Annex 3 to the judgment.

O: Decision

378. In this final section of the judgment, I will set out my decision. The final form of the orders that will be made consequent upon the judgment will be finalised at the hearing at which the judgment is handed down. As the only represented parties, I invite the Claimants' team to provide the first draft. The orders that the Court ultimately makes will be posted on the Judiciary website: www.judiciary.uk.

(1) The claim against Mr Curtin

379. Based on my factual findings, the First Claimant is entitled to judgment against Mr Curtin in respect of its claims against him for (1) trespass on the physical land at the Wyton Site; and (2) interference with the right of access from the Wyton Site to/from the public highway caused by obstructing of vehicles entering or leaving the Wyton Site.

380. The First Claimant's claims against Mr Curtin for public nuisance, harassment and trespass by drone flying are dismissed. The claims of the remaining Claimants against Mr Curtin will be dismissed.

381. Consequent upon the judgment that the First Claimant has been granted, I am satisfied that it is necessary that an injunction should be granted to restrain Mr Curtin from (a) any physical trespass on the land owned by the First Claimant at the Wyton Site; and (b) any direct and deliberate obstruction of vehicles entering or leaving the Wyton Site. The injunction will not include any restrictions in relation to the B&K Site.

382. I have considered carefully whether to continue the prohibition on Mr Curtin's entering the Exclusion Zone. I have concluded that I should not. The Exclusion Zone was a temporary expedient to resolve the flashpoint of vehicles being surrounded. The objectionable, and unlawful, conduct is obstructing vehicles entering or leaving the Wyton Site. The injunction should target that behaviour directly. Continuation of the Exclusion Zone would subject Mr Curtin to restrictions on activities that are not unlawful, for example if Mr Curtin wanted simply to stand on that part of the grass verge that is presently within the Exclusion Zone. The Claimants have not demonstrated that such a restriction is the only way of protecting their legitimate interests. Mr Curtin should not be exposed to the risk of proceedings for contempt by doing acts that are not themselves a civil wrong.

383. The restriction on obstructing vehicles will be drafted in a way that is clear and specific. It will not include the word "*approach*" or the concept of "*slowing*" a vehicle. Approaching a vehicle in a way that is not an obstruction of that vehicle is not an act that the First Claimant is entitled to restrain. The incident on 11 July 2022 (see [275]-[279] above) demonstrates the risks that an injunction framed in these terms risks capturing behaviour that the Court never intended to restrain. Mr Curtin, and the Claimants, now know what acts amount to obstructing a vehicle.

384. The words "*direct and deliberate*" will be included in the injunction to ensure that indirect or inadvertent obstruction is not caught. A disproportionate amount of time was spent at the time considering the extent to which Mr Curtin's simply standing at the side of the Access Road obstructed the view of the driver of a vehicle leaving the Wyton Site, and therefore amounted to an obstruction of the "*free passage*" of the vehicle. As I have held (see [80] above), the First Claimant's common law right of access to the highway is not unqualified. If Mr Curtin simply walks across the Access Road, to get from one side of the entrance of the Wyton Site to the other, he does not interfere with the First Claimant's right of access to the highway if a vehicle attempting to enter or leave the Wyton Site momentarily has to give way to Mr Curtin. Deliberately standing in front of a vehicle to prevent it entering or leaving the Wyton Site is different, and obviously so. The injunction will prohibit the latter, but not the former. An injunction framed in these terms will also enable Mr Curtin to invite drivers of vehicles to stop, to speak to them and to offer them leaflets about the protest.

385. As a result, the injunction granted against Mr Curtin will consist of Paragraph (1)(a) of the Claimants' draft (in Annex 2) together with a new paragraph (2) which will prohibit Mr Curtin from directly and deliberately obstructing vehicles entering or leaving the public highway outside the Wyton Site.

(2) *Contra mundum* claim

386. Based on my factual findings, I am satisfied that the First Claimant has proved that persons who cannot be identified threaten to (a) trespass upon the First Claimant's land at the Wyton Site; and/or (b) interfere with the right of access from the Wyton Site to/from the public highway caused by obstructing of vehicles entering or leaving the Wyton Site.

387. The First Claimant has failed to prove that persons who cannot be identified threaten to fly drones over the Wyton Site at a height that amounts to trespass upon the First Claimant's land. In any event, the First Claimant has not made out a compelling case for the grant of a *contra mundum* injunction or that such an order would be just and convenient. The Claimants have adduced no evidence as to the height at which flying a drone interferes with its user of the First Claimant's land. 100 meters (and indeed the other heights that have variously been proposed by the Claimants) are simply arbitrary. The Claimants have been forced to choose a height (albeit without supporting evidence) because they are seeking to rely upon trespass. In reality the Claimants want to prohibit all drone flying over the Wyton Site (at whatever height) because it is not the trespass that it represents but the filming opportunity that it provides. As I have explained, there is a palpable disconnect between the tort relied upon and the wrong that that the Claimants are seeking to address.

388. I am satisfied that there is a compelling need, convincingly demonstrated by the First Claimant's evidence of repeated infringements of its civil rights, for the Court to grant a *contra mundum* injunction to restrain future acts by protestors of (a) trespass at the Wyton Site; and (b) interference with the right of access from the Wyton Site to/from the public highway caused by the obstruction of vehicles entering or leaving the Wyton Site.

389. I considered carefully whether it was just and convenient to grant an injunction *contra mundum* to restrain future trespass. On the one hand, the First Claimant is particularly

vulnerable to deliberate acts of trespass by protestors targeted against it because of the nature of its business. Leaving the First Claimant to pursue ad hoc civil remedies against individual trespassers would be likely to provide inadequate protection for its civil rights. On the other hand, I have real concerns that this form of order is potentially open to abuse by the First Claimant. It threatens to expose people who do nothing more than step momentarily on the First Claimant's land at the Wyton Site to the threat of proceedings for contempt of court. However, I have decided that these risks are adequately mitigated by the following factors:

(1) First, a contempt application would only be successful if the First Claimant demonstrates that the alleged trespasser had notice of the terms of the *contra mundum* injunction. It is quite clear from the Supreme Court's decision in ***Wolverhampton*** that notice is an essential pre-requisite of liability for breach of the new *contra mundum* 'newcomer' injunction that it has sanctioned. (I say nothing about what, if any, notice is required for the sort of *contra mundum* injunction made under the *Venables* jurisdiction, which appear to me to raise very different questions, and upon which I have received no submissions).

(2) Second, the First Claimant is subject and will remain subject to the Contempt Application Permission Requirement that was imposed on 2 August 2022 (see [49] above). This will mean that the First Claimant will have to make an application to the Court for permission to bring a contempt application alleging breach of the *contra mundum* order. The evidence in support of the application for permission would need to demonstrate that the proposed contempt application (a) is one that has a real prospect of success; (b) is not one that relies upon wholly technical or insubstantial breaches; and (c) is supported by evidence that the respondent had actual knowledge of the terms of the injunction before being alleged to have breached it. Ms Bolton accepted that the continuation of the Contempt Application Permission Requirement was appropriate if the Court were prepared to grant a *contra mundum* injunction. The *contra mundum* order will record, again, the Contempt Application Permission Requirement, and what the First Claimant must demonstrate in order to be granted permission.

390. Based on my experience in this case, and my concerns about potential abuse of such injunctions (see [370]-[374] above), it is my very clear view that all *contra mundum* 'newcomer' injunctions, particularly those in protest cases, should include a requirement that the Court's permission be obtained before a contempt application can be instituted. This would reduce the risks of a *contra mundum* injunction being used as a weapon against perceived adversaries for trivial infringements.

391. The decision in relation to granting a *contra mundum* injunction to restrain interference with the right of access from the Wyton Site to/from the public highway caused by obstructing of vehicles entering or leaving the Wyton Site is more straightforward. If the injunction focuses, as it should, on direct and deliberate obstruction, then unlike trespass, this is unlikely to be an unintentional act or one committed by inadvertence. On the contrary, people who attend the Wyton Site to protest will quickly come to understand that the Court has prohibited direct and deliberate obstruction of vehicles entering or leaving the Wyton Site.

392. The inclusion of the words "*direct and deliberate*" is also required in the *contra mundum* injunction, for the same reasons as they are needed in the injunction against Mr Curtin (see [384] above). There is a further important reason why these words are required in the *contra mundum* order. They will ensure that if a group of protestors lawfully processed along the B1090, and past the entrance of the Wyton Site, for the time they were passing the entrance they would probably prevent a vehicle leaving or entering the Wyton Site. It would be a serious interference to the right of lawful protest, for the *contra mundum* injunction (by an unintended side wind) to prohibit such a procession. This is to be contrasted with a group of protestors assembling outside the Wyton Site (as has happened in the past) which deliberately and directly obstructs vehicles attempting to leave or enter the Wyton Site. This conduct the injunction intends to prevent.

393. Although the First Claimant has demonstrated that there is a continuing risk that large scale demonstrations may be of such a size and duration that they may amount to a public nuisance, it has not demonstrated a compelling case that a *contra mundum* injunction is needed to tackle this risk or that it is just and convenient to make an order in these terms.

394. First, a public nuisance on this scale is primarily a matter for the police, who have ample powers to deal with both obstruction of the highway and public nuisance. I am satisfied that the police are using their powers appropriately and, in doing so, are setting the right balance between the legitimate interests of the First Claimant and the rights of protestors.

395. Second, whether the obstruction of a highway amounts to a public nuisance is entirely dependent upon a factual assessment of what happened on a particular occasion. It clearly does not fit into the category identified by the Supreme Court in ***Wolverhampton*** [143(iv)]. It is virtually impossible to fashion an injunction to restrain public nuisance that complies with the requirements reiterated by the Supreme Court (see [352] above). There is an obvious risk that granting an injunction that was targeted at prohibiting public nuisance would in fact chill perfectly lawful protest activity.

396. The First Claimant has not demonstrated that there is a compelling need for an Exclusion Zone to be imposed *contra mundum*. Even if such an order was directed specifically at protestors, it would still be very problematic. As I have already noted in the context of Mr Curtin's claim, the Exclusion Zone was a temporary expedient granted as an interim measure. It has largely had the desired effect of removing the main flashpoint in the demonstrations. I understand, therefore, why the First Claimant wishes to see it maintained. However, the central objection to this being continued *contra mundum* is that it restrains acts that are not even arguably unlawful. When it is remembered that the Court is going to prohibit obstruction of vehicles entering or leaving the Wyton Site, it is also difficult to argue that this further restriction is necessary. For that part of the Exclusion Zone that is part of the highway, it is, in my judgment, for the police to deal with obstructions of the highway that are anything more than transitory. There may be scope for an Exclusion Zone to be imposed in protest cases (c.f. those imposed around abortion clinics), but that is best done by a Public Spaces Protection Order, not a civil injunction.

397. For vehicles that are leaving or entering the Wyton Site via the public highway, obstruction of those vehicles will be prohibited. That aspect of the "*flashpoint*" will

continue to be restrained. I accept that the Claimants have provided evidence of at least one occasion where there has been significant surrounding, obstruction and delay of vehicles further down the B1090 highway. However, none of the Claimants has demonstrated a legal entitlement to restrain that activity. Save in the most extreme cases, it is unlikely to amount to a public nuisance, and I have explained above why I am not prepared to grant a *contra mundum* injunction to restrain public nuisance. For understandable reasons, the Claimants did not pursue a harassment claim against "Persons Unknown". It suffers from the same problem as public nuisance; the tort is so fact sensitive as to whether the threshold has been crossed into unlawful behaviour as to make it almost impossible to fashion a *contra mundum* injunction in acceptable terms. In my judgment, these are simply the inevitable limits of what can be achieved in attempting to control public order issues by civil injunction.

398. For these reasons, I shall grant to the First Claimant a more limited form of *contra mundum* injunction than that sought by the Claimants. It will restrain future acts by protestors of (a) trespass at the Wyton Site; and (b) interference with the right of access from the Wyton Site to/from the public highway caused by obstructing of vehicles entering or leaving the Wyton Site. Given that *contra mundum* 'newcomer' injunctions remain relatively uncharted waters, I am going to provide that the injunction shall last initially for a period of 2 years, at which point the Court will consider whether it should be renewed, discharged, or potentially extended.

399. Turning to paragraphs 3-5 of the Claimants' proposed order.

(1) It is very important to ensure that those affected by the order are made aware of their right to apply to the Court to vary or discharge it. Anyone affected by the order, which would embrace anyone who is protesting at the Wyton Site, or is intending to do so, is entitled to apply to the Court or vary or discharge the order. For that purpose, they must have an immediately available and effective method of being provided with all of the evidence that was relied upon by the Claimants to obtain the *contra mundum* order.

(2) It is not appropriate to provide for any sort of alternative service of the injunction order. It is for the First Claimant to decide how best to give notice of the injunction to those who need to be aware of its terms. In terms of any subsequent enforcement action, the burden will fall on the First Claimant to demonstrate that the terms of the injunction have come sufficiently to the attention of the person against whom the First Claimant wants to bring contempt proceedings. The effect of paragraphs 3-5 of the Claimants' proposed order would be that, once the relevant steps were completed, the whole world would be deemed to have received notice of the injunction. That would be a palpable fiction. It could even embrace people who are not yet born. Subject to proof of breach of the injunction, it would deliver, practically, a strict liability regime. That is not what remotely what the Supreme Court envisaged, and it is not fair.

(3) Mr Curtin's penalty in the Third Contempt Application

400. When deciding the appropriate penalty for contempt of court, the Court assesses the contemnor's culpability and the harm caused by the breach. The concept of harm, in contempt cases, includes not only direct harm caused to those who the injunction was

designed to protect, but also the harm to the administration of justice by the contemnor's disobedience to an order of the Court.

401. As to Mr Curtin's culpability, I have already found that, in his admitted breach of the Interim Injunction that formed Ground 2, he did not deliberately flout the Court's order; he got partly carried away by his emotions. I accept that, when the breach was committed, he was engaged on protest activities reflecting his sincerely held beliefs. Overall, I assess his culpability as low.

402. As to harm, the breach was in respect of a protective order that was designed to prevent the sort of behaviour in which Mr Curtin engaged. However, against that, the van was only fleetingly obstructed as it attempted to leave the Wyton Site. The incident had none of the significantly aggravating factors that had led to the imposition of the Interim injunction. Overall, this was not a serious breach of the injunction, and it has no other aggravating features. I assess the harm to be low.

403. Mr Curtin accepted the breach represented by Ground 2 at the substantive hearing. By analogy with criminal proceedings, it is fair to reflect the equivalent of a guilty plea with a 10% reduction in the sentence.

404. I am quite satisfied that seriousness of Mr Curtin's breach of the Interim Injunction is not so serious that only a custodial sentence is appropriate. I indicated as much at the conclusion of the hearing on 23 June 2023. I am satisfied that, reflecting upon the culpability and harm, it is appropriate to deal with this breach by way of a fine. In terms of mitigation, this is the first breach of the Interim Injunction and there has been no repetition since the incident almost 3 years ago. I also accept Mr Curtin's evidence that he has always tried to abide by the terms of the Court's order.

405. I have considered the sentencing guidelines for the less serious public order offences as a useful cross reference. On the Sentencing Council Guidelines for disorderly behaviour, in breach of s.5 Public Order Act 1986, Mr Curtin's conduct would appear to fall into category 2B, which gives a starting point of a Band A fine, with a range from discharge to a Band B fine. A Band A fine, is between 25-75% of the defendant's weekly wage, with a Band B fine range of 75-125% of weekly wage. I have also reminded myself of Superintendent Sissons' evidence of penalties that have been imposed on protestors following conviction in the Magistrates' Court. Although not a precise analogue, in my judgment it would be wrong if the penalty I imposed were to be out of all proportion to the penalties that have been imposed by the Magistrates' Court for offences arising out of similar protest activities.

406. Of course, when sentencing for contempt, there is an important element – usually absent from most criminal sentencing – that the conduct is a breach of a court's order. A breach of a protective order is a further aggravating factor.

407. In my judgment, the appropriate penalty for Mr Curtin's breach of the Interim Injunction under Ground 2 would have been a fine of £100. I will reduce that to £90 to reflect his admission of liability at the substantive hearing. When the judgment is handed down, I will invite submissions as the time Mr Curtin might need to pay this sum.

Annex 1: **Full list of Defendants to the claim**

(1) FREE THE MBR BEAGLES (formerly Stop Animal Cruelty Huntingdon) (an unincorporated association by its representative Mel Broughton on behalf of the members of Free the MBR Beagles who are protesting within the area marked in blue on the Plan attached at Annex 1 of the Claim Form and/or engaging in unlawful activities against the Claimants and/or trespassing on the First Claimant's Land at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT and/or posting on social media images and details of the officers and employees of MBR Acres Ltd, and the officers and employees of third party suppliers and service providers to MBR Acres Ltd)

(2) CAMP BEAGLE (an unincorporated association by its representative Bethany Mayflower on behalf of the members of Camp Beagle who are protesting within the area marked in blue on the Plan attached at Annex 1 of the Claim Form and/or engaging in unlawful activities against the Claimants and/or trespassing on the First Claimant's Land at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT and/or posting on social media images and details of the officers and employees of MBR Acres Ltd, and the officers and employees of third party suppliers and service providers to MBR Acres Ltd)

(3) MEL BROUGHTON

(4) RONAN FALSEY

(5) BETHANY MAYFLOWER (also known as Bethany May and/or Alexandra Taylor)

(6) SCOTT PATERSON

(7) HELEN DURANT

(8) BERNADETTE GREEN

(9) SAM MORLEY

(10) PERSON(S) UNKNOWN (who are protesting within the area marked in blue on the Plan attached at Annex 1 of the Claim Form and/or engaging in unlawful activities against the Claimants and/or trespassing on the First Claimant's Land at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT and/or posting on social media images and details of the officers and employees of MBR Acres Ltd, and the officers and employees of third party suppliers and service providers to MBR Acres Ltd)

(11) JOHN CURTIN

(12) MICHAEL MAHER (also known as John Thibeault)

(13) SAMMI LAIDLAW

(14) PAULINE HODSON

(15) PERSON(S) UNKNOWN (who are entering or remaining without the consent of the First Claimant on the land and in buildings outlined in red on the plan at Annex 1 of the Amended Claim Form, that land known as MBR Acres Ltd, Wyton, Huntingdon PE28 2DT)

(16) PERSON(S) UNKNOWN (who are interfering with the rights of way enjoyed by the First Claimant over the access road on the land shown in purple at Annex 3 of the Amended Claim Form and enjoyed by the Second Claimant as an implied or express licensee of the First Claimant)

(17) PERSON(S) UNKNOWN (who are obstructing vehicles of the Second Claimant entering or exiting the access road shown in purple Annex 3 of the Amended Claim Form and/or entering the First Claimant's land at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT)

(18) LOU MARLEY (also known as Louise Yvonne Firth)

(19) LUCY WINDLER (also known as Lucy Lukins)

(20) LISA JAFFRAY

(21) JOANNE SHAW

(22) AMANDA JAMES

(23) VICTORIA ASPLIN

(24) AMANDEEP SINGH

(25) PERSON UNKNOWN 70

(26) PERSON UNKNOWN 74

(27) [Not used]

(28) PERSON(S) UNKNOWN (who are, without the consent of the First Claimant, entering or remaining on land and in buildings outlined in red on the plans at Annex 1 to the Amended Claim Form, those being land and buildings owned by the First Claimant, at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT)

(29) PERSON(S) UNKNOWN (who are interfering, without lawful excuse, with the First Claimant's staff and Second Claimants' right to pass and repass with or without vehicles, materials and equipment along the Highway known as the B1090)

(30) PERSON(S) UNKNOWN (who are obstructing vehicles exiting the First Claimant's land at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT and accessing the Highway known as the B1090)

(31) PERSON(S) UNKNOWN (who are protesting outside the premises of the First Claimant and/or against the First Claimant's lawful business activities and pursuing a course of conduct causing alarm and/or distress to the Second Claimant and/or the staff of the First Claimant for the purpose of convincing the Second Claimant and/or the staff of the First Claimant not to: (a) work for the First Claimant; and/or (b) provide services to the First Claimant; and/or (c) supply goods to the First Claimant; and/or (d) to stop the First Claimants' lawful business activities at MBR Acres Ltd, Wyton, Huntingdon PE28 2DT)

(32) PERSON(S) UNKNOWN (who are photographing and/or videoing/recording the First Claimant's staff and members of the Second Claimant and/or their vehicles and vehicle registration numbers as they enter and exit and/or work on the First Claimant's land outlined in red at Annex 1 to the Amended Claim Form for the purpose of causing alarm and/or distress by threatening to use and/or in fact using the images and/or recordings to identify members of the Second Claimant, follow the Second Claimant or ascertain the home addresses of the Second Claimant for the purpose of convincing the Second Claimant not to: (a) work for the First Claimant; and/or (b) not to provide services to the First Claimant; and/or (c) not to supply goods to the First Claimant)

(33) PERSON(S) UNKNOWN (who are, without the consent of the First Claimant, trespassing on the First Claimant's land by flying drones over the First Claimant's land and buildings outlined in red on the plans at Annex 1 to the Amended Claim Form, that being land and buildings owned by MBR Acres Ltd, Wyton, Huntingdon PE28 2DT)

(34) LAUREN GARDNER

(35) LOUISE BOYLE

(36) PERSON(S) UNKNOWN (who are, without the consent of the First Claimant, entering or remaining on the land shaded in orange on the plans at Annex 1 to the re-re-re-Amended Claim Form – which land measures 2.85 metres from the boundary outlined in red on the plans at Annex 1 to the re-re-re-Amended Claim Form, that boundary marking those land and buildings owned by the First Claimant, at MBR Acres Limited, Wyton, Huntingdon PE28 2DT, and only where that boundary runs adjacent to the Highway known as the B1090)

Annex 2: The relief sought by the Claimants against Mr Curtin

In the draft order provided to the Court as part of their closing submissions, the Claimants seek the following by way of injunction against Mr Curtin:

> "The Eleventh Defendant, Mr John Curtin **MUST NOT** whether by himself or by instructing or encouraging any other person, group, or organisation do the same:
>
> (1) Enter the following land:
>
> (a) The First Claimant's Land at MBR Acres Limited, Wyton, Huntingdon PE28 2DT as set out in Annex 1 ('the Wyton Site');
>
> (b) The Third Claimant's premises known as B&K Universal Limited, Field Station, Grimston, Aldbrough, Hull, East Yorkshire HU11 4QE as set out in Annex 2 ('the Hull Site');
>
> (2) Enter into or remain upon or park any vehicle or place any other item (including, but not limited to, banners) in the area marked with black hatch lines on the plan at Annexes 1 and 2 [which includes all the land up to the midpoint of the highway that is adjacent to the Claimants (sic) property at the Wyton Site]. Save that nothing in this prohibition shall prevent the Defendant from Accessing the highway whilst in a vehicle, for the purpose of passing along the highway only and without stopping in the area marked with black hatching, save for when they are stopped by traffic congestion or any traffic management arranged by or on behalf of the Highways Authority, or to prevent a collision or road accident.
>
> (3) Approach and/or obstruct the path of any vehicle directly entering or exiting the area marked in black hatching (save that for the avoidance of doubt it will not be a breach of this Injunction Order where a vehicle is obstructed as a result of an emergency)
>
> (4) Approach, slow down, or obstruct any vehicle which is travelling to or from the First Claimant's Land along the B1090 Abbots Ripton Road, or within 1 mile in either direction of the First Claimant's Land at the Wyton Site;
>
> (5) Fly a drone or other unmanned aerial vehicle over the Wyton Site as marked on the Plan at Annex 1 [at a height below 50 metres, 100 meters, 150 metres]
>
> (6) Record or use other surveillance equipment (including drones, camera phones and CCTV) to record individual staff members at the Wyton Site, or when staff are carrying out work on the permitter fence of the Wyton Site. Save that nothing shall prohibit the filming of activities at the gates of the Wyton Site other than the filming of staff cars."

Annex 3: The relief sought by the Claimants *contra mundum*

In the draft order provided to the Court as part of their closing submissions, the Claimants seek the following by way of *contra mundum* injunction:

> "UNTIL AND SUBJECT TO ANY FURTHER ORDER OF THE COURT OR UNTIL AND INCLUDING [date – 3 years from the date of grant] (WHICHEVER IS SOONER) IT IS ORDERED THAT:
>
> 1. Any person with notice of this Order **MUST NOT**
>
> (1) Enter the following land:
>
> (a) The First Claimant's land at MBR Acres Limited, Wyton, Huntingdon PE28 2DT as set out in Annex 1 ('the Wyton Site');
>
> (b) The Third Claimant's land known as B&K Universal Limited, Field Station, Grimston, Aldbrough, Hull, East Yorkshire HU11 4QE as set out in Annex 2 ('the Hull Site');
>
> (2) approach, slow down or otherwise obstruct any vehicle entering or exiting the Wyton Site
>
> (3) during the course of protesting against the First Claimant's business activities, enter into, remain upon or park any vehicle or place any other item (including, but not limited to, banners) in the area marked with black hatching on the plan at Annexe 1 ("the Exclusion Zone"). For the avoidance of doubt, the Exclusion Zone extends to 20 metres on both sides of the gate to the Wyton Site, measured from the centre of the gate, and extends from the boundary of the Wyton Site up to the midpoint of the B1090 Sawtry Way that runs adjacent to the Wyton Site. Nothing in this prohibition shall prevent any person from accessing the areas of the Exclusion Zone comprising adopted highway in a manner unconnected with protesting and for the purpose of passing and re-passing along the highway, or for any purpose incidental thereto and otherwise permitted by law;
>
> (4) during the course of protesting against the First Claimant's business activities, approach, slow down or otherwise obstruct any vehicle that is entering or exiting the Exclusion Zone;
>
> (5) during the course of protesting against the First Claimant's business activities, approach, slow down or otherwise obstruct any vehicle that is travelling to or from the Wyton Site and is within a one-mile radius of the Wyton Site;
>
> (6) fly a drone or other unmanned aerial vehicle at a height of less than 100 meters over the Wyton Site.

FURTHER APPILICATIONS ABOUT THIS ORDER

2. Any person affected by the injunction in paragraph 1 above may make an application to vary or discharge the injunction to a High Court Judge on not less than 48 hours' notice to the Claimants.

SERVICE OF THIS ORDER

3. A copy of this Order will be placed on the Judiciary Website.

4. Pursuant to CPR 6.15 and CPR 6.27, the Claimants are permitted to serve this Order endorsed with a penal notice as follows (with the following to be treated conjunctively)

   (1) by uploading a copy to the dedicated share file website at https://apps.fliplet.com/mbr-injunctionwebapp/

   (2) by affixing copies (as opposed to originals) to the notice board opposite the Wyton Site. A covering letter shall accompany the Order explaining that copies of all documents in the Claim, including the evidence in support of the Claim and the skeleton argument and note of the hearing at which this Order was made, can be accessed at the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/. The cover letter will also include an email address and telephone number at which the Claimants' solicitors can be contacted, and advise that hard copy documents can be provided upon request;

   (3) by affixing in a prominent position around the perimeter of the Wyton Site signs advising that an injunction that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed;

   (4) by affixing in a prominent position at the Hull Site signs advising that an injunction. that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed;

   (5) by positioning four signs adjacent to toe main carriageway of the public highway known as the B1090 Sawtry Way within a one-mile radius of the Wyton Site. Those signs shall advise that an injunction that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed.

5. The deemed date of service of this Order shall be one working day after service is completed in accordance with all of the steps set out in paragraph 4 above.

ANNUAL REVIEW

6. The Claimants shall, by 4.30pm on [date – 12 months from the grant of this Order] make an Application to the Court (accompanied by any evidence in support) and seek the listing of a review hearing at which the continuation of the injunction in paragraph 1 above will be considered. The Claimants must by the same date serve that Application and any evidence in support on Persons Unknown in accordance with paragraph 4 above…"

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Claim No. QB-2021-003094

The Honourable Mr Justice Nicklin
19 February 2025

IN THE MATTER OF:

(1) MBR ACRES LIMITED
(2) DEMETRIS MARKOU
(for and on behalf of the officers and employees of MBR Acres Limited, and the officers and employees of third-party suppliers and service providers to MBR Acres Limited pursuant to CPR 19.8)
(3) B & K UNIVERSAL LIMITED
(4) SUSAN PRESSICK
(for and on behalf of the officers and employees of B & K Universal Limited, and the officers and employees of third-party suppliers and service providers to B & K Universal Limited pursuant to CPR 19.8)

Claimants

AND IN THE MATTER OF AN APPLICATION BY THE CLAIMANTS FOR A *CONTRA MUNDUM* INJUNCTION TO RESTRAIN CERTAIN ACTIVITIES AT THE WYTON SITE

ORDER

PENAL NOTICE: IMPORTANT

TAKE NOTICE: ALL PERSONS ARE BOUND BY THE PROHIBITION IN PARAGRAPH 1 OF THIS ORDER. IF YOU DISOBEY PARAGRAPH 1 OF THIS ORDER, YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND LIABLE TO IMPRISONMENT, A FINE OR YOUR ASSETS MAY BE SEIZED

UPON the Claimants' Claim seeking an injunction to restrain acts of trespass, public nuisance by obstruction of the highway and interference with the Claimants' common law right to access the highway

AND UPON hearing Caroline Bolton and Natalie Pratt of counsel on 24-28 April 2023, 2-5 May 2023, 9 May 2023, 11-12 May 2023, 15 May 2023, 17-19 May 2023, 22-23 May 2023, 23 June 2023, 26 March 2024 and 7 May 2024

AND UPON the Court handing down judgment on 19 February 2025 ([2025] EWHC 331 (KB))

UNTIL AND INCLUDING 19 FEBRUARY 2027, AND SUBJECT TO ANY FURTHER ORDER OF THE COURT, IT IS ORDERED THAT:

INJUNCTION

1. Any person with knowledge of this Order **must not**:

   (1) enter the First Claimant's land known as MBR Acres Limited, Wyton, Huntingdon PE28 2DT as marked on the plan at Annex 1 ("the Wyton Site"). For the avoidance of doubt, the Wyton Site includes the First Claimant's land situated directly in front of the gate to the Wyton Site, as marked on the ground with a yellow painted line; and/or

   (2) directly and deliberately obstruct vehicles entering or exiting the Wyton Site.

FURTHER APPLICATIONS ABOUT THIS ORDER

2. Any person affected by the injunction in paragraph 1 above may make an application to vary or discharge the injunction to a High Court Judge on not less than 48 hours' notice to the Claimants.

INTERPRETATION OF THIS ORDER

3. A person who is an individual and who is ordered not to do something must not do it by himself/herself or in any other way. He/she must not do the prohibited act through others acting on his/her behalf or on his/her instructions or with his/her encouragement.

4. A person who is not an individual and which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

5. It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.

PUBLICATION OF THIS ORDER

6. A copy of this Order will be placed on the Judiciary website (www.judiciary.uk).

7. The Claimants must publicise this Order, including by taking the following specific steps:

   (1) by uploading a copy to the dedicated share file website at https://apps.fliplet.com/mbr-injunctionwebapp/

   (2) by affixing copies (as opposed to originals) to the notice board opposite the Wyton Site. A covering letter shall accompany the Order explaining that copies of all documents in the Claim, including the evidence in support of the Claim and the skeleton argument and note of the hearing at which this Order was made, can be accessed at the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/. The cover letter will also include an email address and telephone

number at which the Claimants' solicitors can be contacted, and advise that hard copy documents can be provided upon request;

(3) by affixing in prominent positions around the perimeter of the Wyton Site signs advising that an injunction that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed;

(4) by affixing in a prominent position at the Hull Site signs advising that an injunction. that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed;

(5) by positioning four signs adjacent to the main carriageway of the public highway known as the B1090 Sawtry Way within a one-mile radius of the Wyton Site. Those signs shall advise that an injunction that places restrictions on protest activity is in force in the area. The signs shall include a link to the designated share file website: https://apps.fliplet.com/mbr-injunctionwebapp/ and a QR code through which the designated share file website may also be accessed.

8. By 4.30pm on 19 March 2025, the Claimants must file a witness statement confirming the steps taken to publicise the injunction, including confirmation of compliance with Paragraph 4 above.

9. The Claimants must comply promptly, and in any event within 14 days, with any request for documents relating to the claim and the Order.

REVIEW OF THIS ORDER

10. This Order will expire at 00:01hrs on 20 February 2027. The Claimants may, if so advised, make an application to the Court to seek the continuation of this Order ("a Continuation Application").

11. Any Continuation Application and evidence in support must be filed, and a listing for the hearing of the Continuation Application (with a time estimate of 1 day) sought, by 4pm on 12 January 2027.

12. The Claimants shall, by 4pm on 12 January 2027, place a notification of any Continuation Application in a prominent position outside the Wyton Site, such notification to include a website address at which the Continuation Application and all evidence in support may be accessed.

13. Any person other than the Claimant who wishes to participate in the hearing of the Continuation Application must file and serve on the Claimants' legal representatives any evidence upon which they intend to rely at the hearing of the Continuation Application by 4pm on 26 January 2027.

CONTEMPT APPLICATIONS

14. Any contempt application against any person not being a named Defendant in these proceedings may only be brought with the permission of the Court.

15. Any application for permission under paragraph 14 above ("a Permission Application") must be made by Application Notice attaching the proposed contempt application and evidence in support. To obtain the Court's permission, the evidence in support of the Permission Application will need to show that the proposed contempt application:

    (1) has a real prospect of success;

    (2) does not rely on wholly technical or insubstantial breaches; and

    (3) is supported by evidence that the proposed respondent had actual knowledge of the terms of the injunction in paragraph 1 above before being alleged to have breached it.

16. The Court will normally, where possible, expect the Claimants to have notified the proposed respondent in writing of the allegation(s) that she/she has breached the injunction. Any response by the proposed respondent should be provided to the court with the Permission Application.

17. Unless the Court directs otherwise, any Permission Application will be dealt with on the papers.

NAME AND ADDRESS OF THE CLAIMANTS' LEGAL REPRESENTATIVES

18. The Claimants' solicitors are:

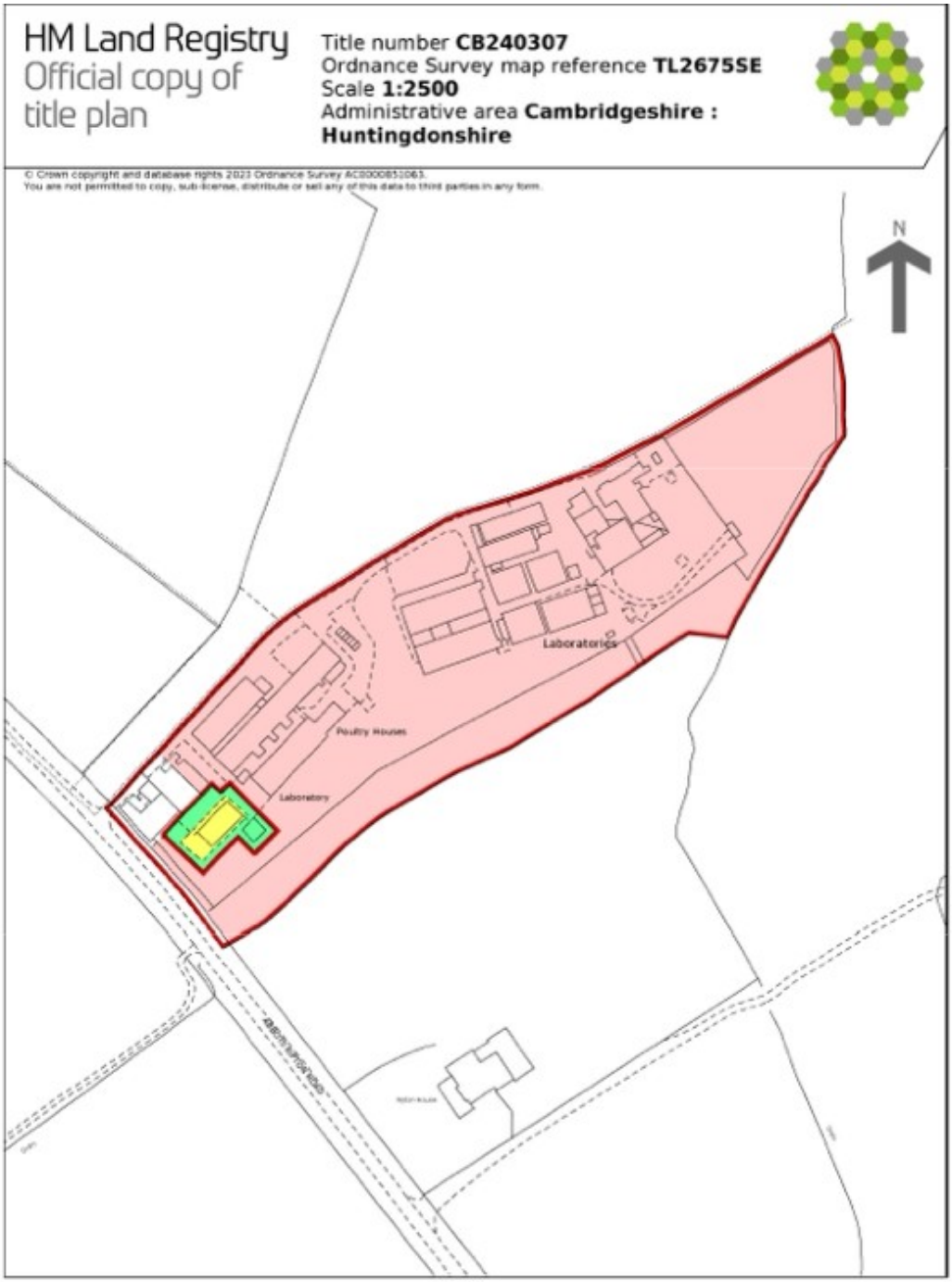
    Mills & Reeve LLP
    7th & 8th Floors
    24 King William Street
    London EC4R 9AT
    Contact: Simon Pedley
    Tel: 020 7648 9220
    mbr.injunction@mills-reeve.com

COMMUNICATIONS WITH THE COURT

19. All communications with the Court about this Order should be sent to Room E03, The Royal Courts of Justice, Strand, London, WC2A 2LL. The telephone number is 020 7947 6010. The offices are open between 10am and 4.30pm Monday to Friday. The email address is KBJudgesListingOffice@justice.gov.uk.

19 February 2025

ANNEX 1


HM Land Registry
Official copy of title plan
Title number CB240307
Ordnance Survey map reference TL2675SE
Scale 1:2500
Administrative area Cambridgeshire : Huntingdonshire
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Laboratories
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Laboratory

Manual
on

Protest Injunctions

Practice, Procedure and Persons Unknown

Yaaser Vanderman

2024
Version 2

Manual
on

Protest Injunctions

Practice, Procedure and Persons Unknown

2024
Version 2

by

Yaaser Vanderman

Landmark Chambers

MA (Cantab), BCL (Oxon), LLM (Harvard)

Foreword by
Rt. Hon. Lord Carnwath of Notting Hill,
Justice of the UK Supreme Court from 2012-2020

FOREWORD

I am pleased to welcome this timely new book on protest injunctions. I was a member of the Supreme Court panel which decided *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC), in which the claimant sought to sue an unidentified hit-and-run driver. This was the first time the Supreme Court or House of Lords had considered the jurisdiction to permit claims to be brought against Persons Unknown and Lord Sumption's judgment, with which I agreed, is now the authoritative statement on when a person can be subject to the court's jurisdiction without having notice of the proceedings. It was not a protest case, but the underlying problem with which we had to deal is fundamentally the same as in cases relating to protest injunctions, which must invariably be directed at Persons Unknown. It is a challenging area of law, liable to confuse and confound legal practitioners let alone their clients.

I first met Yaaser in 2014, when he was a Judicial Assistant at the Supreme Court. Since then I have watched his practice develop successfully in a number of practice areas, including planning, property and human rights. They, and their inter-action, are at the heart of the subject-matter of the present book. As he rightly says in the Preface, there is no other area of law moving so fast. He highlights a succession of recent authorities dealing with such issues as Persons Unknown in protest injunctions, on balancing the rights of those carrying out disruptive protest against the rights of those being disrupted, and on the factors to consider on committal and when to imprison environmental protestors. He also promises regular updates to cover new developments.

I commend this book to all those concerned with obtaining protest injunctions, or defending protest injunctions and indeed the judges deciding whether to grant protest injunctions. It seeks to deal comprehensively with the ever-increasing rules and case law being produced on this topic, and most importantly offers hands-on, practical assistance to all those involved.

Rt. Hon. Lord Carnwath of Notting Hill, Justice of the UK Supreme Court from 2012-2020

November 2022

PREFACE

What?

This is an online book setting out the law on protest injunctions – i.e. when a civil injunction is sought to restrain certain types of protest activity. It seeks to do two things: (1) provide practical know-how to all parties involved in the legal process, an area which can be hard to navigate; and, (2) set out a thorough account of the substantive law by reference to most, if not all, of the reported cases on protest injunctions over the last few years. This book deals specifically with proceedings brought in the High Court.

The law on this area has evolved rapidly. By way of example:

- On the issue of Persons Unknown in protest injunctions, the Court of Appeal has dealt with the issue (including making complete u-turns) in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100, *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 and *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA). The Supreme Court has now had the final word in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45.
- On human rights, there have been several important decisions on how to balance the rights of those carrying out disruptive protest against the rights of those being disrupted: see *DPP v Ziegler* [2022] AC 408 (SC), *DPP v Cuciurean* [2022] 3 WLR 446 (DC) and *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259.
- On committal applications, several cases have tested the courts' resolve on what factors to consider and when to impose custodial sentences on protestors: see *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(d) (Dame Victoria Sharp P and Chamberlain J) and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357.

These are just some of the issues discussed further below.

Why?

(1) There is no other area of law moving this fast. In the last few there have been dozens of important cases. Any book published in the usual way would be instantly out-of-date. By staying online, this Manual can and will be regularly updated to

account for any important developments in the law. (2) More than most other areas of law, practical experience is essential. Such practical know-how is at the heart of this Manual.

When?

This 2024 version (v.2) updates the previous two versions of the Manual, originally released in January 2023. It will be updated online regularly and whenever there is a material development in the law.

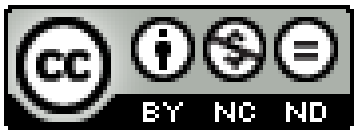
Where?

To check whether you are reading the most up-to-date version of the Manual, as well as for blogposts on more recent decisions, check on www.protestinjunctions.com.

How?

I have had considerable experience of advising and acting in cases involving protest injunctions, having been instructed in approximately dozens of protest injunction matters since 2022. I am indebted to Katharine Holland KC, who was involved in perhaps the first ever protest injunction relating to Persons Unknown in *Hampshire Waste Services* [2004] Env LR 9 (Ch). Without her, this Manual could never have been written. I am also grateful to Myriam Stacey KC, Jude Bunting KC and Admas Habteslasie for reading earlier drafts of this Manual.

Please get in contact with me at yvanderman@landmarkchambers.co.uk or info@protestinjunctions.com if you have any suggestions or think there are any errors or omissions in this Manual.



ABOUT THE AUTHOR

Yaaser Vanderman is a barrister specialising in various areas of law, including public law, human rights and property law. In addition, he is called to the Bar of Northern Ireland and is on the Attorney General's B Panel of Counsel. He regularly appears in the High Court and Court of Appeal, and has been instructed in 9 cases before the Supreme Court since 2019.

Yaaser Vanderman first worked on protest issues as an LLM student at Harvard Law School in the Human Rights Clinic. The law of protest injunctions is now at the confluence of his practice areas.

Yaaser has been instructed in dozens of protest injunction matters since 2022. He has been involved in double that number over the last few years and has also advised extensively on these issues, including in relation to claims brought by:

- Local authorities
- NHS trusts
- Universities
- Park authorities
- Security companies
- Energy companies

More widely, he has been involved in some of the most important recent protest cases, including the Sarah Everard vigil ban during the COVID-19 lockdown and the Supreme Court reference on anti-protest zones outside abortion clinics.

GLOSSARY

Claimant – the party seeking, or having obtained, a protest injunction

Defendant – the party subject to a protest injunction who is prohibited from acting in a certain way

Direct action – a form of protest that seeks to hinder, impede or prevent another person from carrying out a lawful activity

Persons Unknown – Defendants whose identities are unknown

Newcomer – as defined by the Supreme Court in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §2, Defendants whose identities are unknown by virtue of the fact that they have not yet committed (or threatened to commit) the alleged tort

Protest injunction – a form of court order that restrains Defendants from carrying out certain types of protest activity, usually limited to direct action

CONTENTS

1. CAUSES OF ACTION AND RELIEF

(a) Causes of action

1.1 An injunction is a remedy not a cause of action. You may think, therefore, that an underlying substantive cause of action is required before an injunction can be obtained. Until recently, that was the case.[1] This was the position taken, for example, in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §25 (Bennathan J). This must now be wrong following the decision in *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703 (and confirmed in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §43), in which the Privy Council found (by a majority of 4-3) that no underlying cause of action was necessary; the court has the power to grant an injunction where it is just and equitable to do so.[2]

1.2 That said, the court will still only usually exercise this power where there is an underlying cause of action in order to ensure its discretion is exercised consistently and predictably.

1.3 There are a number of causes of action that Claimants have attempted to rely on in the context of protest injunctions:[3]

i. Trespass;

ii. Private nuisance;

iii. Public nuisance;

iv. Economic torts, such as conspiracy to injure by unlawful means;

v. Harassment; and,

vi. Breaches of the criminal law.

[1] As Lord Diplock said in *The Siskina* [1979] AC 210 (HL), 254: "*A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court*."

[2] This has now been followed by the Court of Appeal in *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298, §71 (Asplin LJ and Arnold LJ).

[3] In addition, public authorities are empowered by statute to obtain injunctions in certain circumstances: see, e.g. *Wolverhampton CC v Persons Unknown* [2023] EWHC 56 (KB) (Hill J), §§49-60, albeit in the context of street cruising.

1.4 The simplest cause of action, and the one most commonly relied upon, is trespass.[4] All it requires is to show that: (i) an individual is on (and possibly over or under) someone else's land without their consent; and, (ii) the Claimant has better right to occupy the land.[5] It is actionable without proof of damage and no question of intention or concerns about what is happening on the land arises as long as the physical act of entry was voluntary.[6]

1.5 In this context, the facts grounding the trespass claim will usually support a nuisance claim as well, though nuisance requires damage to be proved.[7]

1.6 In relation to private nuisance, it must be shown that there has been undue and substantial interference with the enjoyment of land.[8] For example, direct action that prevents the Claimant using a right of way it enjoys over another's land may well amount to private nuisance. A further example of private nuisance is where direct action prevents an owner of land accessing that land from an adjoining public highway.[9]

1.7 In relation to public nuisance,[10] this can occur where free passage along a public highway is obstructed or hindered. An owner of land must be able to show that they are specifically affected by it in the sense of suffering substantial inconvenience or damage to an appreciably greater degree than the general public.

1.8 Less straightforward are the economic torts; for conspiracy to injure by unlawful means, for example, the following elements will need to be proved: (i) an unlawful act by the Defendant; (ii) with the intention of injuring the Claimant; (iii) pursuant to an agreement

[4] See, generally, *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 18. A good summary of the trespass, private nuisance and public nuisance causes of action in the protest context can be seen in *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §§33-35 (Morris J) and *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §60 (Linden J).

[5] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §77 (Knowles J); *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB), §§35-41 and 49 (Mr Andrew Hochhauser KC); *Manchester Airport v Dutton* [2000] QB 133 (CA), 149-150 (Laws LJ). This includes temporary possession powers granted under primary legislation or other statutory consenting regimes: *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §75 (Knowles J).

[6] *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §§27-31 (Linden J); *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §80 (Knowles J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §19(i) (Ellenbogen J).

[7] See, generally, *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 19.

[8] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §85 (Knowles J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §41 (Morgan J).

[9] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§86-87 (Knowles J); *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §13 (Leggatt LJ); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §42 (Morgan J).

[10] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§88-90 (Knowles J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §19(ii) (Ellenbogen J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§42-46 (Morgan J).

with others; (iv) which injures the Claimant.[11] Other economic torts include: procuring a breach of contract; the tort of intimidation; causing loss by unlawful means; and, conspiracy to injure by lawful means.[12]

1.9 As to harassment under the Protection from Harassment Act 1997, it has to be shown that:[13] (i) the Defendant has pursued a course of conduct; (ii) which the Defendant knows or ought to know involves harassment; (iii) of two or more individuals; (iv) by which the Defendant intends to persuade those individuals not to do something which they are entitled to do or to do something which they are not under an obligation to do.[14] The threshold for speech-based harassment is a high one.[15]

1.10 Protest cases brought on the basis of harassment have recently struggled before the courts. This is because of: the difficulties of formulating the injunction to refer to all of the necessary ingredients of the tort; the lack of clarity to a member of the public of a prohibition on "*harassment*"; the highly context-specific nature of assessing harassment; and the fundamental tension between freedom of speech and silencing expression as amounting to harassment.[16]

1.11 As to breaches of the criminal law, these cannot in and of themselves support a civil claim for a protest injunction without the highly exceptional course of obtaining the consent of the Attorney General. This is because the Claimant itself would have no civil cause of action.[17] Criminal conduct can, however, support the founding of tortious behaviour – e.g. trespass on the public highway and economic torts. Note also the new criminal offences contained in: Part 1 of the Public Order Act 2023, which now criminalises common tactics of direct action, such as locking-on, tunnelling and interfering with the use or operation of key national infrastructure; and, s.78 of the

[11] *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §21 (HHJ Lickley KC); *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, §18 (Leggatt LJ).
[12] See *Clerk & Lindsell on Torts* (23rd edn, 2022), Chapter 23.
[13] Assuming the Claimant is a company – ss.1(1A) and 3A of the Protection from Harassment Act 1997.
[14] See, e.g., *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §50 (Morgan J).
[15] *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), §64 (Nicklin J).
[16] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§92-96 (Nicklin J); *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB), §§52-54, 78 (Nicklin J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§152-156 (Morgan J).
[17] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §45 (Nicklin J); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL). But see s.222 of the Local Government Act 1972, which permits local authorities in exceptional circumstances to use civil proceedings to prevent breaches of the criminal law: *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §§87-95. (Sweeting J).

Police, Crime, Sentencing and Courts Act 2022, which abolished the common law offence of public nuisance and codified a statutory offence of public nuisance.[18]

1.12 Sections 18 and 19 of the Public Order Act 2023 also empower the Secretary of State to bring civil proceedings and obtain protest injunctions with a power of arrest attached. The Secretary of State can do so where he or she reasonably believes that: (a) the conduct is causing or likely to cause serious disruption to national infrastructure or access to any essential goods or service; or, (b) the conduct is having or is likely to have a serious adverse effect on public safety. These provisions have not yet been brought into force.

1.13 Which one (or more) of these causes of action may be relied upon will depend on the circumstances of the protest and, in particular, what interest the Claimant has in the land on which it is taking place. The most important question is whether the Claimant has a legal right to occupy the land. That right may exist because, for example, the Claimant owns the land, is a lessee of the land or has a licence to occupy the land. But the Claimant has no right to occupy land which it has leased to a third party, such that no claim in trespass will lie unless the lessee is itself joined as a party to the claim.

1.14 Reliance on economic torts may become necessary when the Claimant has no right to occupy the relevant land. There are two recent successful examples of this:

i. *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J):[19] this was an interim injunction application by Shell against environmental protestors targeting Shell-branded petrol stations. Although the Claimant sold fossil fuels to the petrol stations, in most cases the Claimant had no legal interest in those parcels of land; the petrol stations themselves were operated by 3rd-party contractors. As a result, the Claimant could not rely on trespass or nuisance: §25.

ii. *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J):[20] this was at the trial of the claim brought by Esso against environmental protestors targeting its Southampton-London Pipeline. The Pipeline is 105km in length and runs over land with a "*complex tapestry*" of land interests: §36. A conspiracy was

[18] As an example of this provision being contravened, see *R v Trowland* [2023] 4 All ER 766 (CA).
[19] See also the subsequent hearing in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), where Hill J came to the same view as Johnson J.
[20] A similar analysis was given at the interim injunction stage by HHJ Lickley KC in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§20-27.

alleged to avoid attempting a very detailed and complex exercise in identifying all land interests in all of this land.

1.15 More detail on these cases can be seen at **§6.7 below**.

1.16 The case law confirms that the "*unlawful act*" does not have to be actionable by the Claimant itself (i.e. as opposed to being actionable by 3rd parties) where it consists of criminal conduct or breach of contract.[21] As to *tortious* conduct, the same principle was found to apply by Knowles J in *Esso Petroleum v Breen* [2023] EWHC 2013 (KB), §68 – agreeing with HHJ Lickley KC's analysis in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§22-27, which itself relied on *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 (HL) – and *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) (Morgan J).

1.17 Even if a Claimant successfully obtains an injunction on the basis of conspiracy to injure by unlawful means, it will be more difficult to enforce: in order to succeed on a contempt application, the Claimant will have to prove the elements of *agreement* and *intention*. This is unlike injunctions based on, for example, trespass where there will be no need to prove such elements.

(b) Relief

1.18 The main objective of Claimants will invariably be to stop the direct action affecting their land or activities. This means obtaining a possession order or an injunction.

1.19 A possession order is usually the preferred option because of its superior enforcement mechanism; possession orders obtained from the High Court are enforced by High Court Enforcement Officers. They will physically come onto the land and secure possession. But possession orders will only be available if a trespasser has taken possession of the land. Unless protestors have set up an encampment or barricaded themselves in, their presence will generally be too transitory to constitute taking possession of the land.

1.20 More usually, an injunction will be sought. The court has a power to grant an injunction (interim or final) where it appears to be just and convenient.[22] Whilst its existence has a deterrent effect in and of itself, the only way of enforcing against breaches of an injunction is to bring committal proceedings for contempt of court. This involves making

[21] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §27 (Johnson J).
[22] Section 37(1) of the Senior Courts Act 1981.

a committal application to the Court using a specialised procedure and seeking to prove at a hearing that a breach of the injunction has occurred. More detail on contempt and committal proceedings is set out in **Chapter 10 below**.

1.21 Damages may also be available if a Claimant can demonstrate loss suffered as a result of direct action. In reality, and even if technically sought in the claim form, Claimants rarely press for damages due to a combination of: the extra resources it will take to prove the loss caused by the direct action; the unlikelihood of Defendants actually being in a position to pay damages; and, the potential reputational harm in doing so. If, however, a Claimant has pleaded damages and, having obtained the injunctive relief sought, nevertheless wants to keep the option of seeking damages open, it is possible to ask the Court to stay the damages claim for a specified period of time (often ending when the injunctive relief itself is due to end). The aim is to see how the situation on the ground unfolds before taking further action.

2. BEFORE BRINGING THE CLAIM

(a) Pre-action process

2.1 Whether a pre-action process is possible before bringing a claim for a protest injunction will depend on various factors, in particular how urgent it is. Where an injunction is required urgently, it will be difficult to engage in any, or any meaningful, pre-action correspondence. Where, however, the claim is not as urgent, it will usually be beneficial for all parties to go through some form of pre-action process.

2.2 A pre-action process is valuable because it allows: (i) the Claimant to allege that certain unlawful conduct is being carried out by protestors, through direct action or otherwise, and to put the Defendants on notice that legal action is being contemplated; and, (ii) the Defendants to deny that they are responsible for it, to deny that such conduct is unlawful, or to cease their direct action.

2.3 If, during this pre-action process, protestors accept that they have been carrying out direct action or have otherwise been acting unlawfully, but that they will now cease, a Claimant may decide not to join them as a Defendant or a Claimant may ask them to make an undertaking to the court in the same terms as the protest injunction ultimately sought. This requires the individual to come to court to give the undertaking in person to the Judge.

2.4 The same process can occur once a claim has been brought.[23] In *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), in the context of an application to continue an interim injunction and as part of assessing the future risks posed by Defendants, Cotter J said that the Court should offer the opportunity to Defendants to provide a suitable undertaking: §113. He also emphasised that making an undertaking regulates the position going forward such that it would not affect the existing rights and liabilities of the parties to date: §114.

2.5 Breach of an undertaking has the same consequences as a breach of an injunction – i.e. it amounts to contempt of court. The benefit of this for the Defendant is that they are not named in any proceedings that are issued or that any claim against them is discontinued, they play no part in it, and they cannot be liable for any legal costs or to pay any damages

[23] See, e.g. *Transport for London v Lee* [2023] EWHC 1201 (KB) §§10-13 (Eyre J), *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §14 (Morris J) and *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch), §6 (Hugh Sims KC sitting as a Deputy High Court Judge).

if a protest injunction is ultimately granted. The benefit of this for the Claimant is that there are fewer Defendants to proceed against.

(b) Part 7 or 8 claim

2.6 In the protest context, Claimants will often have a choice as to whether to use the procedure set out in Part 7 or Part 8 of the CPR.

2.7 Where there are likely to be substantial disputes of fact, Part 7 should be used.[24]

2.8 In many protest cases, however, there will not be substantial disputes of fact; the usual question is, rather, whether or not the Defendant should be allowed to carry on the activity that they are avowedly (and often publicly) conducting. If that is the case, a Claimant can use the Part 8 procedure instead. Claimants should be aware, though, that if a court disagrees with their opting for the Part 8 procedure, it may transfer the claim to Part 7 with the potential for significant delay.[25]

2.9 As to the relevant differences between Part 7 and Part 8 claims, one is that a Claimant cannot obtain default judgment when using the Part 8 procedure.[26] This may be particularly relevant in cases where Defendants opt to take no part in proceedings. If the Part 7 procedure is used, following the grant of an interim injunction – and assuming that no acknowledgment of service or defence is served – a Claimant may apply for default judgment rather than having to bring a summary judgment application or prepare for a full but unopposed trial.[27] There are other procedural differences. For example, a Particulars of Claim is required in a Part 7 claim but not in a Part 8 claim.

(c) Which High Court Division

2.10 Claimants have a choice as to whether to bring the claim for a protest injunction in: (i) the King's Bench Division or; (ii) the Chancery Division of the High Court. There is no wrong answer as both can deal, and are well equipped to deal, with protest injunctions. It will rarely make a difference to the substantive outcome. In the author's experience, which Division is chosen will usually depend on which one the Claimant's lawyers are most accustomed to using.

[24] CPR r.8.1(2)(a).
[25] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§3-9 (Nicklin J).
[26] CPR r.8.1(5).
[27] Though, in relation to Persons Unknown who are Newcomers, it is difficult to see that default judgment could be granted in light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45.

2.11 There are, however, some practical differences which Claimants ought to be aware of.

- Judges in the Chancery Division will tend to have more experience of dealing with property issues whilst Judges in the King's Bench Division will tend to have more experience of dealing with human rights issues.

- Where urgent relief is sought, Claimants may find that one of the Divisions has better availability for an urgent hearing than the other. The Chancery Division in London has a specific Applications List to hear urgent applications as long as they can be dealt with in less than 2 hours.[28] This is located in Court 10 of the Rolls Building and sits each working day during term except for the last day of term. Such an Applications List also exists in Leeds and Manchester, albeit they only sit on Fridays. The King's Bench Division has an Interim Applications Judge, sitting in Court 17 of the Royal Courts of Justice, but they will only list hearings likely to take 1 hour or less.[29] Hearings likely to take longer than 1 hour will have to be arranged by the King's Bench listing office. It is good practice, generally, for the Claimant's lawyers to phone the listing offices in both Divisions to see when an urgent hearing can be listed.

- The Divisions have slightly different deadlines for the filing of certain documents. For example, in the Chancery Division, for ordinary applications[30] skeleton arguments should be filed and served by 10am on the working day before the hearing.[31] For heavy applications,[32] they must be served by 12pm two clear days before the hearing.[33] In the King's Bench Division, skeleton arguments should be served and filed by 10am one day before an application hearing and by 10am two days before a trial.[34]

2.12 One exception to the free choice of venues referred to above may be claims for a protest injunction based on harassment. In *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (KB), Nicklin J indicated that such claims would have to be brought in the

[28] Including time for pre-reading, oral argument and dealing with consequential points: the Business and Property Courts of England & Wales - Chancery Guide (2022), §15.16.
[29] The King's Bench Guide (2023), §9.56.
[30] Applications listed for a hearing of half a day (2.5 hours) or less: Chancery Guide (2022), §14.26.
[31] Chancery Guide (2022), §14.42.
[32] Applications listed for a hearing of more than half a day: Chancery Guide (2022), §14.44.
[33] Chancery Guide (2022), §14.57.
[34] King's Bench Division Guide (2023), §9.108.

Media and Communications List of the King's Bench Division, pursuant to CPR r.53.1(3)(c): §168.

3 URGENCY AND NOTICE

3.1 The type and amount of notice of a hearing given to a Defendant is an important issue in the context of protest injunctions. Considering the requirement set out in s.12(2) of the Human Rights Act 1998, it is also a jurisdictional issue – i.e. the court will simply not have the power to grant the protest injunction if the notice requirements contained within that provision are not satisfied.

3.2 This Chapter sets out the usual position on filing and serving an application notice before considering those instances where urgency is required.

(a) Standard rules and exceptions

3.3 The general rule is that an application notice – for example, for an interim injunction[35] – must be filed and served before being determined.[36] Service must usually be effected as soon as practicable after it is filed and at least 3 days before the hearing of the application.[37]

3.4 There are exceptions to this. The correct approach to take will ultimately depend on how urgently the Claimant needs the relief.

3.5 The court can still *hear* an application even if it is served less than 3 days before the hearing if it considers that, in the circumstances, sufficient notice has been given.[38]

3.6 According to the CPR, an application (of any sort) may only be made without serving an application notice in the following, admittedly overlapping, scenarios:[39]

i. Where there is exceptional urgency;

ii. Where the overriding objective is best furthered by doing so;

iii. By consent of all parties;

iv. With the permission of the court;

v. Where there is not sufficient time before a hearing that has already been fixed; or

[35] CPR PD25A, §2.2.
[36] CPR r.23.3(1) and 23.4(1). There are exceptions to this rule where permitted by a rule or practice direction or where the court dispenses with the requirement: CPR r.23.3(2) and 23.4(2). See, generally, *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §19 (Warby J).
[37] CPR r.23.7(1).
[38] CPR r.23.7(4); CPR PD23A, §4.1; CPR PD25A, §2.2.
[39] CPR PD23A, §3.

vi. Where a court order, rule or practice direction permits. In the context of interim remedies, a court may permit no notice to be given if it appears that there are good reasons for not giving notice.[40] The Claimant's evidence in support of the application must state the reasons why notice has not been given.[41]

3.7 If no notice or short notice is given in relation to a protest claim, this will usually be because the Claimant considers it needs an injunction urgently. Some of the case law has emphasised how exceptional it is for the court to grant an injunction, particularly where ECHR rights are involved, against a party who has had *no* notice at all.[42] For example, it has been said that, given modern methods of communication, urgency can only be a compelling reason for applying without notice "*if there is simply no time at all in which to give notice*".[43] This point is considered further below.

3.8 Even where full notice cannot be given, short notice should be given unless the circumstances of the application require secrecy.[44]

(b) Levels of urgency

3.9 In the protest context, applications for interim injunctions will often be urgent to a greater or lesser degree. It is important that Claimants correctly assess, and do not overstate, the appropriate level of urgency in their case and, therefore, what steps to take and when.

i. <u>Most urgent</u>

3.10 In cases of the most urgency:

i. An application may be heard by telephone but only where the Claimant is being represented by barristers or solicitors.[45]

ii. In such a case, the phone number to call will vary depending on whether the application is made between 10am-5pm or outside those hours.[46]

iii. The court will likely require a draft order to be provided by email.[47]

[40] CPR r.25.3(1).
[41] CPR r.25.3(3).
[42] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[43] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §53 (Warby J).
[44] CPR PD23A, §4.2.
[45] CPR PD25A, §§4.2 and 4.5(5).
[46] CPR PD25A, §4.5(1).
[47] CPR PD25A, §4.5(3).

iv. Assuming a claim form has not yet been issued, the Claimant must undertake to issue a claim form immediately unless the court gives direction for the commencement of the claim.[48] The claim form should be served with the order for the injunction[49] where possible.[50]

v. The application notice and evidence in support must be filed with the court on the same or next working day together with two copies of the order for sealing.[51]

ii. Very urgent

3.11 In very urgent cases (but not so urgent that a telephone hearing is required):

(1) An application may be made before a claim form is even issued.[52] The Claimant must undertake to issue a claim form immediately unless the court gives direction for the commencement of the claim.[53]

(2) The application notice, evidence in support and draft order should be filed with the court at least two hours before the hearing if possible.[54] If that is not possible, a draft order should be provided at the hearing and the application notice and evidence filed on the same or next working day.[55]

(3) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[56]

(4) The claim form should be served with the order for the injunction[57] where possible.[58]

iii. Urgent

3.12 In urgent cases (but not those requiring the application to be heard by telephone or before the claim is issued):

[48] CPR PD25A, §4.4(1).
[49] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[50] CPR PD25A, §4.4(2).
[51] CPR PD25A, §4.5(4).
[52] CPR PD25A, §§4.1(2) and 4.4(1).
[53] CPR PD25A, §4.4.
[54] CPR PD25A, §4.3(1).
[55] CPR PD25A, §4.3(2).
[56] CPR PD25A, §4.3(3).
[57] Such an order must refer to the parties as "*the Claimant and Defendant in an Intended Action*": CPR PD25A, §4.4(3).
[58] CPR PD25A, §4.4(2).

(1) In most cases, it ought to be possible to file the application notice, supporting evidence and draft order some days in advance of the hearing, even if not the full 3 clear days before. But the application notice, evidence in support and draft order should be filed with the court at least two hours before the hearing.[59] If that is not possible, a draft order should be provided at the hearing and the application notice and evidence filed on the same or next working day.[60]

(2) Except in cases where secrecy is essential, the Claimant should take steps to notify the Defendant informally of the application.[61]

3.13 In each of these cases, s.12(2) of the Human Rights Act 1998 will need to be satisfied (see discussion below).

(c) Short and informal notice

3.14 Notice is not binary; it operates along a spectrum.

3.15 At one end of the spectrum, a Claimant may seek relief with the other side being left completely in the dark. At the other end, a Defendant may have been given full notice – an application for an interim injunction being served at least 3 clear days' before a hearing.[62]

3.16 Then there are midway options – these are referred to as giving "short notice". This may involve, for example, serving the Defendant the day before the hearing.

3.17 Similarly, service may be said to be "*informal*" in the sense of not being served by the method set out in CPR r.6.3 or in another way sanctioned by the court – e.g pursuant to CPR r.6.15 and/or 6.27. In the modern age, there are numerous ways of doing this, such as sending an email to the Defendants attaching the bundle, skeleton argument and notice of hearing.

3.18 The important point to recognise is that, in the court's eyes, there is a significant difference between short notice and no notice at all and, in all but exceptional cases, at least short and informal notice will be required.

[59] CPR PD25A, §4.3(1).
[60] CPR PD25A, §4.3(2).
[61] CPR PD25A, §4.3(3).
[62] CPR r.23.7(1); CPR PD23A, §4.1; CPR PD25A, §2.2.

(d) Section 12(2) of the Human Rights Act 1998

3.19 The legal significance between no notice, short notice and full notice is codified in s.12(2) of the Human Rights Act 1998, a provision which will inevitably apply to all protest injunctions.

3.20 It 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."

3.21 This makes the issue of notice a jurisdictional issue,[63] as compared to an issue resting with the discretion of the court, which would otherwise be the case pursuant to rules in the CPR, as referred to above.

3.22 In other words, the Claimant will only be able to justify anything less than full notice as follows:

- No notice – the Claimant must show be able to show there are "*compelling reasons*" why no notice was given. This will usually only be the case if giving notice to the Defendants would enable them to take steps to defeat the very purpose of the injunction or would otherwise lead to severe harm. The mere fact that notice may cause more protestors to turn up or that direct action may escalate in some way will not usually be sufficient. For example, the *White Book* states that:[64]

  > "The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a freezing or search order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC)."

[63] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §20 (Warby J).
[64] *White Book* (2022), §25.3.2 (p.720).

A good protest example is *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), in which the Claimant sought an injunction against protests made by parents against the teaching of LGBT issues at a primary school. Warby J strongly criticised the Claimant for proceeding without giving the Defendants any notice at all. He stated, at §53, that, "*Urgency can only be a compelling reason for applying without notice if there is simply no time at all in which to give notice. Modern methods of communication mean that will rarely, if ever, be the case, and it was not the position here*."

- All practicable steps – this requirement seems to encompass both the timing and method of service. In terms of method, the Claimant will have to show that it has properly sought to bring the fact of the claim/application (as well as the relevant documents) to the attention of the Defendants. This will most obviously involve sending the information to email addresses associated with the Defendants. It may also involve using other types of social media and, depending on the circumstances, affixing notices at the location of the protest. In terms of timing, full notice may not have been given because of the urgency of the claim. In this scenario, the Claimant will have to demonstrate to the court that although the matter was not so urgent or sensitive to engage s.12(2)(b) it was still too urgent or sensitive to permit the full period of notice.

3.23 In *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §34, the Claimant had sent an email to the Defendants informing them that the hearing would be taking place the following day. Ellenbogen J accepted the Claimant could rely on s.12(2)(b) or, in the alternative, s.12(2)(a) of the Human Rights Act 1998 – i.e. that all practicable steps had been taken to notify the Defendants but, if not, there were compelling reasons why they should not be notified. By contrast, in a separate unreported case that the author was involved in, the Judge found that s.12(2)(a) and (b) were mutually exclusive and that, if some form of notice had been given, the two provisions could not be relied upon in the alternative.

(e) Obligations on Claimant at without notice hearing

3.24 There are a number of obligations on a Claimant both during and after a hearing that has taken place without notice to the Defendant.

3.25 They include the following:

i. The duty of full and frank disclosure.[65] The duty applies even if the Defendant is given short notice.[66] As to factual issues, it requires the Claimant

[65] *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §§21-26 (Warby J); *White Book* (2022), §25.3.5 (p.849).
[66] *White Book* (2022), §25.3.5.1 (p.851).

to make full and fair disclosure of those facts which it is material for the court to know. This extends to facts which the Claimant ought to have known if it had made proper inquiries. As to legal issues, the court's attention must be drawn to significant legal and procedural aspects of the case. Failure to comply may lead to injunction being set aside: see *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §55 (Warby J) for a case in which this occurred.

ii. A duty to provide notes of the without notice hearing with all expedition. This includes, but is not limited to, the judgment given.[67]

iii. A duty to serve the proceedings and injunction on the Defendant as soon as practicable.[68]

iv. A duty to apply for and obtain a return date for a further hearing where the Defendants can be present on full notice.[69]

3.26 It is important to note that, as set out **below at §5.6(ii)**, all claims and applications against Persons Unknown who are Newcomers will be without notice and so the obligations (i) and (ii) above will apply at every hearing. in

[67] *White Book* (2022), §25.3.10 (p.853).
[68] CPR PD25A, §5.1(2); *White Book* (2022), §25.3.9 (p.852).
[69] CPR PD25A, §5.1(3).

4 SERVICE

4.1 Service plays a huge part in protest injunctions and getting it right is essential. If Claimants fall down on service it is usually because they cut corners in the rush for seeking urgent injunctive relief. The consequences can be catastrophic for their claim. In *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), for example, failure properly to serve the claim form on Persons Unknown led not only to refusal of the Claimant's summary judgment application but also to the lifting of the interim injunction: see §§28, 34, 37-54.[70]

(a) Serving the claim

i. General

4.2 Courts are particularly strict when it comes to service of the claim form. This is because service of the originating process is the act by which the Defendant is subjected to the court's jurisdiction. A person simply does not become a party to proceedings until served with a claim form. As Lord Sumption said in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC), a case involving a claim sought to be brought against an unknown hit-and-run driver:[71]

> "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."

4.3 This poses no problem for named Defendants, who can be served in the usual way as long as their address is known. In relation to Persons Unknown who are Newcomers, the previous position was that alternative service was required to bring the claim to their attention. Following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, however, it now appears that Newcomers cannot formally be *served*. Instead, Claimants must take steps to *notify* them of the existence of the claim – see **§5.6 and §5.10(12) below**.

ii. Applications for alternative service

4.4 For Defendants (other than Persons Unknown who are Newcomers) whose whereabouts and address are unknown, a Claimant must obtain an order for service by an alternative method, pursuant to CPR r.6.15 (claim form) and 6.27 (other documents).

[70] See also *Canada Goose v Persons Unknown* [2020] 1 WLR 417 (KB), §§138-139 (Nicklin J) as well as *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J) and *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J), in which serious criticisms were made of the approach taken by the local authorities, albeit in the context of occupations by travellers.

[71] Repeated in the protest context in *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), §45.

In order to do so, the Claimant must be able to prove that the proposed method of service can reasonably be expected to bring the proceedings to the attention of the Defendants.[72] Dispensation of the requirement for service altogether, pursuant to CPR r.6.16, will rarely be acceptable.[73]

4.5 The application for alternative service must be supported with evidence.[74] This evidence must state:

i. The reason why an order is sought.

ii. What alternative method or place is proposed.

iii. Why the Claimant believes that the document is likely to reach the person to be served by the method or at the place proposed.

4.6 In a standard protest context – i.e. a static group of protestors protesting near to the single object of the protest – all or a combination of the following methods will usually be acceptable:

- Fixing a copy in a clear envelope at a prominent position at the site of the protest;[75]
- Uploading the documents to the Claimant's own website;
- Sending the documents to email addresses connected to the protest;
- Sending the documents to social media accounts connected to the protest – e.g. Facebook and Twitter – including to the accounts of those suspected of carrying out the direct action but whose real identity or address is unknown;[76]
- Publicising the fact of the claim in a local/national newspaper.

4.7 Although Courts will require strict adherence to the terms of any order for alternative service,[77] common sense will also prevail. For example, in *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB), the Claimant had to "*Maintain…official road signs*" referring to the injunction. HHJ Emma Kelly found that this imported an obligation to "reasonably

[72] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §144 (Knowles J).
[73] See, e.g. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §143 (Knowles J); *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (CA), §§48-49, 52.
[74] CPR r.6.15(3).
[75] In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §50, the Court of Appeal recognised that posting on social media and attaching copies of documentation at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants.
[76] Ibid.
[77] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §78 (Nicklin J).

maintain" the road signs: §43. An obligation of result – i.e. that the signage must be present at all times – would be unworkable and contrary to the public interest as it would incentivise the Defendants to remove the signage.

4.8 Some difficulties arise where the subject of the protest covers a vast area of land or is a large piece of national infrastructure. In *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) an injunction was granted against Insulate Britain over thousands of miles of the Strategic Road Network. Bennathan J found that the type of alternative methods set out above were "*completely impracticable when dealing with a vast road network*": §51. The "*absence of any practical and effective method to warn future participants about the existence of the injunction*" essentially meant that service by an alternative method of Persons Unknown was not possible. The solution reached by the Judge was that anyone arrested would first have to be identified and then served with the order: §52.

4.9 By contrast, in *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J found that alternative service of Persons Unknown was acceptable, notwithstanding that the injunction covered the entire HS2 route: §229. The methods of alternative service were extensive, including: advertising the injunction in the Times and Guardian; advertising the injunction within 14 libraries every 10 miles along the route or, if that was not possible, on local parish council notice boards; publicising the order on Twitter and Facebook; and, advertising the order on the HS2 website.

4.10 There were, of course, some factual differences between these two cases but it is difficult to see why alternative service was acceptable in the latter but not the former case.

4.11 This apparent disparity was considered by Cotter J in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) where he seemed to prefer the approach taken by Knowles J, at least at that further stage of proceedings. Cotter J referred to all the circumstances, including statements made by Just Stop Oil, the media coverage of the orders and the widespread knowledge of the orders, as well as the extent to which Just Stop Oil protestors were in communication with each other. He concluded that it was very unlikely that there were any protestors who would not be aware of the injunction; the "level of constructive knowledge" meant that there were now practical and effective methods of alternative service: §§126-137.[78]

4.12 There have been other cases where the Court has said that the alternative service provisions sought were not such as could reasonably be expected to bring the proceedings to the attention of all Persons Unknown. In *MBR Acres Ltd v Free the MBR*

[78] Such "constructive knowledge" was also referred to by Cavanagh J in *Transport for London v Lee* [2023] EWHC 402 (KB), §§31-32, and this was adopted in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §205 (Hill J).

Beagles [2022] EWHC 3338 (KB), for example, Nicklin J considered that the method of alternative service sought – posting a copy of the injunction order outside one of the Claimant's site subject to protest – the injunction would catch those who had no previous connection with that site (e.g. those protesting at another site): §72.

4.13 In respect of Persons Unknown who are Newcomers, these authorities must now be viewed with caution following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45. This is because the Supreme Court in that case found that service of such Defendants was not possible as they were not parties to the claim. That said, these authorities may still be useful for the theoretically separate question of whether sufficient *notice* of the claim has been given to Newcomers.

4.14 In *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB), Soole J refused to permit alternative service of the claim on a number of named Defendants sought to be joined to the claim. The Claimant relied, amongst other things, on the time and cost of serving the documents, the difficulty of effecting service on the protestors, and the ability to serve documents electronically. The Judge, however, considered that this was not sufficient in the context of orders which can give rise to committal for contempt; the starting point was that such orders must be served personally. If any difficulties in service arose, individual applications could be made but the mere size of the pool of named Defendants did not in itself justify a general departure from the primary method of service: §§49-51.

4.15 The application for alternative service may be made without notice.[79] In fact, such applications in the protest context will almost always be made without notice.

4.16 The application for alternative service will usually be made at the same time as filing the claim. Depending on how urgent the claim is, the application for alternative service can usually be heard within a matter of days. It is good practice for the Claimant's lawyers to be in contact with the Court staff in the days running up to filing the claim to see when the Court may have availability to hear the application for alternative service.

4.17 The order granting alternative service has to specify:[80]

(1) The method or place of service;

(2) The date on which the claim form is deemed served; and,

(3) The period for filing an acknowledgement of service, filing an admission or filing a defence.

[79] CPR r.6.15(3).
[80] CPR r.6.15(4).

iii. Snapshot summary - what to do and when

4.18 For Claimants bringing a claim in an ordinary protest case, the following steps will need to be taken.

4.19 First, the Claimant will need to file:

(1) Claim form;

(2) N244 application notice for an interim injunction and draft order;

(3) N244 application notice for alternative service of the claim form and other documents by an alternative method, and draft order for service by an alternative method;

(4) Witness statements dealing with the interim injunction and alternative service. These do not necessarily need to be set out in separate statements.

4.20 Secondly, and once the above documents have been issued, the Claimant will need to obtain an order for their service, in addition to the Response Pack, by an alternative method. This is often obtained following a short hearing.

4.21 Thirdly, the Claimant will then need to serve all of these documents in the manner set out in the order for alternative service.

(b) Serving the Order

4.22 Once an injunction is granted (interim or final), this will need to be served.

4.23 In relation to named Defendants, the order will generally need to be served personally.[81]

4.24 In relation to Persons Unknown who are Newcomers, for the reasons already set out above, Claimants will need to take sufficient steps to notify them of the existence of the order. This will usually require, at least, the erection of large warning notices around the site of the protest – e.g. A1 to A3 sized posters referring to the High Court proceedings and stating in simple terms what actions the injunction prohibits.

[81] *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§98, 105 (Nicklin J). It is possible to apply for an order for alternative service, though in some cases the courts have been slow to grant these: *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §111 (Nicklin J). See also **§4.14 above** and *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB), §§49-51 (Soole J).

(c) Serving other documents

4.25 It may also be useful for the initial interim injunction order to provide for how future documents are to be served alternatively in order to avoid having to come back before the Court. Such documents may include future applications.

5 PERSONS UNKNOWN AND INTERESTED PERSONS

(a) Introduction to Persons Unknown

5.1 There are two types of Persons Unknown:

i. Individuals whose identities are unknown but who have already committed (or threatened to commit) the alleged tort.

ii. Individuals whose identities are unknown by virtue of the fact that they have not yet committed (or threatened to commit) the alleged tort (referred to as "Newcomers").[82]

5.2 Without the ability to bring proceedings against both types of Persons Unknown, protest injunctions would be of much less value. This is because, in most cases, the Claimant would not know the names of all (or most of) those carrying out (or those who in the future will carry out) the direct action sought to be prohibited. To limit protest injunctions to named Defendants could, therefore, have the effect of insulating from legal action Defendants who: (i) deliberately hide their identities; and, (ii) are part of organisations who have large enough numbers to replace those individuals who have become subject to an injunction with Newcomers, with the effect of frustrating the rights and lawful activities of Claimants.

5.3 That said, the courts are also alive to the potentially draconian consequences of granting wide-ranging injunctions which could bite against unsuspecting members of the public exercising their Article 10/11 ECHR rights. This led Longmore LJ in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §31, to say that, "*A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance*." Similarly, in *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA), §34, the Court of Appeal relied on Article 6 ECHR (right to fair trial) and the principle that the court should hear both sides of an argument in stating that, "*a court should always be cautious when considering granting injunctions against persons unknown*".

[82] In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court defined this category as:

> "2…persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date".

5.4 For some years, the Courts struggled with the question of whether, and if so how, Persons Unknown who were Newcomers could be made subject to injunctions. Following *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) (5 March 2020), Claimants could only obtain final injunctions against individuals who had already carried out the direct action sought to be restrained; in other words, they would not be able to obtain a final injunction against anyone who was a "Newcomer". This meant that being able to identify an individual, if not by name then by their conduct and physical description, was essential. In *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), however, the Court of Appeal reversed the position finding that Newcomers could be covered by final injunctions as Persons Unknown: §§92-96, 99.

5.5 The issue has been finally resolved in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45,[83] where the Supreme Court was asked to decide whether, and if so, on what basis and subject to what safeguards, the Court had power to grant an injunction against Newcomers. Although a case relating to unlawful encampments of Gypsies and Travellers, the case has much wider implications, including for protest injunctions.

5.6 The Supreme Court decided that Courts did have such a power, albeit subject to certain conditions which are discussed further below. Of importance to its analysis were the following considerations:

i. Injunctions made against Newcomers are a wholly new type of injunction which cannot be fitted into an existing category of injunction; they are, essentially, made against the public at large and potentially embrace the whole of humanity: §§109, 132, 135 and 144.

ii. They are always without notice: §§139, 142, 143(ii), 151, 167, 173, 238(i).

iii. Injunctions against Newcomers are typically neither interim nor final, at least in substance: §§139, 142, 143(vii), 151, 167, 178, 232, 234. Rather, they are sought for their medium- to long-term effect even if time-limited, rather than as a means of holding the ring in an emergency ahead of some later trial process or renewed application in which any defendant is expected to be identified, let alone turn up.

[83] On appeal from *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA).

iv. A Newcomer who knowingly breaches the injunction is liable to be held in contempt whether or not they have been served with the proceedings: §132. Such a person could, instead, apply to have the injunction varied or set aside.

v. To prohibit Newcomer injunctions would mean that "*where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end.*": §138. That would prioritise formalism over substance.

5.7 Notwithstanding this, such injunctions are only to be granted in certain cases, according to the criteria set out in the next section.

(b) Tests to be satisfied for Persons Unknown who are "Newcomers" following *Wolverhampton CC*

5.8 *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 is not a protest injunction case; it involved injunctions sought by local authorities against Gypsies and Travellers for trespass and breach of planning control. In fact, at §235, the Supreme Court went out of its way to say that "*nothing we have said should be taken as prescriptive in relation to Newcomer injunctions in other cases, such as those directed at protesters who engage in direct action*". Nonetheless, in relation to Newcomers (defined at **§5.1 above**), it is likely that many of the same factors adopted by the Supreme Court will apply in the protest context.

5.9 This was the approach taken by Ritchie J in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), the first case to consider *Wolverhampton CC* in detail in the protest context. Ritchie J found that the guidelines at §82 of *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (see **p.106 below**) remained good law but that *Wolverhampton CC* called for the addition of other factors "*because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place.*": §57.

5.10 In the context of a summary judgment application, Ritchie J stated, at §58, that the 14 factors to be considered were as follows:

(1) **There must be a civil cause of action identified in the claim form and particulars of claim.**

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

(3) **There must be sufficient and detailed evidence before the Court. First, the Claimant has to prove that the claim has a realistic prospect of success. Secondly, the Claimant has to prove that any defence has no realistic prospect of success. The Court should not put too much weight on the absence of any evidence or defence from Persons Unknown as the proceedings are without notice; the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them.** Although Ritchie J did not refer to this aspect of the test, a Claimant seeking a precautionary injunction (which will be most protest cases) also has to prove a sufficiently "*real and imminent risk*" of the tortious conduct occurring (see **§6.29 below**).[84]

In addition, whilst this is the appropriate test for summary judgment applications made pursuant to CPR Part 24, it may not be appropriate, e.g., for applications for interim relief: the usual test at the interim injunction stage is the relatively low bar of whether there is a serious case to be tried (**see §6.4 below**). That is subject to whether "*publication*" is involved, where the Claimant will have to prove that they are "*likely*" to succeed at trial, pursuant to s.12(3) of the Human Rights Act 1998 (see **§6.19 below**). But, given the apparent removal of the distinction between interim and final injunctions in Newcomer cases, it may well be that the "serious case to be tried" bar is no longer appropriate and that greater prospects of success on the merits have

[84] The Supreme Court in *Wolverhampton CC* referred to a "*strong probability*" of a tort occurring and that this will cause "*real harm*": §218.

to be demonstrated. This may depend on whether, at the first hearing, the Claimant is, in effect, applying for final relief without a return hearing.

(4) **There must be a "*compelling justification*" for the injunction against Persons Unknown to protect the Claimant's civil rights, as compared to the usual balance of convenience test usually applied for interim relief** (see **§6.15 below**).

(5) **If ECHR rights are engaged, the Court must take into account the balancing exercise required by the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, and any injunction must be necessary and proportionate to the need to protect the Claimants' right.** On this, see **Chapter 8 below**.

(6) **Damages must not be an adequate remedy.** Although Ritchie J did not refer to it, Claimants will also have to prove that the harm would be "*grave and irreparable*" (see **§6.11 below**).

(7) **Persons Unknown must be clearly and plainly identified by reference to: (i) the tortious conduct to be prohibited (and that conduct must mirror the torts claimed in the Claim Form), and (ii) clearly defined geographical boundaries, if that is possible.** This also presupposes the requirement that it has not been possible to identify any Defendants (see **§5.12ff below**).

(8) **The prohibitions must be set out in clear words and should not be framed in legal technical terms. Any prohibited conduct which is lawful viewed on its own must be made absolutely clear and the Claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others** (see **§9.3ff below**).

(9) **The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form** (see **§9.3ff below**).

(10) **The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible** (see **§9.18 below**).

(11) **The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the Claimant's legal rights in the light of the evidence of past tortious activity and the future feared tortious activity** (see **§9.20ff below**)**.** By this finding, Ritchie J accepted the Claimants' submission that the Supreme Court in *Wolverhampton CC*, at §225, was not confining the temporal limit of such injunctions to 1 year in the protest context. On the facts of *Valero* itself, Ritchie J granted a 5-year final injunction with annual reviews.

(12) **The court documents must be served by alternative means which have been considered and sanctioned by the Court. If ECHR rights are engaged, the Claimant must, pursuant to s.12(2) HRA 1998, show that it has taken all practicable steps to notify the Defendants.** The first sentence appears to be a departure from the Supreme Court judgment in *Wolverhampton CC*. In that case, the Supreme Court emphasised that claims brought against Newcomers were, by definition, without notice and that anyone breaching the injunction would be liable for contempt regardless of whether they had been formally served: see §§132, 139, 142, 167(ii), 176-177 and 226. Instead, the Supreme Court stated that:

> "226... in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para 167(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief."

The difference, then, is between: (i) a Claimant making an application for alternative service, pursuant to CPR 6.15 and 6.27, and obtaining an Order to that effect (see **§4.4ff above**); and, (ii) a Claimant carrying out steps it considers sufficient to bring the application/Order to the notice of Defendants without the Court's sanction. In practice, Claimants will likely

have to follow option (i) anyway where there are any named Defendants for whom they do not have an address or there are identified Persons Unknown. Even if not, it may be beneficial for Claimants to follow option (i) out of an abundance of caution in order to be confident that there is no subsequent dispute about the efficacy of the notification. But, technically, it now appears that option (ii) is sufficient.

(13) **Persons Unknown must be given the right to apply to set aside or vary the injunction on shortish notice.**

(14) **Provision must be made for reviewing even a final injunction in the future. The regularity of the reviews depends on the circumstances** (see **§7.13 below**)**.**

(c) When "Persons Unknown" can be restrained

5.10 In order to bring a claim against Persons Unknown, the case law suggests it must be "*impossible*" to name the persons who have or will likely commit the tort unless restrained.[85] That is, on its face, a very high bar. But it is unlikely to mean literal "impossibility" given that it may be *possible* to discover an individual's identity but only if vast amounts of time and money are spent, e.g., using private investigators. In the author's experience, Judges will, in fact, consider whether reasonable steps have been taken to discover the identity of an individual.

5.11 *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J) is the most extreme example of a Claimant failing to join Defendants whose identities it had discovered. In this case, the Court found that the Claimant had wrongly failed to join any individuals as Defendants, notwithstanding that 37 protestors could have been named at the time of the summary judgment application: §§150 and 163.

(d) How to define Persons Unknown

5.12 Once a Claimant decides that it wishes to make Persons Unknown a Defendant, they must be defined in the claim form, court orders, etc as precisely as possible.[86] A failure to do so accurately and correctly according to the case law can be disastrous for a

[85] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §34(2) (Longmore LJ).
[86] *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, §221.

Claimant, with the effect that a class of protestors carrying out direct action is not covered by the injunction.

5.13 The rule is that Persons Unknown must be defined by reference to their conduct which is alleged to be unlawful.[87] This is unlike possession proceedings where the CPR requires that unknown defendants trespassing on the Claimant's land simply be referred to as "Persons Unknown".[88] This is, presumably, what the Supreme Court had in mind in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, when it said that Claimants should explore "*the possibility of identifying them as a class by reference to conduct prior to what would be a breach (and, if necessary, by reference to intention)*": §221.

5.14 The effect is that describing Persons Unknown in protest injunctions is a cumbersome and page-filling exercise. It essentially requires Claimants to repeat the substantive terms of the injunction by reference to each cause of action.

5.15 By way of example, in relation to a trespass claim on private land, Persons Unknown could be described as follows:

> "PERSONS UNKNOWN WHO ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT"

5.16 By contrast, the following definition of Persons Unknown in *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) was found to be flawed by Sweeting J, at §145:

> "PERSONS UNKNOWN WHO ARE ORGANISING, PARTICIPATING IN OR ENCOURAGING OTHERS TO PARTICIPATE IN PROTESTS AGAINST THE PRODUCTION AND/OR USE OF FOSSIL FUELS, IN THE LOCALITY OF THE SITE KNOWN AS KINGSBURY OIL TERMINAL, TAMWORTH B78 2HA"

5.17 This was defective on the basis that it did not refer to the conduct which was alleged to be unlawful.

5.18 In order to avoid a protest injunction catching a broader class of persons than intended, it is generally good practice to refer specifically to the group of protestors being targeted:

> "PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT"

[87] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82(2).
[88] CPR r.55.3(4).

5.19 It should be noted, however, that Constable J in *University of Brighton v Persons Unknown* [2023] EWHC 1485 (KB) – a case involving protests within university premises – required Persons Unknown "*barricading…within the Premises"* not to be defined also by reference to "*the purpose of protesting"*. This is best explained as being unnecessary on the facts of the case given that no lawful behaviour could possibly have involved barricading oneself within the university premises.

5.20 Where there is more than one piece of private land (or more than one cause of action in relation to that private land) it is good practice to have multiple Persons Unknown:

> "(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT
>
> (2) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND Y WITHOUT THE CONSENT OF THE CLAIMANT
>
> (3) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, OBSTRUCT OR OTHERWISE INTERFERE WITH THE CLAIMANT'S ACCESS TO ENTRANCE A ON LAND Y"

5.21 Take the situation where the Claimant is seeking to cover both private and public land (e.g. public highway, parkland, etc.) in an injunction. Here, the Claimant would, generally, not be able to restrain the Defendants' mere presence on public land. It would, therefore, be limited to restraining only certain specified types of conduct, such as erecting structures, tunnelling, locking-on, etc. All of these specified types of conduct will need to be included in the definition:

> "(1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ENTER OR REMAIN ON LAND X WITHOUT THE CONSENT OF THE CLAIMANT
>
> (1) PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMPAIGN Z, ERECT STRUCTURES ON, TUNNEL UNDER, LOCK ONTO OR AFFIX THEMSELVES TO PUBLIC LAND Y"

5.22 In relation to claims brought on the basis of economic torts, the definition of Persons Unknown will be more unwieldy still as it will need to include each element of the tort. For example, as to conspiracy to injure by unlawful means, the injunction in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J) described Persons Unknown as follows:

> "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"

5.23 Johnson J stated that including the element of subjective intention was unavoidable because of the nature of the tort: §54.

5.24 It is important for Claimants to sense-check their definition of Persons Unknown to make sure that too broad a class of persons is not captured. For example, in *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), §70 (Warby J), the Claimant was criticised for describing the Fourth Defendant as "*Persons Unknown*", which was described as "*All persons*" except the other Defendants. As the Judge indicated, this description included the Judge himself.

5.25 Further, in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), the claimant defined Persons Unknown as follows:

> "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."

5.26 The High Court and Court of Appeal found this impermissibly wide; it was capable of applying to a person who had never been to the location of the protest (the Canada Goose Shop on Regent Street) and no intention of going there: CA, §85.

(e) How to identify Persons Unknown

5.27 Claimants may be able to identify Persons Unknown through their own investigations – social media has provided a way of identifying individuals who would otherwise be entirely anonymous.

5.28 Alternatively, Claimants may apply for third party disclosure orders against the relevant police authority to provide details on individuals who have previously been arrested by the police and, therefore, will have had to reveal their names and addresses. This can be done pursuant to CPR r.31.17(3), which empowers a court to make an order against non-parties where:

i. the documents of which disclosure is sought are likely to support the case of the Claimant or adversely affect the case of one of the other parties to the proceedings; and,

ii. disclosure is necessary in order to dispose fairly of the claim or to save costs.

5.29 These criteria will generally be satisfied when seeking to identify Persons Unknown in the context of protest injunctions; third party disclosure orders have been made against the police in a number of cases.

5.30 In the first instance, Claimants ought to write to the relevant police authority and seek their consent to such an order. Being on the receiving end of such an application, police authorities will usually remain neutral and confirm that they will abide by any order the court makes.

5.31 In the past, orders have been made by the court without difficulty and, in most instances, without opposition.[89] In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J), however, it was argued by Counsel for an Interested Person that such disclosure should not be ordered on the basis that it involved using the powers of the state to assist a private party obtain an injunction. Bennathan J rejected this submission, finding that "*it seems to me best that any evidence that could be used by the claimants to pursue breaches is gathered by the legally regulated and democratically accountable police forces of the United Kingdom.*": §32. The same approach was taken by Freedman J in *Transport for London v Lee* [2022] EWHC 3102 (KB), §96(6).

[89] See, e.g., *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §44 (Bennathan J); *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §53 (Bennathan J).

5.32 It should be noted, however, that the Courts have raised some eyebrows on the power to grant such orders in respect of information and documents not yet in existence – i.e. for future arrests – as well as in relation to people who have been arrested but not yet charged.[90] The strongest statement to date was made in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) where Cotter J referred to the "*concern*" caused amongst some High Court Judges by these types of order. Cotter J stated that he was not prepared to continue this aspect of the order in the longer term without understanding the basis upon which it was said that the Court had, or should use, any power to make such an order: §163.

(f) Consequences of identifying Persons Unknown

5.33 If an individual carrying out the restrained (or sought to be restrained) direct action is identified – in the sense of their name being discovered – that individual must be joined as a Defendant.[91]

5.34 In a few cases it has been argued by Defendants that the Claimant wrongly failed to join certain named individuals who had been identified by the Claimant. To date, the courts have been cautious before requiring Claimants to join specific individuals where there is not evidence that they have carried out or intend to carry out the direct action restrained by that specific injunction:

i. *HS2 v Harewood* [2022] EWHC 2457 (KB) ("**Appendices Follow Containing the Approved Transcripts of 4 Decisions Made Extempore During the Hearings**") concerned an order granted by Cotter J which had contained: (a) a protest injunction, which applied to certain named Defendants and Persons Unknown, but in relation to which D33 was not a named Defendant; and, (b) a declaration that that the Claimant was entitled to possession of the land, which did name D33 as a Defendant. A committal application having been brought against him, D33 argued that the protest injunction did not bind him because he was not a named Defendant and but he could also not be a Person Unknown given that he was referred to in the order and so obviously known.

   This argument was rejected by Ritchie J who found that he was a Person Unknown under the terms of the *injunction*. In particular, he was not

[90] See, e.g., *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §62 (Morris J). No such concerns were voiced by Hill J in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§210-219.
[91] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §82(1).

trespassing on the relevant land at the time the injunction was granted and no-one knew at that time who would become a Newcomer for the purpose of that specific injunction: §§32 and 35 of the "*Appendices…Containing the Approved Transcripts of 4 decisions Made Extempore During the Hearings*".

The Court of Appeal (by a majority) rejected his appeal in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519. The Defendant had not occupied the relevant land so far and the Claimant could not look into the future to see what the Defendant was going to do in the future: §37. Coulson LJ also stated that the court should not prefer an approach which meant a Claimant was better off naming all possible Defendants in a protest injunction: §42.

Phillips LJ disagreed; the Defendant was a known person for the purpose of the proceedings and the order and was also known as a person who may subsequently enter the relevant land: §100(i).

ii. In *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J), §30, the Judge accepted the Claimant's argument that there was not the requisite "*causal nexus*" between certain well-known members of Just Stop Oil and the specific direct action being targeted at the Claimant.

5.35 What happens if the Court finds that certain individuals who ought to have been joined were not? The most obvious consequence would appear to be that those specific individuals would not be covered by the injunction. This is because they would not be named Defendants and they would no longer be Persons Unknown. Except perhaps in extreme circumstances (see **§5.11 above**) – it is difficult to see that the failure to name certain individuals would have a broader impact, such as on the Court's willingness to grant an injunction at all.

5.36 Even if an individual is identified, however, Claimants still have to do their due diligence. In *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), Nicklin J warned against aggregating the general wrongdoing by unidentified individuals and imputing them to specific identified individuals without looking at what that individual had actually done. Such an approach carried a risk of serious injustice and risked contravening the right to freedom of assembly: §67. Rather, each named Defendant is entitled to a fair adjudication of the claim made, and evidence presented, against them irrespective of the claim against Persons Unknown: §68. Further, in *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), after various named Defendants had

made submissions at an interim injunction application, Cotter J stated that it would be wrong to treat the Defendants as a homogenous group and that the case against each named Defendant required individual analysis: §108.

5.37 A slightly more relaxed approach appears to have been taken in *Transport for London v Lee* [2022] EWHC 3102 (KB). In that case, the Claimant sought to join named Defendants who had been arrested by the police and whose names had subsequently been provided – i.e. the Claimant was relying on the assertion of the police that they had been acting in breach of the injunction without any supporting information. Although Freedman J had concerns with such an approach, he ultimately joined the named Defendants, particularly in light of the following protections that were available: (i) the Claimants had undertaken to scrutinise, as soon as reasonably practicable after disclosure of information from the police, whether any named Defendant should properly have remained so; and, (ii) any named Defendant was able to apply to discharge or vary the order made against them: §§72-81.

5.38 The failure of a named Defendant to participate in proceedings or make submissions is to be taken as indicating that they have chosen not to challenge the case being asserted against them. It may also give an insight into the intention of the named Defendant as to intention of future conduct.[92] Generally speaking, the courts have emphasised the importance of Defendants actively engaging with proceedings in order to protect and improve their position: *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J), §119 (Cotter J).

(g) Interested Persons

5.39 There will often be no Defendants willing or able to contest the grant of a protest injunction. Legal aid is not available and there is the prospect of being liable for the Claimant's costs of bringing the claim. There is, however, another way in which an individual concerned about a protest injunction can make its concerns known to the Court.

5.40 CPR 40.9 states 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."

[92] *Transport for London v Lee* [2023] EWHC 1201 (KB) §§27, 34 (Eyre J); *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182, §41.

5.41 Once an order has been granted, therefore, a non-party may apply to have it set aside or varied as long as they can show that: (a) they are "*directly affected*" by it; and, (b) they have a good point to raise.[93] Interested Persons can do so by promptly filing and serving an application notice. In a number of cases, Judges have found that protestors who would not otherwise be Defendants ought to be allowed to file evidence and make submissions as if there was a complete rehearing of the matter.[94]

5.42 In *Esso Petroleum v Breen* [2022] EWHC 2600 (KB), Ritchie J set out 7 factors for the Court to consider when determining the nature and degree of an Interested Person's connection to the claim:[95]

(1) Whether the Interested Person will profit from the litigation financially or otherwise.

(2) Whether the Interested Person is controlling the whole or a substantial part of the litigation.

(3) Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise.

(4) Whether the Interested Person is funding the litigation or the defence thereof.

(5) Whether there is a substantial public interest point or a civil liberties point being raised by the interested person.

(6) The court should take into account the wide or draconian nature of injunctions against unknown persons which may be geographically large or temporarily large or both. There should be a low threshold for Interested Persons to be able to take part in such broad and or wide orders.

(7) The costs risks and difficulties faced by Interested Persons who are affected by orders which they did not instigate.

(8) Any prejudice which would be suffered by the Claimant in granting the Interested Persons their request and refusing to require them to become parties.

[93] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§62-65 (Hill J).
[94] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§100-101 (Hill J).
[95] The judgment is not reported but these reported factors are taken from A Hardy, "CPR 40.9: a means for Interested Persons to challenge protest injunctions" - https://tinyurl.com/ye2mmksh (last accessed on 2 July 2023). These factors were relied upon by Hill J in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§75-81.

5.43 *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) involved a summary judgment application following the grant of interim injunctions to prevent direct action on the Strategic Road Network by supporters of Insulate Britain. Ms B argued that she ought to be able to make submissions on the basis that people like her, not involved with Insulate Britain, may inadvertently breach the injunctions. Bennathan J made the order under CPR 40.9 because (see §21):

a. Her concern was not fanciful and would amount to being "*directly affected*".

b. In an injunction against Persons Unknown, the Court should adopt a flexible approach for those with a general concern by a person supporting the relevant political cause.

c. A generous view should be taken where the Court would not otherwise be hearing submissions against the injunction.

5.44 Non-parties were also permitted to make submissions in: *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J), §§2-5, albeit not expressly by reference to CPR r.40.9; in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §11 (HHJ Lickley KC); and, in *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB), §§14-21 (Spencer J).

5.45 The most detailed treatment of interested persons in this context can be found in *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), where an individual sought to rely on CPR r40.9 to make submissions without being joined as a Defendant. Hill J found that the individual was "*directly effected*" on the basis that: the injunctions may have a chilling effect on her lawful protests; she had specific concerns about the existence, scope and wording of the injunctions; and, that if she breached the injunctions this would affect her financial interests and expose her to the risk of a prison sentence: §§68-69. Hill J also found that the individual had a good point to make: §§73-74. Hill J considered that individuals applying to make submissions under CPR r40.9 were not confined, in cases involving Persons Unknown, to challenging existing orders, as opposed to challenging the grant of further orders: §§88-96.

5.46 Such non-parties do, however, have to be wary about being liable for a Claimant's costs, particularly if their submissions are broad in scope, cause the Claimant to incur extra costs and are ultimately unsuccessful. This is because the Court has the power to make a costs order even against non-parties.[96]

[96] s.51(1) and (3) of the Senior Courts Act 1981; *Alden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, 979-981 (Lord Goff).

5.47 The only qualifications on this power are that, pursuant to CPR r.46.2:

a. The non-party must be added as a party to the proceedings for the purposes of costs only; and,

b. The non-party must be given a reasonable opportunity to attend a hearing at which the Court will consider the matter further.

5.48 The authorities sometimes talk about non-party costs order being "*exceptional*" but the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC) clarified at §25(1) that, "*exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense*." Instead, the real test is whether in all the circumstances it is just to make the order.[97]

5.49 There does not appear to be any authority on the specific question of costs liability for those participating pursuant to CPR r.40.9. However, in relation to non-parties in general, the Privy Council in *Dymocks* stated the following about third-party funders of litigation:

> "25…(2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No 2)* [2003] QB 1175 , 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the Knight case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 WLR 12 , 22 as "the defendants in all but name". (emphasis added)

[97] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC), §25(1).

5.50 To the extent that non-parties act, for all intents and purposes, as Defendants, the reasoning in *Dymocks* is analogous and they may, consequently, be at substantial risk of adverse costs orders.

5.51 Conversely, interested persons may be able to claim their costs if their submissions are accepted. For an example of this, see *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB), §§47-50 (Nicklin J).

6 INTERIM INJUNCTIONS

6.1 This Chapter explores the circumstances in which a Claimant can obtain an interim protest injunction, including the potential relevance of s.12(3) of the Human Rights Act 1998. It has been very rare for a Claimant not to seek an interim injunction in circumstances where it wishes to bring a claim against the activity of protestors. Indeed, an interim injunction may effectively be the end of the claim. This Chapter also sets out the obligations on Claimants both when they are seeking to obtaining an interim protest injunction as well as once they have obtained one.

6.2 It is important, nonetheless, to remember the Supreme Court's judgment in *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 that injunctions against Persons Unknown who are Newcomers are typically neither interim nor final, at least in substance (see **§5.6(iii) above**). We will have to wait to see how courts interpret this in practice (and see **§6.41 below** for an early example of this). Until then, in cases involving Newcomers only, it may be prudent to consider the points below in concert with the factors adopted in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) by Ritchie J (see **§5.10 above**).

(a) *American Cyanamid* test

6.3 In order to obtain an interim injunction, a court will usually consider the following criteria set out in *American Cyanamid Co v Ethicon* [1975] AC 396:

i. Whether there is a serious issue to be tried;

ii. Whether damages would be an adequate remedy for the Claimant or Defendant;

iii. Whether the balance of convenience favours the grant of an interim injunction.

i. <u>Serious issue to be tried</u>

6.4 By this criterion, the Claimant has to show that the merits of its case reaches a certain threshold without having to satisfy the ordinary "balance of probabilities" test. The test has been described as whether there is a real prospect of success or whether the claim is not frivolous or vexatious.

6.5 Due to this threshold not being very high, most claims for protest injunctions satisfy this criterion relatively straightforwardly. This is also because most protest cases are brought

on the basis of trespass, and often on private land, a cause of action which tends to be difficult to defend (see **Chapter 8 – Human Rights**).[98]

6.6 There are, however, exceptions. For example:

- Protest cases brought on the basis of harassment (Protection from Harassment Act 1997) have recently struggled before the courts. This is because of: the difficulties of formulating the injunction to refer to all of the necessary ingredients of the tort; the lack of clarity to a member of the public of a prohibition on "*harassment*"; the highly context-specific nature of assessing harassment; and the fundamental tension between freedom of speech and silencing expression as amounting to harassment.[99] In some of these cases, interim injunctions have been refused.

- Trespass above the airspace of the Claimant's land is also less straightforward. In *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J), §§111-115, the Judge found that the claim in trespass against the Defendants' drones being flown over the Claimant's land was uncertain.

6.7 At one time, it was also thought that the courts did not look favourably on protest injunctions based on economic torts, such as conspiracy to injure by unlawful means.[100] This was because it was considered that a Defendant's intention, necessary in order to prove the tort, should not be included within an injunction due to its unknown and ephemeral nature.[101] The Court of Appeal, however, changed its mind in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§65-69 (Leggatt LJ). In two recent cases, protest injunctions have been granted to Claimants relying on conspiracy to injure by unlawful means:

(1) *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J): this was an interim application by Shell against environmental protests targeting Shell-branded petrol stations. Although the Claimant sold fossil fuels to the petrol stations, in most cases the Claimant had no legal interest in those parcels of land; the petrol stations themselves were operated by 3rd-

[98] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §92 (Nicklin J).
[99] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §§92-96 (Nicklin J); *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB), §§52-54, 78 (Nicklin J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§152-156 (Morgan J).
[100] Such torts are usually relied upon (instead of, e.g. trespass) because the Claimant does not have a legal right to occupy the land which is the subject of the direct action.
[101] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §§39-40 (Longmore LJ).

party contractors. As a result, the Claimant could not rely on trespass or nuisance: §25. The inclusion of an intention requirement in the injunction was said to be "*unavoidable*" because of the nature of the tort and that this was "*the inevitable price to be paid for closely tracking the tort*": §46. Relying on objective conduct alone in this instance would lead to a broader prohibition than was justified.

At the subsequent hearing, *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), the same arguments were accepted by Hill J: §§121-122, 126-127, 129, 155.

(2) *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J): this was a claim brought by Esso against environmental protestors targeting its Southampton-London Pipeline. The Pipeline is 105km in length and runs over land with a "*complex tapestry*" of land interests: §36. A conspiracy was alleged to avoid attempting a very detailed and complex exercise in identifying all land interests in all of this land. The Judge had no trouble granting an injunction based on this cause of action: §68.[102]

6.8 In fact, as a result of s.12(3) of the Human Rights Act 1998, there have been a number of protest cases where the relatively low threshold of "serious issue to be tried" has, instead, been replaced with the test of whether the Claimant is likely to succeed at trial. This is discussed further at **§6.19ff below**.

ii. <u>Adequacy of damages</u>

6.9 In addition, a Claimant has to show that an award of damages would not be adequate. A Claimant will often be able to surpass this hurdle given:

- There is usually no arguable defence to an allegation of trespass in this context and, if this is the case, the questions of balance of convenience, and damages being an adequate remedy do not arise. The Claimant will *prima facie* be entitled to an interim injunction to restrain trespass.[103]

[102] Knowles J largely relied on the analysis of HHJ Lickley LJ at the interim injunction stage: *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§20-27 (HHJ Lickley KC).
[103] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §74 (Knowles J); *Patel v WH Smith Ltd* [1987] 1 WLR 853, 861 (Balcombe LJ).

- The often material and potentially unquantifiable losses that may be suffered by the Claimant.
- The lack of evidence that Defendants will be able to pay such damages.
- Health and safety concerns that can sometimes be relied upon to justify the grant of an interim injunction.

6.10 Again, there are exceptions. For example, in one recent case a Court found that damages *would* be an adequate remedy for trespass by drones above the airspace of the Claimant's land.[104]

6.11 In most cases where a precautionary injunction is sought (see **§6.27ff below** on precautionary injunctions), the court also asks, in addition, whether the harm would be "*grave and irreparable*" such that damages would not be adequate.[105] This test originates from *Vastint Leeds BV v Persons Unknown* [2019] 1 WLR 2, where Marcus Smith J stated at §31:

> "(3) When considering whether to grant a quia timet injunction, the court follows a two-stage test: (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?" (emphasis added)

6.12 Linden J in *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), at §§63-64, confessed to some doubts about the structure of the *Vastint* test. He went on to say:

> "63…To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is "just and convenient" but they are not threshold tests. I also note that, even taking into account *Vastint*, the editors of Gee on Commercial Injunctions (7th Edition) say at 2-045:
>
> > "*There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant*

[104] *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB), §115 (Nicklin J).
[105] *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §147 (Hill J); *Transport for London v Lee* [2023] EWHC 1201 (KB), §§20, 40-41 (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §§36 and 43 (Morris J); *Transport for London v Lee* [2022] EWHC 3102 (KB), §65 (Freedman J); *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §20(2) (Bennathan J); *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA), §§35 and 95; *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 (Ch), §31(3) (Marcus Smith J).

to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."

64. Where the court is being asked to grant an injunction in circumstances where no tort has been committed or completed it will naturally need to be persuaded that the risks and consequences of not making such an order are sufficiently compelling to grant relief. Where, as in the present case, tortious conduct has taken place but the identity of the tortfeasors is unknown, and relief is sought on a final basis against future tortfeasors who are not a parties and are identified only by description, again the court will be cautious. But it would be surprising if, for example, a court which considered that there was a significant risk of further tortious conduct, but not a strong probability of such conduct, was compelled to refuse the injunction no matter how serious the damage if that conduct then took place."

6.13 Nonetheless, Linden J did not depart from *Vastint* on the basis that the point was not fully argued before him and that, on the facts of the case, he did not need to do so.

6.14 The court will also consider whether damages would be an adequate remedy for the Defendant if, at trial, it is found that the interim injunction was wrongly granted. Some recent cases have found that damages will not be adequate for such Defendants, as they will have lost the chance to protest, for which specific timing may be very important.[106]

iii. Balance of convenience

6.15 Assuming a serious issue to be tried and that damages would not be an adequate remedy for the Claimant, a court will have to consider where the balance of convenience lies. This has been described, alternatively, as the balance of justice.

6.16 This will normally involve a detailed consideration of all the circumstances of the case and, ultimately, deciding which party would be least prejudiced if the wrong decision was made at the interim stage.

6.17 In the protest context, the courts have sometimes found the balance to be in favour of the Claimant, relying on the fact that, whereas a Claimant cannot enjoy its property rights in any other way, protest can be continued in one form or another without carrying out the complained of direct action.[107]

[106] *Dyer v Webb* [2023] EWHC 1917, §§101-102 (Dexter Dias KC); *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB), §27 (Hugh Southey KC).
[107] *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §26 (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §74 (Linden J); *Secretary of State for Transport* v *Persons Unknown* [2018] EWHC 1404 (Ch), §58 (Barling J).

6.18 In light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, where the Defendants include "Newcomers", courts will now need to consider the elevated test of whether there is a "*compelling justification*" for the injunction (see **§5.10(4) above**).

(b) Section 12(3) of the Human Rights Act 1998

6.19 Section 12(3) of the Human Rights Act 1998 says the following:

> "**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.
> …
> (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."

6.20 There are two questions: (1) does s.12(3) apply as a matter of course to protest injunctions? (2) If so, what difference does it make.

6.21 On (1), the authorities do not speak with one voice. The issue has only been properly considered in a handful of cases. In almost all cases it has been academic because the Court has granted the protest injunction on the assumption that s.12(3) does apply. In those cases that have considered the issue:

- In *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), in the context of environmental protests against a fracking company, Morgan J found that s.12(3) did apply but did not give reasons: §86.
- In *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100, the Court of Appeal proceeded on the assumption that s.12(3) did apply as its application did not form a ground of appeal: §17.
- In *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB), in the context of protests and online abuse by parents against the teaching of LGBT issues at a primary school, Warby J found that s.12(3) did apply: §§57-62. The Defendants in this case had been handing out leaflets as part of their protest and the Claimant in this case sought to prohibit the making of abusive comments on social media. The type of activities in issue, therefore, more easily came under the definition of "*publication*" than normal methods of direct action.

- In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), in the context of environmental protests by Insulate Britain, Lavender J found that s.12(3) did not apply but gave no reasons for this decision: §41(1).

- In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB), in the context of environmental protests at Esso sites, Bennathan found that s.12(3) did apply. He considered that "*On one view of the law that provision is not really aimed at protest cases such as this, but there is Court of Appeal authority that it should be taken as applying so, of course, I follow that authority*": §7. He appeared to have been relying on the *Ineos* case.

- In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), in the context of environmental protests against sites selling Shell's petrol, Johnson J found that s.12(3) did not apply. His reasons, at §§66-76, constitute the fullest treatment of the issue in the cases so far. He did not consider himself bound by *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) because the Court of Appeal proceeded on an assumption rather than deciding the matter for itself.

- In *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§28-40, where the issue was fully argued, HHJ Lickley KC agreed with Johnson J in *Shell* that s.12(3) did not apply. He decided that "*acts of trespass etc. in the course of a protest while publicising the protestor's views do not amount to 'publication'.*": §40.

6.22 These more recent authorities seem not to have been cited to the Court in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J) where the Court appeared to find that s.12(3) of the Human Rights Act 1998 applied to all of the protest activity (and not just those relating to placards and slogans): §61. They were also not cited in *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB) (Soole J) where it was assumed that s.12(3) applied: §32(iii).

6.23 In the most recent case to consider the issue - *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) – Hill J appeared to agree with Johnson J in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB). Notwithstanding that, the facts of that specific case involved "*publication*" given that the injunction prohibited writing on any part of a Shell petrol station. Consequently, s.12(3) applied in relation to that element of the case only.

6.24 On (2), the effect is that the Claimant has to show they would "likely" succeed at trial. This raises the relatively low threshold that would otherwise apply under the first *American Cyanamid* criterion of "serious issue to be tried".

6.25 On the meaning of "likely", this will depend on the circumstances. The question is whether the Claimant's prospects of success at trial are "*sufficiently favourable to justify such an order*" in the circumstances of the case. This will usually require the court to ask whether the relief is more likely than not to be granted at trial but there will be circumstances when a lesser degree of likelihood will suffice.[108]

6.26 In the author's experience, it is relatively rare for the notionally elevated s.12(3) test to make any difference to the outcome.

(c) Precautionary (*quia timet)* injunctions

6.27 Previously known as *quia timet* injunctions,[109] precautionary protest injunctions prohibit conduct which has either not yet taken place or not yet been carried out by a particular Defendant.

6.28 Because precautionary injunctions seek to prohibit conduct that has not yet happened, the courts are more reluctant to grant them. For example, in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), the Court of Appeal rejected the idea of granting wide-ranging protest injunctions before the complained-of conduct had even occurred:

> "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."

6.29 In order to be successful, a Claimant will have to show that there is a sufficiently "*real and imminent risk*" of a tort being committed by the Defendant.[110] These terms are more flexible than they might appear on first glance.

[108] *Cream Holdings Ltd v Banerjee* [2005] 1 AC, §15 (Lord Nicholls).
[109] The Court of Appeal in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946, §8, described the use of Latin in this area of law as "*inappropriate*".
[110] *London Borough of Islington v Elliott* [2012] EWCA Civ 56, §29 (Patten LJ).

6.30 The courts have not sought to gloss the meaning of a "*real*" risk. They have, rather, emphasised the importance of context and doing justice between the parties – i.e. the degree of probability of future injury is not an absolute standard.[111]

6.31 The term "*imminent*" is used in the sense that the remedy sought is not premature.[112] The likely gravity of damage is also an important factor.[113]

6.32 The fact that a named Defendant has not engaged with the claim or the Court will support the argument that he/she will carry out the unlawful acts in the future in the absence of an injunction.[114] In addition, the fact that a Defendant has not given assurances or other evidence that it has no intention to carry out or repeat the impugned conduct will strengthen the case for an injunction.[115]

6.33 Even if a precautionary injunction satisfies the "*real and imminent risk*" test, its precautionary nature will impact the breadth of the restriction. For example, in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), the Court of Appeal found that restrictions such as blocking the highway to slow down traffic, slow-walking and unreasonably preventing the claimants from accessing a site were "*too wide and too uncertain*" for a *precautionary* injunction: §41.

6.34 A protest injunction may be sought over an entire project or piece of infrastructure, notwithstanding that it occupies or runs over a very large area of land. The fact that direct action has only targeted certain parts of the project at the date of the Claimant's application does not mean that only those parts targeted to date suffer from a "*real and imminent risk*" of tortious conduct.[116] There are several recent examples of the Court granting an injunction covering the entire length of a large project or piece of infrastructure in these circumstances:

i. In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), Lavender J granted an injunction across 4,300 miles of the Strategic Roads Network against protests being conducted by Insulate Britain. It was said that this was necessary due to the "*unpredictable and itinerant nature of the Insulate Britain protests*": §24(7).

[111] *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), §§176-177 (Knowles J).
[112] *Hooper v Rogers* [1975] Ch 43 (CA), 49-50 (Russell LJ).
[113] *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (CA), §71 (Sir Etherton MR).
[114] *Transport for London v Lee* [2023] EWHC 1201 (KB), §§36 and 38 (Eyre J).
[115] *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §67 (Linden J).
[116] The issue is sometimes dealt with as a point going towards proportionality/ whether the protest injunction has clear geographical limits.

ii. In *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J granted an interim injunction over effectively the whole route of HS2. Given the activities to date and the protestors stated intention, the Judge found that to limit the scope of the injunction until other parts of the route had been affected would be a licence for "*guerrilla tactics*": §177.

iii. In *Esso Petroleum v Breen* [2023] EWHC 2013 (KB), Knowles J granted an injunction covering the entire 105km oil pipeline from Southampton to Heathrow that was being upgraded. He rejected the argument that an imminent danger of very substantial damage could not be found in relation to the whole area of the pipeline for the same reasons as those given in the above *HS2* case: §69.[117]

iv. In *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), where direct action had affected some but not all of the Claimant's sites, Linden J stated, at §70, that "*the essence of anticipatory relief, where it is justified, is that the claimant need not wait until harm is suffered before claiming protection*".

6.35 The same analysis applies to non-contiguous areas of land. For example, in *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J), the Claimant sought a protest injunction over a number of different sites across the country even though a number of those had not actually been affected to date. Ellenbogen J rejected the argument that the injunction should be confined only to those sites had had already been affected. She stated:

> "28…But that is to adopt an excessively granular, artificial approach to the evidence, considered as a whole. So considered, I am satisfied that the risk of infringement of the claimants' rights, absent injunction, is real. Those aligning themselves with one or both campaigns have shown themselves willing to engage in direct action in furtherance of their aims. ER's stated plans include focused economic disruption at an unspecified single fossil fuel target and to block major UK oil refineries this month.
>
> 29. There is no reason to think that the key sites proportionately identified by the claimants will be treated any differently, going forward, from those sites which have been the subject of past direct action. The risk of harm is sufficiently imminent to justify intervention by the court; activity has escalated since the beginning of this month, with all the associated risks to health and safety and the claimants' operational activities, set out in their evidence. In those circumstances, in

[117] HHJ Lickley at the interim injunction stage (*Esso Petroleum v Breen* [2022] EWHC 2664 (KB)) came to the same conclusion.

particular, there is no legal basis upon which the claimants should be obliged to suffer harm at each of the Sites before the court will grant relief in relation to it."

6.36 Moreover, in *Transport for London v Lee* [2023] EWHC 1201 (KB), Eyre J granted a final injunction over a number of roads in London, many of which had not yet been targeted by Just Stop Oil. This was because, "*all are locations in London where the blocking of the road will be liable to cause substantial and widespread congestion. They are precisely the kind of location at which such protests have previously occurred and the fact that a particular location has not previously been targeted is not an indication of the absence of risk.*": §33.

6.37 There are many examples of the Court adopting this type of reasoning – see, e.g.: *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §48 (Johnson J) and *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §§94-95 (Morgan J).

(d) Renewing an interim injunction

6.38 Where a Claimant seeks to renew an interim injunction – i.e. extend a previous interim injunction that has already been granted and is soon to expire – the Court is entitled to review any aspect of the merits of the claim and entitlement to the Order sought.[118] In practice, and particularly where there has been no challenge by a Defendant to any element of the claim, the Court will focus its consideration on whether there remains a continuing threat of a real and imminent risk.

6.39 It should be noted that courts have taken differing approaches to whether an interim injunction can be renewed for a length period of time or whether a Claimant ought to progress the claim to its final determination such that directions ought to be set for trial. For example, in both *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB) and *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch), interim injunctions granted the previous year in relation to environmental protests were sought to be continued. Collins Rice J and Rajah J, respectively, probed the Claimants on what steps had been taken to progress the claim to final determination. Both Courts subsequently made directions/orders effectively requiring the Claimants to bring the claim to trial or otherwise have the claims finally determined in short order. By contrast, on very similar facts, interim injunctions were continued for 12 months in the cases of *Valero Energy v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J), *Exolum v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J), *Navigator Terminals v Persons*

[118] *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB), §64 (Cotter J).

Unknown (28 Apr 2023) (unreported) (KB) (Garnham J), *Essar Oil v Persons Unknown* (11 May 2023) (unreported) (Ch) (HHJ Monty KC) and *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J).

6.40 There may be some tension between these latter cases and the principle set out in **Chapter 7 below** of a Claimant being required to get on with progressing the claim as rapidly as it can.

6.41 In light of *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, it could now be argued that, in respect of cases involving Newcomers only – where the traditional distinction between interim and final injunctions appears to have been demolished – "renewing an interim injunctions" makes no sense. Rather, all relief obtained could be said to be final relief subject to liberty to any Defendants to apply to set aside the order and subject to regular review from the Court. This was the position in *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB) – an urban explorer trespass case – where the claim was against Newcomers only. The Claimants obtained final relief at the first without notice hearing (there being no return date ordered) and, just before the expiry of that injunction two years later, applied for and obtained an extension.

(e) Obligations on the Claimant

6.42 Other than in the scenario already discussed at **§3.24 above**, a Claimant has traditionally had various obligations when obtaining an interim injunction. These include:

i. Giving a cross-undertaking in damages, unless the court orders otherwise.[119] The purpose is to ensure that, if the Defendant ends up winning at trial, they can be compensated for the loss suffered as a result of the (wrongly granted) interim injunction. Different considerations may apply for public authorities, particularly where they are seeking a protest injunction in order to be able to exercise statutory functions.[120] In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court has now tantalisingly implied that cross-undertakings may not be necessary in injunctions against Newcomers as they are not technically interim orders and they are "*not in any*

[119] CPR PD25A, §5.1(1). See *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) for the general principles.
[120] *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §§121-122 (Sweeting J); *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 (SC), §§30-33 and 41 (Lord Mance). But see *Birmingham CC v Afsar* [2019] EWHC 1619 (KB), §2, where Warby J considered the relevant principles and did require the local authority to give a cross-undertaking.

sense holding the ring until the final determination of the merits of the claim at trial": §234. It did say, however, that this was "*another important issue for another day*".

ii. Progressing the claim. This is considered further, below, in **Chapter 7**.

iii. Keeping the situation under review. As the Court of Appeal said in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §89, 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*." Where, for example, a Claimant becomes aware of information which renders incorrect something that was previously said to the court, it is under a duty to tell the court and/or the Defendant of the change.[121] This includes changes in the law that have occurred since the grant of the interim injunction.[122]

Equally, in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB), Nicklin J stated that the Court will keep the terms of any interim injunctions under review – and in appropriate cases make changes to the injunction – to ensure that they are not having an unintended effect: §10. This duty appears to apply to final injunctions just as much as it does to interim injunctions.[123]

[121] *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §44 (HHJ Klein); *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §32 (Nicklin J).
[122] *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §§27-32 (Nicklin J).
[123] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §77.

7 FINAL INJUNCTIONS

7.1 A Claimant who does obtain an interim injunction (and see **§6.2 above** in respect of the position with Newcomers) is bound to get on with progressing the claim as rapidly as it can.[124] A failure to do so can lead to the court striking out the claim form as an abuse of process.

(a) Available procedural options

7.2 A Claimant has several options:

(1) Apply for summary judgment, pursuant to CPR Part 24;

(2) Apply for default judgment, pursuant to CPR Part 12;

(3) Bring the claim to trial; or,

(4) Discontinue the claim.

7.3 As to summary judgment, the Claimant has to demonstrate that the Defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial.[125] Such an application may not usually be made until the Defendant has filed an acknowledgement of service or defence (or the time for doing so has expired).[126] The relevant procedure is set out in CPR r24.4 and PD24, §2.

7.4 In *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), the Claimant had sought summary judgment against 133 named Defendants as well as Persons Unknown. Bennathan J granted the application against 24 of the named Defendants who had already been found to be in contempt of court for breaching the interim injunctions. But he refused to grant a final injunction against the remaining 109 named Defendants (though he did grant a precautionary interim injunction against them on the same terms). This was on the basis that he was not satisfied that those Defendants had already committed the tort of trespass or nuisance.

7.5 The Court of Appeal overturned this decision that a final injunction could not be granted against the 109 named Defendants.[127] For the grant of a final precautionary injunction, it is not a requirement that the Claimant prove a Defendant has already committed the relevant tort. The essence of this form of injunction is that the tort is *threatened*: §39.

[124] *Gee on Commercial Injunctions* (7th edn, 2022), §§24-029 – 24-032 adopted in *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §43 (HHJ Klein).
[125] CPR r.24.2.
[126] CPR PD24, §2(6).
[127] *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182.

7.6 *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) now represents the most recent judgment dealing with a summary judgment application in a protest context – see **§5.9 above**.

7.7 As to default judgment, a Claimant may not obtain this where they have brought a Part 8 claim.[128] Even in a Part 7 claim, a Claimant may consider that it is inappropriate to make an application for default judgment in a case against Persons Unknown where the Court will not be able to consider the merits of a case.

7.8 As to going to trial, it was previously quite common for a claim never to reach this stage as an interim injunction would have effectively disposed of the proceedings. Indeed, the Court of Appeal in *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA) said that "*There is, as I have said, almost never a trial in a persons unknown case, whether one involving protestors or unauthorised encampments.*": §92. The approach appears to have changed subsequently with the Courts emphasising the need to progress claims.[129] Where the claim is against Newcomers only, however, following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45 it appears unlikely that a claim will need to proceed to trial at all.

7.9 It is also possible to seek expedition for trial depending on the circumstances. In *Transport for London v Lee* [2023] EWHC 402 (KB), for example, the Claimants applied for, and were granted, an expedited trial. Cavanagh J found that it was in the public interest for the trial to take place as soon as possible given the importance of the case to the Claimant, the general public and the Defendants. There was no prejudice to the Defendants given that all but one had not taken part: §§15-17.

7.10 Two recent examples of a protest injunction going to trial can be found in *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J), relating to Insulate Britain, and *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J), relating to Just Stop Oil.

7.11 A recent example of a Claimant failing to progress a claim (or discontinue it) can be seen in *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein). In that case, the court decried the fact that the Claimant had failed, for a number of years, to take steps to obtain a directions hearing following the decision in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA). Even on the Claimant's own case, it had taken 7 months to apply for the interim injunction to be discharged following a material change in circumstances:

[128] CPR r12.2(b).
[129] See, for example, *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch), §§32 and 60 (HHJ Klein); *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §108. See, also, **§6.39 above**.

planning permission for the relevant fracking sites having lapsed. The court found that the Claimant had acted improperly in waiting so long. Ultimately, it decided not to strike out the claim but did order the discharge of the interim injunction on the ground of material change in circumstances. It did, however, impose a sanction in costs on the Claimant.[130] In the sequel, *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye), the Judge did decide to strike out the claim. She considered that, the interim injunctions having been discharged and the claim having been discontinued against the defendants, the proceedings served no useful purpose such that they were abusive: §114. The claim was, therefore, struck out under the Court's inherent power under CPR r 3.3, 3.4 and 3.1(2)(m).

7.12 As set out at **§6.42(iii) above**, there is a duty to keep the situation under review. This appears to apply to final injunctions just as much as it does to interim injunctions.[131] As such, even where a final injunction is made, Claimants must still consider whether they ought to come back to Court following a material change of circumstances.

7.13 This is separate from in-built reviews ordered by Courts to ensure that there remains a continuing threat of direct action. For example, in all of the following cases, final relief was granted in the form of a 5-year injunction but with provision for an annual review:

i. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J);

ii. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J);

iii. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J);

iv. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson); and,

v. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J).

[130] See also the sequel in *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch), in which Master Kaye made a further costs award against the Claimants.
[131] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §77.

8 HUMAN RIGHTS

8.1 The area of protest injunctions is infused with human rights. There is barely a part of the proceedings left untouched by it: its impact being felt just as much in procedural issues (e.g. notice and service) as in substantive ones. This Chapter deals with the latter. In particular, it considers the tests that will need to be satisfied before a court grants a protest injunction, notwithstanding potential interference with a protestor's ECHR right, as well as how to balance the various competing rights and interests.

(a) The rights in play

8.2 For Defendants, the main rights that will be impacted by a protest injunction will be Articles 10 (freedom of expression) and 11 ECHR (freedom of assembly and association). These state that:

> ***"ARTICLE 10***
>
> **Freedom of expression**
>
> vi. 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.
>
> vii. 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 disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> **ARTICLE 11**
>
> **Freedom of assembly and association**
>
> viii. 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.
>
> ix. 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."

8.3 Articles 10 and 11 ECHR are closely related; the case law has treated Article 11 ECHR as a specific manifestation of the broader Article 10 ECHR right. In the protest context, the analysis under both tends to be identical such that courts invariably deal with them together.

8.4 These rights are given strong protection and it is of their very essence that they can affect or disturb others. As Sedley LJ stated in *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (KB), §20: "*Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having*."

8.5 For Claimants, the main right that will be impacted by those carrying out direct action will be Article 1 of Protocol 1 ECHR. This states that:

> "(1) 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."

8.6 There is House of Lords authority that "core" public authorities – e.g. governmental organisations – do not themselves enjoy ECHR rights. This is because they cannot be "*victims*", for the purpose of s.7 of the Human Rights Act 1998, as that term is defined in Article 34 ECHR as "*any person, non-governmental organisation or group of individuals*".[132]

8.7 In a series of protest cases, however, the courts seemingly *have* allowed public authorities to rely on their A1P1 ECHR rights (or equivalent common law rights) against protestors. The matter was fully argued in *HS2 v Persons Unknown* [2022] EWHC 2360 (KB). Knowles J appears to have found that he was bound by Court of Appeal authority that even core public authorities can rely on A1P1 ECHR "*and the common law values they reflect*" in a protest injunction case: §§125-129. The reasoning in *Aston Cantlow* was not dealt with.

8.8 For other examples where this approach has been taken, see:

[132] *Aston Cantlow v Wallbank* [2004] 1 AC 546 (HL), §8 (Lord Nicholls), §45 (Lord Hope), §87 (Lord Hobhouse).

i. *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §28 (Lewison LJ);

ii. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1114 (Ch), §24 (Arnold J); and,

iii. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch), §22 (Arnold J).

(b) Private land

8.9 The position is straightforward where a Claimant is alleging trespass on private land; Articles 10/11 ECHR will provide no protection to those protesting on privately owned land or upon publicly owned land from which the public are generally excluded.[133] It is not entirely clear whether Articles 10/11 ECHR are engaged at all in such a situation[134] but, whether or not they are, the result is the same. A possible exception to this is where it can be said that the bar on access to private property would lead to the essence of the right being destroyed – e.g. where an entire town is controlled by a private body.[135]

8.10 The effect is that in this context a protestor has, at least for all practical purposes, no rights for the Court to weigh in the balance and a protest injunction will generally be granted as a matter of course.

(c) Public land

8.11 The situation is different where protest injunctions are sought covering land which the public have some legal entitlement to access. This most commonly includes the public highway but can include other types of land, such as park land, and other public spaces, such as Parliament Square. In these instances, courts will have to consider the Article 10/11 ECHR rights of protestors.

[133] *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§40-50, relying on *Appleby v UK* (2003) 37 EHRR 38; *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §36 (Longmore LJ).
[134] In *Hicks v DPP* [2023] EWHC 1089 (KB), for example, Chamberlain J stated that an argument to the effect that Articles 10/11 ECHR were not engaged at all in these circumstances was "*ambitious*": §46. But he then stated that it was not necessary for him to decide the issue. Also in *DPP v Bailey* [2023] 2 WLR 1140, §57, the Divisional Court stated that "*This is an arid debate in the context of this case, as the end result on either analysis is the same.*"
[135] *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§44-42.

i. Difference between protest and direct action

8.12 The case law has determined that there is a fundamental difference between simple protest and (peaceful) direct action; unlike the former, the latter involves as its aim the deliberate disruption and frustration of a person's lawful activity. Those seeking to obtain a protest injunction are generally only concerned to stop direct action rather than protest *per se*.

8.13 This distinction is analysed in the case law as the difference between seeking to *persuade*, on the one hand, and seeking to *compel* others to act in a way you desire, on the other hand.[136] Whereas both can fall within Article 10/11 ECHR,[137] direct action is not at the core of those rights.[138] It will, therefore, be given less weight when balancing the competing rights and interests in play.[139] By contrast, in *Canada Goose v Persons Unknown* [2020] 1 WLR 417 (KB), §§98 and 125 (Nicklin J), the Court was clearly concerned that the protest injunction restrained simple protest.

8.14 There may be some circumstances in which direct action will not be protected by Article 10/11 ECHR. For example, in *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (KB) (Swift J) a group of protestors threatened to conduct mass disruption at Heathrow airport. The Judge appeared to find that this activity was not protected by Articles 10/11 ECHR:

> "108. Reliance is placed by the Defendants on Articles 10 and 11 of the ECHR, i.e. the rights to freedom of expression and freedom of association. These are, of course, fundamental rights that must be carefully guarded. However, these rights do not entitle ordinary citizens, by means of mass protest or unlawful action, to stop the lawful activities of others.
>
> 109. The activity that is intended by Plane Stupid and others is not a lawful assembly for the purpose of communicating their views to members of the public. Such an assembly always carries the attendant risk of being hijacked by a minority of persons intent on behaving unlawfully. In those circumstances, the rights of the law-abiding majority should plainly not be curtailed. But the position here is very

[136] *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §§61-62 (Johnson J); *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §94 (Leggatt LJ).
[137] Direct action will tend to engage Article 10/11 ECHR rights: see, e.g., *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §§74-80 (Males J).
[138] *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB), §57 (Linden J); *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §§176-177 (Hill J); *DPP v Bailey* [2023] 2 WLR 1140 (DC), §§61-62; *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, §86; *DPP v Cuciurean* [2022] 3 WLR 446 (DC), §§36-37; *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §68 (Linden J).
[139] *DPP v Ziegler* [2022] AC 408 (SC), §§70, 74 (Lord Hamblen and Lord Stephens); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(1), (4)-(7) (Males J).

different. The activity intended is not a lawful protest. Its sole purpose is to disrupt the operation of the airport. The actions contemplated may be peaceful in that they involve no violence. They would, however, be designed to interfere with the rights of thousands of people, acting perfectly lawfully, as well as with the lawful activities of an authority responsible for running an operation of vital importance to this country, its international communications and its commercial interests."

8.15 It is possible that this authority, of some vintage in protest injunction terms, simply no longer represents good law. In *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), however, Males J, in the course of dealing with the issue of whether direct action was protected by Article 10/11 ECHR, endorsed it. He stated that:

> "78. It is not surprising that the extreme activities of the defendants in the Heathrow Airport case were held not to be protected by articles 10 and 11. They appear to have accepted that they supported and encouraged "unlawful direct action" in the pursuit of their objectives: see para 23 of the judgment. However, while the case supports the existence of a distinction between peaceful protest and unlawful direct action, "direct action" is not a term of art and it does not necessarily follow that all activities which may be so described are unlawful. Nor does it follow that every action which constitutes a trespass or is contrary to some provision of domestic criminal law is necessarily outside the scope of the articles. So to hold would be contrary to the decision of the Court of Appeal in *City of London Corpn v Samede* [2012] PTSR 1624 , where the establishment of the Occupy camp outside St Paul's Cathedral was found to be tortious and to involve the commission of a criminal offence, not least because it impeded members of the public in doing what they were lawfully entitled to do: see eg the judgment at first instance [2012] EWHC 34 (QB) at [92]. Despite this, the defendants' article 10 and 11 rights were held to be engaged so that the order for possession sought by the City needed to be justified under paragraph 2 of those articles."

8.16 The effect is that certain types of direct action, even if peaceful, may not be protected by Articles 10/11 ECHR.

8.17 This can be contrasted with protests involving some element of violence to person and property – i.e. "*where the organisers engage in violence, have violent intentions, incite violence or otherwise 'reject the foundations of a democratic society'*" – which are not protected by Article 10/11 ECHR.[140]

[140] *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259, §§82, 84-87, 90, 102, 110.

ii. Test to be applied

8.18 When deciding whether to grant a protest injunction (at the interim or final stage), the Court will ask the following questions:[141]

(1) Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

(2) If so, is there an interference by a public authority with that right?

(3) If there is an interference, is it prescribed by law? The relevance of this requirement being that article 10 envisages the right to freedom of expression being subject to such restrictions as are prescribed by law and that article 11 provides that only such restrictions as are prescribed by law shall be placed on the right to freedom of assembly.

(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Article 10 or Article 11?

(5) If so, is the interference 'necessary in a democratic society' such that a fair balance is struck between the legitimate aim and the requirements of freedom of expression and freedom of assembly?

8.19 The analysis is usually focused on the last question, which is in turn answered by considering the following factors:[142]

(1) Is the aim sufficiently important to justify interference with a fundamental right? For this purpose, a Claimant will tend to be able to rely on its own A1P1 ECHR right or other lawful activity it is seeking to pursue.

(2) Is there a rational connection between the means chosen and the aim in view? A protest injunction restraining direct action will invariably be rationally connected to the aim of protecting the Claimant's A1P1 ECHR rights or other lawful activities.

(3) Are there less restrictive alternative means available to achieve that aim? This is considered further below.

[141] *DPP v Ziegler* [2022] AC 408 (SC), §§16, (Lord Hamblen and Lord Stephens). For a recent application of this test, see *Transport for London v Lee* [2023] EWHC 1201 (KB), §§42-46 (Eyre J).
[142] *DPP v Ziegler* [2022] AC 408 (SC), §§16, 64-65 (Lord Hamblen and Lord Stephens).

(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others? This is considered further below.

8.20 In practice, it is the last two of these questions which will figure most heavily in the Court's analysis.

iii. Less restrictive alternative means

8.21 In some cases, Claimants have successfully argued that less restrictive alternative means do not exist on the bases that: (1) damages would not prevent further protests; (2) prosecutions for criminal offences can only be brought after the event and are, in any event, not a sufficient deterrent; and, (3) other methods of deterring the protests are impractical.[143]

8.22 In other cases, where a Claimant has sought to restrain direct action on the public highway, Defendants have argued that a protest injunction should not be granted on the bases that: (1) the precise circumstances in which such conduct will take place will vary; and, (2) it should, therefore, be left to the police to strike the right balance on each occasion and determine how to deal with the protest.

8.23 Different judges have taken different approaches to this argument. In *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB), Bennathan J accepted it. He stated:

> "28. I do have a concern in cases such as this about banning any blocking of the road flowing from the Supreme Court case law in *Ziegler*. The effect of that decision, it seems to me, is that Parliament and the Supreme Court have brought about a situation where the rights of protestors and the rights of those against whom they protect can be assessed and weighed carefully with knowledge of all the facts. An injunction banning any blocking of any road would have the effect of demolishing that delicate balance. There would be no "lawful excuse" defence to a breach of that order. Protestors whose identities, dispositions and activities were completely unknown to the court when the order was made would be liable to imprisonment.
>
> 29. In my view the better course when dealing with actions by protestors that might be found lawful on a *Ziegler* assessment, is that taken by the claimants in this case allowing this court to leave those matters to the police to enforce and the Magistrates' Court to adjudicate. I should make clear that these observations on the law after *Ziegler* do not seek to encourage individuals to block highways nor to

[143] See, e.g., *Transport for London v Lee* [2023] EWHC 1201 (KB) §50 (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(3) (Morris J).

assure anyone that such action can be carried out with impunity. The police have the power to arrest those they consider to be committing an offence under s.137 of the Highways Act 1980, and the courts have the power to convict them."

8.24 The Judge did go on to state that he was "*not purporting to lay down any sort of immutable rule*": §30.

8.25 Bennathan J also took the same approach in *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §§35-42.

8.26 Nicklin adopted a similar approach in *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J) where he stated that:

> "76…unless the Claimants can demonstrate a clear case for an injunction, in my judgment it is better to leave any alleged wrongdoing to be dealt with by the police. Officers on the ground are much better placed to make the difficult decisions as to the balancing of the competing rights…"

8.27 Although, this case was based on alleged harassment so, arguably, different issues arose and a more cautious approach was warranted.

8.28 In other cases, the argument has been rejected. For example, in *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB), Spencer J stated:

> "25…In particular, I do not consider that it is sufficient to leave the situation on the highway to the duties of the police. The aims of the police (to uphold the criminal law) are not identical to the legitimate aims of the Claimant (to avoid public and private nuisance), and I consider that there would be a real risk, if no order were made, that there would be direct physical — and potentially violent — confrontation which the police would be unable to prevent and a risk to the maintenance of public order. The police are generally reactive rather than proactive and the injunction sought would complement the function of the police in maintaining public order and responding to criminal obstruction of the highway"

8.29 The same approach was taken in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC) and *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB), §178 (Hill J).[144]

8.30 In light of the Supreme Court's comments in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC), however, there must now be some doubt about the approach taken by Bennathan J in *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) and *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB). This is because the Supreme Court rejected the point made in *DPP v Ziegler* [2022] AC 408 (SC) that "*Determination of the proportionality of an interference with ECHR rights is a fact-specific*

[144] See also *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §60 (Johnson J).

inquiry which requires the evaluation of the circumstances in the individual case": §§28-29 and 66. Rather, it went on to state:[145]

> "30. …the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act , or the development of the common law…"

iv. <u>Factors to consider as part of fair balance analysis</u>

8.31 When deciding how to strike a fair balance between the competing rights, courts will consider a number of factors, including:[146]

(1) Whether the views giving rise to the protest relate to very important issues and which many would see as being of considerable breadth, depth and relevance. It is rare to find a case where the court finds the issues being protested about do not relate to important issues. In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), for example, Johnson J referred to climate change protestors as being "*motivated by matters of the greatest importance*": §57.[147] This will not, however, be a "*particularly weighty factor*" to avoid judges simply giving greater protection to views they, themselves, think are important.[148]

(2) Whether the protestors believed in the views they were expressing. Again, it is rare to find a case where a protestor does not believe in the views being expressed.

(3) The importance of the precise location to the protestors.[149] In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), Lavender J counted

[145] It should be noted, though, that *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC) itself was a case about the proportionality of a legislative measure.
[146] See *City of London v Samede* [2012] 2 All ER 1039 (CA), §§39-41 (Lord Neuberger MR) and adopted by the Supreme Court in *DPP v Ziegler* [2022] AC 408 (SC), §72 (Lord Hamblen and Lord Stephens).
[147] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §52(ii) (Eyre J).
[148] *Transport for London v Lee* [2023] EWHC 1201 (KB), §24 (Eyre J); *City of London v Samede* [2012] 2 All ER 1039 (CA), §41 (Lord Neuberger MR).
[149] *Hicks v DPP* [2023] EWHC 1089 (KB), §§40-43 (Chamberlain J); *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §22(iv) (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §69 (Linden J); *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §49 (Lord Neuberger MR); *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §47 (Wall LJ).

against the Insulate Britain protestors the fact that their protest on the Strategic Road Network was not directed at a specific location: §40(4)(a).[150] Freedman J took the same view in *Transport for London v Lee* [2022] EWHC 3102 (KB), where those disrupted by the protests (members of the public using the highway) were not the apparent object of the protest (the Government): §§46, 61.[151] In *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §114, it also counted against the protestors that the location of the direct action was chosen merely because it was the best place to interfere with the activities of fracking operators. This can be contrasted with *Westminster CC v Haw* [2002] EWHC 2073 (KB), §21 (Gray J), where the Court found the location of the protest – Parliament Square outside the Houses of Parliament – was appropriate given that its aim was to influence Parliament on its policy towards Iraq. Similarly, in *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), §41 (Bennathan J), a specific term of an interim injunction was not granted, in part due to the importance of the location of the protest on the highway.

(4) The extent to which the protestors could still protest even if a protest injunction was granted.[152] In a number of cases, courts have granted protest injunctions and found that the Defendants are still able to make their points in other ways.[153]

(5) The extent to which the continuation of the protest would breach domestic law.[154]

(6) The duration of the protest. In *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §88, Males J stated that "*a protest which starts as a legitimate exercise of article 10 or 11 rights may become unlawful if it continues for a more extended period. The*

[150] See also *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB), §49 (Bennathan J) and *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(4) (Morris J).
[151] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(iii) (Eyre J).
[152] Although related, I have separated out factors (3) and (4) as being conceptually different.
[153] See *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(v) (Eyre J); *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB), §45(4) (Morris J); *Transport for London v Lee* [2022] EWHC 3102 (KB), §61 (Freedman J); *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §53(iv) (HHJ Lickley KC); *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), §59 (Johnson J); *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB), §22(iv) (Ellenbogen J); *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §§69-70 (Linden J); *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §40(4)(a) (Lavender J); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(7) (Males J); *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §48 (Lord Neuberger MR).
[154] See *Transport for London v Lee* [2022] EWHC 3102 (KB), §51 (Freedman J).

more serious the tortious or criminal conduct in question and the greater the impact on the rights of others, the shorter the period is likely to be before the initially legitimate protest becomes unlawful." [155] Moreover, a court will look at the practical realities of the situation in determining how long the direct action has been continuing for; it will not necessarily be the duration of an individual protest as opposed to the overall length of a course of a campaign of direct action.[156] By contrast, in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §41 (Laws LJ), the fact that the Aldermaston Women's Peace Camp had been taking place each month for over 23 years on the Secretary of State's land without complaint supported the protestors' argument that the camp was not unduly interfering with the Secretary of State's rights.

(7) The degree to which the protestors occupy the land. In *Transport for London v Lee* [2022] EWHC 3102 (KB), although the physical occupation of the roads was quite limited, Freedman J took into account the fact that it caused congestion over a much wider area: §48.

(8) The extent to which the protest interferes with the rights of others.[157] This is against a background that "*Rights worth having are unruly things*" and that activities engaging Articles 10/11 ECHR cannot be interfered with merely because they are "*inconvenient or tiresome*".[158] *Westminster CC v Haw* [2002] EWHC 2073 (KB), §21 (Gray J) is a case where the impact on the rights of others was minimal because few people actually used the inner pavements in Parliament Square, the location of the obstruction.[159] Similarly, in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §48 (Wall LJ), there was no evidence that the presence of the Aldermaston Women's Peace Camp was incompatible with the operational requirements of the landowner. By contrast, in many cases the interference with the rights of others has been substantial and the courts have not been persuaded to find that the matter should be left to the police; such enforcement could only take place after the

[155] See also *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §48 (Lord Neuberger MR).
[156] See, e.g. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §67 (Linden J); *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), §114 (Morgan J); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §89(4) (Males J).
[157] E.g., in relation to highway protests, whether there are alternative routes which can be used: *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §40(4)(b) (Lavender J).
[158] *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, §43 (Laws LJ).
[159] Contrast *Mayor of London v Hall* [2011] 1 WLR 504 (CA), §49 (Lord Neuberger MR).

event meaning inevitable loss to the Claimant.[160] In *Transport for London v Lee* [2022] EWHC 3102 (KB), Freedman J considered it strongly arguable that the blocking of roads in London by Just Stop Oil had caused substantial and unreasonable interference and disruption to the owner of the land and members of the public trying to use the highway, not to mention risking the life of protestors and emergency services: §§43-44, 61.[161] He referred to the fact that the protests sometimes occurred during the morning rush hour, leading to very large numbers of people being inconvenienced: §50. Freedman J was also concerned about the considerable police time and diversion of police resources that was being caused by the protests: §45.[162] In *Transport for London v Lee* [2023] EWHC 1201 (KB), Eyre J further relied on the anger and frustration caused to others and the risk of consequent disorder: §53(iv). In *Hicks v DPP* [2023] EWHC 1089 (KB), the defendant attended a hospital to question reports in the media that it was overflowing with COVID-19 patients. In a stairwell of the hospital, she abused and threatened health care professionals. The Court found that although her speech was political and so engaged Article 10 ECHR, there was no need to threaten or abuse anyone: §43.

(9) The extent to which the subject of the protest has been through the democratic processes.[163] In *HS2 v Persons Unknown* [2022] EWHC 2360 (KB), Knowles J relied heavily on the fact that HS2 was the "*culmination of a democratic process*" in granting the protest injunction: §§16-23. Also in relation to protests on HS2, in *DPP v Cuciurean* [2022] 3 WLR 446 (DC), Lord Burnett of Maldon CJ stated Articles 10/11 ECHR "*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.*": §84.[164] In *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch), Hugh Sims KC (sitting as a Deputy High Court Judge) relied on the fact that the Claimant had gone through the full planning process in order to fell a tree that the protestors sought to protect: §§35, 39, 42-45.

[160] See **§§8.22-8.30 above**.
[161] See also the judgment in the final trial of the matter to similar effect: *Transport for London v Lee* [2023] EWHC 1201 (KB), §§52(iv) and 53(i) (Eyre J).
[162] See also *Transport for London v Lee* [2023] EWHC 1201 (KB), §53(ii) (Eyre J).
[163] See *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §§4-5 (HHJ Lickley KC); *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB), §§90-91 (Males J);
[164] In relation to HS2, see also *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB), §71 (Linden J).

8.32 Some cases have stated that the peaceful nature of a protest, and the lack of disorder, is also a relevant factor.[165] In *DPP v Cuciurean* [2022] 3 WLR 446 (DC), however, Lord Burnett of Maldon CJ appeared to suggest that this was not relevant – "*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.*": §86.

[165] *DPP v Ziegler* [2022] AC 408 (SC), §80 (Lord Hamblen and Lord Stephens); *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §39(1)-(2) (Lavender J).

9 SCOPE OF THE INJUNCTION

9.1 In *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), §58, Ritchie J set out various requirements relating to the scope of protest injunctions. Although expressly said to refer to injunctions against Persons Unknown, these specific factors apply equally to named Defendants:

> "…
>
> **The terms of injunction**
>
> (9) The prohibitions must be set out in clear words and should not be framed in legal technical terms (like 'tortious' for instance). Further, if and in so far as it seeks to prohibit any conduct which is lawful viewed on its own, this must also be made absolutely clear and the claimant must satisfy the Court that there is no other more proportionate way of protecting its rights or those of others.
>
> **The prohibitions must match the claim**
>
> (10) The prohibitions in the final injunctions must mirror the torts claimed (or feared) in the Claim Form.
>
> **Geographic boundaries**
>
> (11) The prohibitions in the final injunctions must be defined by clear geographic boundaries, if that is possible.
>
> **Temporal limits - duration**
>
> (12) The duration of the final injunction should be only such as is proven to be reasonably necessary to protect the claimant's legal rights in the light of the evidence of past tortious activity and the future feared (quia timet) tortious activity.
> …"

9.2 This Chapter will consider these requirements in more detail.

(a) Terms must correspond to threatened tort, including lawful conduct if necessary

9.3 Generally, the conduct sought to be prohibited by a protest injunction must be closely tailored to the cause of action relied upon – in other words, it must incorporate and be confined to the ingredients of the relevant tort. For example:

i. In a trespass claim, the injunction must state something along the lines of:

> "The Defendant is prohibited from entering or remaining on the Claimant's land without the Claimant's consent."

ii. In a conspiracy to injure by unlawful means claim, the injunction must state something along the lines of:[166]

> "The Defendant must not with any other person with the intention of causing damage to the Claimant by preventing or impeding the construction of the pipeline do [the prohibited conduct]."

9.4 The courts have, however, admitted of some flexibility to this principle. In *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §50, Leggatt LJ accepted that "*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*." This was confirmed in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §§78, 82(5), and *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), §78 (Sweeting J).

9.5 A claim which fell foul of this rule was *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) itself. The injunction applied for sought to restrain a huge amount of protest activity outside the Canada Goose shop on Regent Street in London. In the course of finding that the interim injunction previously granted was impermissibly wide, the Court of Appeal stated:

> "86…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."

9.6 Similarly, *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) involved feared direct action on environmental grounds against the Claimant's business importing and processing oil. Whilst granting an injunction prohibiting certain action, Bennathan J refused to include the following terms:

> "Blocking, endangering, slowing down, preventing, or obstructing the free passage of traffic onto or along those parts of the Access Roads"

9.7 The Judge decided that, at that moment in time, the injunction should not be granted to catch otherwise lawful conduct:

[166] Using the example in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), §59 (HHJ Lickley KC).

> "40. In *Canada Goose* the Court stated that an injunction can ban what would otherwise be lawful, but the way that proposition was expressed was in qualified [and perhaps even reluctant] terms: *may* include lawful conduct if, and *only to the extent* that, there is *no other proportionate means* of protecting the claimant's rights [emphasis added]. The Court was clearly not expressing a rule that a defendant's otherwise lawful conduct was *irrelevant* to whether an injunction should be granted. The limit of that ruling in *Canada Goose*, it seems to me with respect, is that the facts of a certain case may require such an order which I, of course, unhesitatingly accept. My conclusion is only that this case, at present, does not."

9.8 This can be contrasted with a case such as *Esso Petroleum v Breen* [2023] EWHC 2013 (KB), in which a protest injunction was granted to prevent direct action against the upgrading of the Claimant's pipeline. Given the potential for the protest injunction to catch lawful conduct, Knowles J accepted the submission that:[167]

> "40… (5)…Any interference with Articles 10 or 11 on the highway which might emerge from the order is minor and (this, ultimately, the Claimant says is what counts) certainly proportionate given what is at stake in this case - where a strategically national important project has been explicitly threatened by persons who mean to stop it."

(b) Terms must be sufficiently clear and precise

9.9 The terms of any injunction must be clear and certain to make it clear what is permitted and what is prohibited.[168]

9.10 The fullest treatment of the need for clarity and precision in protest injunctions can be found in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§54-83 (Leggatt LJ). Although an appeal against a committal order, one of the grounds of appeal was that certain paragraphs of the protest injunction were insufficiently clear and certain. The following main propositions can be taken from the case:

i. There are three types of unclarity, in particular where words are (§§57-58):

- Ambiguous: words having more than one meaning.
- Vague: terms worded in such a way so as to create borderline cases where it is inherently uncertain whether the term applies. It will

[167] See also *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), where HHJ Lickley KC came to the same conclusion at the interim injunction stage.
[168] *AG v Punch Ltd* [2003] 1 AC 1046 (HL), §35.

be unacceptably vague where there is no way of telling with confidence what will fall within its scope and what will not.

- Inaccessible: terms which are convoluted, technical or opaque and, therefore, not readily understandable to Defendants. Where Defendants include Persons Unknown, terms must not be such as to require legal advice to understand.

ii. Whether the terms of a protest injunction are unclear is dependent on context. What may be clear in one situation may be unclear in another: §60.

iii. There is nothing unclear, in principle, about including a requirement of intention in an injunction. It is an ordinary English word to be given its ordinary meaning. *Dicta* to the contrary in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) was wrong: §§63-65, 68-69, 74. In any contempt application, however, a Claimant will still have to prove such intention beyond reasonable doubt. That said, the Court of Appeal has said it is better practice to formulate a prohibition without reference to intention if the tortious act can be described in ordinary language without doing so.[169] It is not clear how this can be squared with cases where the court has positively included a requirement for intention as a further layer of protection for protestors: see, e.g., *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB), §24(6) (Lavender J).

iv. If a term of a protest injunction is not sufficiently clear for any of these reasons, a Defendant should not be held in contempt of court for allegedly breaching it: §59. But this will only be the case if the unclarity itself is material to the alleged breach: §60.

9.11 Context is key. For example, in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), a term of the interim injunction sought to restrain slow walking in front of vehicles with the object of slowing them down and the intention of causing inconvenience and delay. Longmore LJ found that this was impermissibly uncertain (§§40-42): no damage may result and how slow was slow?

9.12 By contrast, in *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), the Court of Appeal found that a term of the injunction prohibiting "*blocking or obstructing the highway*

[169] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), §81.

by slow walking in front of vehicles with the object of slowing them down" was acceptable. The Court distinguished *Ineos* on the basis that *Ineos* was a "*pure"* precautionary injunction where no direct action had yet taken place. In *Cuadrilla*, however, there was a well-documented history of this sort of conduct which provided a solid basis for the prohibition.

9.13 In *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB), Bennathan J refused to include the following term in an interim injunction:

> "Blocking, endangering, slowing down, preventing, or obstructing the free passage of traffic onto or along those parts of the Access Roads…"

9.14 One of the grounds for doing so was that it lacked clarity. The Judge stated:

> "37…Does a protestor standing at the very edge of the carriageway endanger themselves or a vehicle? Would a large group of noisy protestors proximate to the road cause a cautious tanker driver to slow down?"

9.15 Bennathan J did stress, however, that he was not setting down an immutable rule. Rather, this specific case had not yet developed to the stage where such a prohibition was justified: §42.

9.16 In *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB), Sweeting J found that carrying out the prohibited activity "*in the locality of*" the claimant's site was sufficiently clear: §§149-151.

9.17 The courts will also consider whether the Defendant was himself/herself clear about what conduct was prohibited and whether it caught him/her. In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, for example, a majority of the Court of Appeal found that a plausible alternative construction of the protest injunction – that it did not catch the Defendant – did not make the finding of contempt unjustified: §51. This was because the Defendant himself had always understood that he was caught by the order.

(c) Clear geographical limits

9.18 In most cases a Claimant will be able to define the area covered by the protest injunction without too much difficulty. This is most obviously done by way of a map attached to the injunction which delineates the relevant land on which the injunction bites. It is rare for a claim to become unstuck on this ground.

9.19 There are some cases where it is more difficult. *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB) (Males J) is such an example, where the Defendants were carrying out direct action

to prevent the felling of a large number of highway trees throughout Sheffield, which the Claimant was doing in exercise of its statutory duties. This most usually consisted of Defendants standing under a tree to be felled to frustrate its felling. The Claimant obtained an injunction which covered "safety zones" around trees to be felled. In order to make the injunction geographically certain, the injunction provided for fencing to be erected around each tree to be felled, so that Defendants could be clear on where exactly they were and were not allowed to stand.

(d) Clear temporal limits

9.20 It will be unacceptable for an injunction to have no temporal limit.[170]

9.21 Where an interim injunction has been granted, there are generally now two possibilities:

i. Interim injunctions will often be expressed to be effective "*Until trial or further order*", though this can only be ordered if "*made in the presence of all parties to be bound by it or made at a hearing of which they have had notice*" – i.e. not at without notice hearings.[171] In order to make sure that this temporal limit does not become academic, there are obligations on a Claimant to make sure that steps towards a final trial are taken (see **§6.42(ii) and Chapter 7 above**).

ii. In some cases, courts will set a short defined temporal limit for the purpose of making sure the final trial comes on quickly. For example, in *Esso Petroleum v Breen* [2022] EWHC 2664 (KB), HHJ Lickley KC granted an interim injunction for 4 months, within which the final trial had to take place. He did not grant it for 15 months as sought, until December 2023, because that would in effect be a final order, the relevant works having been planned to finish by that date: §64. Similarly, in *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB), the Claimants sought to continue an interim injunction for a further 12 months but Collins Rice J instead made directions for trial to come on within a few months. The interim injunction was only continued for the intervening period. In *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch) Rajah J took a similar approach by only continuing the interim injunction for a further 6 months.

[170] *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA), §43 (Longmore LJ).
[171] CPR PD25A, §5.4.

9.22 A third possibility used to be the Court providing for a longstop date with a regular review mechanism. This was on the basis that interim injunctions against Persons Unknown would sometimes not need to proceed to a final trial at all, there being no identified individual actually defending himself/herself. Following *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, however, the distinction between interim and final injunctions has been removed meaning that this third possibility amounts, in effect, to final relief. The result is that a Claimant will have to prove its case as if a final injunction were being sought.

9.23 For final injunctions, there will generally be a defined end-date with reviews built in.[172]

9.24 In *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45, the Supreme Court appeared to suggest that final injunctions against Persons Unknown should never extend for more than a year:

> "225…Similarly, injunctions of this kind must be reviewed periodically (as Sir Geoffrey Vos MR explained in these appeals at paras 89 and 108) and in our view ought to come to an end (subject to any order of the judge), by effluxion of time in all cases after no more than a year unless an application is made for their renewal. This will give all parties an opportunity to make full and complete disclosure to the court, supported by appropriate evidence, as to how effective the order has been; whether any reasons or grounds for its discharge have emerged; whether there is any proper justification for its continuance; and whether and on what basis a further order ought to be made."

9.25 That case involved, however, borough-wide injunctions obtained by local authorities against travellers, a group in relation to which local authorities have various statutory duties. The Supreme Court appeared to accept the situation may be different in the context of protest, stating:

> "(11) Protest cases
> …
> 236… The duration and geographical scope of the injunction necessary to protect the applicant's rights in any particular case are ultimately matters for the judge having regard to the general principles we have explained."

9.26 This was confirmed in *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), where Ritchie J granted the Claimants a 5-year final injunction subject to annual review.

9.27 The duration of the injunction will, then, depend on the circumstances.

[172] See **Chapter 6 above.**

9.28 Where the Claimant's activity being disrupted is a discrete project, such as construction of a development, it will usually be proportionate to seek an injunction until that project is planned to be complete.

9.29 Where the Claimant's activity being disrupted is an ongoing process with no defined endpoint, such as its usual commercial activity, it is more difficult to predict what approach a court will take. There have been protest cases in the past where relatively long injunctions have been granted. For example, in *Harrods Ltd v McNally* [2018] EWHC 1437 (KB), an injunction was directed at limiting the activities of the protestors objecting to Harrods' policy of selling fur products. Nicol J extended an injunction originally granted in 2013 for a further 5 years. More recently, however, it was difficult to find a case where a protest injunction had been granted for longer than 18 months. That was until *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946, §108, where the Court of Appeal said that it was good practice to incorporate a periodic review into the order.[173] Since then, the courts appear to have taken a slightly different approach. In *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (relating to Insulate Britain), for example, Morris J granted a final injunction for 5 years but with a yearly review by the Court for supervisory purposes: §52. The same approach was taken in four recent cases referred to at **§7.13 above**.

9.30 On whether a final injunction can be extended before the fixed time limit expires, particularly where there is no liberty to apply to extend, Nicklin J expressed doubts in both *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB), §4(b) and *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB), §43(h).

[173] *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA), §108.

10 CONTEMPT

10.1 Unlike possession proceedings, the only method of enforcement for breach of a protest injunction is committal for contempt of court – i.e. breach of a court order. This requires the Claimant to make an application to the court seeking to commit a Defendant on the basis that they have breached the injunction. Sanctions can be extremely serious, including imprisonment.

10.2 Over the last few years there has been an explosion in case law on issues arising from contempt applications, most particularly flowing from environmental protests.

(a) Nature of committal proceedings

10.3 The nature of committal proceedings – and its hybrid civil/criminal foundations – was recently valuably discussed in *Sheffield City Council v Brooke* [2019] QB 48 (KB). Males J found that it had more in common with criminal proceedings:

> "58. The application to commit Mr Brooke for contempt has something in common with both civil and criminal proceedings. It arises out of civil proceedings for an injunction which is a civil remedy, albeit that in the present case the injunction was granted (and Mr Brooke's undertaking was given) to restrain conduct which was both criminal … and tortious …. It has been subject to civil rules of procedure and evidence. The contempt proceedings themselves are civil proceedings.
>
> 59. On the other hand, the application is not concerned with financial compensation which is the typical function of civil proceedings. Its purpose is to enforce the order of the court, to punish past breaches of the order and to deter future breaches. The more demanding criminal standard of proof applies and contempt may be punished with a prison sentence, the paradigm example of a criminal sanction. A defendant who was punished for contempt by being sent to prison would not be being punished for committing an obstruction of the highway or for the tort of trespass, neither of which attracts a sanction of imprisonment, but for disobedience to the order of the court, a more serious matter which damages the proper functioning of society. As I indicated at the outset of this judgment, it is critical to the rule of law that the orders of the court should be complied with. The law of contempt therefore represents a vital public interest and invokes the full power of the state to enforce that interest.
>
> 60. In the present case, moreover, the injunction was sought by the council as a public authority in order to enable it to carry out its function as a highway authority. Enforcement of an injunction in such circumstances serves a more obviously public purpose than in the case of a purely private dispute.
>
> 61. Applying the test which I have described, I conclude that the objective of the application to commit Mr Brooke is essentially a public objective which has more

in common with the objective of criminal proceedings than it does with that of civil proceedings, notwithstanding that as a matter of legal classification the application is classified as civil."

10.4 Due to the draconian power involved – punishing contempt by an order for committal – the power is usually reserved to a Divisional Court (i.e. two or more judges of the Division sitting together). This is subject to exceptions, e.g. where it is considered the power could be properly delegated to a single judge.[174]

10.5 In a contempt application, the burden of proof is on the Claimant to show that the Defendant has, beyond reasonable doubt, intentionally committed an act which is in breach of the protest injunction. If the protest injunction is reasonably susceptible to more than one meaning, the meaning favourable to the Defendant should be adopted,[175] although there may be exceptions. For example, in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, Coulson LJ (in the majority) found that any question of doubt should be resolved in the Claimant's favour in circumstances where the Defendant had raised the issue of whether he was caught by protest injunction so late in the day: §52.

10.6 Given the seriousness of committal applications, Claimants must consider carefully: (i) the terms of the injunction and whether the conduct complained of amounts to a breach of it;[176] and, (ii) whether to make a committal application against individuals who may have inadvertently breached the protest injunction in a trivial or technical way and where no penalty is likely. This is particularly important where Persons Unknown are Defendants, given the potential number of individuals that could accidentally be subject to the protest injunction. A failure to do so may have serious consequences. In *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J), for example, the Claimants were severely criticised for bringing a committal application against a solicitor who had confirmed in a statement of truth that she was unaware of the protest injunction and whose breach was, at best, technical: §96. As a result, Nicklin J sanctioned the Claimant by making an order requiring the Claimants to obtain the permission of the court before bringing further contempt applications: §§102-104.

[174] *White Book* (2022), §81.3.8.
[175] *Sheffield City Council v Brooke* [2019] QB 48 (KB), §7 (Males J).
[176] *QRT v JBE* [2022] EWHC 2902 (KB), §47 (Nicklin J).

(b) Pre-action process

10.7 Before bringing an application for committal, it may be appropriate to send a pre-action letter to the proposed Defendant. This will put the Defendant on notice of the Claimant's intentions and enables the Defendant to obtain legal advice at an early stage. It also gives the Defendant the chance to provide an explanation for, and possible defence of, his or her actions to the Claimant and, thereby, possibly avoid the application being brought in the first place. Claimants may be criticised for not engaging in a pre-action process, particularly if the factual position is not straightforward.[177]

(c) Procedure – CPR Part 81

10.8 The procedure for making a contempt of court application is set out in CPR Part 81. Following criticisms of the old regime, CPR Part 81 was significantly amended from 1 October 2020.[178] Those acquainted with the previous rules must, therefore, familiarise themselves with the new version.

10.9 In summary, the main procedural rules to be aware of are as follows:

i. A contempt application is made by way of a Part 23 application in the proceedings in which the protest injunction, alleged to have been breached, was made.[179] The N600 form ought to be used unless there are compelling reasons for not doing so.[180]

ii. Contempt applications must be supported by written evidence given by affidavit or affirmation.[181] This requirement also appears to apply to evidence filed and served subsequently – i.e. it does not just apply to evidence filed at the same time as the application.

iii. The contempt application must include all of the statements set out in CPR r.81.4(2)(a)-(s) unless they are wholly inapplicable. Of particular importance, it must set out:

[177] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §94 (Nicklin J).
[178] See a discussion on the new CPR 81 in *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§53-66 (Nicklin J).
[179] CPR r.81.3(1).
[180] *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §19 (Nicklin J).
[181] CPR r.81.4(1).

(1) The date and terms of the protest injunction alleged to have been breached.[182]

(2) A brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order.[183] This is conventionally done in a separate document headed "Grounds".[184] A Defendant, or the Court of its own motion, may seek to argue that a sufficiently clear summary was not provided in breach of CPR r81.4(2)(h). The test is whether the application notice contains a clear summary, enough to enable the defendant to understand the case which has to be met.[185] *QRT v JBE* [2022] EWHC 2902 (KB) (Nicklin J) is a case where the Judge found the claimant had failed to comply with this requirement, which would justify the Court either dismissing the application entirely or giving the Claimant the opportunity to amend the application: §33. In *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §89, however, Nugee LJ emphasised the fact that only a "*brief summary*" was required rather than a "*fully particularised pleading*". It was "*more akin to a count on an indictment*".

(3) A penal notice to the effect that the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law.[186] Previously, in *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch), the Court confirmed that if a penal notice had not been included on the face of an order (e.g. by mistake), a Claimant could not add a penal notice of its volition; it had to apply to the Court to vary the order: §§15-21. Following amendments to the Civil Procedure Rules,[187] however, from 6 April 2024 it appears that a Claimant will be able to add a penal notice to an order without a further order from the Court.

iv. Unless the court directs otherwise, a contempt application must be served personally on the Defendant.[188] If no objection is made, the application can

[182] CPR r.81.4(2)(b).
[183] CPR r.81.4(2)(h)
[184] *QRT v JBE* [2022] EWHC 2902 (KB), §24 (Nicklin J).
[185] *QRT v JBE* [2022] EWHC 2902 (KB), §29 (Nicklin J); *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §87 (Nugee LJ).
[186] CPR r.81.4(2)(p).
[187] By rule 11 of the Civil Procedure (Amendment) Rules 2024.
[188] CPR r.81.5(1).

instead be served on the Defendant's legal representative.[189] A Court can, however, dispense with personal service and in *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §§57-77 and 81-83 (Nugee LJ), a non-protest case, it was held that the Court has power to do this retrospectively at a committal application. It did so in that case due to the fact that the defendant had actual knowledge of the terms of the order.

v. A contempt hearing may take place in the absence of the Defendant.[190]

vi. In a committal application, a Defendant is entitled to legal aid as of right – i.e. without any assessment of means or whether it is in the interests of justice for representation to be provided. The application must be made to the Legal Aid Agency.[191] But in order to obtain funding for the services of a KC, an additional application must be made to the Court. Such an application was refused in *Esso Petroleum v Breen* [2022] EWCA Civ 1405.

10.10 CPR r.81.7(1) clarifies that the court may make directions as to hearings. The position with listing committal hearings has never been straightforward. Under the old CPR Part 81, service of the application had to be effected at least 14 days before the hearing. That appeared to allow for the possibility of the Defendant having 14 days to obtain legal advice and prepare a defence before the substantive hearing. That would give the Claimant little idea about what the Defendant's case would be and not enough time for a Defendant to mount a proper defence against an allegation with potentially very serious consequences. The new CPR Part 81 has not expressly solved this problem but it has now removed the 14-day requirement. In practice, the effect is that the first hearing can now come on within 14 days and will usually be a directions hearing, particularly where the defendant is a litigant in person, enabling them to be advised of their right to remain silent, the opportunity to seek legal advice and representation, and the availability of legal aid.[192] A proper timetable can then be set down for trial, if the allegation is going to be defended. There is still no requirement for pleadings.[193]

[189] CPR r.81.5(2).
[190] CPR r.81.4(o).
[191] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §31 (Dame Victoria Sharp P and Chamberlain J).
[192] *QRT v JBE* [2022] EWHC 2902 (KB), §23 (Nicklin J).
[193] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §30 (Coulson LJ).

10.11 The court also has a power to issue a bench warrant to ensure Defendants attend a hearing.[194]

10.12 A Defendant may apply to discharge the committal order by way of a Part 23 application.[195]

10.13 In some cases, a Defendant will be involved in both civil and criminal proceedings at the same time. It is usually inappropriate to adjourn civil proceedings to await the outcome of criminal proceedings. The Court will, however, consider whether the Defendant may be punished twice for the same misconduct and whether the penalty for contempt would be manifestly discrepant with any potential criminal sentence.[196]

(d) Knowledge requirement

10.14 There is no requirement to show that the Defendant was aware of the terms of a protest injunction in order to prove contempt. All that a Claimant will usually have to do is comply with the service provisions set out in the interim or final injunction; no further knowledge requirement on the part of the Defendant is necessary. This is one reason why it is so important to have robust service provisions and to provide sufficient notice of the protest injunction, particularly in relation to Persons Unknown, which are likely to come to the attention of Defendants.

10.15 This position was confirmed in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, where Warby LJ stated:[197]

> "58. These authorities indicate that (1) in this context "notice" is equivalent to "service" and vice versa ; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non- compliant with the order; (3) there is no further requirement of mens rea, though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt. I agree also with the Judge's description of the appellant's argument below: "it replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." But nor am I comfortable with the notion that service in accordance with an order properly made can be set aside if the respondent shows that it would be "unjust in the circumstances" to proceed. This is not how the Court saw the matter

[194] CPR r.81.7(2).
[195] CPR r.81.10.
[196] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §§30-33 (Cotter J).
[197] Cited in *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB), §70 (Nicklin J) and *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB), §§26-28 (Nicklin J).

in Cuadrilla, nor is it a basis on which good service can generally be set aside. It also seems to me too nebulous a test.

…

62. One can perhaps understand the unease referred to by the Judge at the notion that a person may be held in contempt of court even though he is not shown to have had actual knowledge of the relevant order, or its relevant aspects. For my part, I doubt this is a dilemma to which a solution is required. The situation does not seem likely to occur often. And if it does then, as this Court indicated in Cuadrilla, no penalty would be imposed. I do not see that as problematic in principle, especially as this is a civil not a criminal jurisdiction..."

10.16 The point was, subsequently, fully argued in *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J). Counsel for the Respondents argued that the Court was not bound by the "*observations in Cuciurean*", that *Cuciurean* was in any event out of step with previous authority, and that notice of an injunction meant knowledge of it: §§16-27. This was rejected by Soole J, who considered that *Cuciurean* was not out of step with previous authority and was binding on him: §17. The same conclusion was reached in *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly), §49, apparently without the Court being referred to the *Kirin* case.

10.17 There are also cases, however, where the Court will *retrospectively* dispense with the need for service: see **§10.9(iv) above**.

10.18 Knowledge of the order will, however, inevitably be relevant at the stage of determining what sanction to impose.[198] Indeed, there have been occasions where a court has criticised a Claimant for even making a committal application against a Defendant who had been unaware of the protest injunction (see §**10.6 above**).[199]

(e) Defences

10.19 There are very few defences to a committal application if it can be shown that the Defendant did a deliberate act which amounted to a breach of the terms of an order. In this sense, contempt involves strict liability. In some very specific circumstances, however, the following defences can be relied upon, as set out below.

10.20 Impossibility: whilst it is not a defence to show that compliance with an order would be burdensome, inconvenient or expensive, it is a defence to show that compliance was

[198] *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §25 (Leggatt LJ).
[199] *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J).

not possible.[200] This is because the Defendant did not have the choice whether to commit the relevant act or omission.

10.21 Defence of another: acting in defence of another can be a defence to an application for contempt of court.

10.22 In *Sheffield City Council v Brooke* [2019] QB 48 (KB), a protestor had managed to climb over Heras fencing and remain in a safety zone within which a tree was about to be felled. Security guards attempted to remove this protestor with force. The Defendant then deliberately broke down the Heras fencing making up the safety zone, before entering the safety zone, in order to reach and defend the protestor. This was a breach of the protest injunction, which had prevented individuals entering such safety zones. Males J found that defence of another was capable of providing a defence to an application to commit for contempt: §48. The action taken by the Defendant must be reasonable, the reasonableness of the action taken being judged objectively by reference to the circumstances as subjectively believed by the Defendant: §52. He did warn, however, that "*a court will need to look carefully and on occasion sceptically at claims made by defendants that it was necessary to intervene*": §49.

10.23 Improper collateral purpose: a committal application must not be brought for an improper collateral purpose. There is distinction between a valid application, even where the applicant may be motivated by revenge, and use of Part 81 CPR for an improper collateral purpose, such as a threat in order to secure settlement.[201] Objective factors such as a hopeless application or one involving purely technical breaches are the signs to look for when considering abuse.[202]

(f) Undertakings

10.24 Even after a contempt application has been made, it is possible for the Claimant to decide not to pursue the matter to a contested hearing. This will usually only be the case where the Defendant accepts he/she has breached the protest injunction, apologises for that breach and undertakes to the court not to carry out further breaches of the protest injunction. If the Claimant is content with this, it can seek to withdraw the application. This approach must, ultimately, be accepted by the court.

[200] *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB), §§10-15 (Chamberlain J).
[201] *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §21 (Linden J).
[202] *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656, §114 (Carr LJ).

10.25 The court will often accept such an undertaking and, thereby, agree to the withdrawal of the contempt application without any sanction being imposed.[203] But sometimes the court does so reluctantly. In *HS2 v Maxey* [2022] EWHC 1010 (KB), the parties sought a consent order whereby the Defendant apologised to the court for acting in contempt and undertook not to do so again. Linden J ultimately granted the consent order but not before saying the following:

> "17. The terms of the proposed consent order suggest a highly pragmatic approach on the part of the claimant having regard to its particular interests and priorities. This is understandable. The court also generally encourages the parties to resolve their differences by agreement if they can. However, the interests and priorities of the parties are not the only relevant consideration in this type of application, given that the court is seized of the fact that its orders were breached by the defendants. Although committal applications for breach of an order are brought by the beneficiary of the order which was breached, and although that party's views as to whether a proposed outcome is satisfactory in terms of ensuring compliance with the order in question and redress for any harm which has been done are relevant, there is also a strong public interest in the court deterring disobedience to its orders and upholding the rule of law.
>
> …
>
> 20. The breaches of the relevant orders by all of the defendants in the present case, and especially the first defendant, were particularly serious. They were well aware of the orders which had been made and, in the case of the first defendant, had the benefit of competent legal advice throughout. What made their failures to comply so serious was the fact that they put their lives and the lives of others at a very high degree of risk. It was extremely dangerous for anyone to be down there in makeshift and poorly-constructed tunnels but they also subjected the CST officers to that risk. Particularly in the case of the first and second defendants, they also heightened that risk by reckless behaviour in obstructing attempts to remove them from the network of tunnels.
>
> 21. Initially, I was therefore very doubtful that I should approve the proposed consent order and invited counsel to explain why I should do so. They then addressed arguments to me which I have accepted..."

10.26 These arguments included the facts that: there was substantial compliance with the order within a relatively short time; the Claimant was slow to proceed with the application for committal; there was no evidence of similar activities by the Defendants since that time; the Defendants made sincere apologies and had given clear undertakings; the Claimant considered that these undertakings were sufficient; and, it

[203] *HS2 v Harewood* [2022] EWHC 2457 (KB) ("**Appendices Follow Containing the Approved Transcripts of 4 Decisions Made Extempore During the Hearings"**), §§51, 58-61 (Ritchie J).

would potentially prevent further litigation, wasted court time and public expense: §22.

10.27 There is no material difference between breaching an undertaking and breaching an injunction.[204] The consequences are exactly the same.

(g) Factual findings

10.28 In *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §96, Nugee LJ summarised the legal principles applicable to findings of fact in a contempt case. These include the following:

> "(1) Contempt has to be established to the criminal standard of proof: *In re L-W (Enforcement and Committal: Contact)* [2011] 1 FLR 1095, para 34 per Munby LJ.
>
> (2) As in criminal cases, inferences can be drawn but only where the jury (or in this case the judge) is able to exclude all realistic possibilities consistent with the defendant's innocence: *R v Masih (Younis)* [2015] EWCA Crim 477 at [3] per Pitchford LJ.
>
> (3) Where the evidence relied on is entirely circumstantial the court must be satisfied that the facts are inconsistent with any conclusion other than that the contempt has been committed*: Masri v Consolidated Contractors International Co SAL (No 3)* [2011] EWHC 1024 (Comm) at [146] per Christopher Clarke J.
>
> (4) Where a number of contempts are charged it is not right to consider individual heads of contempt in isolation: they are details on a broad canvas, and the individual details of the canvas should be informed by the overall picture, although each head of contempt must still be proved beyond reasonable doubt: *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 21 at [18] per Lord Phillips of Worth Matravers MR.
>
> (5) If after considering the evidence the court concludes that there is more than one reasonable inference to be drawn and at least one of them is inconsistent with contempt, the claimants fail: *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch) at [30] per David Richards J, *JSC BTA Bank v Ablyazov (No 8)* [2012] EWHC 237 (Comm) at [8] per Teare J."

(h) Sanctions

10.29 Sanctions for contempt of court are imposed to punish the breach, ensure compliance with court orders and rehabilitate the person in contempt.[205] It has been said, however,

[204] *QRT v JBE* [2022] EWHC 2902 (KB), §51 (Nicklin J).
[205] *National Highways v Buse* [2021] EWHC 3404 (KB), §28 (Johnson J).

that in civil contempts, as opposed to criminal contempts, punishment is a less significant aim than securing compliance with court orders.[206]

10.30 Where an individual had no knowledge of the relevant injunction, no penalty will be imposed for the purely technical breach. The court has no discretion.[207] But that is not the case where the individual is notified of the injunction whilst the breach is taking place and fails to cease.[208]

10.31 Otherwise, the following factors demonstrate the correct approach to sanctions in protest cases:[209]

i. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused. This includes consideration of the following:[210]

(1) Whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy.

(2) The extent to which the contemnor has acted under pressure.

(3) Whether the breach of the order was deliberate or unintentional.

(4) The degree of culpability.

(5) Whether the Defendant was placed in breach by reason of the conduct of others.

(6) Whether the Defendant appreciated the seriousness of the breach.

(7) Whether the Defendant has cooperated, for example by providing information.

(8) Whether the Defendant has admitted his contempt and has entered the equivalent of a guilty plea.

(9) Whether a sincere apology has been given.[211]

[206] *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §105 (Edis LJ).
[207] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), §§110-111 (Soole J).
[208] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), §§150-153 (Soole J).
[209] I have adopted the factors set out by the Supreme Court in *AG v Crosland* [2021] 4 WLR 103 (SC), §44, and expanded them by reference to other case law.
[210] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(d) (Dame Victoria Sharp P and Chamberlain J).
[211] In *Ocado Group plc v McKeeve* [2022] Costs LR 1489 there was a dispute as to the relevance of this factor to the question of seriousness. Adam Johnson J, at §15, found that it was relevant.

(10) The Defendant's previous good character and antecedents.

(11) The impact on police resources.[212]

(12) Any other personal mitigation.

ii. A more benign sentence will ordinarily be justified for protestors carrying out acts of civil disobedience as compared to "*ordinary law-breakers*".[213] As well as there being a moral difference between these two groups, this is also on the basis that conscious objectors are capable of engaging in a dialogue with the court with a view to mending their ways.[214] But the more disproportionate or extreme the protest action, the less obvious is the justification for reduced culpability and more lenient sentencing.[215] Moreover, the courts have sometimes found that what may have started out as a dialogue has turned into a monologue from the Defendant.[216] The conscientious motives of a protestor act do not act as a licence to flout court orders with impunity.[217] In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §75, Coulson LJ stated that:

> "A protestor, no matter how conscientious he or she believes themselves to be, cannot keep ignoring the court's orders, and then expect some sort of discount in the sanction to be applied every time they are dealt with for contempt."

iii. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty. As part of this, the court will keep in mind the desirability of keeping offenders, and in particular first-time offenders, out of prison.[218]

iv. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt. This is likely to be the case where there has been

[212] *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly), §§22-23.
[213] *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch), §24 (Miles J); *National Highways v Buse* [2021] EWHC 3404 (KB), §30 (Johnson J); *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §50 (Dame Victoria Sharp P and Chamberlain J); *AG v Crosland* [2021] 4 WLR 103 (SC), §47; *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA), §§97-98 (Leggatt LJ).
[214] *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J), §§117 and 148; *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §53 (Dame Victoria Sharp P and Chamberlain J).
[215] *R v Trowland* [2023] 4 All ER 766 (CA), §50.
[216] *HS2 v Harewood* [2022] EWHC 2457 (KB), §155 (Ritchie J), confirmed in *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §74 (Coulson LJ).
[217] *AG v Crosland* [2021] 4 WLR 103 (SC), §47.
[218] *SRA v Khan* [2022] EWHC 45 (Ch), §52(3) (Leech J).

serious contumacious flouting of a court order.[219] The maximum sentence is two years' imprisonment.[220] A person committed to prison for contempt is entitled to unconditional release after serving half of the sentence.[221] If a custodial sentence is imposed, a fine can[222] but should not generally be imposed in addition, particularly if the Defendant has no way of paying the fine.[223]

v. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.

vi. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children or vulnerable adults in their care.

vii. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

viii. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. A court can suspend a sentence pursuant to its inherent powers.

In deciding whether to suspend a sentence, the Sentencing Council's Guideline on the "Imposition of Community and Custodial Sentences states that:[224]

- It would not be appropriate to suspend a custodial sentence where: the Defendant presents a risk/danger to the public; an appropriate punishment can only be achieved by immediate custody; or, there is a history of poor compliance with court orders.
- It may be appropriate to suspend a custodial sentence where; there is a realistic prospect of rehabilitation; strong personal mitigation; or where immediate custody will result in significant harmful impact upon others. In the author's experience, a genuine apology to the Court will usually result in a sentence of imprisonment

[219] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §49(e) (Dame Victoria Sharp P and Chamberlain J).
[220] Section 14(1) of the Contempt of Court Act 1981.
[221] Section 258(2) of the Criminal Justice Act 2003.
[222] *White Book* (2022), §81.9.1. In *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §109, Edis LJ said that, "*It may well be that orders for a committal to prison and a fine are rare and confined to cases of people with very substantial assets who show themselves to be prepared to lose their liberty but may be more concerned about those assets*.": §111.
[223] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §§85-86 (Coulson LJ); *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §93 (Coulson LJ).
[224] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §§15, 46 (Coulson LJ).

being suspended, although this will of course depend on all the other circumstances.[225]

ix. Citation of other cases to compare penalties is generally inappropriate in contempt cases because they vary so widely in context and fact.[226]

x. Prison conditions – i.e. how full they are – may also be taken into account in reducing the custodial penalty.[227]

xi. Although there is no requirement to reduce a custodial sentence to reflect a period already spent in custody following arrest, the Court may do so.[228]

10.32 In terms of how long a custodial sentence should be, assuming the custody threshold has been passed, there is no Sentencing Council Guideline to assist. The courts have, occasionally, attempted to come up with a methodology of their own. In *Esso Petroleum v Breen* [2022] EWCA Civ 1405, the Judge at first instance had imposed a sentence of 112 days imprisonment, using the following calculation:

$$\frac{\text{5 days for each day the Defendant remained on the relevant land in breach of the order (5x16 days) + 21 days for each of 5 aggravating factors}}{\text{40\% discount for mitigation}}$$

10.33 This approach was criticised by the Court of Appeal as being "*too granular*", involving "*arbitrary*" multipliers and inviting comparison between different cases: §49.[229] That said, the sentence of 112 days was not found to be excessive and one that the Judge was entitled to impose: §53. A similar critique as to methodology likely also applies to the approach adopted in *HS2 v Harewood* [2022] EWHC 2457 (KB), §§100, 119, 136, 170 where Ritchie J imposed 7 days' custody for every day the Defendants had spent tunnelling under the HS2 development.

[225] *National Highways v Heyatawin* [2021] EWHC 3078 (KB), §65 (Dame Victoria Sharp P and Chamberlain J). But see *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §67 (Coulson LJ), where this was not the case when an apology was made part way through the committal hearing.
[226] *Esso Petroleum v Breen* [2022] EWCA Civ 1405, §12 (Coulson LJ).
[227] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §50 (Cotter J).
[228] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §51 (Cotter J). The sentence was reduced on this basis in *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly), §29.
[229] See also *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §94 (Coulson LJ).

10.34 The courts have differed on whether time spent on remand in parallel criminal proceedings ought to mitigate the sentence. In *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch), Miles J considered that it did: §27. But in *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB), Soole J found that this was not the right course to take: §120.

10.35 Traditionally, courts took the position that whereas Counsel for the Claimant should make submissions to the court on the extent of its powers and the guidelines set out above, Counsel should not make submissions on what sentence should actually be imposed; that was thought to be a matter between the Court and the Defendant.[230] More recently, however, the Court of Appeal has said that there is nothing improper about Claimants remaining partial or suggesting to the Judge the length of imprisonment that should be imposed. This is on the bases that private parties have a proper private interest in the outcome of the application, their lawyers are duty-bound to act on their clients' instructions, and that if they had to act impartially it may discourage Claimants from pursuing such applications contrary to the public interest.[231]

(i) Costs

10.36 In general, the approach to an award of costs in a contempt case involving breach of a protest injunction is the same as in other civil proceedings – i.e. costs should follow the event.[232] Similarly, even where a contempt application is only successful on one of multiple grounds, the Court will not generally make an issues-based costs order. The question will be who, in the event, was ultimately the successful party.[233]

10.37 This general approach is tempered to some extent; because of the relevance of Article 10 and 11 ECHR, the court must be satisfied that the award of costs does not amount to a breach of those rights – it must be necessary in a democratic society for the protection of the rights of the Claimant and maintaining the authority of the judiciary.[234]

10.38 Awarding the Claimant its reasonable costs will usually be proportionate in order to compensate it, at least partially, for the legal costs incurred in vindicating its own

[230] *Rehbeim v Isufai* [2005] EWCA Civ 1046, §20 (Ward LJ), §§25-26 (Smith LJ).
[231] *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA), §§135-138 (Carr LJ); *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §131 (Arnold LJ).
[232] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §50.
[233] *Ocado Group plc v McKeeve* [2022] Costs LR 1489 (Ch), §§54-61 (Adam Johnson J).
[234] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §55 (Lewison LJ).

rights, and maintaining the rule of law and the authority of the court. This is in circumstances where the balance between conflicting rights has already been struck by the terms of the protest injunction and the Defendant has, nonetheless, decided to breach that order.[235]

10.39 The means of the Defendant will generally not be relevant to this assessment.[236] If, however, there is evidence that the Defendant will be completely unable to pay the costs award, this may be relevant in determining whether there is a rational connection between the aim of compensating the Claimant and making a costs award. It will be up to the Defendant to provide satisfactory evidence as the court will not undertake an inquisitorial function to discover the relevant information.[237]

(j) Appeals

10.40 Parties may appeal decisions made on contempt applications.[238]A decision from the High Court can be appealed to the Court of Appeal.[239] A contemnor does not need permission to appeal.[240] A decision from the Divisional Court can only be appealed to the Supreme Court.[241] Where an appeal to the Supreme Court is made from the Divisional Court, permission to appeal must be obtained and it must be certified that a point of law of general public importance is involved.[242]

10.41 Such an appeal will be a review rather than a re-hearing, such that the appeal court will only interfere if satisfied that the decision was wrong or unjust because of a serious procedural or other irregularity.[243] In relation to appealing against a sentence for contempt, the appeal court will be reluctant to interfere with such a decision and will generally only do so if the judge made an error of principle, took into account

[235] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 64. See *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB), §§97-100 (Linden J), for an example of no order to costs being made, despite the claimant being successful, on account of the facts that: the claimants had acted disproportionately in prosecuting one of the alleged breaches; the claimants made the contempt application without giving the defendant a warning that further breaches would result in proceedings; and, there were significant delays in bringing the application.
[236] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§53, 65; *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §64 (Cotter J).
[237] *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA), §§58-60, 64(b).
[238] Section 13 of the Administration of Justice Act 1960.
[239] *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB), §57 (Cotter J).
[240] *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA), §§5-6 (Nugee LJ).
[241] Section 13(2)(b)-(c) of the Administration of Justice Act 1960.
[242] Section 1(2) of the Administration of Justice Act 1960; *National Highways v Buse* [2021] EWHC 3404 (KB), §61 (Johnson J).
[243] CPR r.52.21. See *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519, §56 (Coulson LJ).

immaterial factors or failed to take into account material factors, or reached a decision which was outside the range of decisions reasonably open to him/her.[244]

[244] *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA), §37.

Guidelines from Court

1. In *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, §82, the Court of Appeal set out the following procedural guidelines applicable to proceedings for interim relief against Persons Unknown:

> "(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."

2. In *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB), Johnson J stated:

> "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."

3. In *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB), in the context of injunctions against Newcomers, Ritchie J stated:

> "58. **(A) Substantive Requirements**
>
> **Cause of action**
>
> (1) There must be a civil cause of action identified in the claim form and particulars of claim. The usual quia timet (since he fears) action relates to the fear of torts such as trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy with consequential damage and on-site criminal activity.
>
> **Full and frank disclosure by the Claimant**
>
> (2) There must be full and frank disclosure by the Claimant (applicant) seeking the injunction against the PUs.
>
> **Sufficient evidence to prove the claim**
>
> (3) There must be sufficient and detailed evidence before the Court on the summary judgment application to justify the Court finding that the immediate fear is proven on the balance of probabilities and that no trial is needed to determine that issue. The way this is done is by two steps. Firstly stage (1), the claimant has to prove that the claim has a realistic prospect of success, then the burden shifts to the defendant. At stage (2) to prove that any defence has no realistic prospect of success. In PU cases where there is no defendant present, the matter is considered ex-parte by the Court. If there is no evidence served and no foreseeable realistic defence, the claimant is left with an open field for the evidence submitted by him and his realistic prospect found at stage (1) of the hearing may be upgraded to a balance of probabilities decision by the Judge. The Court does not carry out a mini trial but does carry out an analysis of the evidence to determine if it the claimant's evidence is credible and acceptable. The case law on this process is set out in more detail under the section headed "The Law" above.
>
> **No realistic defence**
>
> (4) The defendant must be found unable to raise a defence to the claim which has a realistic prospect of success, taking into account not only the evidence put before the Court (if any), but also, evidence that a putative PU defendant might reasonably be foreseen as able to put before the Court (for instance in relation to the PUs civil rights to freedom of speech, freedom to associate, freedom to protest and freedom to pass and repass on the highway). Whilst in National Highways the absence of any defence from the PUs was relevant to this determination, the Supreme Court's ruling in Wolverhampton enjoins this Court not to put much weight on the lack of any served defence or defence evidence in a PU case. The nature of the proceedings are "ex-parte" in PU cases and so the Court must be alive to any potential defences and the Claimants must set them out and make submissions upon them. In my judgment this is not a "Micawber" point, it is a just approach point.

Balance of convenience – compelling justification

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

Index of cases

Chronological list

30. *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC) ……...20 Feb 2019
31. *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA)……...28 Mar 2019
32. *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) ……..3 Apr 2019
33. *Secretary of State for Transport* v *PU* [2019] EWHC 1437 (Ch) (David Holland KC) 16 May 2019
34. *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB) (Warby J) ……..18 Jun 2019
35. *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) (Warby J)……25 Jun 2019
36. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J)...20 Sep 2019
37. *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB) ……16 Dec 2019
38. *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA) ……...21 Jan 2020
39. *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA) ……. 23 Jan 2020
40. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA) ……...5 Mar 2020
41. *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J) ……..2 Oct 2020
42. *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J) ……30 Oct 2020
43. *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB) (Mr Andrew Hochhauser KC) ……...21 Jan 2021
44. *UK Oil & Gas v Persons Unknown* [2021] EWHC 599 (Ch) (Falk J) ……9 Feb 2021
45. *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357……..16 Mar 2021
46. *AG v Crosland* [2021] 4 WLR 103 (SC) ……...10 May 2021
47. *DPP v Ziegler* [2022] AC 408 (SC) ……25 Jun 2021
48. *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB) (Hugh Southey KC)…..…13 Jul 2021
49. *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703 (PC) ……4 Oct 2021
50. *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J) …….10 Nov 2021
51. *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB) (Lavender J)…17 Nov 2021
52. *National Highways v Heyatawin* [2021] EWHC 3078 (KB) (Dame Victoria Sharp P and Chamberlain J) ……17 Nov 2021
53. *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA)……30 Nov 2021
54. *National Highways v Buse* [2021] EWHC 3404 (KB) (Johnson J) ……15 Dec 2021
55. *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA) ……13 Jan 2022
56. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB) (Linden J) ….17 Mar 2022
57. *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein) ……25 Mar 2022
58. *HS2 v Maxey* [2022] EWHC 1010 (KB) (Linden J) ……28 Mar 2022

59. *DPP v Cuciurean* [2022] 3 WLR 446 (DC) ……..30 Mar 2022
60. *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J) ……6 Apr 2022
61. *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) (Bennathan J) ……..13 Apr 2022
62. *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J) ……27 Apr 2022
63. *National Highways Ltd v PU* [2022] EWHC 1105 (KB) (Bennathan J) ……11 May 2022
64. *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB) (Nicklin J) ……16 May 2022
65. *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA) ……16 May 2022
66. *Shell UK Oil Products Ltd v PU* [2022] EWHC 1215 (KB) (Johnson J) ……... 20 May 2022
67. *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J) ……2 Aug 2022
68. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB) (Knowles J) ……20 Sep 2022
69. *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly) ……21 Sep 2022
70. *HS2 v Harewood* [2022] EWHC 2457 (KB) (Ritchie J) ……23 Sep 2022
71. *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259……28 Sep 2022
72. *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA)……4 Oct 2022
73. *Ocado Group plc v McKeeve* [2022] Costs LR 1489 (Ch) (Adam Johnson J)……..5 Oct 2022
74. *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB) (Cotter J)……...7 Oct 2022
75. *QRT v JBE* [2022] EWHC 2902 (KB) (Nicklin J)……20 Oct 2022
76. *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC)……21 Oct 2022
77. *Esso Petroleum v Breen* [2022] EWCA Civ 1405……..26 Oct 2022
78. *Three Counties Agricultural Society v PU* [2022] EWHC 2708 (KB) (Spencer J)…….26 Oct 2022
79. *Transport for London v Lee* [2022] EWHC 3102 (KB) (Freedman J)……..31 Oct 2022
80. *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519…….17 Nov 2022
81. *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB) (Soole J)…...…21 Nov 2022
82. *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch) (HHJ Pearce)……....21 Nov 2022
83. *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC)..7 Dec 2022
84. *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch) (Hugh Sims KC)……...16 Dec 2022
85. *DPP v Bailey* [2023] 2 WLR 1140 (DC)……21 Dec 2022
86. *Wolverhampton CC v Persons Unknown* [2023] EWHC 56 (KB) (Hill J)……....21 Dec 2022
87. *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J)……..22 Dec 2022
88. *Valero Energy v Persons Unknown* (unreported) (KB) (Soole J)……..…...…….11 Jan 2023
89. *Exolum v Persons Unknown* (unreported) (KB) (Soole J)……...…….11 Jan 2023

90. *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye)……...8 Feb 2023
91. *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182……..……..23 Feb 2023
92. *Transport for London v Lee* [2023] EWHC 402 (KB) (Cavanagh J)……..24 Feb 2023
93. *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB)…...……..…30 Mar 2023
94. *UK Oil Pipelines Ltd v Persons Unknown* (unreported) (Ch) (Rajah J)……..…....21 Apr 2023
95. *Navigator Terminals v Persons Unknown* (unreported) (KB) (Garnham J..……..28 Apr 2023
96. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J)…...…3 May 2023
97. *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J)……...5 May 2023
98. *Hicks v DPP* [2023] EWHC 1089 (KB) (Bean LJ and Chamberlain J)……....9 May 2023
99. *Essar Oil v Persons Unknown* (unreported) (Ch) (HHJ Monty KC)…….…..…....11 May 2023
100. *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J)……..……23 May 2023
101. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J)……...…….26 May 2023
102. *University of Brighton v PU* [2023] EWHC 1485 (KB) (Constable J)……. 16 Jun 2023
103. *Dyer v Webb* [2023] EWHC 1917 (KB) (Dexter Dias KC)……10 Jul 2023
104. *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) (Sweeting J)……14 Jul 2023
105. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J)……18 Jul 2023
106. *R v Trowland* [2023] 4 All ER 766 (CA)……..31 Jul 2023
107. *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J)……..31 Aug 2023
108. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson)……...6 Oct 2023
109. *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch) (Miles J)…….11 Oct 2023
110. *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J)……..…30 Oct 2023
111. *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45……29 Nov 2023
112. *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB) (Linden J)……..8 Dec 2023
113. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J)…….....26 Jan 2024
114. *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly)..……...29 Jan 2024
115. *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB)……8 Mar 2024
116. *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298…….27 Mar 2024

Alphabetical list

1. *1 Leadenhall Group London v Persons Unknown* [2024] EWHC 530 (KB)
2. *American Cyanamid Co v Ethicon* [1975] AC 396 (HL)
3. *Aston Cantlow v Wallbank* [2004] 1 AC 546 (HL)
4. *Attorney General's Reference (No. 1 of 2022)* [2022] EWCA Crim 1259
5. *AG v Crosland* [2021] 4 WLR 103 (SC)
6. *AG v Punch Ltd* [2003] 1 AC 1046 (HL)
7. *Balfour Beatty Group Ltd v Persons Unknown* [2022] EWHC 874 (KB) (Linden J)
8. *Barking & Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 (CA)
9. *Birmingham City Council v Afsar* [2019] EWHC 1560 (KB) (Warby J)
10. *Birmingham CC v Afsar* [2019] EWHC 1619 (KB) (Warby J)
11. *Bloor Homes Ltd v Callow* [2022] EWHC 3507 (Ch) (Hugh Sims KC)
12. *Broad Idea International Ltd v Convoy Collateral Ltd* [2022] 2 WLR 703 (PC)
13. *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA)
14. *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 (CA)
15. *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC)
16. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 417 (KB) (Nicklin J)
17. *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA)
18. *Canterbury CC v Persons Unknown* [2020] EWHC 3153 (KB) (Nicklin J)
19. *City of London v Samede* [2012] 2 All ER 1039 (CA)
20. *Cream Holdings v Bannerjee* [2005] 1 AC 253 (HL)
21. *Cuadrilla Bowland v Persons Unknown* [2020] 4 WLR 29 (CA)
22. *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357
23. *Cuciurean v Secretary of State for Transport* [2022] EWCA Civ 1519
24. *Donovan v Prescott Place Freeholder Ltd* [2024] EWCA Civ 298
25. *DPP v Bailey* [2023] 2 WLR 1140 (DC)
26. *DPP v Cuciurean* [2022] 3 WLR 446 (DC)
27. *DPP v Ziegler* [2022] AC 408 (SC)
28. *Dyer v Webb* [2023] EWHC 1917 (KB) (Dexter Dias KC)
29. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 (PC)
30. *Enfield LBC v Persons Unknown* [2020] EWHC 2717 (KB) (Nicklin J)

31. *Essar Oil v Persons Unknown* (11 May 2023) (unreported) (Ch) (HHJ Monty KC)
32. *Esso Petroleum v Persons Unknown* [2022] EWHC 966 (KB) (Ellenbogen J)
33. *Esso Petroleum v Persons Unknown* [2022] EWHC 1477 (KB) (Bennathan J)
34. *Esso Petroleum v Breen* [2022] EWHC 2664 (KB) (HHJ Lickley KC)
35. *Esso Petroleum v Breen* [2022] EWCA Civ 1405
36. *Esso Petroleum v Breen* [2023] EWHC 2013 (KB) (Knowles J)
37. *Esso Petroleum v Persons Unknown* (30 Mar 2023) (unreported) (KB) (Collins Rice J)
38. *Esso Petroleum v Persons Unknown* [2023] EWHC 1837 (KB) (Linden J)
39. *Exolum v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J)
40. *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 (CA)
41. *Financial Services Authority v Sinaloa Gold plc* [2013] 2 AC 28 (SC)
42. *Fitzwilliam Land Co v Milton* [2023] EWHC 3406 (KB) (Linden J)
43. *Gitto Estates v Persons Unknown* [2021] EWHC 1997 (KB) (Hugh Southey KC)
44. *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL)
45. *Hampshire Waste Services* [2004] Env LR 9 (Ch)
46. *Harrods Ltd v McNally* [2018] EWHC 1437 (KB)
47. *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (KB) (Swift J)
48. *Hicks v DPP* [2023] EWHC 1089 (KB) (Bean LJ and Chamberlain J)
49. *Hooper v Rogers* [1975] Ch 43 (CA)
50. *HS2 v Maxey* [2022] EWHC 1010 (KB) (Linden J)
51. *HS2 v Harewood* [2022] EWHC 2457 (KB) (Ritchie J)
52. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB) (Knowles J)
53. *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2023] AC 505 (SC)
54. *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) (Morgan J)
55. *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA)
56. *Ineos Upstream v Persons Unknown* [2022] EWHC 684 (Ch) (HHJ Klein)
57. *Ineos Upstream v Persons Unknown* [2023] EWHC 214 (Ch) (Master Kaye)
58. *Jockey Club Racecourses Ltd v Kidby* [2023] EWHC 2643 (Ch) (Miles J)
59. *London Borough of Islington v Elliott* [2012] EWCA Civ 56
60. *Manchester Airport v Dutton* [2000] QB 133 (CA)
61. *Mayor of London v Hall* [2011] 1 WLR 504 (CA)

62. *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (KB) (Nicklin J)
63. *MBR Acres Ltd v Maher* [2022] 3 WLR 999 (KB) (Nicklin J)
64. *MBR Acres Ltd v McGivern* [2022] EWHC 2072 (KB) (Nicklin J)
65. *MBR Acres Ltd v Free the MBR Beagles* [2022] EWHC 3338 (KB) (Nicklin J)
66. *National Highways v Heyatawin* [2021] EWHC 3078 (KB) (Dame Victoria Sharp P and Chamberlain J)
67. *National Highways Ltd v Lancaster* [2021] EWHC 3080 (KB) (Cotter J)
68. *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (KB) (Lavender J)
69. *National Highways v Buse* [2021] EWHC 3404 (KB) (Johnson J)
70. *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (KB) (Bennathan J)
71. *National Highways Ltd v Persons Unknown* [2022] EWHC 3497 (KB) (Soole J)
72. *National Highways Ltd v Persons Unknown* [2023] EWCA Civ 182
73. *National Highways Ltd v Persons Unknown* [2023] EWHC 1073 (KB) (Cotter J)
74. *National Highways Ltd v Kirin* [2023] EWHC 3000 (KB) (Soole J)
75. *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA)
76. *Navigator Terminals v Persons Unknown* (28 Apr 2023) (unreported) (KB) (Garnham J)
77. *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (CA)
78. *North Warwickshire BC v Shatford* [2022] EWHC 2570 (KB) (HHJ Kelly)
79. *North Warwickshire BC v Baldwin* [2023] EWHC 1719 (KB) (Sweeting J)
80. *Ocado Group plc v McKeeve* [2022] Costs LR 1489 (Ch) (Adam Johnson J)
81. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch) (Arnold J)
82. *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1114 (Ch) (Arnold J)
83. *Patel v WH Smith Ltd* [1987] 1 WLR 853 (CA)
84. *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (KB)
85. *QRT v JBE* [2022] EWHC 2902 (KB) (Nicklin J)
86. *R v Trowland* [2023] 4 All ER 766 (CA)
87. *Re Taray Brokering Ltd* [2022] EWHC 2958 (Ch) (HHJ Pearce)
88. *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (KB)
89. *Rehbeim v Isufai* [2005] EWCA Civ 1046
90. *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 (HL)
91. *Secretary of State for Transport* v *Persons Unknown* [2018] EWHC 1404 (Ch) (Barling J)

92. *Secretary of State for Transport* v *Persons Unknown* [2019] EWHC 1437 (Ch) (David Holland KC)
93. *Secretary of State for Transport v Cuciurean* [2022] 1 WLR 3847 (CA)
94. *Sheffield City Council v Brooke* [2019] QB 48 (KB) (Males J)
95. *Sheffield CC v Fairhall* [2017] EWHC 2121 (KB) (Males J)
96. *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (KB) (Johnson J)
97. *Shell UK Ltd v Persons Unknown* [2023] EWHC 1229 (KB) (Hill J)
98. *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23
99. *Three Counties Agricultural Society v Persons Unknown* [2022] EWHC 2708 (KB) (Spencer J)
100. *Transport for London v Lee* [2022] EWHC 3102 (KB) (Freedman J)
101. *Transport for London v Lee* [2023] EWHC 402 (KB) (Cavanagh J)
102. *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) (Morris J)
103. *Transport for London v Lee* [2023] EWHC 1201 (KB) (Eyre J)
104. *UK Oil & Gas v Persons Unknown* [2021] EWHC 599 (Ch) (Falk J)
105. *UK Oil Pipelines Ltd v Persons Unknown* (21 Apr 2023) (unreported) (Ch) (Rajah J)
106. *UK Oil Pipelines Ltd v Persons Unknown* (PT-2022-000303) (Ch) (6 Oct 2023) (unreported) (Mr Simon Gleeson)
107. *University of Brighton v Persons Unknown* [2023] EWHC 1485 (KB) (Constable J)
108. *Valero Energy Ltd v Persons Unknown* [2022] EWHC 911 (KB) (Bennathan J)
109. *Valero Energy v Persons Unknown* (11 Jan 2023) (unreported) (KB) (Soole J)
110. *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134 (KB) (Ritchie J)
111. *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 (Ch) (Marcus Smith J)
112. *Walton Family Estates Limited v GJD Services Ltd* [2021] EWHC 88 (KB) (Mr Andrew Hochhauser KC)
113. *Westminster CC v Haw* [2002] EWHC 2073 (KB) (Gray J)
114. *Wolverhampton CC v Persons Unknown* [2023] EWHC 56 (KB) (Hill J)
115. *Wolverhampton CC v London Gypsies & Travellers* [2024] 2 WLR 45
116. *Wolverhampton CC v Phelps* [2024] EWHC 139 (KB) (HHJ Emma Kelly)