

IN THE HIGH COURT OF JUSTICE

Claim No:

KINGS BENCH DIVISION

BETWEEN:

- (1) QWR Properties NW07 Limited**
- (2) Wembley NW07 Investments Limited**
- (3) QWR Properties NW09 Limited**
- (4) QWR Properties E01 Limited**
- (5) QWR Properties E03 Limited**
- (6) QWR Properties E05 Limited**
- (7) QWR Properties SW03A Limited**
- (8) QWR Properties NE02 Limited**
- (9) QWR Properties NE03 Limited**

Claimants

-and-

**PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT
OF THE CLAIMANTS ON THE QUINTAIN BTR ESTATE, WEMBLEY PARK**

Defendant

AUTHORITIES BUNDLE

1. Senior Courts Act 1981, section 37;
2. Quintain (Wembley Retail Park) Ltd v Persons Unknown [2023] EWHC 1509
3. Wolverhampton CC v London Gypsies and Travellers [2024] 2 WLR 4;

4. Heathrow Airport Limited v Persons Unknown [2024] EWHC 2599;
5. Valero Energy Ltd v Persons Unknown [2024] EWHC 134;
6. Canada Goose UK Retail Ltd v v Persons Unknown [2020] EWCA Civ 303;
7. Jockey Club Racecourses Ltd v PU [2024] EWHC 1786;
8. Shell Oil UK Ltd v. PU [2024] EWHC 3130;
9. The Mayor and Burgesses of the London Borough of Enfield v Snell & Persons [2024] EWHC 2064;
10. Unknown Multiplex Construction Europe Ltd v Persons Unknown [2025] 2 WLUK 578;
11. 1 Leadenhall GP Ltd v Persons Unknown [2024] EWHC 854;
12. National Highways Limited v Persons Unknown [2023] 1 WLR 2088
13. Ineos Upstream Ltd v Persons Unknown [2019] 4 WLR 100;
14. Hooper v Rogers [1975] Ch 43;
15. Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] 1 WLR 2780;
16. High Speed Two (HS2) Limited v Four Categories of Persons Unknown [2022] EWHC 2360;
17. Manchester Airport Plc v Dutton & ors [2000] 1 Q.B.133;
18. *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2
19. *Rochdale MBC v Persons Unknown* [2025] EWHC 1314
20. *MBR Acres Ltd v Curtin* [2025] EWHC 331
21. Clerk & Lindsell on Torts (24th Edn) at 19-08;

Senior Courts Act 1981 c. 54

s. 37 Powers of High Court with respect to injunctions and receivers.



Law In Force

Version 2 of 2

22 April 2014 - Present

Subjects

Administration of justice; Civil procedure

Keywords

Appointments; High Court; Injunctions; Jurisdiction; Receivers

37.— Powers of High Court with respect to injunctions and receivers.

- (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.
- (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.
- (4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—
 - (a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under [section 1](#) of the [Charging Orders Act 1979](#) for the purpose of enforcing the judgment, order or award in question; and
 - (b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.
- (5) Where an order under the said [section 1](#) imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under [section 6](#) of the [Land Charges Act 1972](#), [subsection \(4\)](#) of the said section 6 (effect of non-registration of writs and

orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

[

(6) This section applies in relation to the family court as it applies in relation to the High Court.

] ¹

Notes

- ¹ Added by Crime and Courts Act 2013 c. 22 [Sch.10\(2\) para.58](#) (April 22, 2014: insertion has effect as SI 2014/954 subject to savings and transitional provisions specified in 2013 c.22 s.15 and Sch.8 and transitional provision specified in SI 2014/954 arts 2(d) and 3)

*Part II JURISDICTION > Chapter 002 THE HIGH COURT > Powers
> s. 37 Powers of High Court with respect to injunctions and receivers.*

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2023] EWHC 1509 (KB)



No. KB-2022-004824

Royal Courts of Justice
The Strand
London WC2A 2LL
Thursday, 16 February 2023

Before:

HIS HONOUR JUDGE SIMPKISS
(Sitting as a Judge of the High Court)

B E T W E E N :

- (1) QUINTAIN (WEMBLEY RETAIL PARK) LIMITED
- (2) WEMBLEY NE02 INVESTMENTS LIMITED
- (3) WEMBLEY NE03 INVESTMENTS LIMITED
- (4) JOHN SISK & SON (HOLDINGS) Limited

Claimants

- and -

PERSONS UNKNOWN

Defendants

MR T MORSHEAD KC appeared on behalf of the Claimants.

THE DEFENDANTS did not appear and were not represented.

J U D G M E N T

JUDGE SIMPKISS:

- 1 This is the return date of an application for an injunction which was granted by Cotter J on 16 December 2022. The application was made by the claimant, which is a large construction company involved in a major construction project as part of the Wembley Stadium area regeneration scheme. The claimants are entitled to possession of the land currently covered by Cotter J's injunction.
- 2 The injunction order granted on 22 December 2022 prevents the defendants, without the consent of the claimants, from entering or remaining on any part of land shown in red on the plan at Schedule 2 to the order, which is referred to as "the construction site". No defendants have been identified but I am satisfied that sufficient notice has been placed around the site, both of the original injunction order and of the date of this return hearing, so that anyone who might have an interest in making submissions in relation to this hearing has had the opportunity of doing so, and that opportunity will continue in the future if they wish to make an application to set aside or vary it.
- 3 The reason that the injunction was granted is that this site is very close to Wembley Stadium. Sites which form part of the redevelopment scheme have previously been involved in incidents, where people who are colloquially known as "Urban Explorers" enter sites as trespassers with a view to scaling attractively high buildings or cranes and then filming themselves at the top. One of the attractions that is highlighted in the evidence is the evasion of strong security measures which these sites generally have. The best known incident in this country was the scaling of the Shard but other buildings have been scaled both in this country and around the world. Unfortunately, a number of people engaged in this activity have met fatal accidents when they have taken their eye off the ball or become complacent. There is evidence that the person who climbed the Shard was attracted to the high cranes involved in the construction project in the vicinity of Wembley Stadium so that he could look down on the arch over Wembley Stadium, and in social media he has expressed a passion one day to evade the security at Wembley and to place himself in the middle of the arch.
- 4 The consequences of this sort of activity, which at one level might be regarded as a fun thing to do for those that are daredevil and like climbing, is severe, not only to them but also the people who have to risk their lives when they are found at height and need to be removed. Furthermore, on entering, particularly a construction site, trespassers do not know where the dangers lie. A construction site is a dangerous place, particularly if it is in its early stages. Someone entering the site does not know where the holes are, the ground may not be stable, there may still be a risk of things falling on them, and electrical wiring which may injure them. All of this means that people in charge of construction sites cannot ignore these threats and must take steps once they get to hear of a trespass to secure the person and make them safe, and this puts the rescuer at risk.
- 5 In these circumstances, an application is made to continue the injunction but also to amend the details of claim to add further of land known as the cinema site which is now part of the construction site. I am satisfied that the amendment should be made, because this will all be part of the same construction project. Already there are five cranes on the site.
- 6 The principles that are applied in deciding whether or not to grant an injunction are, firstly, the well-known principles set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396:

1. Is there a serious question to be tried?
 2. If so, would damages be an adequate remedy for a party injured by the grant of or failure to grant an injunction?
 3. If not, where does the balance of convenience lie?
- 7 There cannot be any doubt that there is a serious question to be tried, given the proximity to this site of at least one previous adventure when someone climbed to the top of a crane. It is quite clear that damages would not be an adequate remedy and that the balance of convenience in normal circumstances would lie with the applicant.
- 8 Cases of this sort of have been come to court for a number of years and I have been showed the recent authorities. Rather than cite all the authorities, I will simply extract from the decision of the Court of Appeal in *Barking and Dagenham LBC & Ors. v Persons Unknown* [2022] EWCA Civ 13 the principles that should be applied in considering whether to grant such an injunction.
- 9 In that case, the Master of the Rolls approved, at least so far as is applicable to the present case, the guidelines set out in *Canada Goose UK Retail Limited v PU* [2020] 1 WLR 2802 in relation to interim relief. I should say that *Barking* is currently in the Supreme Court being argued this week, and whether the Supreme Court decision, when it is in due course handed down, has any bearing on this injunction remains to be seen, but at this stage I must apply the law as it stands.
- 10 The principles to be drawn from *Canada Goose* are set out in paragraph 82 of the Master of the Rolls' judgment in *Barking and Dagenham*. Subparagraph (1) reads as follows:
- “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’.”
- 11 This case, of course, is not a protest case, but I am satisfied that notice of these proceedings has been given, because the claimants have, at considerable expense, printed out large signs and placed them on the hoardings which surround this construction site, informing them of the injunction granted by Cotter J and of the hearing today, and will continue to do that with future injunction orders. In this case, no-one has been identified as a potential defendant and it is the class of Urban Explorers who might be tempted to climb these cranes and trespass on the property because of its proximity to Wembley Stadium.

12 The Master of the Rolls then went on to approve the *Canada Goose* guidelines. Having dealt with the identification of the defendants, at paragraph (3) he approves the *Canada Goose* guideline that interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify precautionary relief. Imminence has been considered in this context and means that in the circumstances the claim is not brought prematurely. This was what Marcus Smith J had said in paragraph 31(4)(d) in the case of *Vastint v Persons Unknown* [2018] EWHC 2456. In the present case, the attraction is the secured site and the presence of the cranes. As soon as the high level cranes go up, this becomes a risk, and, in my judgment, the risk is not premature, it is real, and will continue for as long as the attractions on the site remain there, as they must while the construction is completed.

13 The fourth criteria is as follows:

“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.”

14 In this case, the individuals, with one exception, are not identified - and he is not a party because he has not specifically threatened this site and it would not be appropriate to name him (he has been party to other injunction proceedings) - but the individuals who might enter this site are sufficiently identified and will be served by leaving notice of the injunction in prominent positions all around the site so that anyone attempting to enter the site by an inappropriate route, other than the main entrance, is going to see the injunction order and know exactly what they are prohibited from doing. I am satisfied, therefore, that it is reasonably likely that these proceedings, and the order, will come to the notice of the people who might wish to trespass on this site.

15 The fifth criteria is as follows:

“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.”

In this case the threatened tort is trespass and, therefore, there is no lawful conduct that is to be prohibited. If the defendants do not enter the site, they will not breach the injunction.

16 The sixth criteria is as follows:

“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."

In my judgment, the proposed order fully satisfies that test. It is quite clear that if someone is told not to enter the site, and what the consequences will be if they do, that that is sufficient.

17 Paragraph (7) reads as follows:

"The interim injunction should have clear geographical and temporal limits [temporal limits because it is an interim and not a final injunction]."

18 In this case the limits proposed are that the injunction should remain in place until the first phase of the development has been completed. That is the time of most risk and the claimant will review at that stage whether it intends to apply to extend the injunction further and, therefore, give the bare minimum that is necessary to protect this site.

19 In these circumstances, I am satisfied that the injunction should be continued, and I will just look at the order with Mr Morshead to ensure that it is sufficiently clear.

CERTIFICATE

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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 Kitchen

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

D

With the intent of preventing unauthorised encampments by Gypsies or Travellers within their administrative areas, a number of local authorities issued proceedings under CPR Pt 8 seeking injunctions under section 37 of the Senior Courts Act 1981¹ prohibiting “persons unknown” from setting up such camps in the future. Injunctions of varying length were granted to some 38 local authorities, or groups of local authorities, on varying terms by way of both interim and permanent injunctions. After the hearing of an application to extend one of the injunctions which was coming to an end, a judge ordered a review of all such injunctions as remained in force and which the local authority in question wished to maintain. The 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.

E

F

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

G

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 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 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

H

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

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

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

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

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

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

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

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

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

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

- A in direct action. Such activity may, depending on all the circumstances, justify the grant of an injunction against persons unknown, including newcomers (post, para 235).
Decision of the Court of Appeal sub nom *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51 affirmed on different grounds.
- B The following cases are referred to in the judgment of Lord Reed PSC, Lord Briggs JSC and Lord Kitchen:
A (A Protected Party) v Persons Unknown [2016] EWHC 3295 (Ch); [2017] EMLR 11
Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)
Adair v New River Co (1805) 11 Ves 429
- C *Anton Piller KG v Manufacturing Processes Ltd* [1975] EWCA Civ 12; [1976] Ch 55; [1976] 2 WLR 162; [1976] 1 All ER 779, CA
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Attorney General v Chaudry [1971] 1 WLR 1614; [1971] 3 All ER 938, CA
Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103; [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401, SC(E)
- D *Attorney General v Harris* [1961] 1 QB 74; [1960] 3 WLR 532; [1960] 3 All ER 207, CA
Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 2 WLR 247; [1979] 1 All ER 745; 68 Cr App R 342, HL(E)
Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, CA
Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)
- E *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)
Baden's Deed Trusts, In re [1971] AC 424; [1970] 2 WLR 1110; [1970] 2 All ER 228, HL(E)
Bankers Trust Co v Shapira [1980] 1 WLR 1274; [1980] 3 All ER 353, CA
Barton v Wright Hassall LLP [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)
- F *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB)
Blain (Tony) Pty Ltd v Splain [1993] 3 NZLR 185
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Brett Wilson LLP v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
British Airways Board v Laker Airways Ltd [1985] AC 58; [1984] 3 WLR 413; [1984] 3 All ER 39, HL(E)
- G *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775; [2000] 1 WLR 1590; [2000] 2 All ER 727, CA
Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA
Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802, CA
CMOC Sales and Marketing Ltd v Person Unknown [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62
- H *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) A
- Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] 1 All ER 949; [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA; [2018] UKSC 28; [2018] 1 WLR 3259; [2018] Bus LR 1417; [2018] 4 All ER 373, SC(E)
- Castanho v Brown & Root (UK) Ltd* [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143; [1981] 1 Lloyd's Rep 113, HL(E)
- Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E) B
- 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 C
- D v Persons Unknown* [2021] EWHC 157 (QB)
- Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
- EMI Records Ltd v Kudhail* [1985] FSR 36, CA
- ESPN Software India Private Ltd v Tudu Enterprise* (unreported) 18 February 2011, High Ct of Delhi
- Earthquake Commission v Unknown Defendants* [2013] NZHC 708 D
- Ernst & Young Ltd v Department of Immigration* 2015 (1) CILR 151
- F (or se 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) 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 F
- 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) G
- 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 H
- Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406, HL(E)
- Mareva Cia Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, CA
- Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143

- A *Mercedes Benz AG v Leiduck* [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929; [1995] 2 Lloyd's Rep 417, PC
Meux v Maltby (1818) 2 Swans 277
Michaels (M) (Furriers) Ltd v Askew (1983) 127 SJ 597, CA
Murphy v Murphy [1999] 1 WLR 282; [1998] 3 All ER 1
News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2) [1987] ICR 181
- B *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 B/JM [2011] EWHC 1059 (QB); [2011] EMLR 23
Parkin v Thorold (1852) 16 Beav 59
Persons formerly known as Winch, In re [2021] EWHC 1328 (QB); [2021] EMLR 20, DC; [2021] EWHC 3284 (QB); [2022] ACD 22, DC
- C *R v Lincolnshire County Council, Ex p Atkinson* (1995) 8 Admin LR 529, DC
R (Wardship: Restrictions on Publication), In re [1994] Fam 254; [1994] 3 WLR 36; [1994] 3 All ER 658, CA
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2020] QB 703; [2020] 2 WLR 635, DC
Revenue and Customs Comrs v Eggleton [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606
- D *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803; [1978] 1 Lloyd's Rep 1, HL(E)
Smith v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 1391; [2023] PTSR 312, CA
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
- E *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
South Cambridgeshire District Council v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provinciën" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487; [1986] 2 Lloyd's Rep 317, HL(E)
- F *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
TSB Private Bank International SA v Chabra [1992] 1 WLR 231; [1992] 2 All ER 245
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
- G *United Kingdom Nirex Ltd v Barton* The Times, 14 October 1986
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908
Wykeham Terrace, Brighton, Sussex, In re, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649
X (A Minor) (Wardship: Injunction), In re [1984] 1 WLR 1422; [1985] 1 All ER 53
X (formerly Bell) v O'Brien [2003] EWHC 1101 (QB); [2003] EMLR 37
- H *Z Ltd v A-Z and AA-LL* [1982] QB 558; [1982] 2 WLR 288; [1982] 1 All ER 556; [1982] 1 Lloyd's Rep 240, CA

The following additional cases were cited in argument:

A v British Broadcasting Corp'n [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) A
- Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752, CA
- Birmingham City Council v Nagmadin* [2023] EWHC 56 (KB)
- Birmingham City Council v Sharif* [2020] EWCA Civ 1488; [2021] 1 WLR 685; [2021] 3 All ER 176; [2021] RTR 15, CA
- Cambridge City Council v Traditional Cambridge Tours Ltd* [2018] EWHC 1304 (QB); [2018] LLR 458 B
- 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) C
- MBR Acres Ltd v McGivern* [2022] EWHC 2072 (QB)
- Mid-Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460, CA
- Porter v Freudenberg* [1915] 1 KB 857, CA
- Redbridge London Borough Council v Stokes* [2018] EWHC 4076 (QB)
- Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357, CA D
- 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. E

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. F

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, G

- A Lewison and Elisabeth Laing LJ) [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:

B (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.

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

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

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

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

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

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

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

The court took time for consideration.

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

I. Introduction

(1) The problem

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

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

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

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

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

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

(2) The factual and procedural background

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

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

- B 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”.

- D 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.
- E They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

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

- G 10 From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen’s Bench Division and the Judge in Charge of the Queen’s Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups 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.
- H

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

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

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

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

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

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

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

2. The legal background

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

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

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

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

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

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

15 This is not the stage at which to consider these questions, but it may be helpful to explain the legal context in which they arise, before turning to the authorities through which the law relating to newcomer injunctions has developed in recent times. We will explain at this stage the legal background, prior to the recent authorities, in relation to (1) the jurisdiction to grant injunctions, (2) injunctions against non-parties, (3) injunctions in the absence of a cause of action, (4) the commencement of proceedings against unidentified defendants, and (5) the service of proceedings on unidentified defendants.

(1) *The jurisdiction to grant injunctions*

E 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.

G 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.

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*

A (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 Provinciën” NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

B “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.”

C 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:

D “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.

G (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.

H 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 it is also possible for persons to apply to become parties in the absence of service. As

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

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

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

(i) Representative proceedings

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

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

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

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

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

E 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* The Times, 14 October 1986, 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).

H (ii) Wardship proceedings

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

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

(iii) Injunctions to protect human rights

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

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

(iv) Reporting restrictions

34 Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (eg 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

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

(v) Embargoes on draft judgments

- B 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.

C (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.

- D 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).

- F 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.

- G 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):

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

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

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

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

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

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

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

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

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

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

B 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).

C 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.

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

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

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

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

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

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

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

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

D 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 E under the authority of the heads of division. It has no statutory force and cannot alter the general law.

F 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.

G 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 H 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 the act by which the defendant is subjected to the court’s jurisdiction, in the

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

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

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

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

(1) Bloomsbury

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

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

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

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

C “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*

D 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.

H 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 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*

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

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

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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 LJ) had earlier granted an injunction under section 187B of the Town and Country Planning Act 1990 against persons described as “persons unknown . . . causing or permitting hardcore to be deposited . . . caravans, mobile homes or other forms of residential accommodation to be stationed . . . or existing caravans, mobile homes or other forms of residential accommodation . . . to be occupied” on land adjacent to a Gypsy encampment in rural Cambridgeshire: *South Cambridgeshire District Council v Persons Unknown* [2004] 4 PLR 88 (“*South Cambs*”). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

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

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66 The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJ 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.

- A 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*

- C 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*

- H 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

A might in future commit the acts which the injunction prohibited (eg *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.

B 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.

C 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.

E 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.

G 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):

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

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

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

(6) *Cameron*

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

- A The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates 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.
- B
- C 81 The Court of Appeal allowed the claimant's appeal. In the Court of Appeal's view, it would be consistent with the CPR and the policy of the 1988 Act for proceedings to be brought and pursued against the unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151 of the 1988 Act for any judgment obtained against that driver.
- D 82 A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who 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.
- E
- F 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 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 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.
- G
- H 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 not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it

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

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

(7) *Ineos*

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

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

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

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

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

(8) *Bromley*

- B 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.

- C 91 Important aspects of the background were that some Gypsy and Traveller communities had a particular association with Bromley; the borough had a history of unauthorised encampments; there were no or no sufficient transit sites to cater for the needs of these communities; the grant of these injunctions in ever increasing numbers had the effect of forcing Gypsies and Travellers out of the boroughs which had obtained them, 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.

- F 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.

H 93 As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJs 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

A 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*

B 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.

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

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

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

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

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

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

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 F G H

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

B 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*

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

E 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 F paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

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

4. *A new type of injunction?*

A

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.

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

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

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

A between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating 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.

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C 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."

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

E 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 KGo3 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."

F "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 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.

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

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

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

- A Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the 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.

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- C 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".
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- E 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*.

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

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

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

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

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

B 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.

C 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:

D “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.”

E 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.

H 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 Private Ltd v Tudu Enterprise* (unreported) 18 February 2011.

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

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

- D 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*?

- E 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.

- F 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
- G category. Such an approach is mistaken in principle, as explained in para 21 above.

- H 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,

- A at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.
- B **140** More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129–132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (e.g. by seeing a copy of the order at the relevant site or by reading it on the internet), may be expected to comply with the injunction rather than act in breach of it. At the point of compliance that person will not be a defendant,
- C if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant
- D by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at
- E the interim stage.
- 141** In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the
- F assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that
- G they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.
- 142** Recognition that injunctions against newcomers are in substance
- H 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. A

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. B

(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. C

(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. D

(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. E

(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. F

(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. G

(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 H

A 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.

B **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 C 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?

D **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:

E “(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.”

F 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, G to inform the judge and the parties as to what is likely to be just or convenient.

H **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 e.g. *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).

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

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

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

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

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

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

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

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

C 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:

D “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 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 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.

F 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 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 flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A 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.

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

D 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 immovable 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:

F (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.

G (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.

H (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. A

(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. B

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. C

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. D

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. E

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 F

- A 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.

- B 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.

- C 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.

- D 174 This is an objection which applies to all forms of without notice injunction, and explains why they are generally only granted when there is truly no alternative means of achieving the relevant objective, and only for a short time, pending an early return day at which the merits can be argued out between the parties. The usual reason is extreme urgency, but even then it is customary to give informal notice of the hearing of the application to the persons against whom the relief is sought. Such an application used then to be called "ex parte on notice", a partly Latin phrase which captured the point that an application which had not been formally served on persons joined as defendants so as to enable them to attend and oppose it did not in an appropriate case mean that it had to be heard in their absence, or while they were ignorant that it was being made. In the modern world of the CPR, where "ex parte" has been replaced with "without notice", the phrase "ex parte on notice" admits no translation short of a simple oxymoron. But it demonstrates that giving informal notice of a without notice application is a well-recognised way of minimising the potential for procedural unfairness inherent in such applications. But sometimes even the most informal notice is self-defeating, as in the case of a freezing injunction, where notice may provoke the respondent into doing exactly that which the injunction is designed to prohibit, and a search order, where notice of any kind is feared to be likely to trigger the bonfire of documents (or disposal of laptops) the prevention of which is the very reason for the application.

- H 175 In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement

to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

176 But advertisement in advance might well alert bodies with a mission to protect Travellers' interests, such as the appellants, and enable them to intervene to address the court on the local authority's application with focused submissions as to why no injunction should be granted in the particular case. There is an (imperfect) analogy here with representative proceedings (paras 27–30 above). There may also be a useful analogy with the long-settled rule in insolvency proceedings which requires that a creditors' winding up petition be advertised before it is heard, in order to give advance notice to stakeholders in the company (such as other creditors) and the opportunity to oppose the petition, without needing to be joined as defendants. We say more about this and how advance notice of an application for a newcomer injunction might be given to newcomers and persons and bodies representing their interests in the next section of this judgment.

177 It might be thought that the obvious antidote to the procedural unfairness of a without notice injunction would be the inclusion of a liberal right of anyone affected to apply to vary or discharge the injunction, either in its entirety or as against them, with express provision that the applicant need show no change of circumstances, and is free to advance any reason why the injunction should either never have been granted or, as the case may be, should be discharged or varied. Such a right is generally included in orders made on without notice applications, but Mr Drabble KC submitted that it was unsatisfactory for a number of reasons.

178 The first was that, if the injunction was final rather than interim, it would be decisive of the legal merits, and be incapable of being challenged thereafter by raising a defence. We regard this submission as one of the unfortunate consequences of the splitting of the debate into interim and final injunctions. We consider it plain that a without notice injunction against newcomers would not have that effect, regardless of whether it was in interim or final form. An applicant to vary or discharge would be at liberty to advance any reasons which could have been advanced in opposition to the grant of the injunction when it was first made. If that were not implicit in the reservation of liberty to apply (which we think it is), it could easily be made explicit as a matter of practice.

179 Mr Drabble KC's next objection to the utility of liberty to apply was more practical. Many or most Travellers, he said, would be seeking to fulfil their cultural practice of leading a peripatetic life, camping at any particular site for too short a period to make it worth going to court to contest an injunction affecting that site. Furthermore, unless they first camped on the prohibited site there would be no point in applying, but if they did camp there it would place them in breach of the injunction while applying to vary it. If they camped elsewhere so as to comply with the injunction, their rights (if any) would have been interfered with, in circumstances where there would be no point in having an expensive and

A risky legal argument about whether they should have been allowed to camp there in the first place.

B 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.

C 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.

E 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.

G 183 The appellants' final main point was that it would always be impossible when considering the grant of an injunction against newcomers to conduct an individualised proportionality analysis, because each potential target Traveller would have their own particular circumstances relevant to a balancing of their article 8 rights against the applicant's claim for an injunction. If no injunction could ever be granted in the absence of an individualised proportionality analysis of the circumstances of every potential target, then it may well be that no newcomer injunction could ever be granted against Travellers. But we reject that premise. To the extent that a particular Traveller who became the subject of a newcomer injunction wished to raise particular circumstances applicable to them and relevant to the proportionality analysis, this would better be done under the liberty to

apply if, contrary to the general disinclination or inability of Travellers to go to court, they had the determination to do so.

184 We have already briefly mentioned Mr Drabble KC's point about the inappropriateness of an injunction against one group of Travellers based only upon the disorderly conduct of an earlier group. This is in our view just an evidential point. A local authority that sought a borough-wide injunction based solely upon evidence of disorderly conduct by a single group of campers at a single site would probably fail the test in any event. It will no doubt be necessary to adduce evidence which justifies a real fear of widespread repetition. Beyond that, the point goes nowhere towards constituting a reason why such injunctions should never be granted.

185 The point was made by Stephanie Harrison KC for Friends of the Earth (intervening because of the implications of this appeal for protesters) that the potential for a newcomer injunction to cause procedural injustice was not regulated by any procedure rules or practice statements under the CPR. Save in relation to certain statutory applications referred to in para 51 above this is true at present, but it is not a good reason to inhibit equity's development of a new type of injunction. A review of the emergence of freezing injunctions and search orders shows how the necessary procedural checks and balances were first worked out over a period of development by judges in particular cases, then addressed by text-book writers and academics and then, at a late stage in the developmental process, reduced to rules and practice directions. This is as it should be. Rules and practice statements are appropriate once experience has taught judges and practitioners what are the risks of injustice that need to be taken care of by standard procedures, but their reduction to settled (and often hard to amend) standard form too early in the process of what is in essence judge-made law would be likely to inhibit rather than promote sound development. In the meantime, the courts have been actively reviewing what these procedural protections should be, as for example in the *Ineos* and *Bromley* cases (paras 86–95 above). We elaborate important aspects of the appropriate protections in the next section of this judgment.

186 Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate exercise of the court's equitable discretion, where the general conditions set out in para 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

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

187 We turn now to consider the practical application of the principles affecting an application for a newcomer injunction against Gypsies and Travellers, and the safeguards that should accompany the making of such an order. As we have mentioned, these are matters to which judges hearing such applications have given a good deal of attention, as has the Court of Appeal in considering appeals against the orders they have made. Further,

- A the relevant principles and safeguards will inevitably evolve in these and other cases in the light of experience. Nevertheless, they do have a bearing on the issues of principle we have to decide, in that we must be satisfied that the points raised by the appellants do not, individually or collectively, preclude the grant of what are in some ways final (but regularly reviewable) injunctions that prevent persons who are unknown and unidentifiable at the date of the order from trespassing on and occupying local authority land.
- B We have also been invited to give guidance on these matters so far as we feel able to do so having regard to our conclusions as to the nature of newcomer injunctions and the principles applicable to their grant.

(1) Compelling justification for the remedy

- C 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)).

- D 189 This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are) properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.
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(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.

- G 191 The starting point is section 23 of the Caravan Sites and Control of Development Act 1960 (“CSCDA 1960”) which gave local authorities the power to close common land to Gypsies and Travellers. As Sedley J observed in *R v Lincolnshire County Council, Ex p Atkinson* (1996) 8 Admin LR 529, local authorities used this power with great energy. But they made little or no corresponding use of the related powers conferred on them by section 24 of the CSCDA 1960 to provide sites where caravans might be brought, whether for temporary purposes or for use as permanent residences, and in that way compensate for the closure of the commons. As a result, it became increasingly difficult for Travellers and Gypsies to pursue their nomadic way of life.
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192 In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 (“CSA 1968”) imposed on local authorities a

duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

193 Some 25 years later, the CJPOA repealed section 6 of the CSA 1968. But the *power* to provide sites for Travellers and Gypsies remained. This is important for it provides a way to give effect to the assessment by local authorities of the needs of these communities, and these are matters we address below.

194 The position in Wales is rather different. Any local authority applying for a newcomer injunction affecting Wales must consider the impact of any legislation specifically affecting that jurisdiction including the Housing (Wales) Act 2014 (“H(W)A 2014”). Section 101(1) of the H(W)A 2014 imposes on the authority a duty to “carry out an assessment of the accommodation needs of Gypsies and Travellers residing in or resorting to its area”. If the assessment identifies that the provision of sites is inadequate to meet the accommodation needs of Gypsies and Travellers in its area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General “needs” assessments

195 For many years there has been an obligation on local authorities to carry out an assessment of the accommodation needs of Gypsies and Travellers when carrying out their periodic review of housing needs under section 8 of the Housing Act 1985.

196 This obligation was first imposed by section 225 of the Housing Act 2004. This measure was repealed by section 124 of the Housing and Planning Act 2016. Instead, the duty of local housing authorities in England to carry out a periodic review of housing needs under section 8 of the Housing Act 1985 has since 2016 included (at section 8(3)) a duty to consider the needs of people residing in or resorting to their district with respect to the provision of sites on which caravans can be stationed.

(iii) Planning policy

197 Since about 1994, and with the repeal of the statutory duty to provide sites, the general issue of Traveller site provision has come increasingly within the scope of planning policy, just as the government anticipated.

198 Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled *Gypsy Sites and Planning*. This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local planning authorities (“LPAs”) were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts

A to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 13.

B 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 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.

C 200 Meantime, the advice in Circular 1/94 having failed to achieve its purpose, the government has from time to time issued new planning advice on the provision of sites for Gypsies and Travellers in England, and that advice may be taken to reflect national policy.

D 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 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 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; 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 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.

H 202 The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local

authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction. A

(iv) Consultation and co-operation

203 This is another matter of considerable importance, and it is one with which all local authorities should willingly engage. We have no doubt that local authorities, other responsible bodies and representatives of the Gypsy and Traveller communities would benefit from a dialogue and co-operation to understand their respective needs; the concerns of the local authorities, local charities, business and community groups and members of the public; and the resources available to the local authorities for deployment to meet the needs of these nomadic communities having regard to the wider obligations which the authorities must also discharge. In this way a deeper level of trust may be established and so facilitate and encourage a constructive approach to the implementation of proportionate solutions to the problems the nomadic communities continue to present, without immediate and expensive recourse to applications for injunctive relief or enforcement action. B
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(v) Public spaces protection orders D

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. E
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(vi) Criminal Justice and Public Order Act 1994 G

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. H

206 Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a

A reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

207 Following amendment in 2003, section 62A of the CJPOA confers on the police a power to direct trespassers with vehicles to leave land at the occupier's request, and that is so even if the trespassers have not caused damage or used threatening behaviour. Where trespassers have at least one vehicle between them and are there with the common purpose of residing there, the police, (if so requested by the occupier) have the power to direct a trespasser to leave and to remove any vehicle or property, subject to this proviso: if they have caravans that (after consultation with the relevant local authorities) there is a suitable pitch available on a site managed by the authority or social housing provider in that area.

208 Focusing more directly on local authorities, section 77 of the CJPOA confers on the local authority a power to direct campers to leave open-air land where it appears to the authority that they are residing in a vehicle within its area, whether on a highway, on unoccupied land or on occupied land without the consent of the occupier. There is no need to establish that these activities have caused damage or disruption. The direction must be served on each person to whom it applies, and that may be achieved by directing it to all occupants of vehicles on the land; and failing other effective service, it may be affixed to the vehicles in a prominent place. Relevant documents should also be displayed on the land in question. It is an offence for persons who know that such an order has been made against them to fail to comply with it.

(vii) Byelaws

209 There is a measure of agreement by all parties before us that the power to make and enforce byelaws may also have a bearing on the issues before us in this appeal. Byelaws are a form of delegated legislation made by local authorities under an enabling power. They commonly require something to be done or refrained from in a particular area or location. Once implemented, byelaws have the force of law within the areas to which they apply.

210 There is a wide range of powers to make byelaws. By way of example, a general power to make byelaws for good rule and government and for the prevention and suppression of nuisances in their areas is conferred on district councils in England and London borough councils by section 235(1) of the Local Government Act 1972 ("the LGA 1972"). The general confirming authority in relation to byelaws made under this section is the Secretary of State.

211 We would also draw attention to section 15 of the Open Spaces Act 1906 which empowers local authorities in England to make byelaws for the regulation of open spaces, for the imposition of a penalty for breach and for the removal of a person infringing the byelaw by an officer of the local authority or a police constable. Notable too is section 164 of the Public Health Act 1875 (38 & 39 Vict c 55) which confers a power on the local authority to make byelaws for the regulation of public walks and pleasure grounds and for the removal of any person infringing any such byelaw, and under section 183, to impose penalties for breach.

212 Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899 (62 & 63 Vict c 30). A

213 Appropriate authorities are also given powers to make byelaws in relation to nature reserves by the National Parks and Access to the Countryside Act 1949 (as amended by the Natural Environment and Rural Communities Act 2006); in relation to National Parks and areas of outstanding natural beauty under sections 90 and 91 of the 1949 Act (as amended); concerning the protection of country parks under section 41 of the Countryside Act 1968; and for the protection and preservation of other open country under section 17 of the Countryside and Rights of Way Act 2000. B

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. C
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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. E
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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. G
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(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

- A 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
- B dealing with communities of unidentified trespassers including newcomers. But these are undoubtedly matters that must be explored upon the review of these orders.

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

- 218 We now turn to more general matters and safeguards. As we have
- C 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
- D 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
- E 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
- F 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.

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- (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)
- H 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;

- A 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

- B 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.

- D 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.

- F 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.

- F 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

- G 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).

- H 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. A

(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. B

(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. C
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(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. E
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(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. G
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- A 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.
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(12) Conclusion

- 237 There is nothing in this consideration which calls into question the development of newcomer injunctions as a matter of principle, and we are satisfied they have been and remain a valuable and proportionate remedy in appropriate cases. But we also have no doubt that the various matters to which we have referred must be given full consideration in the particular proceedings the subject of these appeals, if necessary at an appropriate and early review.
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6. Outcome

- 238 For the reasons given above we would dismiss this appeal. Those reasons differ significantly from those given by the Court of Appeal, but we consider that the orders which they made were correct. There follows a short summary of our conclusions:
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- (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.
- F

- (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.
- G

(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.
- H

(b) That equity looks to the substance rather than to the form.

(c) That equity takes an essentially flexible approach to the formulation of a remedy.

(d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

These principles may be discerned in action in the remarkable development of the injunction as a remedy during the last 50 years. A

(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

(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

(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

(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. E

Appeal dismissed.

COLIN BERESFORD, Barrister

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Neutral Citation Number: [2024] EWHC 2599 (KB)

Case No: KB-2024-002210

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2024

Before :

MR JUSTICE JULIAN KNOWLES

Between :

HEATHROW AIRPORT LIMITED

Claimant

- and -

**PERSONS UNKNOWN WHO (IN CONNECTION
WITH JUST STOP OIL OR OTHER
ENVIRONMENTAL CAMPAIGN) ENTER,
OCCUPY OR REMAIN (WITHOUT THE
CLAIMANT'S CONSENT) UPON 'LONDON
HEATHROW AIRPORT' AS IS SHOWN EDGED
PURPLE ON THE ATTACHED PLAN A TO THE
PARTICULARS OF CLAIM**

Defendants

Katharine Holland KC and Jacqueline Lean
(instructed by **Bryan Cave Leighton Paisner**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing date: **9 July 2024**

Approved Judgment

This judgment was handed down remotely at 10:30 on 14 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. Following a hearing on 9 July 2024 I granted the Claimant's without notice application for a precautionary injunction to restrain anticipated protests at Heathrow Airport (the Airport) by environmental campaigners and others falling within the description of the Defendants on the Order. The Claimant is the owner and operator of the Airport. It says the planned action would amount to trespass and nuisance.
2. Having read the evidence in advance, and after hearing Ms Holland KC on behalf of the Claimant, I was satisfied it was entitled to the order it was seeking. These are my reasons.
3. 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 the *Wolverhampton Travellers* case.
4. 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.
5. A few weeks before the present application I granted a similar application by the operators of London City Airport to restrain the same sort of anticipated conduct which the Claimant fears.

Without notice

6. The application before me was made without notice. I was satisfied this was appropriate for the following reasons.
7. 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, 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.

8. I was and am satisfied that there are good and compelling reasons for the application to have been made without notice.
9. In particular, the Claimant was 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 injunction.
10. 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), [80]-[81], [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

11. The evidence in support of the application principally comes from Jonathan Coen, the Airport's Director of Security, and Akhil Markanday, of Bryan Cave Leighton Paisner, the Claimant's solicitors. I will refer to their statements as 'Coen' and 'Markanday' respectively, meaning no discourtesy.
12. Just Stop Oil (JSO) is one of a number of groups which in 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.
13. JSO'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.”
14. The Airport is Europe's busiest airport. The average number of daily flights exceeds 1,300, with an average of nearly 227,000 passengers daily. It is a designated Critical National Infrastructure site. It is the Claimant's case that it is a clear and obvious target for the planned disruptive action, and, indeed, features in one of the videos on the JSO website promoting the proposed campaign.
15. Details about the campaign of disruption at airports being organised and/or publicised by the Defendants are set out in Markanday, [14]-[24,] and Coen,

[23] – [25]. Examples of recent unlawful actions at airports generally (supporting the Claimant’s concerns as to the apprehended actions) and at or directed at the Airport previously are set out in Markanday, [25]-[28], and Coen, [26]-[28].

16. By way of summary, in March 2024, the Daily Mail reported that environmental activists associated with the JSO campaign were planning a campaign of disruptive action at airports over the summer of 2024, advocating actions such as:
 - a. Cutting through fences and gluing themselves to runway tarmac;
 - b. Cycling in circles on runways;
 - c. Climbing onto planes to prevent them from taking off; and
 - d. Staging sit-ins at terminals ‘day after day’ to stop passengers getting inside airports.
17. At the relevant time JSO’s own website emphasised that the group plans to target action on airports during the summer of 2024, with recent updates on its fundraising pages stating (inter alia) that ‘We’re escalating our campaign this summer to take action at airports’ and ‘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.**’
18. In June 2024 JSO sent a letter to MPs threatening further action if its demands were not met by a deadline of 12 July 2024. That was three days after the hearing before me. That was plainly an imminent threat.
19. UK and foreign airports, including Heathrow, have previously been the subject of unlawful trespass or other disruptive actions by environmental activists, including:
 - a. Two JSO supporters breaching the perimeter fence at Stansted Airport on 20 June 2024, and spraying paint over private jets (Markanday, [25]);
 - b. Extinction Rebellion activists blocking access to Farnborough Airport on 2 June 2024 (Markanday, [26]);
 - c. A group affiliated with JSO, called Last Generation, causing disruption at Munich airport on 18 May 2024, including people gluing themselves to the runway (Markanday, [27]);
 - d. On 27 September 2021, climate change protestors defied a court order and blocked part of the M25 at Heathrow (Coen, [28(a)]);
 - e. In September 2019, the climate change group, Heathrow Pause, attempted to disrupt flights into and out of the Airport by flying drones in the Airport’s exclusion zone (Coen, [27(a)]); and

- f. On 13 July 2015, 13 members of the climate change protest group ‘Plane Stupid’ broke through the perimeter fence and onto the northern runway at the Airport. They chained themselves together in protest, disrupting hundreds of flights (Coen [27(c)]).
- 20. In the London City Airports case (see above) I also had evidence about protests by environmental activists there in 2019.
- 21. I was and am satisfied on all of the Claimant’s evidence that there is real threat of disruptive protest to the Airport by environmental protesters. For reasons I will come to, this protest will not be lawful.
- 22. I turn to the question of harm.

Risk of harm

- 23. I was and am satisfied that the anticipated protest would cause a serious risk of harm; those harms being serious injury and death; financial harm; and unquantifiable inconvenience. I adopt the analysis in [17] et seq of the Claimant’s Skeleton Argument and highlight the following.
- 24. The Airport is a busy, operational site serving passengers and cargo, with two runways and, as I have said, around 1,300 flight every day. As a Code F compliant airport (an International Civil Aviation Organisation designation), it can receive the largest aircraft which many other airports cannot, and accordingly has a higher proportion of long-haul aircraft landing than other UK airports (Coen, [31]).
- 25. In his witness statement Mr Coen says at [29]:

“29. Heathrow is a complex operational environment. Health and Safety is naturally taken very seriously and we consider there to be a real risk that any unlawful direct action at the Airport may endanger our staff, other companies’ staff, our passengers, other legitimate visitors and the participants themselves.”
- 26. The risks of harm are set out by Mr Coen at [29]-[33]. The risks to life and limb principally arise from:
 - a. Trespassers being struck by landing, departing or taxi-ing aircraft, or others being struck by aircraft having to take evasive action (Coen, [30]);
 - b. Trespassers coming too close to a jet engine (Coen, [30(a)]);
 - c. Emergency services and the Airport’s own rescue and fire-fighting services potentially having to put themselves at risk to remove and/or rescue trespassers (and in the event of an airfield emergency, their response potentially being hampered) (Coen [30(c)]);

27. There would also be severe disruption to passengers, and the proper operations of the Airport more generally (Coen, [43]). The potential economic loss to the Claimant would be significant (Coen, [37]). The disruption would have effects beyond the Airport itself, including, but not limited to, the potential need for other airports to find capacity to accommodate in-bound flights which might have to be diverted from Heathrow (Coen, [34(f)]); the need to divert additional Police resources to the Airport (Coen, [34(g)]); disruption to the highway network (Coen, [34(d)]); and impacts on businesses and wider economy given the contribution which the Airport makes to the wider economy (Coen, [12]-[13], [15] and [34(b)]).

The site

28. The Airport occupies a very large area. I am satisfied that the site to be covered by the injunction is clearly shown on the plans produced by Mr Markanday that are in the bundle and which form part of the Order. I can summarise matters as follows.
29. The land within the Airport perimeter comprises a significant number of land parcels registered at HM Land Registry. A Schedule of Titles is appended to the Particulars of Claim. The land which is owned by the Claimant, either freehold or leasehold, is shown on one of the plans in the bundle; this equates to the area shown edged purple on Plan A to the Particulars of Claim.
30. A number of the parcels of land listed in the Schedule of Titles are subject to leases to third parties. Those parts of the Airport which are subject to above-surface leases are shown hatched blue on Plan A.
31. There are, in addition, a number of areas, within terminal buildings which are occupied by third parties. (As explained in Markanday, [12], in light of the complexity of seeking to show which parts of different floors of the terminal buildings are subject to leases (etc) to third parties, for the purposes of this claim, the terminal buildings are excluded from those parts of the Airport to which the Claimant asserts an immediate entitlement to possession by virtue of its freehold/leasehold ownership). These areas are shown shaded orange on Plan A. Those parts of the Airport to which the Claimant asserts an immediate entitlement to possession, in its capacity as freehold or leasehold owner under the titles shown in the Schedule of Titles, are therefore those areas shown shaded yellow but excluding those areas hatched blue or shaded orange on Plan A.
32. As operator of the Airport, the Claimant holds a certificate for the operation of the Airport issued by the Civil Aviation Authority (CAA) under the relevant legislation (the Certificate). It also has an Economic Licence granted by the CAA under Part 1 of the Civil Aviation Act 2012 (the Licence). In broad terms, these confer the right to control the Airport and the right to charge fees.
33. The Claimant has also made the Heathrow Airport – London Byelaws 2014 (the Byelaws) pursuant to s 63 of the Airports Act 1986. They regulate the use and operation of the Airport, and the conduct of all persons while within the Airport. They came into force on 13 April 2014. Section 64 makes it an offence

punishable by a fine to breach byelaws made under s 63. Several of the byelaws are relevant, but for example, Byelaw 3.19 provides:

“no person shall organise or take part in any demonstration, procession or public assembly likely to obstruct or interfere with the proper use of the Airport or obstruct or interfere with the safety of passengers or persons using the Airport”

Causes of action

34. The Claimant seeks an injunction to restrain acts it said would constitute trespass and nuisance.
35. I am satisfied that the Claimant has an overwhelmingly strong case and that there is (or would be) no realistic defence. I will say more about this later.

Legal principles

36. 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

37. The test for precautionary relief of the type sought by the Claimants is whether there is an imminent and real risk of harm: *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [34(1)] (Court of Appeal) and the first instance decision of Morgan J: [2017] EWHC 2945 (Ch), [88]. See also *High Speed Two (HS2) Limited*, [99]-[101]. 'Imminent' in this context simply means 'not premature': *Hooper v Rogers* [1975] Ch 43, 49.
38. I was satisfied that this application was not premature and that, for the reasons I gave earlier, there is more than a real risk of harm.

'Newcomer' or 'Persons Unknown' injunctions

39. 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).
40. 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.

41. 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 Claimant's case by reference to them.
42. *There must be a civil cause of action identified*: here, the causes of action are trespass and nuisance.
43. In relation to trespass, as set out [5] of the Particulars of Claim, the Claimant is entitled to immediate possession of those parts of the Airport shown shaded yellow on Plan A in its capacity as the registered freehold or leasehold proprietor of those parts of the Airport. The availability of injunctive relief to restrain an anticipated trespass of land to which a landowner is entitled to immediate possession is well established: see, for example, *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780.
44. However, it is also well established that an entitlement to exclusive possession, or actual possession itself, is not required where possession, or injunctive relief, is sought against trespassers: *Manchester Airport Plc v Dutton & ors* [2000] 1 QB 133. In *High Speed Two (HS2) Limited v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB), in granting injunctive relief to restrain protests over the HS2 route and other land, I said at [77]: 'In relation to trespass, all that needs to be demonstrated by the claimant is a better right to possession than the occupiers', citing *Dutton* at p147.
45. In *Mayor of London v Hall* [2011] 1 WLR 504, the Court of Appeal was satisfied that the Mayor of London, as the person with 'control' of Parliament Square Gardens, could properly seek injunctive relief against the defendants founded in trespass, even though title was vested in the Crown ([22]-[27]).
46. The Claimant plainly comes within these principles. As well as its title holding over the relevant parcels of land, it is the operator of the Airport as a whole and so in control of it. It holds the Certificate and the Licence, which mean that it is responsible for the safe and efficient operation of the Airport. And it has made byelaws pursuant to the power given to it by s 63 of the Airports Act 1986 which regulate the use and operation of the airport and the conduct of all persons within the Airport.
47. As the Defendants have no interest, estate or other right to possession of the Airport, or right to enter it without permission (which they do not have), there can be no dispute that the Claimant enjoys a better right to possession of the Airport than they do. As set out in Coen, [20], whilst it is the case that large parts of the Airport are broadly open to the public, that is with the Claimant's permission and consent for legitimate short-term purposes connected with Heathrow's status as an airport – for example, to travel themselves or to drop-off/collect other travellers. That general consent is subject to compliance with the Byelaws.
48. The Claimant is therefore entitled to injunctive relief to restrain trespass over the whole of the Airport, as shown edged purple on Plan A, being the land over

which it has control even if not, by reason of title, an immediate right to possession in its capacity as landowner.

49. I turn to nuisance. This can either be private nuisance or public nuisance.
50. The essence of a claim for private nuisance is that the acts of the defendant have wrongfully interfered with the claimant's use and/or enjoyment of its property. I am satisfied that in the present case, the acts complained of would fall into this category of nuisance by interference with enjoyment discussed in *Clerk & Lindsell on Torts* (24th Edn), [19-08].
51. A public nuisance is one which 'inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere of a neighbourhood of its operation': *High Speed 2 (HS2) Limited*, [84]. A public nuisance is actionable in private law if the claimant can establish that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial: *Benjamin v Storr* (1873-74) LR 9.
52. I am satisfied that the Defendants' threatened conduct satisfies these tests and would constitute a public nuisance. The actions apprehended by the Claimant would substantially affect members of the public, including, but not limited to persons wishing to use the Airport for the purpose of air travel - as well as the Claimant.
53. *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.
54. *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.
55. *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.”

56. In the case before me, there is more than a real risk of grave injury and death, as I explained earlier. Other harm would also result.
57. *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 many people. Further, the evidence of Mr Coen shows that the economic loss to the Claimant would be huge and of such a scale that there is no credible reason to believe that any of the Defendants could or would meet any such award (Coen [39(d)]).
58. *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.
59. *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.
60. *The prohibitions must match the pleaded claim(s)*: I am satisfied that this requirement has been fulfilled.
61. *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.
62. *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

63. Cross-undertaking in damages: the order contains an appropriate cross-undertaking.
64. 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.

65. I was and am satisfied that the existence of byelaws is not a sufficient means of control and that an injunction is necessary. Byelaws have not prevented previous disruptive protests. Although handed down after the hearing in this case, I would also adopt my reasoning in *Wolverhampton City Council*, [35]-[43], where I granted injunctions to prevent so-called car cruising (in effect, organised dangerous driving) on when it is appropriate to grant an injunction in support of the criminal law. I am satisfied the relevant tests are satisfied here.
66. At [43] of its Skeleton Argument the Claimant made submissions in compliance with its duty of full and frank disclosure on reasons why it might be said not to be appropriate to grant an injunction.
67. Firstly, it 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.
68. Second, it 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 injunction relief. The Airport is an obvious target, as Mr Coen said.
69. Third, it referred to arguments based on the Defendants' Convention rights. These have no application for the reasons explained earlier.

Conclusion

70. It was for the substance of these reasons that I granted the injunction.



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

Claim no: QB-2022-000904

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

Date: 26th January 2024

Before:

MR JUSTICE RITCHIE

BETWEEN

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

Claimants

-and-

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

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

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

(3) MRS ALICE BRENCHER AND 16 OTHERS

Defendants

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

Hearing date: 17th January 2024

Approved Judgment

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

Mr Justice Ritchie:

The Parties

1. The Claimants are three companies who are part of a large petrochemical group called the Valero Group and own or have a right to possession of the 8 Sites defined out below.
2. The “4 Organisations” relevant to this judgment are:
 - 2.1 Just Stop Oil.
 - 2.2 Extinction Rebellion.
 - 2.3 Insulate Britain.
 - 2.4 Youth Climate Swarm.

I have been provided with a little information about the persons who set up and run some of these 4 Organisations. They appear to be crowdfunded partly by donations. A man called Richard Hallam appears to be a co-founder of 3 of them.
3. The Defendants are firstly, persons unknown (PUs) connected with 4 Organisations who trespass or stay on the 8 Sites defined below. Secondly, they are PUs who block access to the 8 Sites defined below or otherwise interfere with the access to the 8 Sites by the Claimants, their servants, agents, licensees or invitees. Thirdly, they are named persons who have been involved in suspected tortious behaviour or whom the Claimants fear will be involved in tortious behaviour at the 8 Sites and the relevant access roads.

The 8 Sites

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

- 4.7 the second Claimant's Avonmouth oil terminal at Holesmouth Road, Royal Edward dock, Avonmouth BS11 9BT (shown outlined red on the plan G in Schedule 1 to the Order made by Bourne J on 28.7.2023);
- 4.8 the third Claimant's Pembrokeshire terminal at Main Road, Waterston, Milford Haven SA73 1DR (shown outlined red on plan H in Schedule 1 to the Order made by Bourne J on 28.7.2023).

Bundles

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

Summary

- 6. The 4 Organisations and members of the public connected with them seek to disrupt the petrochemical industry in England and Wales in furtherance of their political objectives and demands. After various public threats and protests and on police intelligence the Claimants issued a Claim Form on the 18th of March 2022 alleging that they feared tortious trespass and nuisance by persons unknown connected with the 4 Organisations at their 8 Sites and their access roads and seeking an interim injunction prohibiting that tortious behaviour.
- 7. Various interim prohibitions were granted by Mr Justice Butcher on the 21st of March 2022 in an ex-parte interim injunction protecting the 8 Sites and access thereto. However, protests involving tortious action took place at the Claimant's and other companies' Kingsbury site between the 1st and the 15th of April 2022 leading to not less than 86 protesters being arrested. The Claimants applied to continue their injunction and it was renewed by various High Court judges and eventually replaced by a similar interim injunction made by Mr Justice Bourne on the 28th of July 2023.
- 8. On the 12th of December 2023 the Claimants applied for summary judgment and for a final injunction to last five years with annual reviews. This judgment deals with the final hearing of that application which took place before me.
- 9. Despite valid service of the application, evidence and notice of hearing, none of the named Defendants attended at the hearing which was in open Court and no UPs attended at the hearing, nor did any member of the public as far as I could see in Court. The Claimants' counsel informed me that no communication took place between any named Defendant and the Claimants' solicitors in relation to the hearing other than by way of negotiations for undertakings for 43 of the named Defendants who all promised not to commit the feared torts in future.

The Issues

- 10. The issues before me were as follows:

- 10.1 Are the elements of CPR Part 24 satisfied so that summary judgment can be entered?
- 10.2 Should a final injunction against unknown persons and named Defendants be granted on the evidence presented by the Claimants?
- 10.3 What should the terms of any such injunction be?

The ancillary applications

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

Pleadings and chronology of the action

- 12. In the Claim Form the details of the claims were set out. The Claimants sought a *quia timet* (since he fears) injunction, fearing that persons would trespass into the 8 Sites and cause danger or damage therein and disrupt the processes carried out therein, or block access to the 8 Sites thereby committing a private nuisance on private roads or a public nuisance on public highways. The Claimants relied on the letter sent by Just Stop Oil dated 14th February 2022 to Her Majesty's Government threatening intervention unless various demands were met. Just Stop Oil asserted they planned to commence action from the 22nd of March 2022. Police intelligence briefings supported the risk of trespass and nuisance at the Claimants' 8 Sites. 3 unidentified groups of persons in connection with the 4 Organisations were categorised as Defendants in the claim as follows: (1) those trespassing onto the 8 Sites; (2) those blockading or obstructing access to the 8 Sites; (3) those carrying out a miscellany of other feared torts such as locking on, tunnelling or encouraging others to commit torts at the 8 Sites or on the access roads thereto. The Claim Form was amended by order of Bennathan J. in April 2022; Re amended by order of Cotter J. in September 2022 and re re amended in July 2023 by order of Bourne J.
- 13. In late March 2022 Mr Justice Butcher issued an interim ex parte injunction on a *quia timet* basis until trial, expressly stating it was not intended to prohibit lawful protest. He prohibited the Defendants from entering or staying on the 8 sites; impeding access to the 8 sites; damaging the Claimants' land; locking on or causing or encouraging others to breach the injunction. The Order provided for various alternative methods of service for the unknown persons by fixing hard copies of the injunction at the entrances and on access road at the 8 Sites, publishing digital copies online at a specific website and sending emails to the 4 Organisations.

14. Despite the interim injunction, between the 1st and the 7th of April 2022 protesters attended at the Claimants' Kingsbury site and 48 were arrested. Between the 9th and 15th of April 2022 further protesters attended at the Kingsbury site and 38 were arrested. No application to commit any person to prison for contempt was made. The protests were not just at the Claimants' parts of the Kingsbury site. They targeted other owners' sites there too.
15. On the return date, the original interim injunction was replaced by an Order dated 11th of April 2022 made by Bennathan J. which was in similar terms and provided for alternative service in a similar way and gave directions for varying or discharging the interim injunction on the application by any unknown person who was required provide their name and address if they wished to do so (none ever did). Geographical plans were attached to the original injunction and the replacement injunction setting out clearly which access roads were covered and delineating each of the 8 Sites. Undertakings were given by the Claimants and directions were given for various Chief Constables to disclose lists and names of persons arrested at the 8 Sites on dates up to the 1st of June 2022.
16. The Chief Constables duly obliged and on the 20th of September 2022 Mr Justice Cotter added named Defendants to the proceedings, extended the term of the interim injunction, provided retrospective permission for service and gave directions allowing variation or discharge of the injunction on application by any Defendant. Unknown persons who wished to apply were required to self-name and provide an address for service (none ever did). Then, on the 16th of December 2022 Mr Justice Cotter gave further retrospective permission for service of various documents. On the 20th of January 2023 Mr Justice Soole reviewed the interim injunction, gave permission for retrospective service of various documents and replaced the interim injunction with a similar further interim injunction. Alternative service was again permitted in a similar fashion by: (1) publication on a specified website, (2) e-mail to the 4 Organisations, (3) personal service on the named Defendants where that was possible because they had provided addresses. At that time no acknowledgement of service or defence from any Defendant was required.
17. In April 2023 the Claimants changed their solicitors and in June 2023 Master Cook gave prospective alternative service directions for future service of all Court documents by: (1) publication on the named website, (2) e-mail to the 4 Organisations, (3) fixing a notification to signs at the front entrances and the access roads of the 8 Sites. Normal service applied for the named Defendants who had provided addresses.
18. On the 28th of July 2023, before Bourne J., the Claimants agreed not to pursue contempt applications for breaches of the orders of Mr Justice Butcher and Mr Justice Bennathan for any activities before the date of the hearing. Present at that hearing were counsel for Defendants 31 and 53. Directions were given permitting a redefinition of "Unknown

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

19. On the 30th November 2023 Master Eastman ordered that service of exhibits to witness statements and hearing bundles was to be by: (1) uploading them onto the specific website, (2) emailing a notification to the 4 Organisations, (3) placing a notice at the 8 Sites entrances and access roads, (4) postal service to of a covering letter named Defendants who had provided addresses informing them where the exhibits could be read.
20. The Claimants applied for summary judgment on the 12th of December 2023.
21. By the time of the hearing before me, 43 named Defendants had provided undertakings in accordance with the Order of Mr Justice Bourne. Defendants 14 and 44 were wrongly added and so 17 named Defendants remained who had refused to provide undertakings. None of these attended the hearing or communicated with the Court.

The lay witness evidence

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

Service evidence

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

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

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

Substantive evidence

25. **David Blackhouse.** Mr. Blackhouse is employed by Valero International Security as European regional security manager. In his earlier statements he evidenced his fears that there were real and imminent threats to the Claimants' 8 Sites and in his later statements set out the direct action suffered at the Claimants' sites which fully matched his earlier fears.
26. In his first witness statement he set out evidence from the police and from the Just Stop Oil website evidencing their commitment to action and their plans to participate in protests. The website set out an action plan asking members of the public to sign up to the group's mailing list so that the group could send out information about their proposed activities and provide training. Intervention was planned from the 22nd of March 2022 if the Government did not back down to the group's demands. Newspaper reports from anonymous spokespersons for the group threatened activity that would lead to arrests involving blocking oil sites and paralysing the country. A Just Stop Oil spokesperson asserted they would go beyond the activities of Extinction Rebellion and Insulate Britain through civil resistance, taking inspiration from the old fuel protests 22 years before when lorries blockaded oil refineries and fuel depots. Mr. Blackhouse also summarised various podcasts made by alleged members of the group in which the group asserted it would train up members of the public to cause disruption together with Youth Climate Swarm and Extinction Rebellion to focus on the oil industry in April 2022 with the aim of causing disruption in the oil industry. Mr. Blackhouse also provided evidence of press releases and statements by Extinction Rebellion planning to block major UK oil refineries in April 2022 but refusing to name the actual sites which they would block. They asserted their protests would "*continue indefinitely*" until the Government backed down. Insulate Britain's press releases and podcasts included statements that persons aligned with the group intended to carry out "*extreme protests*" matching the protests 22 years before which allegedly brought the country to a "*standstill*". They stated they needed to cause an "*intolerable level of disruption*". Blocking oil refineries and different actions disrupting oil infrastructure was specifically stated as their objective.
27. In his second witness statement David Blackhouse summarised the protest events at Kingsbury terminal on the 1st of April 2022 (which were carried out in conjunction with similar protests at Esso Purfleet, Navigator at Thurrock and Exolum in Grays). He was present at the Site and was an eye-witness. The protesters blocked the access roads which were public and then moved onto private access roads. More than 30 protesters

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

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

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

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

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

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

“September 2019

6.5 The Refinery was the target of protest activity in 2019, albeit this was on a smaller scale to that which took place in 2022 at the Kingsbury Terminal. The activity at the Refinery involved the blocking of access roads whereby the protestors used concrete “Lock Ons” i.e. the protestors locked arms, within the concrete blocks placed on the road, whilst sitting on the road to prevent removal. Although it was a non-violent protest it did impact upon employees at the Refinery who were prevented from attending and leaving work. Day to day operations and deliveries were negatively impacted as a result.

6.6...

Friday 1st April 2022

Protestors obstructed the crossroads junction of Trinity Road, Piccadilly Way, and the entrance to the private access road by sitting in the road. They also climbed onto two stationary road tanker wagons on Piccadilly Way, about thirty metres from the same junction, preventing the vehicles from moving, causing a partial obstruction of the road in the direction of the terminal. They also climbed onto one road tanker wagon that had stopped on Trinity Road on the approach to the private access road to the terminal. Fuel supplies from the Valero terminal were seriously disrupted due to the continued obstruction of the highway and the entrance to the private access road throughout the day. Valero staff had to stop the movement of road tanker wagons to or from the site between the hours of 07:40 hrs and 20:30 hrs. My understanding is that up to twenty two persons were arrested by the Police before Valero were able to receive road tanker traffic and resume normal supplies of fuel.

Sunday 3rd April 2022

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

Tuesday 5th April 2022

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

Thursday 7th April 2022

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

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

Saturday 9th April 2022

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

Sunday 10th April 2022

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

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

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

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

Friday 15th April 2022

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

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

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

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

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

Tuesday 26th April 2022

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

Wednesday 27th April 2022

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

Thursday 28th April 2022

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

Wednesday 4th May 2022

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

Thursday 12th May 2022

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

Monday 22nd August 2022

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

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

Tuesday 23rd August 2022

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

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

Wednesday 14th September 2022

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

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

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

30. In his 5th witness statement the main threats identified by Mr Blackhouse were; (1) protestors 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 immovable obstacle in the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

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

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

varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

(iii) Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

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

(v) It is, on the particular facts, just and convenient that such an injunction be granted. ...”

...

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

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

Compelling justification for the remedy

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

...

“(viii) A need for review

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

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

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

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

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

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

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

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

(4) The prohibited acts

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

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

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

(5) Geographical and temporal limits

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

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

(6) Advertising the application in advance

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

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

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

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

(7) Effective notice of the order

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

respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

231. Any applicant for such an order must in our view make full and complete disclosure of all the steps it proposes to take (i) to notify all persons likely to be affected by its terms; and (ii) to ascertain the names and addresses of all such persons who are known only by way of description. This will no doubt include placing notices in and around the relevant sites where this is practicable; placing notices on appropriate websites and in relevant publications; and giving notice to relevant community and charitable and other representative groups.

(8) Liberty to apply to discharge or vary

232. As we have mentioned, we consider that an order of this kind ought always to include generous liberty to any person affected by its terms to apply to vary or discharge the whole or any part of the order (again, see para 167(ii) above). This is so whether the order is interim or final in form, so that a respondent can challenge the grant of the injunction on any grounds which might have been available at the time of its grant.

(9) Costs protection

233. This is a difficult subject, and it is one on which we have received little assistance. We have considerable concern that costs of litigation of this kind are way beyond the means of most if not all Gypsies and Travellers and many interveners, as counsel for the first interveners, Friends of the Earth, submitted. This raises the question whether the court has jurisdiction to make a protective or costs capping order. This is a matter to be considered on another day by the judge making or continuing the order. We can see the benefit of such an order in an appropriate case to ensure that all relevant arguments are properly ventilated, and the court is equipped to give general guidance on the difficult issues to which it may give rise.

(10) Cross-undertaking

234. This is another important issue for another day. But a few general points may be made at this stage. It is true that this new form of injunction is not an interim order, and it is not in any sense holding the ring until the final determination of the merits of the claim at trial. Further, so far as the applicant is a public body acting in pursuance of its public duty, a cross undertaking may not in any event be appropriate. Nevertheless, there may be occasions where a cross undertaking is considered appropriate, for reasons such as those given by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1619 (QB), a protest case. These are matters to be considered on a case-by-case basis, and the applicant must equip the court asked to make or continue the order with the most up-to-date guidance and assistance.

(11) *Protest cases*

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

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

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

58. **(A) Substantive Requirements**
Cause of action

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

Full and frank disclosure by the Claimant

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

Sufficient evidence to prove the claim

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

No realistic defence

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

Balance of convenience – compelling justification

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

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

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

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

- (15) Even a final injunction involving PUs is not totally final. Provision must be made for reviewing the injunction in the future. The regularity of the reviews depends on the circumstances. Thus such injunctions are “Quasi-final” not wholly final.
59. Costs and undertakings may be relevant in final injunction cases but the Supreme Court did not give guidance upon these matters.
60. I have read and take into account the cases setting out the historical growth of PU injunctions including *Ineos Upstream v PUs* [2019] EWCA Civ. 515, per Longmore LJ at paras. 18-34. I do not consider that extracts from the judgment are necessary here.

Applying the law to the facts

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

(A) Substantive Requirements

Cause of action

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

Full and frank disclosure

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

Sufficient evidence to prove the claim

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

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

No realistic defence

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

“9. The following general principles are well-settled, and uncontroversial on this appeal.

(1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.

(2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol ('A1P1'). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has *the right to possession*, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest.”

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

Balance of convenience – compelling justification

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

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

68. I also take into account the dangers involved in shutting down any refinery site. I take into account that a temporary emergency shutdown had to be put in place at Kingsbury on 7th April 2022 and the dangers that such safety measures cause on restart.
69. I take into account that no spokesperson for any of the 4 Organisations has agreed to sign undertakings and that 17 Defendants have refused to sign undertakings. I take into account the dark and ominous threats made by Roger Hallam, the asserted co-founder of Just Stop Oil and the statements of those who assert that they speak for the Just Stop Oil and the other organisations, that some will continue action using methods towards a more excessive limit.

Damages not an adequate remedy

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

(B) Procedural Requirements

Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

Temporal limits - duration

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

Service

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

The right to set aside or vary

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

Review

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

Conclusions

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

END



Neutral Citation Number: [2020] EWCA Civ 303

Case No: A2/2019/2604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Nicklin J

[2019] EWHC 2459 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS

and

LORD JUSTICE COULSON

Between :

CANADA GOOSE UK RETAIL LIMITED (1)
James HAYTON (for and on behalf of the Employees,
Security Personnel and Protected Persons
pursuant to CPR 19.6) (2)

Appellants

- and -

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 (1)
PEOPLE FOR THE ETHICAL TREATMENT OF
ANIMALS (PETA) FOUNDATION
(a charitable company limited by guarantee, in its own right
and for and on behalf of its employees and members
pursuant to CPR 19.6) (2)

Respondents

Ranjit Bhose QC and Michael Buckpitt (instructed by Lewis Silkin LLP) for the Appellants
The Respondents did not appear and were not represented
Sarah Wilkinson appeared as Advocate to the Court

Hearing dates : 4 & 5 February 2020

Approved Judgment

Sir Terence Etherton MR, Lord Justice David Richards and Lord Justice Coulson :

1. This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against “persons unknown” can be used to restrict public protests.
2. The first appellant, Canada Goose Retail Limited UK (“Canada Goose”), is the UK trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in London (“the store”). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as “a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]”.
3. The first respondents (“the Unknown Persons respondents”), who are the first defendants in the proceedings, were described in the claim form as: “Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]”. The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation (“PETA”).
4. This is an appeal from the order of Nicklin J of 20 September 2019 by which he dismissed the application of the appellants for summary judgment for injunctive relief against the respondents and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by HHJ Moloney QC (sitting as a Judge of the High Court) on 15 December 2017.

Factual background

5. From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose’s use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J’s judgment at [132]-[134]. The following is a brief summary.
6. A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been coordinated by Surge Activism (“Surge”), an animal rights organisation. Other protestors have joined the on-going protest as individuals who were not part of any wider group.
7. The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose’s employees.

8. A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2018, the front doors of the store were vandalised with “*Don’t shop here*” and “*We sell cruelty*” painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, 300, and 100, respectively) had a serious impact on the operation of the store. The police were present on each of those occasions. On one occasion five arrests were made. On 18 November 2017 the police closed one lane of the carriageway on Regent Street. There is also evidence of criminal offences by certain individual protestors, including an offence of violence reported to the police during the large protest on 18 November 2017.

The proceedings

9. Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as:

“Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR”

10. They are described in paragraph 6 of the particulars of claim as including “all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign”. The “Campaign” was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.
11. The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:
 - (1) Assaulting, molesting, or threatening the Protected Persons [defined in the particulars of claim as including Canada Goose’s employees, security personnel working at the store and customers];
 - (2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards Protected Persons.
 - (3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the Protected Persons;
 - (4) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them;

- (5) Making in any way whatsoever any abusive or threatening communication to the Protected Persons;
 - (6) Making or attempting to make repeated communications not in the ordinary course of the First Claimant's retail business to or with Employees by telephone, email or letter;
 - (7) Entering the Store;
 - (8) Blocking or otherwise obstructing the Entrances to the Store;
 - (9) Demonstrating at the Stores within the Inner Exclusion Zone;
 - (10) Demonstrating at the Stores within the Outer Exclusion Zone save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets therein;
 - (11) Using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone or otherwise within 50 metres of the Building Line of the Store.
12. On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:
 - “(1) Assaulting, molesting, or threatening the Protected Persons (defined as including Canada Goose's employees, security personnel working at the store, customer and any other person visiting or seeking to visit the store);
 - (2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of Protected Persons;
 - (3) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of Animal Products;
 - (4) Making in any way whatsoever any abusive or threatening electronic communication to the Protected Persons;
 - (5) Entering the Store;
 - (6) Blocking or otherwise obstructing the Entrance to the Store;
 - (7) Banging on the windows of the Store;
 - (8) Painting, spraying and/or affixing things to the outside of the Store;

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

(10) Demonstrating at the Store within the Inner Exclusion Zone;

(11) Demonstrating at the Store within the Outer Exclusion Zone A save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets within the Outer Exclusion Zone A (but not within the Inner Exclusion Zone provided that no obstruction occurs other than that which is implicit in handing out leaflets;

(12) Demonstrating at the Store within the Outer Exclusion Zone B [as defined in the order] save that no more than 5 Protestors may at any one time demonstrate and hand out leaflets within Outer Exclusion Zone B (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

(13) Using at any time a Loudhailer [as defined] within the Inner Exclusion Zone and Outer Exclusion Zones or otherwise within 10 metres of the Building Line of the Store;

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

13. A plan attached to the order showed the Inner and Outer Exclusion Zones. Essentially those Zones (with a combined width of 7.5 metres) covered roughly a 180-degree radius around the entrance to the store. The Inner Exclusion Zone extended out from the store front for 2.5 metres. The Outer Exclusion Zone extended a further 5m outwards. The Outer Exclusion Zone was divided into Zone A (a section of pavement on Regent Street) and Zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined Exclusion Zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.
14. The order permitted the claimant to serve the order on “any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order”. It provided for alternative service of the order, stating that “The claimants shall serve this order by the following alternative method namely by serving the same by email to ‘contact@surgeactivism.com’ and ‘info@peta.org.uk’”.
15. The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16. The order was sent on 29 November 2017 to the two email addresses mentioned in the order: ‘contact@surgeactivism.com’ and ‘info@peta.org.uk’. The claim form and the particulars of claim were also sent to those email addresses.
17. On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J’s order.
18. On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.
19. At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under Article 10 of the European Convention on Human Rights (“the ECHR”) and to freedom of assembly under Article 12 of the ECHR.
20. Judge Moloney continued the interim injunction but varied it by amalgamating Zones A and B in the Outer Exclusion Zone and increasing the number of protestors permitted within the Outer Exclusion Zone to 12 people. He also varied paragraph (14) of Teare J’s order, substituting a prohibition on:

“... using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone... [and] using a Loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2pm and 8pm a single Loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use.”
21. Judge Moloney’s order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22. Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.
23. On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Part 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application

differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the restrictions applicable to the Zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

“Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Limited and are involved in any of the acts prohibited by the terms of this order”

24. Canada Goose says that the further written submissions made clear that it no longer pursued summary judgment against PETA.
25. Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147, and *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further sets of written submissions on behalf of Canada Goose.
26. Bearing in mind that only one party was represented before him, Nicklin J’s judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.
27. The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue as to the substance of the application for summary judgment.
28. Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR 6.5, and there had been no order permitting alternative service under CPR 6.15. Teare J’s order only permitted alternative service of his order. Nicklin J declined to amend Teare J’s order under the “slip rule” in CPR 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR 6.16 without a proper application before him.
29. Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protesters who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.
30. He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37 protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown

Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31. Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protesters, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.
32. Nicklin J said the following (at [163]), in conclusion on the form of the proposed final injunction:

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

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

“164. The Second Defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the Second Defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.

165. In relation to the First Defendants, and those for whom the Second Defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual Defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the Claimants have demonstrated that the Defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of “persons unknown” who

have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various Defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused.”

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

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

The grounds of appeal

35. The grounds of appeal are as follows.

“Ground 1 (Service of the Claim Form): In relation to the service of the Claim Form, the Judge:

Erred in refusing to amend the Order of 29 November 2017, pursuant to CPR 40.12 or the court’s inherent jurisdiction, to provide that service by email was permissible alternative service under CPR 6.15; alternatively

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

Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the Claim Form

under CPR 6.16, alternatively erred in law in refusing to exercise that power of dispensation.

Ground 2 (Description of First Respondents): The Judge erred in law in holding that the Appellants' proposed re-formulation of the description of the First Respondents was an impermissible one.

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

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

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

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

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

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

Discussion

Appeal Ground 1: Service

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

38. Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect email service as provided for below of the Order, the Claim Form and Particulars of Claim and application notice and evidence in support".
39. Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.
40. Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.
41. In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR 6.16.
42. We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.
43. CPR 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co. v Baker Noton Pharmaceuticals Inc (No. 2)* [2001] EWCA Civ 414, [2001] RPC 45.
44. We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR 40.12.
45. Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR 6.15(2)) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* at [14] the general rule is

that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and, at [17]:

“It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.”

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

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

47. Sending the claim form to Surge's email address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.
48. The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR 6.16 to dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR 6.16.
49. Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.
50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention

of protesters at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protesters and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

51. Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protester than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.
52. We have already mentioned, by reference to Lord Sumption's comments in *Cameron*, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protesters who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to apply to be joined as a party, can justify using the power under CPR 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protesters to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR 6.16.
53. In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was plainly the case, that service of the claim form by sending it to PETA's email address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR 6.16 dispensing with service on PETA.
54. Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial

discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

55. For those reasons we dismiss Appeal Ground 1.

Appeal Ground 2 and Appeal Ground 3: Interim and Final Injunctions

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

Interim relief against "persons unknown"

57. It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* and put into effect by the Court of Appeal in the context of protesters in *Ineos* and *Cuadrilla Bowland Limited v Persons Unknown* [2020] EWCA Civ 9.
58. In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.
59. Lord Sumption, referred (at [9]) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at [10]) that English judges had allowed some exceptions to the general rule, he said (at [11]) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance.
60. Lord Sumption identified (at [13]) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61. That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.
62. Lord Sumption said (at [15]) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at [26]), such a person cannot be sued under a pseudonym or description.
63. It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.
64. Lord Sumption also referred (at [11]) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).
65. The claimants in *Ineos* were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protesters. Each of the first five defendants was a group of persons described as "Persons unknown" followed by an unlawful activity, such as "entering or remaining without the consent of the claimants on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass ... over private access roads", or "interfering with the right of way enjoyed by the claimants ... over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order". The first instance Judge made interim injunctions, as requested, apart from one relating to harassment.
66. One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgement, with which the other two

members of the court (David Richards and Leggatt LJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at [29]) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only come into existence in the future. Longmore LJ concluded (at [30]) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67. Longmore LJ said (at [31]) 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. He also referred (at [33]) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under Article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at [34]) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

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

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

69. Longmore LJ said (at [40]) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of “unreasonably” obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of “without lawful authority or excuse” into an injunction since an ordinary person exercising legitimate right to protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse: if he is not clear about what he can and cannot do, that may well have a chilling effect also. He said (at [40]) that it was unsatisfactory that the injunctions contained no temporal limit.
70. The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.
71. *Cuadrilla* was another case concerning injunctions restraining the unlawful actions of fracking protesters. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants’ land, unlawful interference with the claimants’ rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.
72. The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising the jurisdiction to grant a *quia timet* interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ (“the *Ineos* requirements”). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth *Ineos* requirements required some qualification.
73. Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] 1 QB 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.
74. Although the point did not arise for decision in *Cuadrilla*, the point is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited

demonstrating within the Inner Exclusion Zone and limited the number of protesters at any one time and their actions within the Outer Exclusion Zone.

75. In *Hubbard v Pitt* [1976] 1 QB 142 the issue was whether the first instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp. 187-188) that the injunction was not wider than was necessary for the purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p. 190):

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

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

“It would not seem to me to be a valid objection to the making of an “exclusion zone” order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest ... Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest —

and also, but indirectly, the defendant's — a wider measure of restraint is called for.

77. Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.
78. It is open to us, as suggested by the Court of Appeal in *Cuadrilla*, to qualify the fourth *Ineos* requirement in the light of *Hubbard* and *Burris*, as neither of those cases was cited in *Ineos*. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or Articles 10 and 11 of the ECHR, *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way.
79. The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* was the fifth requirement – that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance ... with a view to slowing down or stopping the traffic ... with the intention of causing inconvenience or delay to the claimants".
80. Leggatt LJ said (at [65]) that he could not accept that there is anything objectionable in principle about including a requirement of intention in an injunction. He acknowledged (at [67]) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at [68]) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at [74]) that there was no reason in principle

why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

81. We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so. As Ms Wilkinson helpfully submitted, this can often be done by reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.
82. Building on *Cameron* 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 protester cases like the present one:
 - (1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
 - (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
 - (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.
 - (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
 - (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
 - (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as

trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

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

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

84. As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as:

"Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR".

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

86. The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the Inner Zone or the Outer Zone, using a loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to Ground 1 above) by the specified method of emailing the order to the respective email addresses of Surge and PETA. The order of Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87. Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary

judgment by 1 December 2018, the claim would stand dismissed and the injunction discharged without further order.

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

Final order against "persons unknown"

89. A final injunction cannot be granted in a protester case against "persons unknown" who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the "persons unknown" and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.
90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in *Attorney-General v Times Newspapers* of the usual principle that a final injunction operates only between the parties to the proceedings.
91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].
92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim

relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

93. As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what it 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 protesters. 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* [2019] EWCA Civ 1490, [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.
94. In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.
95. In all those circumstances, Nicklin J having concluded (at [145] and [164]) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

Appeal Ground 4: Evidence

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

Conclusion

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



Neutral Citation Number: [2024] EWHC 1786 (Ch)

Case No: BL-2023-000713

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9th July 2024

Before :

SIR ANTHONY MANN
Sitting as a Judge of the High Court

Between :

JOCKEY CLUB RACECOURSES LIMITED

Claimant

- and -

**(2) PERSONS UNKNOWN ENTERING THE
AREA DESCRIBED BELOW AS THE "RACE
TRACK" ON THE DAY OF A "RACING
FIXTURE", EXCEPT AT "CROSSING
POINTS" WITH "AUTHORISATION", AS
DESCRIBED BELOW**

**(3) PERSONS UNKNOWN ENTERING
AND/OR REMAINING ON ANY
"CROSSING POINTS" WITHOUT
"AUTHORISATION" ON THE DAY OF A
"RACING FIXTURE", AS DESCRIBED
BELOW**

**(4) PERSONS UNKNOWN ENTERING THE
AREA DESCRIBED BELOW AS THE
"PARADE RING" WITHOUT
"AUTHORISATION" ON THE DAY OF A
"RACING FIXTURE", AS DESCRIBED
BELOW**

**(5) PERSONS UNKNOWN ENTERING
AND/OR REMAINING ON ANY PART OF
THE AREAS DESCRIBED BELOW AS THE
"HORSES' ROUTE TO THE PARADE
RING" AND/OR THE "HORSES' ROUTE
TO THE RACE TRACK" WITHOUT
"AUTHORISATION" ON THE DAY OF A**

**“RACING FIXTURE”, AS DESCRIBED
BELOW
(6) PERSONS UNKNOWN
INTENTIONALLY OBSTRUCTING THE
“HORSE RACES”, AS DESCRIBED BELOW
(7) PERSONS UNKNOWN
INTENTIONALLY CAUSING ANY OBJECT
TO ENTER ONTO AND/OR REMAIN ON
THE “RACE TRACK” WITHOUT
“AUTHORISATION” ON THE DAY OF A
“RACING FIXTURE”, AS DESCRIBED
BELOW
(8) PERSONS UNKNOWN
INTENTIONALLY ENDANGERING ANY
PERSON AT THE LOCATION DESCRIBED
BELOW AS THE “EPSOM RACECOURSE”
ON THE DAY OF A “RACING FIXTURE”,
AS DESCRIBED BELOW**

Defendants

**Alan Maclean KC and Antonia Eklund (instructed by Pinsent Masons LLP) for the
Claimant**

The Defendants did not appear and were not represented.

Hearing date: 8th July 2024

Approved Judgment

Sir Anthony Mann :

Background

1. This is the disposal hearing of these Part 8 proceedings in which the claimant, the Jockey Club, seeks a continuation of injunctive relief against persons unknown to restrain them from trespassing on certain parts of their property at Epsom racecourse.
2. This action has its origins in a fear of the claimant that its running of the Derby race in June 2023 would be disrupted by animal rights protesters, orchestrated, at least to some extent, by a loose association known as Animal Rising. That association (if that is the right word) does not have any apparent corporate or unincorporated existence, but it appears to be a form of movement in which those interested in its objectives can participate. Its object seems to be to prevent what it considers to be cruelty to animals which is said to take various forms, including, for present purposes, horseracing. It has a website whose content has a significance to these proceedings.
3. The claimant is the freehold owner of land at Epsom which comprises the racecourse and a number of ancillary buildings and areas. Its rights are, however, circumscribed by various rights of the public in relation to Epsom Downs. The scope of the ownership, and the nature of those public rights, appear from a previous judgement of mine on an application for an interim injunction which I granted in May 2023 – see [2023] EWHC 1811 (Ch). I do not propose to set out again here matters appearing in that judgement; they should, so far as necessary, be taken as incorporated in this judgement.
4. In 2023, before the running of the Derby, the claimant became aware of a threat to disrupt the running of the Derby by entering various parts of the Jockey club land and, in various potential ways, interfering with the race. Attempts had previously been made to disrupt the running of the Grand National, and indeed the start of that race in that year was delayed as a result. In those circumstances the Jockey club commenced these proceedings in order to restrain interference with its running of the race.
5. An application for an interim injunction was made to me and I granted it. The reasons for the grant of that injunction appear in the judgement to which I have just made reference. An account of the background to the grant of the injunction, and to the circumstances of my granting it, appear fully in that judgement and again I do not propose to repeat them here. They should be treated as incorporated into this judgement. In particular, that judgement explains the various areas of the racecourse affected.
6. At the time of the commencement of these proceedings and of the hearing of the injunction the claimant had been able to identify one particular individual who it was thought was threatening to interfere with the race. That was a Mr Daniel Kidby, and he was made the first defendant to the proceedings. Otherwise the claimant was unable to identify the various animal activists who threatened or planned to disrupt the race. In those circumstances they sought an injunction against persons unknown described in various ways by reference to the geographical or topographical areas which it was anticipated would be or might be affected. That was in line with authorities at the time dealing with the obtaining of injunctions against persons unknown. How that technique worked in practice is apparent from the heading to this judgment.

7. When the race meeting took place the event was heavily policed and stewarded. One protester entered the actual racetrack by way of protest shortly after the race had started. That was a Mr Ben Newman. He was duly charged with a public order offence and served a number of weeks in prison on remand. He was joined as 9th defendant to these proceedings and also became the subject of committal proceedings for infringement of my order and on 11 October 2023 he was sentenced by Miles J to 2 months imprisonment, suspended.
8. These proceedings were restored before Roth J on 15 March 2024, on which occasion he ordered that Mr Kidby and Mr Newman take appropriate steps if they were going to defend the claim against them and gave permission to the Jockey Club to file further evidence. The Club duly availed itself of that opportunity.
9. Shortly after the hearing before Roth J Mr Kidby and Mr Newman both settled with the Jockey Club, giving undertakings not to do the acts complained of, those undertakings lasting five years. Thus for practical purposes they fell out of these proceedings and they continued as proceedings against the various categories of persons unknown to which I have referred above. In a witness statement dated 4 October 2023 Mr Newman accepted that he had wrongfully breached the injunction and reflected on the fact that his time in prison had caused him to reflect on his actions and he expressed his regret for them. In his case it would appear that the threat of prison had become a real deterrent. One can draw the inference that it would be the same for others.
10. The evidence before me on this occasion comprised, first, a witness statement of Mr Nevin Truesdale, chief executive of the Jockey Club, which was the witness statement originally provided in support of these Part 8 proceedings and which was deployed on the interim application before me (along with other limited witness statements). That evidence set out the property background to the case and the reasons for supposing that persons were proposing to disrupt the race and thereby commit trespasses. Pursuant to the permission given by Roth J Mr Truesdale filed a second witness statement signed on 5 April 2024. That witness statement gives evidence of various public pronouncements of Animal Rising on its website, on its Facebook page and in press releases. That material boasted of previous activities of its members in disruptive protests and indicated intentions to carry on activities including disrupting race meetings, albeit that a press release of 4 April 2024 stated that it would not target the Grand National this year and it was suspending its campaign of direct action against racing indefinitely. The reason for not targeting the Grand National meeting was said to be that there was a “huge public conversation” since the Grand National and Derby, and it would appear that the public had in large part been convinced that they do not want racing to be part of the fabric of British culture going forward. The claimant does not accept the genuineness of that analysis. Mr Truesdale gave evidence of attendance figures at some race meetings which gainsay it and points to statements on the then website which threatened disruption of race meetings. That is material on the basis of which I am invited to view with suspicion any protestations that animal rising does not intend to disrupt race meetings. He also pointed to the disruption of other sporting events by other activists, such as throwing confetti, jigsaw puzzle pieces and orange paint variously at Wimbledon, the golf Open Championship, the Ashes and the World Snooker Championship. I am invited to infer, and I do, that the claimant’s race meetings are potentially vulnerable to such protests even if Animal Rising is genuine in its

statement that its own disruptive activities in that area have been suspended indefinitely, which I do not accept is a strong enough assertion.

11. There has, however, been a recent change in the website. The claimant has made an application to adduce further evidence as part of its duty of full and frank disclosure. During the hearing I indicated that I would allow in the new evidence and give reasons in this judgment. That evidence takes the form of a witness statement of Julian Diaz-Rainey, a solicitor at Pinsent Masons, solicitors acting for the claimant. In that witness statement Mr Diaz-Rainey provides evidence that the Animal Rising website has recently been updated to remove references to plans to disrupt horse-racing activities. The material to which Mr Truesdale referred in his second witness statement which professed an intention to disrupt in that way have been removed – indeed the pages which evidence that intention have been removed. It is not known when that change happened, but it must be since Mr Truesdale's second witness statement. That is drawn to my attention because, quite properly, the claimant is aware of its obligation to draw adverse material to my attention.
12. I allow that evidence in in order that the claimant can fulfil its obligation of full and frank disclosure. Mr Diaz-Rainey's witness statement goes on to point out, as a counter to his earlier disclosure, that Animal Rising has not given up its challenge to the horse-racing industry and its intention to try to stop it, and that it trumpets what it calls its successes to date. This material appears in website and Facebook postings. I allow that evidence too. It is a legitimate counter to the evidence disclosed under the full and frank disclosure obligation.
13. The result of this evidence is the following findings, which I make:
 - i) The claimant is the freehold owner of the racecourse property which it is trying to protect.
 - ii) Animal rights protesters have no legal right to be on the property in order to carry out disruptive protests.
 - iii) Despite Animal Rising's statement that is it suspending the disruption of horse-racing activities, there remains a serious risk that its members, or others, will try to disrupt the claimant's races in order to gain publicity unless restrained by this court. It is not possible to identify the individuals who would be concerned, but nonetheless there is a very serious risk.
 - iv) That disruption, if it occurred, would give rise to a serious risk to life and limb of humans and horses, and would cause damage to the Jockey Club of the nature referred to in my earlier judgment. Damages would not be an adequate remedy for any disruption to racing activities.
 - v) The disruption would be an actionable trespass and an actionable interference with the claimant's rights to hold races under the Epsom and Walton Downs Regulation Act 1984 (see my earlier judgment) and to manage its part of the Downs accordingly.

Relevant law

14. The ability of the courts to grant injunctions against persons unknown, and the requirements for the exercise of that jurisdiction, have recently (and since my first judgment) been the subject of consideration by the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2024] 2 WLR 45. The case deals with “persons unknown” who are sought to be barred, being persons who are not identifiable as parties to the proceedings at the time when the injunction is granted, as opposed to persons whose current attributes are known but whose identities are not. In that case the persons unknown were Travellers. That category of persons unknown were designated as “newcomers”, and injunctions of the kind sought in that case, and in other protester cases, were called “newcomer injunctions”. I shall, of course, adopt the same nomenclature.
15. The court analysed the jurisdiction to grant injunctions against such persons and found that injunctions which in other contexts would be regarded as “final” (as opposed to interim) were not in fact properly so regarded but were of a distinct kind. After an extensive review the court held:

“139 ... 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 (ie 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.”
16. This has consequences as to the requirements:

“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.”
17. That case 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 immovable 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.
20. In the course of argument Mr MacLean drew to my attention two decisions of Ritchie J in *High Speed Two (HS2) Ltd v Persons Unknown* [2024] EWHC 1277 (KB) and *Valero Energy Ltd v Persons Unknown* [2024] EWHC 134, and to the decision of Farbey J in *Exolum Pipeline System Ltd v Persons Unknown* [2024] EWHC 1015 (KB). Other than to observe that in the third of those cases Farbey J drew attention to the need to balance the claimant’s claim against the Article 10 (free speech) and Article 11 (freedom of association) rights of the protesters (which I shall do) I do not think it necessary to refer to those cases which apply *Wolverhampton* to their particular circumstances. I have, however, borne those cases in mind.

Decision

21. Taking all those matters into account, I find that it is appropriate to grant a newcomers injunction in this case, with the appropriate safeguards. I deal with the procedural matters which *Wolverhampton* requires to be taken into account in the following manner, following the sub-paragraph numbering appearing above.
- (i) It is clear enough that there is a threat of wrongful behaviour against which the Jockey Club with its proprietary rights is entitled to be protected. Real harm will be caused if it is not stopped – see my earlier judgment. There plainly was a very substantial risk of wrongdoing when I made my first order in the case, and that is demonstrated by the acts of Mr Newman which were carried out in the face of the injunction. The greater risk is to the running of the Derby meeting because of the publicity and attention which that race involves, but there still a risk to other meetings. The only question about this is whether that risk should be seen to have gone away because of the more recent pronouncements of Animal Rising and the removal of the threats from the website. I do not consider that it has gone away. Those who associate

themselves with Animal Rising have been shown to be vehement in their cause. The reasons given for suspending the campaign against racing are not plausible. They give the appearance of seeking to find some justification for the ostensible abandonment of the campaign to mask what is really going on. It is not plausible that the real reason is that those behind the website have changed their minds about racing. It is more plausible that the statements and the withdrawal of references to horse racing are some sort of tactical move, leaving open the real possibility that the campaign and the unlawful activities associated with it will be re-ignited, which could happen at short notice. The ostensible withdrawal of the horse racing campaign came only after Mr Kidby and Mr Newman were served with the second witness statement of Mr Truesdale, which pointed up the then references to the campaign against horse racing. It looks as though the withdrawal was a tactical response to that. I consider that there is still a compelling case and a strong possibility of a risk of disruption.

(ii) I am satisfied that there is no practical alternative to an injunction. Before the 2023 Derby the Jockey Club sought to negotiate a peaceful protest mechanism by proffering a site within the racecourse premises at which Animal Rising could promote its cause peacefully, but that was turned down. The activities might contravene some of the byelaws, but not all of them, and in any event the only remedy under those is a fine capped at £50, and that is not going to be a deterrent. There may be criminal sanctions for the sort of activities which are threatened, but the Jockey Club is not a prosecuting authority and it is impractical to suppose that they are a deterrent in themselves. If they were the threats would not be real. An injunction is the only practical answer. It provides a real risk of punishment and its prosecution is in the hands of the claimant, not prosecuting authorities. The case of Mr Newman suggests that committal proceedings are likely to be perceived as a cogent deterrent against infringement.

(iii) I am satisfied that there are no other practical steps that the Club can take to prevent the wrong. See (ii). It is not practical to suppose that the activities of the protesters can be completely prevented by any sensible levels of policing or stewarding, though obviously stewarding and policing have a part to play in the overall strategy.

(iv) As to byelaws, see (ii) above.

(v) The Jockey Club is obviously aware of its duty of full and frank disclosure, as is demonstrated by the evidence of Mr Diaz-Rainey referred to above. I am as satisfied as I can be that this duty has been fulfilled.

(vi) I am satisfied that this requirement has been fulfilled.

(vii) This point arose on the application for the interim injunction. The order proposes the same technique of identifying defendants by reference to their specific intended activities. This is effective and adequate.

(viii) I will ensure that the order achieves this objective. The present draft seems to do so but it will be considered further after this judgment has been delivered.

(ix) The territorial limits will appear in the order. They will be clearly limited to the racecourse and particular areas, which will be delineated by maps and plans. This has already been achieved in the interim injunction. A time limit of 5 years is proposed. I agree that that is an appropriate limit. The one year which the Supreme Court thought

would be prima facie appropriate in Traveller cases is too short to deal with a campaign such as that of the animal rights activists. In the case of an annual event like the Derby it would lead to an annual application. An annual review (see below) is more appropriate.

(x) The claimant proposes an annual review. That is sensible.

(xi) I am satisfied that proper notice of this application has been given. This has been done by posting it on the Club's website page and Facebook page, and by emailing to Animal Rights at its website. It has also posted at at least 2 locations on its racecourse. These methods of service are in accordance with directions given by Roth J in his order of 15 March 2024.

(xii) Service of the order will be dealt with in the order. It will largely mirror the technique for service of the proceedings, though extra steps will be appropriate in the period of, and leading up to, race meetings.

(xiii) The order will contain a liberty to apply, as the draft before me reflects.

(xiv) I cannot see that any cross-undertaking in damages is appropriate in this case.

22. The satisfaction of those matters will fulfil the requirements of the Supreme Court as set out in paragraph 167 of its judgment and the later paragraphs dealing with procedural matters. The only other matter left for consideration is the interaction with the Article 10 and Article 11 rights of the newcomers. Insofar as the injunction would impinge on those rights it is quite plain that it falls within the qualification of those rights in those Articles as being necessary in a democratic society to prevent disorder and crime and to protect the rights of others – the claimants and those wishing to attend race meetings. The balance is clearly in favour of granting the injunction.

Conclusion

23. In all the circumstances I will grant the relief sought, subject to such adjustments as emerge from further consideration after this judgment has been delivered.



Neutral Citation Number: [2024] EWHC 3130 (KB)

Claim 1: No: QB-2022-001241 (“Haven Claim”)

Claim 2: No: QB-2022-001259 (“Tower Claim”)

Claim 3: No: QB-2022-001420 (“Petrol Stations Claim”)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2024

Before :
Mr Justice Dexter Dias

Between :

(1) Shell U.K. Limited

Claimant:
Claim 1

-and-

**PERSONS UNKNOWN ENTERING OR
REMAINING AT THE CLAIMANT'S SITE
KNOWN AS SHELL HAVEN, STANFORD-LE-
HOPE (AND AS FURTHER DEFINED
IN THE PARTICULARS OF CLAIM) WITHOUT
THE CONSENT OF THE CLAIMANT, OR
BLOCKING THE ENTRANCES TO THAT SITE**

Defendants:
Claim 1

**(2) Shell International Petroleum Company
Limited**

Claimant:
Claim 2

-and-

**PERSONS UNKNOWN ENTERING OR
REMAINING IN OR ON THE BUILDING
KNOWN AS SHELL CENTRE TOWER,
BELVEDERE ROAD, LONDON ("SHELL
CENTRE TOWER") WITHOUT THE CONSENT
OF THE CLAIMANT, OR DAMAGING THE
BUILDING, OR DAMAGING OR BLOCKING
THE ENTRANCES TO THE SAID BUILDING**

(3) Shell U.K. Oil Products Limited

Claimant:
Claim 3

-and-

**PERSONS UNKNOWN DAMAGING AND/OR
BLOCKING THE USE OF OR ACCESS TO ANY
SHELL PETROL STATION IN ENGLAND AND
WALES, OR TO ANY EQUIPMENT OR
INFRASTRUCTURE UPON IT, BY EXPRESS OR
IMPLIED AGREEMENT WITH OTHERS, IN
CONNECTION WITH ENVIRONMENTAL
PROTEST CAMPAIGNS WITH THE INTENTION
OF DISRUPTING THE SALE OR SUPPLY OF
FUEL TO OR FROM THE SAID STATION**

-and-

**14 named defendants, including:
Emma Ireland (D7)
Charles Philip Laurie (D8)**

Myriam Stacey KC and Joel Semakula (instructed by **Eversheds Sutherland
(International) LLP**) for the **Claimants**
Emma Ireland (D7, Claim 3) in person
Charles Philip Laurie (D8, Claim 3) in person
No other defendant appeared or was represented

Hearing dates: 22-23 October 2024

JUDGMENT

Approved Judgment

This judgment was handed down remotely at 10.30 am on 5th December 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 Dexter Dias

Mr Justice Dexter Dias :

1. This is the judgment of the court.
2. To assist the parties and the public to follow the court’s line of reasoning, the text is divided into 13 sections and four annexes as set out in the table below.

§I.

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INTRODUCTION

3. Three claims are being heard together. The case overall is about whether the claimants, a number of companies in the Shell Group (“Shell”), should be granted final injunctions against Persons Unknown (“PUs”) and a number of named environmental protesters, who took direct and deliberately disruptive action against Shell during 2022. Two of these protesters, Emma Ireland and Charles Philip Laurie, appear in person and addressed the court at length, carefully explaining why they, and many other protesters, have directed protests against Shell. The protesters include supporters or affiliates of environmental campaigning and activism groups including Just Stop Oil (“JSO”), Extinction Rebellion (“XR”), Youth Climate Swarm and Scientists’ Rebellion.

4. The protesters strongly object to Shell's involvement in the extraction, distribution, supply and sale of fossil fuels, and thus Shell's involvement in the burning of the fuels. Such incineration releases carbon dioxide and greenhouse gases into the atmosphere through the process of hydrocarbon combustion. Indeed, the whole point of the complex supply chain created by the fossil fuel industry is the supply of such fuel for burning hydrocarbons. The three claims sharply raise, perhaps for the first time in these direct action environmental protest cases, the applicability and legal relevance of the Aarhus Convention ("Aarhus") (full title: Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), an international convention that the United Kingdom is party to, having ratified the treaty almost 20 years ago in 2005 (analysed in detail in **Section X. Aarhus Convention Analysis**). In particular, Ms Ireland and Mr Laurie rely on Article 3(8) of Aarhus, which provides insofar as material:

"Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement."

5. Their joint submission is that the grant of final injunctions would be "in breach of Aarhus" and "an excessive use of the law". More generally, the environmental protest groups in these three claims maintain that burning fossil fuel is a major contributor to the environmental emergency they wish to bring to the urgent attention of the general public and the Government. They intend to pressurise the Government into ending investment in fossil fuels and halting the issuing of licences and consents for their exploration, development and production. In pursuit of this aim, from the spring until the autumn of 2022, environmental groups, including JSO, directed protests at the fossil fuel industry, including Shell. Their tactics have been variable and have explored new ways to manifest their rights under the European Convention on Human Rights ("ECHR") to freedom of expression and assembly and association. Some people support them; others share their concerns about climate change and the environment but disapprove of their protest methods. In this it is important to remind oneself of the words of Sedley LJ in *Redmond-Bate v DPP* [2000] HRLR 249 at para 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."

Shell maintains that the acts of the protesters have gone beyond mere irritation, but damage or create the strong probability of damaging Shell's substantive rights under the civil law. Various of the campaign groups have explicitly called for acts of "civil disobedience", a term with a long and complex history. It was defined by Rawls in his landmark *A Theory of Justice* (1971) as a

"public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." (p.364)

6. A key issue the court has been invited to examine by the defendants is whether peaceful acts contrary to the law and the rights of others under the civil law are protected by the Aarhus Convention, and if so, in what way. Previously in these claims, when Shell

sought to protect its commercial interests from what it said was unlawful protest activity, various judges of this court granted interim injunctions against a shifting array of defendants to prohibit direct action protest which targeted three different parts of Shell's broad business activities:

- (1) **"Haven"**: Shell's Haven Oil Refinery in Stanford-le-Hope, Essex, a substantial fuel storage and distribution facility (**Claim 1**);
- (2) **"Tower"**: Shell Centre Tower on London's South Bank, an administrative centre for Shell's UK operations (**Claim 2**);
- (3) **"Petrol stations"**: petrol stations which are retail customers of Shell, buying Shell's fuel and selling it on to the public and commercial customers via fuel pumps on petrol station forecourts (**Claim 3**).

7. This judgment must be read in conjunction with the previous judgments of this court. The relevant judgments are tabulated below for convenience and when mentioned will be referred to by the name of the judge (for example, "the Hill judgment" or "Johnson J at para XX"). In all of them, Shell succeeded in obtaining or renewing interim injunctions.

Judgment Date	Site(s)	Expiry	Judge	Citation
5 May 2022	Haven Tower	2 May 2023	Bennathan J	Ex tempore (no transcript available)
20 May 2022	Petrol stations	12 May 2023	Johnson J (hearing 13 May 2022)	[2022] EWHC 1215 (QB)
23 May 2023	All 3 claims	12 May 2024	Hill J (hearing dates: 25-26 April 2023)	[2023] 1 WLR 4358 [2023] EWHC 1229 (KB)
24 April 2024	All 3 claims	12 November 2024 or 4 weeks after final hearing (whichever later)	Cotter J	[2024] EWHC 1546 (KB)

8. Therefore, these are three separate but connected claims that have been managed together for administrative convenience and efficiency. I come to this case completely independently and have considered the claims afresh. Having received submissions for a day and a half, I reserved judgment and extended the interim injunctions pending the handing down of the court's decision. This is that decision.
9. Before turning to the specific details of the claims, there are four immediate contexts to the applications for final injunctive relief.

§II. FOUR CONTEXTS

Context 1: The burning of fossil fuels

10. It is a significant understatement to say that climate change and the existence or not of an environmental emergency are controversial, highly contested issues. There has been a mass of litigation in both civil and criminal courts as a result of this vital public debate. The most recent expression in the courts comes from our highest court, the Supreme Court, in *R (on the application of Finch on behalf of the Weald Action Group)(Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20. Neither party had provided the court with this authority, but the court drew it to their attention and ensured both parties had an opportunity to read its material passages and make submissions on it. Lord Leggatt, delivering the unanimous judgment of the court, said at the very outset of the court’s judgment:

“1. Anyone interested in the future of our planet is aware by now of the impact on its climate of burning fossil fuels—chiefly oil, coal and gas. When fossil fuels are burnt, they release carbon dioxide and other “greenhouse gases”—so called because they act like a greenhouse in the earth’s atmosphere, trapping the sun’s heat and causing global surface temperatures to rise. According to the United Nations Environment Programme (“UNEP”) Production Gap Report 2023, p 3, close to 90% of global carbon dioxide emissions stem from burning fossil fuels.

2. The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming. This is true even if only the net increase in greenhouse gas emissions is considered. Leaving oil in the ground in one place does not result in a corresponding increase in production elsewhere: see UNEP’s 2019 Production Gap Report, p 50, which reported, based on studies using elasticities of supply and demand from the economics literature, that each barrel of oil left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term.”

11. It is that “virtual certainty” noted by the Supreme Court that is of concern to the defendants in this case, objecting to Shell’s involvement in the fossil fuel business due to its damaging impact, they maintain, on climate change and the environmental emergency. Shell’s position is simple: its business is lawful. It has rights under the law. These rights have been violated by protesters and there is a real and imminent risk of future unlawful interference by direct action activists. This is Shell’s rationale for seeking, securing and continuing injunctive relief. Shell seeks the court’s legal protection against direct action which breaches its “civil rights” as the Supreme Court termed them in the recent seminal case of *Wolverhampton CC v London Gypsies and Travellers* [2024] 2 WLR 45 at para 167 (“*Wolverhampton*”). The term “civil rights”, coming to prominence in the 1960s, here simply means Shell’s rights under the civil law. It is important to note that the draft orders sought by Shell do not seek to prevent lawful protest. Direct action is action that seeks to prevent, obstruct or interfere with other people’s ability to carry out their lawful activity. However, the two defendants

who appeared and represented themselves in the case claim that their acts of protest are lawful (or not unlawful) because they are necessary and proportionate infringements of Shell's rights. This is because their protests, and those of others, must be seen in the context of the damage they claim Shell is causing through its fossil fuel commercial activities. Indeed, Ms Ireland submits that if Shell properly understood the damage it is producing across the world, it would "consent" to the protests. Shell disputes this.

Context 2: The Special Rapporteur's mission

12. The second context is the recent "mission" visit to the United Kingdom by the United Nations Special Rapporteur on Environmental Defenders. This office was established in October 2021 by a consensus of parties to the Aarhus Convention, including the United Kingdom, to provide "a rapid response mechanism for the protection of environmental defenders" (UN Economic Commission for Europe website ("UNECE") unece.org; examined in detail later in **Section X**). This international treaty played a significant role in the submissions before me, and I must deal with its status in domestic law and assess its significance for the discretionary decisions the court is being invited to make in these claims.
13. The role of the Special Rapporteur is to "take measures to protect any person experiencing, or at imminent threat of experiencing, penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention". The Aarhus Convention protects not just individuals but non-governmental organisations seeking to safeguard the environment. The Special Rapporteur is "the first mechanism specifically safeguarding environmental defenders to be established within a legally binding framework either under the United Nations system or other intergovernmental structure" (both quotes UNECE, *ibid.*).
14. The Special Rapporteur who visited the United Kingdom is Michael Forst. Mr Forst was elected at an extraordinary meeting of signatory parties in October 2022. He visited between 10-12 January 2024. I set out parts of his mission report since it is cited by and relied on by both Ms Ireland and Mr Laurie, who took part in direct action protests at Shell's Cobham petrol station in August 2022 (Claim 3). They emphasise the significance of the mission report, coming as it does from an officeholder appointed by the parties to this important international convention that the United Kingdom has chosen to become party to. Mr Forst writes:

"On 10 – 12 January 2024, I made my first visit to the United Kingdom since I was elected as UN Special Rapporteur on Environmental Defenders under the Aarhus Convention in June 2022. During my visit I met with government officials and with environmental defenders, including NGOs, climate activists and lawyers. I am issuing this statement in the light of the extremely worrying information I received in the course of these meetings regarding the increasingly severe crackdowns on environmental defenders in the United Kingdom, including in relation to the exercise of the right to peaceful protest.

These developments are a matter of concern for any member of the public in the UK who may wish to take action for the climate or environmental protection. The right to peaceful protest is a basic human right. It is also an essential part of a healthy democracy. Protests, which aim to express dissent and to draw attention to a particular issue, are by their nature disruptive. The fact that they cause

disruption or involve civil disobedience do not mean they are not peaceful. As the UN Human Rights Committee has made clear, States have a duty to facilitate the right to protest, and private entities and broader society may be expected to accept some level of disruption as a result of the exercise of this right.

During my visit, however, I learned that, in the UK, peaceful protesters are being prosecuted and convicted under the Police, Crime, Sentencing and Courts Act 2022, for the criminal offence of “public nuisance”, which is punishable by up to 10 years imprisonment. I was also informed that the Public Order Act 2023 is being used to further criminalize peaceful protest. In December 2023, a peaceful climate protester who took part for approximately 30 minutes in a slow march on a public road was sentenced to six months imprisonment under the 2023 law.

...

In addition to the new criminal offences, I am deeply troubled at the use of civil injunctions to ban protest in certain areas, including on public roadways. Anyone who breaches these injunctions is liable for up to 2 years imprisonment and an unlimited fine. Even persons who have been named on one of these injunctions without first being informed about it – which, to date, has largely been the case – can be held liable for the legal costs incurred to obtain the injunction and face an unlimited fine and imprisonment for breaching it. The fact that a significant number of environmental defenders are currently facing both a criminal trial and civil injunction proceedings for their involvement in a climate protest on a UK public road or motorway, and hence are being punished twice for the same action, is also a matter of grave concern to me.

As a final note, during my visit, UK environmental defenders told me that, despite the personal risks they face, they will continue to protest for urgent and effective action to address climate change. For them, the threat of climate change and its devastating impacts are far too serious and significant not to continue raising their voice, even when faced with imprisonment. We are in the midst of a triple planetary crisis of climate change, biodiversity loss and pollution. Environmental defenders are acting for the benefit of us all. It is therefore imperative that we ensure that they are protected. While the gravity of the information I received during my visit leads me to issue the present statement to express my concerns without delay, I will continue to look more deeply into each of the issues raised during my visit and in the formal complaints submitted to my mandate. In this regard, I also look forward to engaging in a constructive dialogue with the Government of the United Kingdom in order to ensure that members of the public in the UK seeking to protect the environment are not subject to persecution, penalization or harassment for doing so.

23 January 2024”

Context 3: Abandonment of costs

15. The third context is a development in court at the very end of legal submissions on the second listed day of the hearing. Shell announced through counsel that it would not be seeking costs against the named defendants in this claim. This was announced in open court without notice to the court or the two attending defendants, Ms Ireland and Mr

Laurie. Shell's change of position caused them to be overwhelmed by emotion, given the strain they have been under as litigants in person. They had feared being bankrupted through an award of Shell's costs against them. The court directed that Shell's new stance on costs be reduced to writing so there could be no future misunderstanding. The script ultimately filed is in these terms:

1. "In this particular case [Claim 3], [Shell U.K. Oil Products Limited] has taken the decision not to seek costs against Named Defendants in the event that it secures the injunctive relief sought.
2. That decision has been arrived at in the specific circumstances of these proceedings including by having regard to the fact that: (i) the Court was addressed by unrepresented Named Defendants who acted in person and who had not breached the injunctions since they have been in place; (ii) substantive new issues of public importance were raised by those Defendants namely the applicability of the Aarhus Convention as a consideration to the Court's discretion under s.37 Senior Courts Act 1981 in the context of environmental protest injunctions, which had not been previously considered by any Court to date; and (iii) they conducted themselves throughout the proceedings in a respectful and constructive manner to everyone and were of assistance to the Court.
3. However, this is a bespoke decision which is limited to the present case and does not reflect Shell policy or its approach in any future case.
4. In deciding not to pursue costs in this case, C3 is giving up its *in principle* entitlement to its reasonable and proportionate costs against those persons who have been joined pursuant to the obligations under *Canada Goose* and against whom a final injunction is secured on the application of the usual costs rules CPR r.44.2(2)(a). Costs should follow the event and a successful party's entitlement to such costs is necessary in a democratic society for the purposes of Articles 10 and 11 of the ECHR. C3's *in principle* entitlement is reinforced by the fact that: (i) that the Named Defendants were invited to sign undertakings in order to avoid potential costs consequences; (ii) the consequence of refusing to sign such undertakings was repeatedly explained to them; and (iii) the desire to make submissions is no justification for refusing to sign such undertakings, in circumstances where interested persons may address the Court pursuant to CPR r.40.9 and/or the Cotter J Petrol Stations Order provide for any other person who "claims to be affected by the Order and wishes to vary or discharge it or to be heard at the final hearing" (§15)."

Context 4: The cautionary approach to PUs

16. Each of the three applications for final orders includes applications for injunctive relief against PUs. This is a serious step. It should not be underestimated or taken for granted as the senior courts have repeatedly observed. The Court of Appeal noted in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) ("*Ineos*") at para 31:

"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."

17. This cautionary note was repeated by the court in *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA) at para 34:

“a court should always be cautious when considering granting injunctions against persons unknown.”
18. This is because the precautionary prohibition may seriously impinge on the right to freedom of expression and the right to protest of very large numbers of members of the public. This is why such injunctions are sometimes called injunctions “against the world” (*contra mundum*). While such far-reaching scope is sometimes authorised in intellectual property and privacy cases, when it occurs in public protest situations, its seriousness attains a different complexion. It is not something that can or should go through as a matter of routine, and is an aspect of these claims I have anxiously considered.
19. I have taken the non-conventional step of providing these four contexts at the beginning of the judgment to illustrate how complex, important and multifaceted these claims are. To offer another crude measure: the papers provided to me exceeded 8000 pages. Inevitably, this judgment, which must deal with all three claims, is lengthy. I have tried to simplify wherever possible. However, some of the complexity remains indispensable to an informed understanding of the court’s reasoning, and for that there can be no apology.

§III. PARTIES

20. I now detail the parties to the claims. In all three claims the Shell corporate entity involved is represented by Ms Stacey KC and Mr Semakula. No defendant appeared in any of the claims save for Claim 3 (petrol stations), where Ms Ireland and Mr Laurie appeared in person. Both counsel and both litigants in person made submissions to the court, for which it is grateful. The court particularly wishes to note the thoughtful and respectful way in which Ms Ireland and Mr Laurie conducted themselves throughout. Further, the public gallery was invariably filled with their supporters, who also conducted themselves responsibly throughout. This demonstrates how this serious and contentious issue can be explored in public in a productive and constructive way.

Claim 1: Haven

21. In the first claim, the claimant is Shell U.K. Limited. This company is the freeholder of the Shell Haven Oil Refinery facility, on the Thames Estuary, south of Basildon and between Tilbury and Southend-on-Sea. The defendants are PUs. The torts relied on are trespass, public nuisance, private nuisance (interference with access from the public highway) and private nuisance (interference with private right of way).

Claim 2: Tower

22. In the second claim, the claimant is Shell International Petroleum Company Limited. This company is the freehold owner of the Shell Centre Tower, a large office building rising prominently on the South Bank’s Belvedere Road near to the London Eye. The defendants are PUs. The torts relied on are trespass, public nuisance in the form of

obstruction of the highway, private nuisance in the form of interference with access from the highway, and private nuisance in the form of interference with private right of way.

Claim 3: Petrol stations

23. In the third claim, the claimant is Shell U.K. Oil Products Limited. This company supplies fuel to Shell-branded petrol stations across the country. While Shell has a proprietary right in the land on which some petrol stations are situated, it does not in all the outlets it wishes to protect through injunctive relief. Therefore, rather than trespass or nuisance, the tort relied on is a conspiracy to injure. The claim, put very shortly, is that jointly conducted direct action at or on petrol station forecourts creates very real risk of significant harm and injury. The defendants are PUs and a number of named defendants. Fourteen identified individuals were joined to the claim by Soole J at a review and case management hearing on 15 March 2024. They had been arrested on suspicion of criminal damage and/or aggravated trespass and/or conspiracy to destroy or damage property and/or wilful obstruction of the highway and/or causing a public nuisance and/or being in possession of an offensive weapon at the petrol station sites in connection with certain environmental protest groups.
24. On 16 October 2023, Shell's solicitors wrote to 29 of the 30 protesters identified as being arrested at petrol stations protests at Cobham Services and Acton Vale in August 2022. One person had died in the interim. Shell invited the remaining 29 protesters to agree to undertakings not to engage in certain protest activities, the breach of such promise exposing them to fine, asset seizure or imprisonment for contempt of court. A further letter was sent on 16 November 2023. Fourteen people gave undertakings. That left 15 people. One person gave an undertaking on 5 March 2024. Therefore, when the matter came before Soole J on 15 March, the remaining 14 people were joined to the claim as named defendants. Of these named defendants, on 26 September 2024, the third named defendant gave an undertaking in the terms the claimant sought. That left 13 defendants, including Ms Ireland as the seventh defendant and Mr Laurie as the eighth.

§IV. ISSUES

25. The issues before the court were:
- (1) Whether to grant final orders in respect of each of the three claims;
 - (2) Whether the duration of the final orders should be 5 years;
 - (3) Whether alternative service orders should be granted;
 - (4) Whether to grant the application to remove the third defendant from Claim 3 (petrol stations) and consequently amend the claim form and particulars of claim to reflect the strike out.
26. I can deal with Issue 4 immediately. I have carefully reviewed the evidence and it is appropriate to grant the application to remove the third defendant in the petrol stations

claim. She has given the undertaking sought. I need say no more about it. That leaves the three prime issues for the court to determine.

§V. APPROACH TO JUDGMENT

27. I make plain that my approach to the judgment text is heavily informed by the approach of the Court of Appeal in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ. 407. The court stated at para 58:

"... a judgment is not a summing-up in which every possible relevant piece of evidence must be mentioned."

28. Therefore, I focus on what has been essential to my determinations in this case. Numerous side issues were thrown up. I do not need to resolve them all. The critical issues are clear. I focus on those as are necessary to determine the remaining three prime identified issues here. While I do not set out all the evidence the court received, and it is extensive, I emphasise that as part of my review I considered or reconsidered all the prime evidence. I reserved judgment for precisely that reason.

§VI. THE PROTESTS

29. The targeting of Shell in the first part of 2022 led to its seeking injunctive relief from the court. That said, Shell has repeatedly emphasised that it does not oppose lawful protest. The most recent evidential expression of this sentiment can be found in the statement of Paul Eilering, the Interim Cluster Security Manager for the Shell businesses' UK assets, in a statement filed on 1 July 2024 in support of the final injunctions:

"The Claimants have not sought orders which stop protesters from undertaking peaceful protests whether near the Shell Sites or otherwise. That remains the case. The Claimants' concern continues to be the need to reinforce its proprietary rights and to mitigate the serious health, safety and wellbeing risks (to the Claimants' employees, contractors, visitors and indeed protesters themselves) posed by the kind of unlawful actions and activities which prompted the Claimants to seek injunctive relief back in April 2022."

30. Against this, the protesters maintain that Shell is in truth more concerned about its profits and brand reputation than the welfare of people or the planet. As Mr Laurie put it, Shell "just doesn't care" and "does not take the climate emergency seriously". As Ms Ireland says, if Shell did actually care, and understood the consequences of its actions, "it would consent to the protests". How have matters come to this? I now provide a brief account of the protests.

Haven

31. Mr Prichard-Gamble, a security manager with Shell, provided evidence that Shell became aware in early 2022 that environmental campaign groups, including XR and JSO, intended to target the fossil fuel industry, including Shell. XR called for a

campaign of civil disobedience, which would include “testing the limits of the protest law”, to end “the fossil fuel economy”. One of Shell’s Distribution Operations Managers Ian Brown provided Bennathan J with a statement dated April 2022 detailing protest activity around Haven. This included a six-hour incident on 3 April 2022 whereby a group of protesters blocked the main access road to Haven, boarded tankers and blocked a tanker, requiring police attendance. Further, protesters tried to access the jetty at Haven; and similar incidents at fuel-related sites near to Haven caused concern that Haven was an imminent target. Deep anxiety arose because the Haven site is used for the storage and distribution of highly flammable hazardous products. Unauthorised access could cause a fire or explosion. Unauthorised access to the jetty could lead to a significant release of hydrocarbons into the Thames Estuary resulting in serious pollution and risk to health and the local environment. Thus Shell’s stated concern was for the safety and well-being of Shell’s staff and contractors, the protesters themselves and the local environment.

Tower

32. On 6 April 2022, what appeared like paint was thrown on the walls and above one of the staff entrances to the Tower, resulting in black marks and substantial spattering. On 13 April 2022 approximately 500 protesters closed on the Tower, banging drums and carrying banners stating, “Jump Ship” and “Shell=Death”, clearly directed at Shell staff, several glued themselves to the reception area of the Tower and another Shell office nearby. On 15 April 2022, approximately 30 protesters with banners obstructed the road outside the Tower. On 20 April 2022, 11 protesters with banners, used a megaphone and ignited smoke flares. Protesters also inscribed the XR logo on the outside of the Tower. On several occasions the Tower was placed in security “lockdown”.

Petrol stations

33. Benjamin Austin is a Health, Safety and Security Manager with Shell. He provided a statement to Johnson J about protests directed at petrol stations. He narrated how on 28 April 2022, two petrol stations on the M25 were the targets of protest activity. Forecourt entrances were blocked and the displays of fuel pumps were either obscured with spray paint or smashed with hammers. Kiosks were interfered with “to stop the flow of petrol”, while protesters glued themselves to one another or fuel pumps or the roof of a tanker. In total, 55 fuel pumps were damaged, including 35 out of the 36 pumps at Cobham. They became unsafe for use and the forecourt was closed. Johnson J noted at para 9 that the protesters were “committed to protesting in ways that are unlawful, short of physical violence to the person”. The campaign websites referred to “civil disobedience”, “direct action”, and a willingness to risk “arrest” and “jail time”. He continued at para 18:

“18. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation ...

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason. The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: “Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations.” I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.”

34. On 24 August 2022, there was another protest at the Cobham M25 petrol station. This was the direct action that Ms Ireland and Mr Laurie took part in. The forecourt was blocked by seated protesters. Two petrol pump screens were smashed. Ms Ireland did not do this. Mr Laurie had intended to smash petrol pump screens, but “changed course”, as he put it in his witness statement, when he saw police at the scene. He glued himself to the ground instead, blocking the forecourt. Both Ms Ireland and Mr Laurie were arrested. They stand trial at Winchester Crown Court in August 2025 and are on bail pending that hearing.

§VII. INJUNCTION TERMS

35. The future acts of protest that the claimants seek to restrain vary according to the site. The shared intention is to avoid interference with the claimants’ right under the civil law not to be subject to the torts specifically pleaded by Shell.

Claim 1: Haven

36. In respect of Haven, the acts sought to be restrained are:
- a. Entering or remaining upon any part of Haven without the consent of the Claimant;
 - b. Blocking access to any of the gateways to Haven the locations of which are identified and marked blue on “Plan 1” and “Plan 2” which are appended to this Order in the Third Schedule;
 - c. Causing damage to any part of Haven whether by:
 - i. Affixing themselves, or any object, or thing, to any part of Haven, or to any other person or object or thing on or at Haven;
 - ii. Erecting any structure in, on or against Haven;
 - iii. Spraying, painting, pouring, sticking or writing with any substance on or inside any part of Haven; or

iv. Otherwise.

Claim 2: Tower

37. The Tower injunction is applied for in similar terms to Claim 1.

Claim 3: Petrol stations

38. In respect of Petrol Stations, the acts relate to the disruption or interference with the supply or sale of fuel (to those premises or outlets connected to Shell). They are specified as:

- a. Directly blocking or impeding access to any pedestrian or vehicular entrance to a Petrol Station forecourt or to a building within the Petrol Station;
- b. Causing damage to any part of a Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
- c. Operating or disabling any switch or other device in or on a Petrol Station so as to interrupt the supply of fuel from that Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Petrol Station; and
- d. Causing damage to any part of a Petrol Station, whether by:
 - i. Affixing or locking themselves, or any object or person, to any part of a Petrol Station, or to any other person or object on or in a Petrol Station;
 - ii. Erecting any structure in, on or against any part of a Petrol Station;
 - iii. Spraying, painting, pouring, depositing or writing in any substance on to any part of a Petrol Station.

39. Each draft order further specifies that the defendant must not do any of these acts by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

§VIII. LAW

40. Frequently in judgments, judges have the advantage of saying that the law is uncontroversial and can be stated shortly. I do not have that advantage. The law around protests and particularly injunctive relief against PUs - what is sometimes called “against the world” - has rapidly evolved in the last few years. Few areas of law in the recent past have undergone development of such rapidity accompanied by stringent scrutiny all the way to the Supreme Court. Therefore, the legal context for these claims is markedly different to that of a decade ago, or even five years previously, as the Court of Appeal noted in *London Borough of Barking and Dagenham and Others v Persons Unknown and Others* [2022] EWCA Civ 13 (“*Barking*”).

41. This has, as Lord Reed put it in *Wolverhampton* at para 22:

“illustrate[d] the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice ... [and] in respect of orders designed to protect substantive rights.”

42. I will set down the main features of this evolution, simplifying wherever possible, dealing first with the discretionary power confirmed by section 37 of the Senior Courts Act 1981 (“SCA 1981”) before reviewing the main features of the common law. I stress that I have considered and adopt the law as previously set down in the claims at the interlocutory stage by Johnson, Hill and Cotter JJ in the judgments tabulated above, and am grateful to them for it.

1. Statute

43. The authority to grant an injunction in the exercise of the court’s general “equitable discretionary power” (*Wolverhampton*, para 167) is set down in section 37 of the SCA 1981. It provides:

“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”

and

“on such terms and conditions as the court thinks fit.”

44. Injunctions are equitable in origin and section 37 is a statutory “confirmation” of how decisions about them should be approached (*Wolverhampton*, para 17). Section 37, as explained by Lord Scott in *Fourie v Le Roux* [2007] UKHL 1, simply confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (“the 1873 Act”) and still exists. That power was transferred to the High Court by section 16 of the 1873 Act (see Spry, *Equitable Remedies* (9th ed) at 333). The power of courts with equitable jurisdiction to grant injunctions is, subject to any statutory limitations, unlimited.

2. Common law

45. Survey of the authorities involving recent protest cases reveals different formulations of the “test” (if that it is) to be applied. This is inevitable: the senior courts have repeatedly stated that there is no uniform and invariable test or standard. This was recognised as long ago as *Hooper v Rogers* [1975] Ch 43, where at 50, Russell LJ, giving the judgment of the Court of Appeal said:

“In different cases, differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth, it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances.”

46. In this case, while recognising the existence of no “absolute standard” to definitively measure how to do justice between the parties, I adopt the approach of the Supreme Court in *Wolverhampton* at para 218. The claimant

“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.”

47. For assistance, I add para 167(i) since it was referred to:

“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.”

48. Linden J was, to my mind, right to sound a note of caution in *Esso Petroleum v PUs* [2023] EWHC 1837 (KB) at para 63 about reducing any formulation to an invariable test:

“With respect, I confess to some doubts about whether the two questions which he [Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch)] 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.”

49. Linden J then went on quote from *Gee on Commercial Injunctions* (7th Edition) which says 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.”

50. This, it seems to me, must be right. This is precisely why the Supreme Court has identified questions of the probability of rights breach with attendant harm. The court will inevitably and rightly be concerned by the risk of very grave consequence and may be prepared to grant injunctive relief where the risk of occurrence is lower than a case where the harm is less severe. All these factors have to be weighed together. Therefore, *solely* for organisational purposes, and without suggesting the existence of a universal test, I examine the case approaching the relevant questions by separating out two vital factors that need to be assessed holistically:

- (1) **Consequences:** of conduct in terms of (a) breach of rights and (b) level of harm (“Limb 1”);
- (2) **Risk:** of the conduct’s future occurrence (“Limb 2”).

51. The approach to be adopted when granting a final injunction in the context of protests against PU (including newcomers) is not materially altered by the decision of the Supreme Court in *Wolverhampton*. The Supreme Court confirmed that injunctions can be granted against PUs, including “newcomers” (para 167) and expressly stated at para 235 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 by, for example, blocking motorways, occupying motorway gantries or occupying HS2’s land with the intention of disrupting construction”.

52. Therefore, the following seven “procedural guidelines” in *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 (“*Canada Goose*”) at para 82 remain good law and must still be satisfied in claims for protest injunctions against PUs and have been applied in all subsequent protest injunction cases:

“(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 nontechnical 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."

53. Ritchie J said in *Valero Energy Ltd v PU* [2024] EWHC 134 (KB) ("*Valero*") at para 57 that:

"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."

54. The Supreme Court stated in *DPP v Ziegler* [2021] UKSC 23 ("*Ziegler*") that 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, a careful balancing exercise is required. The injunction must be necessary and proportionate to the need to protect the claimants' right.

55. The situation is different with trespass to private land. A landowner whose title is not disputed is *prima facie* entitled to an injunction to restrain a threatened or apprehended trespass on her or his land (*Snell's Equity* (34th ed) at para 18-012). Further, Convention rights under the ECHR do not confer a right to trespass onto private land. The basis for this conclusion is that the rights under Articles 9, 10 and 11 are qualified rights. This matter has been explored by the courts at senior level. In *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, 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."

56. In *DPP v Cuciurean* [2022] EWHC 736 (Admin), an HS2 protest case before the Divisional Court, Lord Burnett CJ said:

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

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

57. For these reasons, in *HS2 v PUs* [2022] EWHC 2360 (KB), Julian Knowles J said at para 80:

"In relation to defences to trespass, genuine and *bona fide* concerns on the part of the protesters about HS2 or the proposed HS2 Scheme works do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *Samede*, [63]."

58. In similar vein, in *Halsbury's Laws* (5th ed) at para 325, it is said that generally "it is not a defence to show that although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public."

SIX. ANALYSIS OF THE 15 FACTORS: PART I

59. To assist in the analysis, I reduce the “guidelines” Ritchie J identifies to tabular form for ease of reference, remaining indebted to him for his analysis. I perceive these to amount to a series of 15 factors that together form a vital checklist. I use the term “factor” to underline that these are matters for the court to examine and then weigh in the overall equitable discretionary exercise under section 37 of the SCA 1981. Once the court has evaluated the factors globally and holistically, an accurate decision on whether it is “just and convenient” to exercise the section 37 discretion in favour of granting the injunction applied for is possible. Only then may terms be properly determined. The statutory working of section 37 is deliberately framed as “may” grant not “must”, and the court retains an overall equitable discretion whether to grant the injunction or not depending on the overall justice of the case. The court must exercise its necessarily wide discretion judicially. I take that to mean rationally, reasonably and based on the totality of evidence, fairly considered.

Factor	Summary
1.	Cause of action clearly identified
2.	Full and frank disclosure by claimant
3.	Sufficient evidence to prove claim
4.	No defence (or no realistic defence where no defence filed)
5.	Balance of convenience / compelling justification or need
6.	Proportionate interference with ECHR rights
7.	Damages not adequate remedy
8.	Clear identification of defendants: (a) Named defendants identified in claim form and injunction order by tortious acts prohibited (b) PUs capable of being identified and served
9.	Terms of injunction: (a) Sufficiently clear and precise (b) Only prohibiting lawful conduct where no other proportionate means to protect claimant’s rights
10.	Correspondence between terms of injunction and threatened tort
11.	Clear and justifiable geographical limit
12.	Clear and justifiable temporal limit
13.	Service: all reasonable steps taken to notify defendants
14.	Right to set aside or vary
15.	Review

60. I now examine each of the 15 factors in turn, comprising as they do a structured and essential checklist.

1 Cause of action clearly identified

61. The next table sets down the prime elements of each of the torts pleaded by the claimants.

Trespass	(a) entry onto land in the possession of another (b) without justification or the other's consent
Private nuisance	(a) substantial and unreasonable interference (b) with the land of another or the enjoyment of that land
Public nuisance	(a) wrongful acts or omissions on or near a highway (b) causing the public ("all the King's subjects") or all members of an identifiable class proximate to the acts' operation (c) to be hindered or prevented from freely, safely and conveniently passing along the highway (d) [and] possessors of land must demonstrate substantial inconvenience or damage to them
Conspiracy to injure by unlawful means	(a) an unlawful act by the defendant (b) with the intention of injuring the claimant (c) pursuant to an agreement with others (d) which injures the claimant

Haven and Tower

62. These sites share a common feature: Shell has a proprietary right in the land. The torts relied on reflect that interest, being trespass to land and private nuisance. It is unarguable but that they have been clearly identified. As noted by Julian Knowles J in *HS2 Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at para 85:

"Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land: *Bamford v Turnley* (1862) 3 B & S; *West v Sharp* [1999] 79 P&CR 327, 332:

Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

63. The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance (*Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29) ("*Cuadrilla*"). In *Cuadrilla* the Court of Appeal said at para 13:

"The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land.

An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181.”

Petrol stations

64. The petrol stations claim sits in a different legal context as Shell does not possess proprietary rights or a sufficient degree of control over all the service station locations. For simplicity’s sake, Shell relies on the tort of conspiracy to injure by unlawful means. The claim is that Shell has been the target of a coordinated campaign of protest activity directed at and intended to harm it economically and commercially by disrupting its supply and sale of fuel, which is a lawful activity. The elements of the tort are set out in *Cuadrilla* by Leggatt LJ (as he then was) at para 18 and in the immediately preceding table. This tort was relied on by Julian Knowles J in *Esso Petroleum v PUs* [2023] EWHC 2013 (KB). It was also examined and approved in connection with these claims by Johnson J in *Shell U.K. Oil Products Limited v Persons unknown* [2022] EWHC 1215 (QB) at para 26.
65. On element (a), it is not necessary for the claimant to establish that the underlying conduct is actionable by itself. This was noted by Johnson J at para 29:
- “29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant’s brand, selling the claimant’s fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act.”
66. On (b): the intention of the activities of the protesters is evident from their conduct and the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. That is a prime objective of their protests.
67. On (c): no one suggests that this was anything but a coordinated and agreed joint group protest.

68. On (d): there can be little debate about loss. The petrol stations were unable to sell fuel, with the forecourts being blockaded, petrol pumps damaged and the service station shut to the public. That was all part of the objective of the protest as a stepping stone to raising awareness about fossil fuels. There can be no doubt that the tort relied on by the claimant in the petrol stations claim has been clearly identified with evidence filed by the claimant going to each of the elements. This tort was considered in detail by Johnson J at para 30. He said:

“The intention of the defendants’ unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant’s fuel.”

69. When the case came before Hill J for review, powerful argument was advanced by Mr Simblet KC on behalf of one defendant that reliance on wide-ranging economic torts, such as conspiracy to injure through unlawful means, was discouraged by the Court of Appeal in *Boyd v Ineos* [2019] 4 WLR 100. The court discharged those parts of an order based on public nuisance and unlawful means conspiracy, leaving only those based on trespass and private nuisance. Hill J concluded at para 129:

“in *Cuadrilla*, the prohibitions were made out on the facts from claims in private nuisance and at para 81 the court described the prohibition corresponding to unlawful means conspiracy as “a different matter” on which Cuadrilla did not need to rely. However, as Ms Stacey highlighted, the discharge of the injunction based on conspiracy by the Court of Appeal in *Ineos* involved materially different facts, namely, a challenge to an injunction sought before any offending conduct had taken place; and terms which were impermissibly wide. In *Cuadrilla* at para 47 the Court of Appeal noted that the fact that the injunction had been made before any alleged unlawful interference with the claimant's activities had occurred was “important in understanding the decision” and I agree. In contrast, the injunction granted by Johnson J was based on past conduct having already occurred and was suitably narrow in focus.”

70. I find in respect of each of the three claims that this requirement has been met.

2 Full and frank disclosure

71. With regard to PUs, the injunctions sought are without notice, by definition. As such, the claimant must act fairly in all material respects, including “a duty to act in the utmost good faith and to disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms” (*Gee on Commercial Injunctions* at para 9-001; there is nothing new in this: see *Thomas A. Edison Ltd v Bullock* (1912) 15 C.L.R. 679 at 682, per Isaacs J; *Dormeuil Freres SA v Nicolian Ltd* [1988] 1 WLR 1362 at 1368).

72. In respect of named defendants, there remains a high duty of full and frank disclosure. Here Shell has filed and served many thousands of pages of evidence and background material. I detect no want of frankness as opposed to extensive and candid disclosure. It is noticeable that this point was not taken by any named or appearing defendant. I find this requirement met.

3 Sufficient evidence to prove claim

73. The two-limbed approach outlined by the Supreme Court in *Wolverhampton* is useful organisationally here.

Limb 1: strong probability

74. For the reasons given above, I am satisfied that should the acts that the claimants fear take place that there is a “strong probability” of a breach of the claimants’ rights in civil law by committing a tort. In large measure the rationale of the direct action as opposed to other forms of protest is avowedly to interrupt, interfere and disrupt. The defendants’ case is not that there is no interference, but that it is justified, in the sense of proportionate to the damage they claim Shell is causing.

Limb 2: real and imminent risk

75. As noted by Hill J, Mr Prichard-Gamble on behalf of Shell provided evidence of harm and risk (see Hill judgment at paras 38-40). He stated that (i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent effect and mitigate against the risk of harm which unlawful activities at the sites would otherwise give rise to. Unlawful activity at the sites, he states, presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them. In a recent statement, Mr Eilering states:

“2.4 Each of the Injunction Orders have been carefully considered and drawn so as to ensure that they are not too wide and only prohibit activity which would be clearly unlawful.

2.6 The Injunction Orders have been obeyed and have acted as an effective deterrent against unlawful protest activity. They continue to have that deterrent effect and ensure that damage and harm is avoided.”

76. Mr Prichard-Gamble has provided an updated witness statement emphasising that the risk of rights violation to Shell and risk of harm should it occur continues. Marcus Smith J addressed the question of future harm in his judgment in *Vastint* at para 31(5):

“it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant’s rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of

the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material:

(a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind.”

77. In this case, Shell has filed evidence about grave concern that direct action protests could cause localised leaks and pollution through the release of highly toxic substances, serious or severe injury or death through combustion of dangerously flammable liquids, resulting in harm to employees, contractors, members of the public and protesters that cannot be or cannot be easily undone.
78. That evidence is compelling. Indeed, in respect of damaging petrol pumps, Ms Ireland has circulated the information about the risk it produces within protest “circles” and she now says that she would not endorse future protest action involving damage to petrol pumps due to the risk presented by it. Mr Laurie’s position is more nuanced. Coming from his engineering background, he told the court that risk is not “binary”. It exists along a spectrum and damaging petrol pumps “is not a straightforward situation”. There is a “gradient of risk we all exist on”. However, he recognised that “just because we think some form of protest is safe, that does not make it [objectively] safe”.
79. The court accepts the evidence that direct action that involves damaging petrol pumps plainly carries with it the risk of serious injury and Ms Ireland is right to recognise and change her stance in light of that risk. Protests that may release the highly toxic and flammable substances that Shell store and supply plainly carries with it the associated danger of serious harm.
80. I will deal with general risk first before turning to three categories of defendants (1) Ms Ireland and Mr Laurie; (2) named defendants in Claim 3 (see Annex A for details); (3) PUs generally. I examine Ms Ireland’s evidence before Mr Laurie simply because she precedes him in the list of named defendants and addressed the court first.

General risk

81. In terms of general risk of future direct action against Shell, I begin by noting the observations of Cotter J at para 41:

“There have been 63 separate protests at Shell Tower since the April renewal hearing. Apart from three incidents in June 2023 when protesters accessed the entrance to the Tower, these appear, I say no more, to have been lawful protests. I pause to observe that this is also of significance as it gives credence to the claimants’ repeated assertion that it does not seek to prevent protesters from undertaking lawful peaceful protests, whether or not such protests arise near to its premises. It also highlights how it is possible to protest against the use of fossil fuels without infringing the rights of the claimants or others.”

82. Cotter J added at para 43:

“the Protest Groups had made comments reiterating that this is “an indefinite campaign of civil resistance” and (in March 2024) that “non violent civil resistant to a harmful state will continue with coordinated radical actions.”

83. In June 2024, JSO repeated its statements that supporters will continue to take action to “demand necessary change” that this UK government “end the extraction and burning of oil, gas and coal by 2030” and will continue “the resistance” if the Government fails to “sign up to a legally binding treaty to phase out fossil fuels by 2030”. Student members of JSO have posted that “[t]his November, hundreds of students are coming to London – this is going to be the biggest episode of civil disobedience this country has ever since. Be there, November 12.” As Linden J put it in *Esso Petroleum Company Ltd v PUs* [2023] EWHC 1837 (KB) (“*Esso Petroleum*”) at para 67:

“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.”

84. Similarly, Ritchie J noted in *Valero* (at para 64):

“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”.

85. I find that similar considerations apply to the direct action protests against Shell as at autumn 2024. In her careful analysis, Hill J noted at para 30 the ending of direct action protests at Haven following the injunction, but noted wider fossil fuel protests elsewhere:

“30. There do not appear to have been any further unlawful protest incidents at the Haven. However, the evidence shows a significant number of incidents in relation to oil refinery sites between August 2022 and February 2023. These included protest action at a number of oil refineries located in Kingsbury. The main road used to access the site was closed as a result of protesters making the road unsafe, by digging and occupying a tunnel underneath it, access roads were also blocked by protesters performing a sit-down roadblock. Similar activity occurred at the Gray's oil terminal in West Thurrock in August/ September 2022. On 28 August 2022 eight people were arrested after protesters blocked an oil tanker in the vicinity of the Gray's terminal, climbing on top of it and deflating its tyres. On 14 September 2022 around fifty protesters acted in breach of the North Warwickshire local authority injunction in relation to the Kingsbury site.”

86. Hill J then continued at para 39:

“(i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent

effect and mitigate against the risk of harm which unlawful activities at the sites would otherwise give rise to. Unlawful activity at the sites presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them.”

87. In respect of petrol stations, Hill J noted:

“18 Johnson J was provided with witness statements from Benjamin Austin, the claimant's health, safety and security manager, dated 3 and 10 May 2022. In his judgment, he explained that, on 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, at Clacket Lane and Cobham. Entrances to the forecourts were blocked. The display screens of fuel pumps were smashed with hammers and obscured with spray paint. The kiosks were “sabotaged ... to stop the flow of petrol”. Protesters variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker or each other. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed: paras 12–13. Johnson J also referred to wider protests in April/early May 2022 at oil depots in Warwickshire and Glasgow: paras 14–15.

19 Johnson J explained that he had not been shown any evidence to suggest that XR, JSO or Insulate Britain had resorted to physical violence against others. He noted, however, that they are “committed to protesting in ways that are unlawful, short of physical violence to the person”. He observed that their websites demonstrate this, with references to “civil disobedience”, “direct action”, and a willingness to risk “arrest” and “jail time”: para 9.

20 He summarised the various risks that arise from these types of protest, in addition to the physical damage and the direct financial impact on the claimant (from lost sales), as follows [quoting paras 18-19 in the Johnson J judgment quoted at this judgment's para 33 ante, before continuing at para 21]:

“21. Aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on the claimant (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on “Storing petrol safely” and “Dispensing petrol as a fuel: health and safety guidance for employees”, and non-statutory guidance, “Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions.”

“22. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: “Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion.”). The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to

photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: “Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations.” I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.”

88. Hill J stated at para 21 that Johnson J:

“noted the evidence that the campaign orchestrated by the groups in question looked set to continue and cited JSO's statement on its website that the disruption would continue “until the government makes a statement that it will end new oil and gas projects in the UK: para 16.”

89. In the exhibit to his statement in the core bundle, Mr Eilering on behalf of Shell appends the online report of Shell's AGM. The report dated 21 May 2024 documents how protesters from “numerous” climate campaigning groups, including XR, disrupted the AGM by singing “Shell Kills”, while outside the hotel where the meeting took place, protesters unfurled a sign saying “SHELL PROFITS KILL”. Beyond this, Mr Eilering exhibits several hundred pages of articles and documents recording recent protest activity not only in the United Kingdom but internationally directed towards the fossil fuel industry. This documentation builds on the earlier filed statements by Mr Prichard-Gamble attesting to the ongoing threat to the business interests of Shell from those who object to their involvement in fossil fuel extraction and supply.

90. During the course of the hearing before me, the claimants provided the court with an updated 19-page chronology of protest activity from 1 July to 15 October 2024. As Mr Laurie points out, many of the incidents listed took place in other countries or were not directed at Shell. These included protests or results of courts cases around protests with different targets, including JSO supporters spraying orange paint at departure boards at Heathrow Airport; JSO activists throwing soup at Van Gogh's Sunflowers painting and stopping traffic in Parliament Square; and the occupation of the offices of Policy Exchange by XR activists.

91. The filed chronology documents that no direct action protests have breached Shell's rights. That said, there have been regular peaceful protests outside Shell Tower. These have involved small numbers of protesters usually in silent vigils with banners:

3 and 10 July

Peaceful protest outside Shell Tower – one member of Christian Climate Action.

17 July

Similarly at Shell Tower, with two protesters.

Same day in Manchester: Extinction Rebellion activists have protested at the National Cycling Centre in Manchester to call on the former policy adviser for British Cycling, Chris Boardman, to convince British Cycling to drop Shell as its

sponsor of the Paris Olympics. Protesters held signs and placards carried messages like 'Shell Lie, Cyclists Die' and '[Heart] Chris, Hate Shell'.

24 July

One female protester from Christian Climate Action protested peacefully outside Shell Tower on Belvedere Road. Protester was carrying Placard that reads "I Pray Shell Stops Climate Chaos".

30 July

Twelve XR protesters set up outside Shell Tower. The protesters held up large banners reading "REVEAL THE TRUTH" and "SHELL KILLS". The protesters made speeches and sang a song.

31 July

Three protesters from Christian Climate protested peacefully outside Shell Tower.

1 August

5 protesters peacefully protested outside Shell Tower. They were carrying placards that read "Thousands of Children Killed by Oil Pollution in Niger Delta" "Was It Worth It". They took pictures of Shell Centre on Belvedere Road.

3 August

Climate activists from Shropshire cycle from London to the Paris Olympics to protest against Shell's sponsorship of British Cycling.

7 and 14 August

Two protesters from Christian Climate protested peacefully outside Shell Tower.

21 August

Two Christian Climate protesters protested peacefully outside Shell Tower.

28 August

One protester from Christian Climate Action peacefully protested outside Shell Tower. Protester was carrying Placard that reads "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying our planet".

5 September

2 protesters from Christian Climate Action set up outside Shell Tower. Protesters were carrying a placard that read 'To Ignore The Climate Science Is Insane' and a banner reading 'We Are Crucifying Our Planet'.

11 September

1 male protester from Christian Climate Action set up outside Shell Tower carrying a placard reading "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying Our Planet".

12 September

2 male protesters from Asthma and Lung UK set up outside Shell Tower with two bicycles with large digital displays on the back stating:
Toxic air stunts lung growth in children.
Air pollution affects our health before we're born.
99% of people in the UK breathe unsafe air.
Toxic air causes up to 43000 premature deaths in the UK every year.

18 September

1 female protester from Christian Climate Action set up outside Shell Tower. A second protester then turned up with a placard reading "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying our Planet".

25 September

1 male and 1 female protester from Christian Climate Action set up to protest outside Shell Tower. They carried a placard reading "To Ignore Climate Science Is Insane" and a banner reading "We Are Crucifying our Planet".

2 October

2 Protesters from Christian Climate Action set up outside Shell Tower and sat next to planters. They were carrying placards that read "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying Our Planet".

8 October

Protesters stood outside the Royal Court displaying placards and banners ahead of a key appeal case against Shell.

9 October

2 protesters from Christian Climate Action set up outside Shell Tower. They produced banners and a flag and knelt down to carry out their silent protest.

15 October

Shell's Chief Energy Advisor, Peter Wood, was giving a presentation at the World Energies Summit in London. While walking to the event he was questioned by a member of Fossil Free London who questioned him about Shell in the Niger Delta.

92. Further, there is evidence filed by Shell that senior executives have been "doorstepped" and subject to abusive and threatening messaging on social media.

Ms Ireland and Mr Laurie

Ms Ireland

93. Emma Ireland is currently "job free", as she puts it, and lives in Bristol. She has a long track record of dedicating herself to others. Ms Ireland filed a skeleton argument and a witness statement dated 17 October 2024 with the court. To provide an overview of her defence, I extract and combine her submissions by combining both documents. She states:

"I trained as a social worker from 2009-2011. Since 2012 I have worked in mental health, sometimes as a support worker and other times at more senior

levels, as a care co-ordinator. I am currently job free. I have recently been volunteering with food cycle, cooking 3 course community meals with waste food. I have a work contract starting on 1st November working in a mental health setting, with people who have been street homeless for a long time. I care deeply for others and look for ways to support fellow human beings and the earth, be it in my paid work, with family and friends, neighbours, or volunteering. For 3 months of this year I have volunteered on organic farms in the UK.

We do not agree that this injunction is necessary. We believe that Shell should not be protected from lawful protest. We have not yet faced criminal trial for the acts that led to our inclusion on this injunction, so it remains to be seen whether the protest will be judged as lawful. We believe our actions have to date, been entirely within the law as it stood on 24.08.22. Since then the Government has, after much lobbying from Fossil Fuel Companies, passed even stronger laws protecting companies such as Shell. For clarity, I am asking for the Shell Petrol Station injunction to be discontinued.

Events of August 24th 2022

On that day, I attended Cobham Service Station with other supporters of the Just Stop Oil campaign. I walked towards the entrance of the forecourt and sat down on the ground. There were 5 others who sat down too. There was a banner that read Just Stop Oil. The entrance to the forecourt was blocked. Cars continued to leave the petrol station via the exit road. When asked to move I continued to stay seated on the ground. I had my back to the petrol pumps. I am aware that there was damage caused to 2 petrol pump screens by one or two other people.

I sat in the entrance of the Shell Petrol station, as an act of protest, to demand that the government stop issuing new licences for the discovery, development and production of new oil and gas in the UK.

I also took this action to get this message out to Shell and to the public, who were there on the day, and other members of the public and the government via the media. To raise the alarm that we are in a climate emergency and we have to act like it. I put my body on the line and 2 petrol pump screens were decommissioned, to temporarily pause the flow of new petrol into some cars for a limited time. By jolting the status quo, I hoped that this more embodied message, would get through to some more people. Because we all need to be doing more, every day, at all times, to reduce our harmful impact on the climate and to encourage others to do so as well.

I was arrested for causing a public nuisance, and was taken to Staines police station. I pleaded not guilty at the first appearance at Guildford Crown Court. I have been released on unconditional bail for this matter and the trial is currently listed for 11 August 2025 [now at Winchester Crown Court].

My spiritual faith, beliefs and views regarding climate change are set out in my witness statement. These views are sincerely held, reflecting those of many citizens who are concerned about climate change and the role of fossil fuels in perpetuating further man-made global warming.

The health and safety concerns of potential future actions at Shell petrol stations has been discussed in evidence. I too take this point very seriously. I agree that a protest should not be allowed that causes physical harm to staff, customers, passers by and protesters.

I hold the belief that if those that run Shell fully understood the part that they were playing in the climate crisis, in the deepest part of their heart and sole [sic], they would have consented to the damage having been caused the pumps and the disruption to the sale of their fuel.

Since the injunction was made the law relating to protest has changed significantly, offering greater protection to the fossil fuel industry. For instance, s.7 Public Order Act 2023 means that people can be arrested almost immediately after the protest begins and they will face up to a year in prison. I do not understand why there is any need for the injunction to continue to exist in addition to these draconian laws.

Shell requested the interim injunction when these new laws were not yet in force. I propose that the criminal laws of this country are protection enough for Shell to be able to continue to effectively and safely sell petrol to the public. Who can say whether it is the injunction, or the criminal laws, or something else that has meant that there have been no more actions by environmental groups on any petrol station of any brand in England and Wales since August 2022. The evidence since August 2022 given by the claimant talks about other types of actions on other sites in the UK, that are not petrol stations.

[A]nalysis from Carbon Majors Database, has proposed that just 57 oil, gas and cement producers are directly linked to 80% of the world's global fossil fuel CO2 emissions since the 2016 Paris Agreement. Shell has been named as one of these.

We are in a climate emergency. Let us not be a country that continues to use injunctions to create new laws that are overly harsh for environmental defenders and protect big oil companies.

The scientific consensus on the climate emergency could not be clearer. We are in a climate crisis, driven by rising temperatures and extreme weather. An average of over 1.5°C warming would be catastrophic for humanity. The International Panel for Climate Change (IPCC) reports state that we are already overshooting the targets of liveability. We cannot keep burning fossil fuels if we are to have any chance of a liveable future.

I feel that it is my calling to do all I can to reduce the negative impact of climate change at this time. I feel that part of this is to invite others to question what they can do, within their sphere of influence. I understand that for each of us this may be different. In 2022 I became a supporter of Just Stop Oil in order to demand that the government stop issuing licences for the exploration, discovery and development of new oil and gas projects in the UK. For me, this demand felt necessary, clear and reasonable.

I feel so privileged to be saying this from a place where I have a home, enough food and I am well. The reality for many today, especially in the global south, is that their lives are being ripped apart due to fires, floods, famine caused by climate change. It is us in the global north who have played the biggest part in climate change. I feel it is our responsibility to do all we can as individuals, and to ask those, with different spheres of influence, to do what they can too. This is why I protested on that day, and why I am defending myself at this trial.

Since that day I have been arrested a further five times, each time for participating in protests as a supporter of Just Stop Oil. The demand to the government, on each of these occasions was to stop issuing new oil and gas licences:

- On August 26 2022 I was arrested for blocking the entrance to a petrol station forecourt in London.
- On 8 October 2022 I was arrested for sitting in a road in London , causing a disruption to traffic. For this I was charged, pleaded not guilty to wilful obstruction of the highway, and later the case was dropped.
- On 21 October 2022, I was arrested for sitting in a road in London, causing a disruption to traffic. For this I was found guilty of Wilful Obstruction of the Highway. I was sentenced to £200 court costs £26 surcharge and conditional discharge of 12 months.
- On 10 July 2023, I was arrested for continuing to walk slowly down a road in London, causing traffic to move more slowly. I was arrested for breaching s.12. I was later found guilty for breaching s.12. I was sentenced to £120 court costs and £120 fine. I was also given £120 fine for the above action, due to the conditional discharge.
- On 10 November 2023 I was arrested for walking slowly down a London road. I was later found guilty of Wilful Obstruction of the Highway and sentenced to £348 costs, £200 fine, £80 surcharge.”

Conclusion on Ms Ireland

94. Ms Ireland has devoted her life to supporting and helping others. She sees her environmental activism as being connected to that life’s work. She is a person with an acute empathetic sensibility, and as she puts it, “I have always been able to feel the suffering of others”. It is commendable that in her career she has sought to assist vulnerable people because of that insight. She is committed to protecting the environment, has never owned a car, and indeed cycled to London for the court hearing all the way from Bristol over several days.
95. The claimant submits that the court should draw an inference against Ms Ireland from her declining to sign an undertaking. The inference is that her refusal makes it more likely that she would take unlawful direct action against Shell again in future should the injunction be discharged. I listened very carefully to Ms Ireland’s explanation for wishing to attend the court hearing and not signing the undertaking. It is true, as the claimant submits, that it would be possible for Ms Ireland to sign the undertaking and apply to attend the hearing as an interested party. However, Ms Ireland appears in person. I am not convinced that she has the confidence and legal wherewithal to take this more sophisticated legal course. Further, I am persuaded by the sincerity of her comments to the court that she wished to address it personally to explain the reasons

for her protest activities and felt her ability to do so would be compromised by the undertaking. Therefore, I decline to make an inference against her. I turn to the other matters.

96. Two days after her protest in Cobham 24 August 2022, Ms Ireland was arrested on the forecourt of another petrol station, this time in the Acton area of west London. In October of that year, she was arrested for disrupting the traffic in London, although no further action was ultimately taken. Later in October 2022, she disrupted the traffic and was found guilty of Wilful Obstruction of the Highway. In July 2023, she again disrupted the traffic and was again found guilty. In November 2023, she again disrupted the London traffic. She was again found guilty of Wilful Obstruction of the Highway. Therefore, Ms Ireland's commitment to environmental activism has continued following the Cobham protest. She has been convicted of criminal offences for it and that has not dampened her moral commitment.
97. That said, she submits to the court that "the criminal law might well be enough of a factor to deter future protests [rendering] an injunction unnecessary", pointing to the coming into force of the Public Order Act 2023. She supports this point with the fact that "there have been no further protests at petrol stations since August 2022".
98. I have no doubt whatsoever that Ms Ireland is a selfless and committed person. She feels the suffering of others acutely. That extends beyond those in her immediate circle whom she has helped and includes people who are partially sighted or without sight, and people living with mental health problems and trauma. That act of imaginative empathy extends to the many millions of people in the Global South who she says are suffering because of climate change. It also extends, as she powerfully put it, to "the suffering of the Earth". She does not think that Shell has changed since her action at Cobham in August 2022, except that it has resiled from its "green and sustainable commitments". Ms Ireland stated that 57 producers are responsible for 80 per cent of global fossil fuel carbon dioxide emissions. Shell is one of them. Lives in the Global South are being "ripped apart" by this climate emergency. This is why she feels the obligation to protest and "do all we can".
99. While she is committed to relieving the suffering of others "from a peaceful place", the court is left in little doubt that should the injunctions be discharged, such is the passion and strength of Ms Ireland's commitment to trying to effect change, there is a real and imminent risk of her engaging in direct action protests and breaching the claimant's rights and there is a strong probability that it would constitute a tort committed against Shell. I am not persuaded that the coming into force of the Public Order Act 2023 with the 12-month maximum sentence would be effective to deter Ms Ireland. It is unlikely that Ms Ireland would act alone, because as she told the court in terms, she is "still a supporter of JSO" and has circulated information to protest groups. The overwhelming probability is that her future direct action would again be joint and coordinated tortious action. This is because since her arrest at Cobham in August 2022, and despite it, she has risked arrest and repeated arrest and that has not deterred her from continuing to intervene.
100. Ms Ireland told the court that "to do nothing is not within my nature". Therefore, I find that as against Ms Ireland the claimant has produced sufficient evidence to prove its claim on both limbs identified in *Wolverhampton*.

Mr Laurie

101. Charles Phillip Laurie lives in Faversham, Kent. Mr Laurie is a retired civil engineer and Quaker, whose faith is immensely important to him and closely connected to his activism. He filed a skeleton argument and a witness statement with the court dated 16 October 2024. Once more, extracts from both are melded to provide an overview of Mr Laurie’s defence. He states:

“We do not agree that this injunction is necessary. We believe that Shell should not be protected from lawful protest.

On 24th August 2022 – Cobham Service Station – I was arrested for public nuisance and possession of articles with the intent to cause or damage property. On that day, I attended Cobham Service Station with other protesters from JSO group. Initially my plan was to cause damage to the petrol pumps of the service station with two other protesters, whilst five other protesters blocked the entrance to the station forecourt and glued themselves to the ground.

Whilst I was walking towards the petrol pumps, I changed my mind about causing damage to the petrol pumps and I changed course to join the other protesters at the entrance to the forecourt. I sat down with them and glued myself to the ground. I was arrested.

The interim injunction and its extension are “immensely troubling for me because it curtails my right to peacefully protest outside petrochemical facilities, offices and retail facilities are which are owned and operated by Shell.

On 26 August 2022, Shell’s Petrol Stations at Acton Park and Acton Vale were subjected to action by protesters that went well beyond peaceful protest. As part of what Just Stop Oil described as a week-long “series of actions disrupting oil terminals and petrol stations in support of [Just Stop Oil’s] demand that the UK government end new oil and gas projects in the UK”, individuals once again blocked the entrance to the petrol station and caused damage to 10 fuel pumps in total across the two Shell Petrol Stations.

I would ask that you consider if the cost is actually a big or small number. I am sure that the numbers are big for those Shell trading businesses actually impacted but at the highest level in terms of a business making 19.5 billion dollars profit in the past year, it is very, very small. Whether you want to regard it as being large or small is down to you. For me it is very small, and fits exactly for the requirement protest to be proportional.

All protests that gave rise to this injunction where at locations directly connected with the harm being caused by the ongoing operations of Shell.

There is no evidence that I will act in breach of the Claimant’s rights in the future such that “imminent and real risk of harm test” for an anticipatory injunction is met.

Another way to look at this might be that this injunction shields Shell from the consequences of public discontent at the decisions made at senior levels within the company.

I am a Quaker. I integrate my faith in everything I do in my life but particularly through my activism. Quakerism calls for Quakers to live by our values and actively participate in the upholding of these values where we see it is necessary. Activism is the practical side of my faith. It is interconnected. Quakerism is not about heaven or an afterlife, it is about the world we are in now. That's why so many Quakers are involved in activism about climate change.

Human induced climate change is real. It is happening now. My Environmental Science degree tells me that there is cause and effect in the laws of physics. If you increase CO₂ in the atmosphere the temperature has to increase.

The products sold by fossil fuel companies such as Shell are one of the major causes of climate change. These companies know the risks their products pose. Their role is totally malign. They deny the impact, delay action, destroy lives and environments. They take no responsibility for the output of their products, at all times seeking to maximise their sales which is a death sentence to many people and the planet.

In general, business is unable to see past profit. Generally, if they think taking action to reduce their impact on climate change will undermine their profits they prefer to continue with business as usual and where necessary green wash past any issues.

This is why it is important to me to protest; my faith requires me to take action to alert people to the dangers of climate change and put pressure on the Government and fossil fuel companies to change their ways, while the Government and big business are failing to do so."

Conclusion on Mr Laurie

102. For similar reasons to Ms Ireland's case, I refuse to draw an adverse inference against Mr Laurie that the claimant invites me to make. I judge that it is neither safe nor reasonable.
103. Mr Laurie engages in environmental activism and protest animated by his religious, spiritual and moral beliefs. His Quakerism compels him to take action against what he perceives to be a vast societal and global wrong, the climate emergency. He is entitled to hold these views. Some will agree with him; others will not. His right to hold that belief must be respected and protected by the law. The issue in this case is how he seeks to intervene in the public sphere in furtherance of that belief. His sincerely held Quaker views, and the moral imperative to take action that arises because of them, have not changed. He continues to believe that Shell and fossil fuel companies like it are "one of the major causes of climate change". He maintains that the role of Shell is "totally malign". Shell and others "destroy lives and environments". He regards the impact of the protests on Shell to be "small" and "proportional", given the vast resources at its disposal. I judge that the strength of Mr Laurie's sincerely held religious and moral beliefs significantly outweigh any further deterrent effect that the operation of the

Public Order Act 2023 might have. He has been willing to risk arrest previously. He had gone to the Cobham petrol station in August 2022 with the intention of causing criminal damage himself, such is the force of his conviction. He was one of the protesters arrested outside Inner London Crown Court for holding placards, although it must be emphasised that the case against him for that protest was discontinued. The fact that at Cobham he did not damage any petrol pump is no real answer as the presence and deployment of the police caused him to alter his approach. Further, I found his comments about the risk that smashing petrol pumps may cause indicative of his belief, grounded in his scientific background and training, that such direct action is not as risk—laden as Shell’s evidence maintains. That increases the risk that he would engage in future similar direct action. It is noteworthy that despite the presence of the police at Cobham, he was still prepared to protest and be arrested in the furtherance of his cause and moral concerns.

104. He spoke passionately and emotionally when addressing the court. He stated:

“Shell have abandoned all the promises that they were going to be become the greenest energy company in the world. Shell say they are going to drill a new gas field in the North Sea, so ‘how is that green ambition going?’.”

105. He continued, “I cannot make a promise that I will not protest again, but cannot say I will.” If the injunctions are discharged, he says he may resume the protests against Shell but tells the court he is unable to say he will or not. He provided a different analysis of the changes in the law and increased sentencing under section 7 of the Public Order Act 2023. He emphasises that:

“Maximum sentences are artificial as rarely used. Instead, the real change is the new police powers. The police only have to determine the action is ‘more than minor’ disruption [through obstruction] and they do that really quickly. The change enables the police to break up the protests more quickly and it is not the sentences that ‘protects Shell’.”

106. On Mr Laurie’s analysis, then, the increased sentencing powers are not the material difference in deterring protests: it is rather the police’s ability to break up protests far earlier. He concluded his submissions by telling the court:

“This is a very serious issue. But Shell is putting this CO₂ into the atmosphere causing thousands and millions of deaths, even hundreds of millions of deaths, not in the future, but in the next few years, probably in my lifetime and certainly the lifetime of my children. It is so serious we must look in the mirror and take action.”

107. It seems to me that the real and imminent risk remains that without a final and continuing injunction, Mr Laurie would in pursuit of his sincere beliefs take unlawful direct action again against Shell and there is a strong probability that this would result in a breach of Shell’s rights under the civil law. Therefore, I find that as against Mr Laurie the claimant has produced sufficient evidence to prove its claim on both limbs of *Wolverhampton*.

Other named defendants

108. As to the risk or threat attaching to the other named defendants, I draw an adverse inference from their failure to sign the undertakings, enter a defence, attend the final hearing or otherwise engage in these proceedings. I note the observations of Linden J in *Esso Petroleum* at para 45:

“it would have been easy for Defendants to give assurances or evidence to the court that there was no intention to carry out direct action at the various sites, but a decision was taken not to do so. As I have indicated in other cases, this provides an insight into the mindset of those who would, unless restrained, engage in unlawful activities with the aim of halting the Claimants’ business in fossil fuels.”

PUs

109. In respect of PUs, I cannot draw an inference regarding undertakings.
110. However, in respect of the other named defendants and PUs, I find that the claimants have provided sufficient evidence to prove the claim and meet the two limbs of the *Wolverhampton* approach. The argument that direct action against Shell since the granting of the injunctions has significantly diminished must be seen in light of the observation of Cotter J at para 19 that injunctions are granted on the assumption that they will be obeyed and thus have a material effect. Indeed, the likely effectiveness of an injunction must be one of the factors in the section 37 discretionary assessment of whether to grant it at all. There have been, as set out in the claimant’s chronology, repeated unlawful acts directed at airports and universities.
111. It is significant that the series of recent protest injunction cases touching on various elements of the energy and fossil fuel sector, this court has found a continuing real and imminent risk of direct action resulting in tortious breach of the claimants’ rights. While it would be naïve to ignore that context of diverse and disparate targeting of the fossil fuel sector, I emphasise that I judge this case on the evidence before me. I note what Ritchie J said in *Valero* at para 64:

“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”.

112. Finally on this point, Hill J noted at para 36:

“The claimants liaise regularly with the police, whose intelligence indicates that there continues to be an ongoing threat; that the protest campaign is not over; and that protest groups will continue to attempt to put pressure on the Government to halt new investment in fossil fuels. It is apparent that JSO continues to have the ability to draw on a large group of protesters who are willing to be arrested; that they take action using a variety of tactics and target locations across the UK; and that they employ tactics that attract the media and public interest. Further, there is a high level of crossover between the individual protest groups, who appear to share disruptive tactics between them. His view was that activities of the sort described above would be likely to increase as a result of the Government's recent approval of the building of a new power station, the cost-of-living crisis and the

likely increase in support for JSO given that environmental concerns affect the majority of the public.”

113. Stepping back and assessing the totality of the evidence before me, I find that should the injunctions be discharged, a real and imminent risk arises of direct action tortious interference with the claimants’ rights by the named defendants and PUs.

4 Defences

5 Balance of convenience/compelling need

6 Proportionate interference with ECHR rights

114. Only two defences have been filed, those of Ms Ireland and Mr Laurie. They share a common approach. The main lines of their defence can be reduced to three key features:

- (1) An injunction amounts to an unlawful, that is unnecessary and disproportionate, interference with their Article 9, 10 and 11 Convention rights;
- (2) The disruption caused and Shell’s loss is “proportional” to the acts committed by Shell in pursuit of its business interests;
- (3) The Aarhus Convention protects “environmental defenders” from the “excessive” use of law.

115. Since the analysis of these points engages questions of balance of convenience and compelling need and proportionality, I consider Factors 5 (balance of convenience) and 6 (proportionality) within this section. I examine the defences of Ms Ireland and Mr Laurie first, before considering the position of PUs.

Convention rights and proportionality

116. Article 9 of the ECHR provides:

“Article 9 – Freedom of thought, conscience and religion

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.”

117. I cannot see that the granting of anticipatory injunctions interferes with the defendants’ freedom of thought or conscience or indeed religion. They can adhere and continue to believe what they wish. Equally, I am not persuaded that the injunctions interfere with

the right of defendants to “manifest” their beliefs. However, and in any event, any interference is subject to the proportionality analysis in respect of other Convention rights that follows and what is crucial to appreciate is that Article 9 is a qualified right and explicitly limited to matters “prescribed by law” which are necessary “in a democratic society”. It is protection not just of public order and health (which must include bodily safety and integrity), but the protection of the rights and freedoms of others, which are capable of including rights under the civil law, such as those claimed by Shell.

118. I turn to Articles 10 and 11, the rights to freedom of expression and freedom of peaceful assembly and association with others.

“Article 10 of the Convention

Freedom of expression

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.

Article 11 of the Convention

Freedom of assembly and association

Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...”

119. The argument advanced by the defendants is a repeat of the argument that was fully developed by Mr Simblet KC before Hill J. Nevertheless, I reconsider it here. Both rights are once more qualified rights. Art 10 is qualified in this way:

“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.”

120. The qualification to Article 11 is in these terms:

“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.”

121. The first point is that in respect of interferences with or entry onto the private property belonging to Shell, ECHR rights do not confer a right to enter onto private land (*DPP*

v Cuciurean [2022] EWHC 736 (Admin), para 45 and paras 76-77; *Ineos* at para 36, per Longmore LJ). Johnson J at paras 55-56 identified the four-part approach to issues of rights violation and proportionality taken by the Supreme Court in *Ziegler*:

“55. The injunction interferes with the defendants’ rights to assemble and express their opposition to the fossil fuel industry.

56. Unless such interference can be justified, it is incompatible with the defendants’ rights under articles 10 and 11 ECHR and may not therefore be granted (see sections 1 and 6 of the Human Rights Act 1998). Articles 10 and 11 ECHR are not absolute rights. Interferences with those rights can be justified where they are necessary and proportionate to the need to protect the claimant’s rights: articles 10(2) and 11(2) ECHR. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2021] UKSC 23 [2022] AC 408 *per* Lord Sales JSC at [125].”

122. Of course, this is a familiar rubric and echoes the widely cited four-part proportionality test set down by Lord Reed in *Bank Mellat v HM Treasury No. 2* [2013] UKSC 39 at para 74:

“It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”

123. I consider in turn each of the four *Ziegler* elements.

***Ziegler* (i): legitimate aim**

124. The legitimate aim of the proposed final injunction is the protection of the claimants’ right to carry on their business, which, despite falling under severe criticism as it does from the defendants, remains under the law a lawful business. I have received no argument identifying the illegality of Shell’s core business under the law of England and Wales. The defendants argue that Shell contributes to the climate emergency, but that is distinct from identifying a clear basis in law that the sale of fuel from service stations in the United Kingdom, as but one example, is unlawful. On that point, I received no argument. It was, of course, open to the defendants or any of them to argue that there is no legitimate aim worthy of protection as the core business of fuel sale is illegal. That was not an argument advanced.
125. Instead, the focus was on the balance between the risk to global environmental factors created, it is said, by Shell and the far less intrusive infringements of Shell’s rights by the protests. That is essentially an evaluative (balance) argument and not one about

legitimate aim. However, Johnson J while touching on this point, focused on aim and Ziegler (i) at para 57:

“The defendants might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is thereby putting the world at risk, and that the claimant’s interests pale into insignificance by comparison. This is not, however, “a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important” – *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039 *per* Lord Neuberger at [41]. It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants’ actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the injunction is therefore sufficiently important to justify interferences with the defendants’ rights of assembly and expression: cf. *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 *per* Morgan J at [105] and *Cuadrilla per* Leggatt LJ at [45] and [50].”

126. I find that the objectives of the injunctions do constitute a legitimate aim.

Ziegler (ii): rational connection

127. As to rational connection, it is important to be clear what this means. I take it to mean that not only is there a clear and logical connection between the measure and the objective or legitimate aim sought and that the measure can be seen to be an effective means to further the aim – to achieve it. In this case, I judge that the injunctions sought clearly have the capacity to deter and protect the claimants’ rights. Indeed, it is likely that they have materially contributed to achieving that aim since their granting on an interim basis. I find that that is a reasonable inference from the significant falling away of direct action breaches of Shell’s civil law rights.

Ziegler (iii): least intrusive measure

128. It is essential that the measure is the least intrusive action consistent with achieving the legitimate aim. Both Johnson J and Hill J (and indeed Cotter J in the April 2024 review) so found. Indicative of the level of intrusion is that the injunctions as drafted, as before, in terms only prohibit future acts of unlawful protest. For similar reasons, the court finds that the injunctions are the least intrusive measure, being directed exclusively at unlawful rights breaches.

Ziegler (iv): fair balance

129. As to the fourth element, Hill J considered the question of balance between the competing rights and concluded at paras 179-80:

“the injunctions strike a fair balance between the Defendants’ rights to assembly and expression and the Claimants’ rights: they protect the Claimants’ rights insofar as is necessary to do so but not further;

“the interferences with the Defendants’ rights of free assembly and expression caused by the injunctions are necessary for and proportionate to the need to protect the Claimants’ rights.”

130. Hill J’s conclusion was adopted by Cotter J at para 59, when he held:

“As for interference with the defendants' rights to free assembly and expression necessary for the proportionate need to protect the claimants' rights under Articles 10(2) and 11(2), read with section 6(1) of the Human Rights Act, it is right to note that all three of the injunctions interfere with the defendants' rights under Articles 10(1) and 11(1). However, such interference can be justified when it is necessary and proportionate to protect the claimants' rights. I adopt Hill J's reasoning and conclusions at paragraphs 179 to 180 in this regard.”

131. To the extent that it is necessary to consider proportionality separately, and invoke the four-part *Bank Mellat* test enunciated by Lord Reed, I reach the same conclusions as in the *Ziegler* analysis. As Ms Stacey put it with accuracy, in fact the point “overlaps”. However, before reaching my decision on “fair balance” and the infringement of the defendants’ rights, I must address the question of the Aarhus Convention. The court considers whether (1) it is relevant to the exercise of its discretion in granting an injunction; (2) if so, in what way and to what extent, whether as part of the *Ziegler* analysis or as a freestanding point.

132. Before I consider the Aarhus Convention, I reflect on the argument that was put before Cotter J that the creation of additional criminal offences relating to protesting and increased police powers represent a material change of circumstances since the granting of the injunctions in 2022 and 2023. Cotter J held from para 22:

“22. Mr Laurie's submission is that the coming into force of the Public Order Act 2023 represents a material change, since the orders were made by Hill J, as sections 1, 2 and 7 create new offences. Sections 1 and 2 create the offences of locking-on and being equipped for locking-on; and section 7, interference with use or operation of key national infrastructure.

25 Mr Laurie's admirably brief submission was that in light of these new offences, the orders were no longer necessary. Put simply, fear of prosecution will prevent the unlawful activity which is prohibited by their terms. Where the criminal law provides that conduct will be an offence, with the potential for significant penalties, including imprisonment, the civil law does not need to provide additional protection.

26 No authorities have been cited to me in support of (or against) this proposition.”

133. Part of the Aarhus argument that I must turn to, and as noted at the start of the judgment as reported by the Special Rapporteur, is that the simultaneous use of criminal and civil proceedings is oppressive and “excessive” use of the law. I make three initial observations about this.

134. **First**, that I agree with Cotter J that the change in criminal law is potentially relevant as a material change in circumstances.
135. **Second**, however, what is essential is to assess the evidence about what the significance of that change is or is likely to be. As to the deterrent effect of increased criminal sanction and powers, the submission is advanced without any or any solid evidence. It is just as possible that the reduction in direct action unlawful protests targeting Shell is a result of the interim injunctions granted. It seems to me speculative to assign the change in pattern of protest to the coming into force of the Public Order Act 2023. Indeed, Mr Eilering notes in his statement at para 8.5.2 in relation to protests that postdate the coming into force of the new statute that:

“both the Fourth and Tenth Defendant in the Shell Petrol Station Proceedings were recently arrested under the Public Order Act. Pages 304-306 of Exhibit PE1. I am also aware that the Fifteenth Defendant was arrested after spraying a University of Leeds building with orange paint.”

136. The ongoing nature of protests was noted by Ritchie J in *Valero*, where he reviewed the evidence filed on behalf of the claimant up to December 2023, and thus after the enactment of the new Public Order Act on 3 May 2023. He summarised the evidence of Ms Pinkerton in this way at para 41:

“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.”

137. **Third**, and vitally, the argument confuses the focus of the criminal law and civil injunctive relief. It is certainly the case that one of the stated objectives of criminal sentencing is to deter as well as punish. As the Sentencing Act 2020 provides:

“57 Purposes of sentencing: adults

(1) This section applies where—

- (a) a court is dealing with an offender for an offence, and
- (b) the offender is aged 18 or over when convicted.

(2) The court must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (**including its reduction by deterrence**),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.”

(emphasis provided)

138. Thus deterrence is both a recognised and legitimate aim of criminal sanction and one shared by jurisdictions across the world. However, in any specific case one must carefully assess whether the evidence supports that the particular enactment has in fact attained the powerful (here additional) deterrent effect claimed. Indeed, Mr Laurie in oral submissions argued that the real impact of the Public Order Act 2023 was not the increased sentencing powers, empowering the court to impose sentences of imprisonment up to 12 months (section 7(3)(b)). Instead, he argues that it is the ability of the police to intervene earlier and when the levels of disruption through protest were lower. This is all a matter of debate and speculation. It is not a reliable or safe basis to make important discretionary judgments.
139. Another of the chief aims of criminal sentencing is to punish offenders, as the Sentencing Act 2020 made clear. That is looking, as Mr Semakula put it succinctly, at the past. By contrast, injunctive relief is looking towards the future and seeking to prevent future harm. This point was considered by Hill J at para 178:
- “178. On the other hand, as Johnson J observed at para 60, simply leaving it to the police to enforce the criminal law would not adequately protect the rights of the claimant in the petrol stations claim: such enforcement could only take place after the event, meaning inevitable loss to the claimant; and some of the activities that the injunction sought to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions. The same is true of the claimants’ rights at the Haven and Tower sites. Indeed the balance is even clearer in those respects given that the sites involve the claimants’ private property, as to which see *Cuciurean*, paras 45–46, 76 and the conclusion at para 77, that 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”.
140. Therefore, while I do accept that the enactment of the Public Order Act 2023 is a material change, it remains evidentially unclear what material impact it has on deterring future protest and to what extent it operates on the minds of those who would protest against Shell. Further, given that criminal and civil proceedings are directed at distinctly different objectives, the argument that the parallel proceedings are a form of, as Mr Laurie put it, “double punishment”, is misplaced. An anticipatory injunction is granted not to punish, but to prevent identifiable future harm. As the Supreme Court put it in *Wolverhampton* at para 141, an injunction is not granted “as stage one in a process intended to lead to committal for contempt” (per Lord Reed). Punishment may result if there is contemptuous breach; punishment is not the objective of the injunction, preventing future harm is.
141. I break off the systematic analysis of the 15 factors to examine the substance of the Aarhus argument.

§X. AARHUS CONVENTION ANALYSIS

142. There is a significant amount of analysis to undertake, so I divide it into four subsections and flag them as follows:

- (1) Short history and context;
- (2) Status of Special Rapporteur;
- (3) Status of the Aarhus Convention;
- (4) Discussion.

143. The significance of the Aarhus Convention (here “Aarhus” or “the Convention”) for this case is that both appearing defendants rely on it in their defence. Their common position is that Aarhus “protects environmental defenders from excessive use of the law” and the grant of final injunctions against them would “breach Aarhus” and particularly Article 3(8).

144. The claimants submit that Aarhus is an unincorporated convention and thus is “not justiciable” in these courts. Only certain narrow, highly specific - and for these purposes irrelevant - exceptions have been incorporated into domestic law. These are irrelevant provisions about costs in judicial statutory review by dint of the Civil Procedure Rules 1998 Part 46.24-28 (indeed, two of the historic referrals of the UK to the Convention’s Compliance Committee have concerned the high costs of legal challenge in environment matters: *ACCC ‘Findings and Recommendations with Regard to Communication ACCC/C/2008/27 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland’ UN Doc ECE/MP.PP/C.1/2010/6/Add.2* (24 September 2010) (ACCC/C/2008/27 UK); *ACCC ‘Findings and Recommendations with Regard to Communication ACCC/C/2008/23 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland’ UN Doc ECE/MP.PP/C.1/2010/6/Add.1* (24 September 2010)). Thus, Mr Semakula, who very ably took the Aarhus issue on behalf of the claimants, submitted that “none of the circumstances for Aarhus to be taken into account apply here”. It should not factor in the court’s discretionary decision. However, even if it should be considered, there would be no breach of Aarhus by granting the proportionate injunctions sought by Shell.

(1) Short history and context

145. On 25 June 1998, the Aarhus Convention was adopted at the Fourth “Environment for Europe” Ministerial Conference in Aarhus, Denmark. The United Kingdom signed the treaty and had been involved in its evolution and formulation. A series of meetings of the signatories took place, before in May 2005 the United Kingdom ratified Aarhus. Aarhus enshrines Principle 10 of the 1992 Rio Declaration on Environment and Development:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in

their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

146. To achieve these objectives, the Convention is grounded in three foundational “pillars”:

- (1) Access to information (Articles 4-5)
- (2) Public participation (Articles 6-8)
- (3) Access to justice (Article 9)

147. The UNECE guide to the Convention states that the instrument is “unique” because it “explicitly links environmental rights with human rights” (while this connection is not made explicit in the text of the Convention, it has been frequently recognised by the Convention’s institutional bodies: see the rapid response mechanism decision, post at para 151). In making such connection, the UNECE emphasises the Convention’s confirmation that “you have a right to information about, to have a say in, and if necessary, seek justice regarding important decisions that affect you and your environment.” The “three pillars” act to provide a “mutually reinforcing mechanism to hold Governments to decision-makers accountable.” Further:

“progressive Governments increasingly recognize and understand that environmental decisions will only be sustainable if reached through transparent, participatory and accountable process. The Aarhus Convention provides Governments with standards to ensure that this happens.”

And the Convention:

“makes clear that we have an obligation to protect and improve the environment for the benefit of present and future generations.”

148. The UNECE document emphasises that the Convention is “a living treaty” to be interpreted in “a dynamic way”. A further aspect of the history of the Convention is provided by Lord Leggatt in *Finch* at paras 19-21:

“19. The Aarhus Convention was itself partly based on Council Directive 85/337/EEC of 27 June 1985, which introduced the EIA procedure within the European Economic Community (as it was then called). That Directive was amended after the Aarhus Convention came into force by Directive 2003/35/EC to implement obligations arising under the Aarhus Convention and was later codified in the EIA Directive. Recital (18) to the EIA Directive refers to the Aarhus Convention and recital (19) records that:

‘Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and wellbeing.’

20. Obligations arising under the Aarhus Convention have been built into articles 6, 8 and 9 of the EIA Directive. Thus, article 6 imposes obligations on member states to inform the public early in the decision-making procedure of various

matters, which include details of the arrangements made for public participation in the process; to make available to the public concerned the information gathered where an EIA is required; and to give the public concerned early and effective opportunities to express comments and opinions before the decision on the request for development consent is taken. The “public concerned” is defined in article 1(2)(e) as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures” required by the EIA Directive and specifically includes NGOs promoting environmental protection. Article 8 of the EIA Directive requires the results of such public consultation to be “duly taken into account” in the decision-making procedure; and article 9(1) provides that the public must be promptly informed of the decision taken and of “the main reasons and considerations on which the decision is based, including information about the public participation process”.

21. The rationale underpinning these public participation requirements is expressed in recital (16) to the EIA Directive:

“Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.”

Two important ideas are included within this rationale. First, public participation is necessary to increase the democratic legitimacy of decisions which affect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision-making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite. You can only care about what you know about.”

149. This authoritative exposition by the Supreme Court identifies the focus of the Convention, and highlights how parts of it have been incorporated. The corollary of that is that large parts of the text of the Convention have quite deliberately not been incorporated into domestic law by the United Kingdom. I now deal with the most relevant parts of the Convention for this case, citing Article 3(8) in full.

“Article 1
OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 3

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings. “

150. There has been growing international recognition of the importance of environmental human rights defenders and concern about the obstacles and threats they have faced (see UN General Assembly, Resolution adopted by the Human Rights Council on 21 May 2019, “Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development”; among numerous UNECE records voicing such concerns, see “Information note on the situation regarding environmental defenders in Parties to the Aarhus Convention from 2017 to date”, 24th meeting of Working Group of the Parties, Geneva, 1-3 July 2020).
151. Thereafter, there was a proposal for the creation of a “rapid response mechanism” for the protection of environmental defenders, resulting in a new mandate. The Meeting of Parties to the Aarhus Convention seventh session in Geneva on 21 October 2021 adopted the rapid response proposal. At its third extraordinary session (Geneva, 23-24 June 2022), the Meeting of the Parties by consensus elected Mr. Michel Forst as Special Rapporteur on Environmental Defenders under the Aarhus Convention (decision VII/9 of the Meeting of the Parties (“the Decision”). The Special Rapporteur’s role is to take measures to protect any person experiencing or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention. The terms of reference make plain how the mandate is closely linked to Article 3(8). This is the first international mechanism specifically safeguarding environmental defenders to be established within a legally binding framework either under the United Nations system or other intergovernmental structure.
152. The Decision recognised in terms:
- “the critical importance of establishing and maintaining a safe environment that enables members of the public to exercise their rights in conformity with the Convention” and to ensure “due protection of environmental defenders.”
153. The Decision expressed “alarm” at:
- “the serious situation faced by environmental defenders, including, but not limited to, threats, violence, intimidation, surveillance, detention and even killings, as reported by States Members of the United Nations, and by intergovernmental and non-governmental organizations and other stakeholders”
154. The Decision clarified the definition of environmental defenders which are:
- “any person exercising his or her rights in conformity with the provisions of the Convention”

and the decision acknowledged:

“that the safety of environmental defenders is critical in achieving the entire 2030 Agenda for Sustainable Development, and in particular its Sustainable Development Goal 16.”

155. Therefore, the mandate of the Special Rapporteur is to monitor the treatment of environmental defenders and, where necessary, raise the issue with the relevant national government through a “letter of allegation”. Should the response not satisfy the Special Rapporteur, the matter can be referred on to the Convention’s Compliance Committee, which has a mandate operating in parallel to the Rapporteur’s. The Compliance Committee oversees the compliance of member states with their obligations under the Convention.

(2) Status of the Special Rapporteur

156. Shell submits that Michel Forst’s statement is simply “an opinion” and “has little or no status in a domestic law claim”. While what he says is an opinion, this to my mind cannot reduce his detailed observations and concerns to insignificance. While it is true that what Mr Forst says is not the determination of a court of law, it is the assessment of the official with a mandate granted by the United Nations to monitor and safeguard the rights of those who express concern about pressing environmental issues that have the potential to affect us all. Out of respect to Mr Forst and indeed the United Nations, I have carefully read and considered what Mr Forst has said in his mission statement.

(3) Status of the Convention

157. While the United Kingdom has withdrawn from the European Union, Brexit did not alter the United Kingdom’s ratification of Aarhus, and the UK remains a signatory and party. The question here is the Convention’s enduring status in domestic law. My focus is on the unincorporated parts of the treaty. There can be no argument but that due to their being unincorporated they cannot be directly applied in domestic law. But that is not an end to it. The question of the legal relevance of international treaties that are not incorporated was considered by the Supreme Court in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (SC) (“SG”). Put shortly, in considering Convention rights under the ECHR, regard may be had to international law conventions. Lord Reed said:

“82 As an unincorporated international treaty, the UNCRC [United Nations Convention on the Rights of the Child] is not part of the law of the United Kingdom (nor, it is scarcely necessary to add, are the comments on it of the United Nations Committee on the Rights of the Child). The spirit, if not the precise language of article 3.1 has been translated into our law in particular contexts through section 11(2) of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 23. The present case is not however concerned with such a context.

83 The UNCRC has also been taken into account by the European Court of Human Rights in the interpretation of the Convention, in accordance with article

31 of the Vienna Convention on the Law of Treaties. As the Grand Chamber stated in *Demir v Turkey* (2008) 48 EHRR 1272 [“*Demir*”], para 69,

“the precise obligations that the substantive obligations of the Convention impose on contracting states may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere”. It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere.”

(4) Discussion on Aarhus

158. Relevance or applicability cannot amount to surreptitious incorporation. What cannot happen is for the common law to be used to incorporate otherwise unincorporated international conventions “through the back door” (*A v Secretary of State for the Home Department* (No 2) [2005] 1 WLR 414 (CA)). That is because the court cannot do what Parliament declined to do: give direct effect to an international treaty that remains, in its relevant provisions for these purposes, unincorporated.
159. Upon enquiry by the court, the parties agree that Aarhus does not explicitly mention “excessive use of the law”. That phrase is the defendants’ characterisation of the essential thrust of the Convention read as a whole. In particular, they rely on Article 3(8) and the obligations of signatory parties to protect environmental defenders from penalisation, persecution and harassment.
160. The United Kingdom has not incorporated Article 3(8). However, in line with *SG* (Supreme Court), *Demir* (Grand Chamber) and the Vienna Convention on the Law of Treaties, I find that the Aarhus Convention:
 - (1) Is a relevant treaty in the sphere of environmental rights and protest about environmental issues;
 - (2) Is relevant to the interpretation of substantive rights under the ECHR, and particularly the rights under ECHR Articles 9, 10 and 11.
161. While it is submitted by the claimants that the court’s focus should strictly remain on the ECHR as it is incorporated into domestic law by the Human Rights Act 1998, that misses the point of the Supreme Court’s observations about relevance of unincorporated international treaties. While the United Kingdom has not incorporated Article 3(8), nor has it disowned it. This country continues to be a signatory to Aarhus. Thus, it must be taken to respect its terms and all of them save for any reservations. There is no reservation that has been brought to my attention in respect of Article 3(8). There is, of course, an understandable and material overlap between Articles 10 and 11 of the ECHR and Article 3(8) of Aarhus. The rights enjoyed under the ECHR are meaningless if states decline to protect them. What Article 3(8) of the Aarhus Convention achieves in the protection of the rights of protesters is to provide a poignant focus on the importance of ensuring that environmental defenders are not penalised, persecuted or harassed for exercising right in conformity with the Aarhus Convention. To repeat: the three pillars of Aarhus are (1) access to information (Articles 4-5); (2) public participation (Articles 6-8); and (3) access to justice (Article 9) in relation to decision-making around environmental matters. It can be said that protest is part and parcel of

public participation in a wider understanding of decision-making that “may have a significant effect on the environment”, to borrow from Article 6(1)(b). Article 6(1)(a) provides:

“Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES 1.

Each Party: (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I”

162. Annex I then provides a list of relevant activities:

“Annex I LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a) 1. 2. Energy sector:- Mineral oil and gas refineries; Installations for gasification and liquefaction”

163. Stepping back to consider all this, people who protest about and wish to draw attention to the fossil fuel industry (Annex I) seem to me to be capable of falling within the “public participation” provisions of Article 6, which in turn is connected to the Article 3(8) protections. It should also be remembered that Article 3(3) provides:

“3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.”

164. While there is a focus on participation in decision-making, I recognise that the concept of environmental defender is capable of extending to those engaging in protests about environmental projects (see the communication of the Compliance Committee against Belarus about protests against a new nuclear plant: *ACCC ‘Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus’*).

165. I accept that the terms of the Convention do not spell out a necessity for peaceful or non-violent action. This is a point made by Mr Forst in his UK mission report (“The fact that they cause disruption or involve civil disobedience do not mean they are not peaceful.”). That said, I can find no basis within Aarhus that authorises environmental defenders to deliberately break or flout the law or materially violate the lawful rights of others. This appears to extend to “civil disobedience”, should that be in deliberate breach of the law in the Rawlsian sense (*A Theory of Justice*, *ibid.*, where what is being avowedly “disobeyed” is the law, for a claimed higher purpose, framed by those protesting often as the protection of human and environmental ecosystems, ecology and life). No Aarhus authorisation or exemption for unlawful acts has been brought to my attention, including for acts of civil disobedience in violation of national law. Contrast that with the putative case of arrests and prosecutions or the granting of an injunction to prohibit entirely peaceful protesters such as those who have regularly gathered with placards near to Shell without infringing any of Shell’s rights. Then it is strongly arguable that Aarhus would be engaged, with possible breaches of Article 3(8). I do not rule on that scenario as I have not been invited to, the situation not arising here. However, in cases of Aarhus breach, the mechanism is for the Special Rapporteur to

bring the concern to the attention of the national government through a letter of allegation, and if not satisfied with the response, or if none were forthcoming, to refer the matter to the Convention's Compliance Committee. On the question of acts of intentional or deliberate disobedience, I note what Leggatt LJ said in *Cuadrilla* at para 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....;"

166. What Aarhus is directed at explicitly in Article 3 is imposing obligations on signatories ("Each Party") to ensure that the exercise of rights under the Convention is not subject to penalisation, persecution and harassment. I cannot see how that would protect a protester who causes, for example, criminal damage and creates a significant hazard risk to health and the immediate environment by smashing the glass of petrol pumps. Each case, I emphasise, must be examined on its own facts and merits. However, I find nowhere in the Aarhus Convention an endorsement or authorisation of the right to break the law by committing crimes or unlawfully violating the rights of others or causing deliberate damage.
167. As to legal principle, the Aarhus Convention is not and cannot be determinative of these claims. However, I am persuaded, and find, that the substance of the Convention is relevant to the court's assessment of interferences with the Convention rights of protesters under the ECHR and proportionality analyses. It consequently has relevance for the court's equitable discretion confirmed by section 37 of the Senior Courts Act 1981. I must explain what relevance means in this context. It is a matter for the court to have regard to in making its discretionary decision rather than a freestanding and independently justiciable right, Aarhus not having been incorporated. It is relevant to recognise, and I do, that the United Kingdom remains a party to an international treaty that obliges member states to guarantee the rights of public participation in decision-making and access to justice in environmental matters in conformity with the provisions of Aarhus Convention and ensure that those who act in such conformity are not penalised, persecuted or harassed.
168. Having concluded the Aarhus analysis, I apply it to the overall questions of defences, balance of convenience and compelling need and proportionality under *Ziegler*. I have carefully considered whether the granting of the injunctive relief sought by Shell in this case exclusively directed at unlawful acts, while explicitly exempting lawful protest, would be, as the defendants maintain, contrary to Article 3(8) of the Aarhus Convention. Given that there is nothing in Aarhus authorising, for example, committing criminal offences, and that lawful protest is not prohibited under the terms of the injunction, I cannot find a putative breach of Aarhus.
169. I therefore add the Aarhus analysis to the four-part *Ziegler* analysis. I include the recognition of the United Kingdom's unincorporated treaty obligations under Aarhus in the proportionality assessment overall. Having done so, I concur with Hill and Cotter

JJ that the granting of the injunctive relief sought by Shell is necessary and proportionate, even including full Aarhus obligation recognition. The balance of convenience, which can be alternatively understood as the balance of prejudice, significantly favours the grant of injunctive relief as what is being prohibited in future is unlawful protest in breach of the lawful rights vested in the claimants where the potential damage caused by future unlawful breaches have the capacity to be irreversible, certainly should it involve serious physical injury or death. There is undoubtedly a compelling need to prohibit future unlawful protests in the way that the Supreme Court identified in *Wolverhampton* at para 167, in other words, to prevent the claimants from being subject to the torts pleaded. The explicit inclusion of the lawful protest exemption within the orders strikes the right balance between the competing interests. Defendants can apply to vary or set aside the injunctions or any of them and they will be regularly reviewed. While breaches of the claimants' rights in civil law may not be capable of remedy, there is no evidence that the defendants would in any event be able to provide a remedy in damages. The damage may be "grave and irreparable" as Marcus Smith J put it in *Vastint* at para 31(4)(d).

170. The question with regard to PUs is whether there is a realistic defence. The court has examined the filed defences of Ms Ireland and Mr Laurie in detail and concluded that they do not provide a defence to the claims. There is no logical basis to envisage that the position of PUs would be superior to the rejected defences of the appearing defendants.
171. Having analysed the relevance of the Aarhus Convention and completed the *Ziegler* analysis, including analysing balance of convenience and compelling need and proportionality, I return to my systematic analysis of the 15-part factor checklist and reach Factor 7.

§XI. ANALYSIS OF THE 15 FACTORS: PART II

7 Damages not adequate remedy

172. There is no evidence that either Ms Ireland or Mr Laurie would have the financial resources to compensate Shell for the damage caused by their protests, particularly if serious injury or the leaking of toxic substances resulted. I note that Ms Ireland has said in future she would not be prepared to participate in protests that damaged petrol pumps. However, presently Ms Ireland receives limited income. Mr Laurie was less clear about his future intentions about petrol pumps and spoke about the spectrum of risk in a way that suggested that he may indeed participate in such a protest in future should the injunctions be discharged. These are very specific examples, but there is a wider picture about economic torts. There is no undertaking from any of the named defendants to pay damages or costs. Against this, Shell has offered cross-undertakings in damages. I am satisfied that this would be an adequate remedy for the defendants. Hill J summarised the position as it had evolved before the court in these claims at paras 133-37:

- 133 "The note of Bennathan J's judgment indicates that he accepted that (i) the activities at the Haven and Tower sites would cause grave and irreparable harm; (ii) trespassing on the sites could lead to highly dangerous outcomes,

especially given the presence on the sites of flammable liquids; and (iii) the blocking of entrances could lead to business interruption and large scale cost to the Claimant's businesses. He concluded that given the sorts of sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy.

134 Johnson J accepted at [34] that the Defendants' conduct with respect to the petrol stations gives rise to potential health and safety risks and if those risks materialise they could not adequately be remedied by way of an award of damages. He took into account the fact that there is no evidence that the Defendants have the financial means to satisfy an award of damages, such that it is "very possible that any award of damages would not, practically, be enforceable."

135 The evidence before me shows that all of these considerations remain valid.

136 There is also an element to which the losses at the Haven and Tower sites may be impossible to quantify, though like Johnson J at [33], I do not find the Claimants' argument to similar effect with respect to the petrol stations persuasive.

137 However, for the other reasons set out at [133]-[135] above I am satisfied that damages would not be an adequate remedy for the Claimants."

173. I have separately and independently assessed the situation in respect of damages. I accept the submission of Ms Stacey that essentially "nothing has changed". I also note that Hill J's analysis was adopted by Cotter J at para 51.

174. I endorse the finding of Johnson J that the losses at Haven and Tower may be impossible to quantify, although I agree with Hill J that this is not the same for the petrol stations claim. That said, the potential harm through serious injury has the capacity to be irreversible. The cross-undertakings in damages offered by the claimants, I am satisfied, would be an adequate remedy for any future Convention breach caused by the operation of the injunctions. There is no doubt that the claimants have the resources to meet any award due.

175. Overall, I am satisfied that this requirement has been met.

8(a) Whether the defendants are identified in the claim forms and the injunctions by reference to their conduct.

176. As to PUs, I am satisfied that the claim forms and the subsequent injunctions identify any person falling into that category with the requisite clarity and proportionality. Geographical boundaries, where relevant, have been identified. Evidence before the court about the efficacy of the identification process is gleaned from the fact that in the petrol stations claim a large number of named individuals were joined to the claim when the matter came before Soole J. I am satisfied that this requirement has been met.

8(b) Whether PUs are capable of being identified and served

177. As explained, this process has been successfully conducted on an interim basis. As Ms Oldfield points out in her statement, the claimants have been liaising with relevant police forces and individuals have previously been identified and served. Shell undertakes to continue this approach: if any PUs are identified, Shell will serve them and make an application to join them to the claim as soon as reasonably practicable. In the meantime, there are provisions in the draft order for alternative service, a connected requirement I will come to.
178. The court finds that requirement 8(b) is met.

9 (a) Whether the terms of the injunctions are sufficiently clear and precise

179. The claimants seek final orders on terms that are substantially and materially identical to those previously sought by Shell and approved and granted by this court. That this was not a rote or routine approval process can be seen from the meticulous way in which Hill J examined the terms and directed changes to the geographical limits. Aside from that, she approved the terms of the injunctions at paras 154-56 in this way:

“154. In my judgment the wording of all three injunctions is in clear and simple language, save for two caveats with respect to the petrol stations injunction: (i) some wording should be inserted before clauses 3.4-3.6 to reflect that the acts are only prohibited if they cause damage (such wording being clear on the face of the Tower and Haven injunctions but not on the petrol stations one); and (ii) clause 3.7 should be removed as it duplicates paragraph 4.

155. In respect of the petrol stations injunction, as Johnson J noted at [46], it is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. However, for the reasons he gives, the element of subjective intention in paragraph 2 (“with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station”) is necessary because of the nature of the tort of conspiracy to injure and to avoid the language being wider than is necessary or proportionate (noting the sweet wrapper example he gave at [21]).

156. I do not accept Mr Simblet’s contention that the “encouragement” provisions are unduly vague: they are clearly defined as being linked with the underlying acts and are intended to ensure that the injunctions are effective. To the extent that they capture lawful activity, they are proportionate as explained under sub-issue (10) below.”

180. The terms of the injunctions were also approved by Cotter J at para 55. I have independently scrutinised each draft order and conclude that the terms bear the qualities of clarity and precision.

9(b) Whether the injunctions only prohibit lawful conduct where no other proportionate means to protect claimant’s rights

181. All three draft orders specify in terms that lawful protest is exempted. Hill J held at para 153:

“153. Each injunction contains an order making clear that it is not intended to prohibit behaviour which is otherwise lawful. To the extent that it does, the same is a proportionate means of protecting the Claimant’s rights for the reasons given under sub-issue (10) below.”

182. I have considered the question of proportionality in the *Ziegler* analysis, and as part of the four-element analysis have considered whether the measure sought is the least interference with the Convention rights of the defendants consistent with achieving the legitimate aim of preventing future material breach of the claimants’ civil law rights. I have found that this was the case. Overall, I find that requirement 9(b) is met.

10 Whether there is correspondence between terms of injunction and threatened tort

183. I have carefully considered each of the torts relied upon and compared the terms of each injunction to them. To that end, I prepared a table of the prime elements of each of the torts that the claimants rely on and have compared those elements with the acts to be prohibited under the draft orders. There is a clear and mirroring correspondence between the torts and the injunction terms. This issue has been previously considered by the court, with Hill J finding the necessary correspondence at paras 151-53 and Cotter J endorsing that conclusion after his consideration at para 54.

184. The issue of whether the injunction sought in the petrol stations claim corresponds to the tort of conspiracy to injure was litigated before Hill J. She ruled at para 151:

“151. The acts prohibited in the petrol stations injunction reflect those in the petrol stations injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure, provided that the injunction is read in full in the way described by Johnson J at [26 above]. This means that the concerns raised in Mr Simblet’s submission to the effect that clause 3.4 (“affixing any object or person”) would prohibit placing leaflets or signs on any objects on or in a Shell petrol station and his similar concerns about clauses 3.5 and 3.6 (“erecting any structure in, on or against any part of” or “painting or depositing or writing in any substance on any part of” a Shell petrol station) are to some degree mitigated by the fact that such activities are only prohibited by the injunction if they are (i) such that they damage the petrol station; (ii) done in agreement with others; and (iii) done with the intention of disrupting the sale or supply of fuel. These are similar to the “sweet wrapper” example given by Johnson J at [26] above: the prohibited acts in paragraph 3 need to be read in conjunction with the definition of Defendants. When that is done, it can be seen that they mirror the torts underlying the overarching tort of conspiracy to injure.”

185. Nothing has changed since this analysis and no point was taken before me. I find that requirement 10 is satisfied.

11 Whether there is a clear and justifiable geographical limit

186. This matter was reviewed by Cotter J at para 56:

“56. As for geographical and temporal limits, the extent of the Haven and Tower injunctions are made clear by the plans appended to them. In respect of the petrol stations injunctions, this matter was revised by Hill J, and again I am satisfied that the form of order is appropriate.”

187. The geographical scope of the Haven and Tower injunctions are precisely set out in the plans attached to the draft orders. The extent of these protected areas makes evident sense and is plainly justifiable. For example, in respect of Tower, it does not – and critically has not – prevented ongoing and regular protests in the vicinity of the building complex as set out in the filed chronology.

188. As to petrol stations, as indicated, Hill J refined the geographical extent. The reason was that on objection from the defendants, the court agreed that there needed to be greater clarity about the scope of injunction not to impinge on the public highway. The terms endorsed by Hill J, were also approved by Cotter J at para 56. The finding of Hill J, endorsed by Cotter J, makes evident sense and is justifiable, being logically connected to and proportionate to the need to protect the sites. No point was taken about this factor or the draft orders, reflective of their necessity and proportionality.

189. I find that this requirement is met.

12 Clear and justifiable temporal limit

190. The application in respect of each injunction is for a duration of 5 years. I questioned Ms Stacey about why such a period was necessary, notwithstanding that it had been granted in other protest cases (such as by Ritchie J in *Valero*), the court wanting to be independently satisfied. She made two submissions. First, that several environmental groups have made demands of the Government that the extraction of fossil fuels ends by 2030. Mr Eilering notes in his statement at paras 2.8-2.9:

“2.8 it is clear to me that there is still a very real risk that without the protection of the Injunction Orders, protest activity would very likely return to the levels of unlawful activity previously experienced.

2.9 For example, I am aware of an article in which Just Stop Oil were quoted saying “*whilst governments are allowing oil corporations to run amok destroying our communities, the actions of individuals mean very little. Failure to defend the people they represent will mean Just Stop Oil supporters, along with citizens from Austria, Canada, Norway, the Netherlands and Switzerland will join in resistance this summer, if their own governments do not take a meaningful action.*” Pages 279-286 of **Exhibit PE1**.”

191. He fears that their activist campaigns are highly likely to continue until the extraction of fossil fuels ends. Second, Ms Stacey points to the costs of refiling and reissuing these claims. The petrol stations claim, for example, covers 1000 petrol stations across the

jurisdiction. It involves a very significant undertaking to implement the necessary warning signs at the sites. In all these circumstances, it is proportionate to grant a 5-year period in the order because of another vital consideration: there is built into the structure of the orders an annual review along with provision to vary or set aside. Should therefore there be a significant or material change, the grant of the injunctions or any of them can be actively and promptly revisited. I find myself in a position analogous to Ritchie J, who held at para 75:

“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.”

192. It should be noted that the “4 organisations” are JSO, XR, Youth Climate Swarm and Insulate Britain. I find that this requirement is satisfied.

13 Service

193. It is essential that all practical steps are taken to notify defendants and potential defendants. The Supreme Court addressed this point in *Wolverhampton* from para 226:

“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.

...

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.”

194. This is precisely what has happened in the claims before me. The court has original evidence and updating evidence from Ms Alison Oldfield on behalf of Shell to explain the numerous steps that have been taken (her tenth statement is dated 24 September 2024; the court has considered all of them). For example, in the draft order in respect of the petrol stations claim, it is stated that:

- 9 “Pursuant to CPR 6.15 and 6.27 and CPR 81.4(c) and (d), service of this Order (with the addresses in the Third Schedule and the social media addresses redacted) shall be validly effected on the First Defendant and any other non-parties as follows:
- a. the Claimant shall use all reasonable endeavours to arrange to affix and retain Warning Notices at each Shell Petrol Station by either Method A or Method B, as set out below:

Method A

Warning notices, no smaller than A4 in size, shall be affixed:

- (a) at each entrance onto each Shell Petrol Station
- (b) on every upright steel structure forming part of the canopy infrastructure under which the fuel pumps are located within each Shell Petrol Station forecourt
- (c) at the entry door to every retail establishment within any Shell Petrol Station

Method B

Warning notices no smaller than A4 in size shall be affixed:

- (a) at each entrance onto the forecourt of each Shell Petrol Station

(b) at a prominent location on at least one stanchion (forming part of the steel canopy infrastructure) per set/row of fuel pumps (also known as an island) located within the forecourt of each Shell Petrol Station

- b. Procuring that a Warning Notice is uploaded to www.shell.co.uk;
- c. Sending an email to each of the addresses set out in the Second Schedule of this Order providing a link to and, specifically notifying them that a copy of this Order is available at, <https://www.noticespublic.com/>
- d. Uploading a copy of this Order to <https://www.noticespublic.com/>
- e. Sending a link to www.noticespublic.com data site where this Order is uploaded to any person or their solicitor who has previously requested a copy of documents in these proceedings from the Claimant or its solicitors, either by post or email (as was requested by that person).”

195. CPR Part 6 requires “good reason” to justify such alternative service steps. Where there are PUs, doing what can reasonably be done to publicise the prohibitions generally to potential future protesters is required. Similar efforts apply to the general public. It will not do if people are not given fair warning. The point of alternative service methods is, as stated in *Canada Goose* at para 82, to take such steps as can be reasonably expected to bring the proceedings to the attention of people who may be affected by the restrictions in future. To that end, the claimants have filed evidence of the extensive steps they have taken to meet this requirement in the three claims. The efforts mirror what was approved by Johnson, Hill and Cotter JJ. As put by Hill J at para 201-04:

201 “The alternative means of service proposed for the order in the Tower claim are (i) affixing warning notices to and around the Tower which (a) warn of the existence and general nature of the order, and of the consequences of breaching it; (b) indicate when it was last reviewed and when it will be reviewed in the future; (c) indicate that any person affected by it may apply for it to be varied or discharged; (d) identify a point of contact and contact details from which copies of the order may be requested; and (e) identify <http://www.noticespublic.com/> as the website address at which copies of the order may be viewed and downloaded; (ii) uploading a copy of the notice to <http://www.noticespublic.com/>; (iii) emailing a copy of the notice to a series of emails relating to the main protest groups listed in the schedule of the order; and (iv) sending a copy of the notice to any person who has previously requested a copy of documents in the proceedings.

202 The alternative means of service proposed for the order in the Haven claim are (i)-(iii) above.

203 The alternative means of service proposed for the order in the petrol stations claim are (i)-(iv) above. The interim orders which I made on 28 April 2023 mirrored the terms of Johnson J’s order and provided for the notices to be affixed by use of conspicuous notices in prescribed locations in the petrol stations, in alternative locations in the stations, depending on the physical layout and configuration of the stations.

204 The alternative means of service proposed for the amended claim form and any ancillary documents in the petrol stations claim are (ii)-(iv) above.”

196. The alternative service methods previously used remain relevant and the court authorises their continued use. This includes service through notification through social media accounts where necessary. The claimants' filed evidence on this point has not been disputed by the defendants and I accept it. The balance of fairness is maintained because any person committed for possible future breach can make the argument that the service provisions have operated in a way that was ineffective and unfair in her or his case (see *Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) at para 63(9)).
197. I find requirement 13 satisfied.

14 Right to set aside or vary

198. This right has been explicitly included in all draft orders and will form part of any final orders granted. I find this requirement met.

15 Review

199. The duty to keep an injunction under review is equally applicable to final injunctions as it is to interim injunctions (*Barking* at para 77). Indeed, in *Barking* at para 105 the court stated that even where final orders are granted "it is good practice to provide for periodic review". As already indicated, an annual review is included in the draft orders and will form part of any final orders granted. I find this requirement met. In her evidence and updating evidence, Ms Oldfield explains how the claimants continue to keep the necessity for the injunctions under anxious review. I have no reason not to accept that evidence, nor was it disputed.

§XII. OVERALL CONCLUSION

200. I have carefully considered each of the three claims separately. The applications do not stand or fall together. They are, I emphasise, separate applications in separate claims being managed and heard together for administrative convenience. In each claim, the requirements ("the 15 factors") identified in *Valero*, summarising *Canada Goose* and *Wolverhampton*, have been met and this is highly significant in the exercise of the court's equitable discretion. In such matters, a court will grant injunctions on the assumption that they will be effective and obeyed. This point was made by the Supreme Court in *Wolverhampton* at para 141, where Lord Reed said:

"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.”

201. As to Mr Laurie’s concern that parallel proceedings in both the criminal courts and the civil jurisdiction “trap” him, it is vital to note that the distinct proceedings are directed at different matters. The Crown Court at Winchester, through the historic device of a jury of the defendants’ peers, will decide whether Ms Ireland and Mr Laurie broke the criminal law during their protest at the service station at Cobham in August 2022. About that important question, nothing determined in this judgment has any relevance. This court respects the sacrosanct province of the British jury and its right to make its own decision. The injunctions sought here are exclusively aimed at prohibiting future breaches of the lawful rights possessed by Shell. Justice must be blind; it does not have sides. It must respect the rights of all parties coming before the court, and the court’s duty where they clash is to strike the fair balance, ensuring that any necessary interference with the Convention rights of a defendant is proportionate. These final orders achieve that. They are anticipatory injunctions, with the objective of prohibiting future unlawful breaches of the claimants’ rights. The right and fair balance is struck by ensuring that lawful protest is not prohibited, and indeed I observe that such lawful protests have continued with great regularity near to the Shell Tower in London. The “way out” of the trap that Mr Laurie perceives himself to be in is, as Ms Stacey submits, to give the undertaking that other defendants have given, and thereby promise that he will not engage in the specified unlawful acts in future. He does not wish to do that. Neither does Ms Ireland. That is their right. But nothing in these final injunctions prohibits their engaging in future protest that is lawful.
202. Should they protest lawfully and in conformity with the Aarhus Convention, acts of penalisation, persecution or harassment would undoubtedly be matters of grave concern to the Special Rapporteur. In pursuance of the mandate, the Rapporteur is authorised to take “measures” such as public statements and raising the matter with the relevant government. If there were no satisfactory governmental response, the issue can be referred to the Aarhus Convention Compliance Committee. This is a mechanism now recognised on the international plane. The Compliance Committee can request the member state to submit a Plan of (remedial) Action. Should a domestic court be tasked with exercising its discretion confirmed by section 37 of the SCA 1981, recognition of United Kingdom’s Aarhus Convention obligations would plainly be relevant to the assessment of incorporated substantive rights such as those under the ECHR. I have little difficulty in reaching that conclusion in a similar way to the Supreme Court in *SG*.
203. In *Finch*, the Supreme Court set down in unsparing terms the “virtual certainty” that oil extracted from the ground “will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming.” These are unquestionably issues of generational and inter-generational significance. It is not part of this court’s function to quell, suppress or deter legitimate debate about these vital matters, nor to prohibit genuine and lawful protest lawfully conducted by genuinely concerned and sincere citizens. But the lawful rights of others which are recognised by the law cannot be ignored in this equation. This is the balance that the granting of these final orders strikes. The question of infringing the rights of others out of necessity was considered by the Court of Appeal in *Monsanto PLC v Tilly & Ors*. [2000] Env LR 313 (“*Monsanto*”; and see *Clerk & Lindsell on Torts* (24th ed.) at para 18-58). In *Monsanto*, Mummery LJ said at 339:

“Public confidence in the legal system and in the rule of law would be undermined if the courts refused to enforce the law on the ground that defendants, who wished to establish the validity of beliefs sincerely and genuinely held, were entitled to rely on the public interest to justify wrongs to the property of others who did not share their point of view. It is extremely improbable that a reasonable man would regard the [necessity] defence proposed as an acceptable reason for the unauthorised presence of anyone, public official or fellow citizen, on his property or on the property of anyone else.

On the other hand, the unavailability of public interest as a justification for trespass does not in any way curtail or prejudice the exercise by the defendants of their undoubted right in a democratic society to use to the full all lawful means at their disposal to achieve the[ir] aims and objects ... Supporters can peacefully and effectively pursue those aims and gain publicity and public support for them in many different ways without the need to commit unlawful acts of trespass.”

204. Here starkly is the issue posed by these protests and indeed these claims: what is justifiable in a functioning democracy when the actions of genuinely concerned citizens interfere with the rights of others who wish to go about their business or wish to exercise their property rights in peace? In this, the court does not take sides about the policy and political debate; it applies the law. In *Wolverhampton* at para 170-71, the Supreme Court stated that it was relevant to the court’s discretion to consider whether other “non-judicial” remedies lie open to the claimants. In those gypsy/traveller injunction cases, for example, it was relevant to consider whether local byelaws could be passed by the local authority. Here, however, the claimants have no such powers open to them. They have turned to the court for protection of their substantive rights under the law. The remedy of an equitable injunction has been sought because, as Lord Reed said in *Wolverhampton* at para 238(iii)(a):

“equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.”

205. It is vital to return to the basis of these claims. The claimants are not inviting the court to determine whether trespass to land or private or public nuisance has been proved. The question is vitally different. These are applications for anticipatory or precautionary injunctions. The question is simply whether there is a real and imminent risk of future direct action by the defendants or PUs that carries with it the strong probability that the claimants’ rights under civil law will be breached. It is on that exclusive and focused basis that the court exercises its discretion confirmed by section 37 of the SCA 1981 to grant the final orders sought as satisfying the just and convenient test – the true and paramount test.
206. Regular review is built into the very structure of the orders to ensure that changing circumstances do not “outflank or outlast” (*Wolverhampton*, para 167(iv)) the compelling need that resulted in the grant, as is the liberty for defendants to apply to vary or set aside. These are essential safeguards and checks and balances. Ultimately, as the Supreme Court remarked in *Wolverhampton* at para 18, the High Court when exercising its equitable discretion in respect of injunctions

“possesses the power, and bears the responsibility, to act so as to maintain the rule of law.”

207. It is this high responsibility that this court must give effect to in these three claims.

§XIII. DISPOSAL

208. Therefore, on the issues the court was invited to determine:

(1) Whether to grant final orders in each of the three claims:

- a. Claim 1 (Haven): final order **GRANTED**;
- b. Claim 2 (Tower): final order **GRANTED**;
- c. Claim 3 (petrol stations): final order **GRANTED**.

(2) Whether the duration of the final orders should be 5 years: **GRANTED**.

(3) Whether alternative service orders should be granted: **GRANTED**.

(4) Whether to grant the application to remove the third defendant from Claim 3 (petrol stations) and consequently amend the claim form and particulars of claim to reflect the strike out: **GRANTED**.

209. As noted, the claimant in Claim 3 does not seek its costs against the defendants. If there is any other consequential application, it should be notified to the court accompanied by a draft order and skeleton by 4pm, five working days after electronic publication of the judgment. The other parties are granted 3 working days to respond. The applicant(s) granted one further day for a short reply after that. The court will consider whether it can determine the application on the papers. If not, a hearing will be directed.

210. I intend for this judgment to be handed down electronically and published to the National Archives.

ANNEX A

Defendants in Claim 3

Persons Unknown

First Defendant

Louis McKechnie

Second Defendant

XXX XXX

(Struck out on order of court following undertaking)

Third Defendant

Callum Goode

Fourth Defendant

Christopher Ford

Fifth Defendant

Sean Jordan

**(also known as Sean Irish, John Jordan,
John Michael Jordan and Sean O'Rourke)**

Sixth Defendant

Emma Ireland

Seventh Defendant

Charles Philip Laurie

Eighth Defendant

Michael Edward Davies

also previously known as Michael Edward Jones

Ninth Defendant

Tessa-Marie Burns

(also known as Tez Burns)

Tenth Defendant

Simon Reding

Eleventh Defendant

Kate Bramfit

Twelfth Defendant

Margaret Reid

Thirteenth Defendant

David Nixon

Fourteenth Defendant

Samuel Holland

Fifteenth Defendant

Annex B

Procedural history

Date	Event
3 April 2022	Haven protests
6-20 April 2022	Tower protests
28 April 2022	Initial petrol stations protests
5 May 2022	Bennathan J grants Haven and Tower interim injunctions
20 May 2022	Johnson J continues Haven and Tower interim injunctions
24 August 2022	JSO petrol station protest at Cobham services
26 August 2022	JSO petrol stations protest at Acton Vale and Acton Park
23 May 2023	Hill J grants petrol stations injunction and continues Haven and Tower and Petrol injunctions
15 March 2024	Soole J review (joinder and case management directions)
24 April 2024	Cotter J review and interim injunctions continued
7 May 2024	Mr Laurie's defence filed
16 May 2024	Ms Ireland's defence filed
16 October 2024	Mr Laurie's witness statement and skeleton argument

16 October 2024	Claimants' skeleton argument
17 October 2024	Ms Ireland's witness statement and skeleton argument
17 October 2024	Mr Laurie's skeleton argument
22-23 October 2024	Substantive hearing

Annex C

Materials

Item	Pages
Core hearing bundle	1-413
Previous service bundle	414-7234
Miscellaneous bundle	7235-7766
Authorities bundle	636
Additional authorities bundle	166
Claimants' skeleton	31
Ms Ireland's skeleton	7
Mr Laurie's skeleton	10

Annex D

Draft undertaking (Claim 3)

Form of Undertaking

Shell U.K. Oil Products Limited V Persons Unknown (etc) and others with the claim number: QB-2022-001420 (the “Petrol Stations Injunction”)

I promise to the Court that, whilst the Petrol Stations Injunction remains in force (including for the avoidance of doubt where it is continued at a renewal hearing or final hearing and in each case as amended by further order of the Court), I will not engage in the following conduct:

- a) Directly blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station forecourt or to a building within the Shell Petrol Station;
- b) Causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
- c) Operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station; and
- d) Causing damage to any part of a Shell Petrol Station, whether by:
 - i. Affixing or locking myself, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station.
 - ii. Erecting any structure in, on or against any part of a Shell Petrol Station.
 - iii. spraying, painting, pouring, depositing or writing in any substance on to any part of a Shell Petrol Station.
- e) I confirm I will not carry out such activities myself, by means of another person doing so on my behalf, or on my instructions with my encouragement or assistance.

I confirm that I understand what is covered by the promises which I have given and also that if I break any of my promises to the Court I may be fined, my assets may be seized or I may be sent to prison for contempt of Court.

Signed

Name

Dated



Neutral Citation Number: [2024] EWHC 2064 (KB)

Case No: KB-2024-001199

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2024

Before :

DUNCAN ATKINSON KC (Sitting as a Deputy High Court Judge)

Between :

**THE MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF ENFIELD
- and -**

Claimant

**(1) CHARLES SNELL
(2) DAVID SNELL
(3) STEPHEN MAY
(4) ABDELLAH TAYEB (AKA CASTRO)
(5) PERSONS UNKNOWN**

Defendant

Francis Hoar (instructed by London Borough of Enfield) for the Claimant
The defendants were not represented

Hearing date: 12 JUNE 2024

Approved Judgment
.....

DUNCAN ATKINSON KC

Duncan Atkinson KC (Sitting as a Deputy High Court Judge):

INTRODUCTION

1. The Claimant is a London local authority and the freehold owner of land, traversed by a stretch of the River Lea, which is the subject of the Meridian Water Regeneration Project. The Claimant has a contract with Vinci Construction UK Limited, which operates through Taylor Woodrow, for what are described as essential preparatory works and development of the river embankment for the purposes of the Meridian Water Regeneration Project. This includes the clearing of the embankment and related construction works abutting the river. These particular works had a contractual commencement date of 6 December 2023.
2. On 18 April 2024 the Claimant filed a Part 8 claim in trespass and nuisance and to prevent alleged anti-social behaviour. There were five named Defendants. The Sixth Defendant was persons unknown. In terms of the named Defendants:
 - (a) The Second Defendant, David Snell, is the father of the First Defendant, Charles Snell. David is 64. Charles is 29. They have been living on a narrow long boat on the relevant stretch of the River Lea for several years.
 - (b) The Third Defendant, Steven May, was said by the Claimant to have had a narrow long boat moored on the relevant stretch of river. However, relief is no longer sought against him, as it is accepted that he is no longer in residence.
 - (c) The Fourth Defendant, Abdellah Tayeb (or Castro) also has a boat which the Claimant says is currently moored on the relevant stretch of river. He has a number of dogs.
 - (d) The Fifth Defendant, Michal Wujek, is living in a structure on the relevant land which he calls a shed. He has been doing so for at least eight months. He too has a number of dogs.
3. On 21 May 2024, His Honour Judge Auerbach, sitting as a Judge of the High Court, granted the interim relief sought against the four named Defendants in respect of whom it was at that time sought (namely David and Charles Snell, Abdellah Tayeb and Michal Wujek). Each was required to give up their occupation of the Claimant's land by the end of 12 June 2024. The case of the named Defendants was listed before me on 12 June 2024 to address an application for a further injunction order in the same terms, effectively in renewal of the order made on 21 May, as the named Defendants have not ended their occupancy of the Claimant's property.
4. On 21 May His Honour Judge Auerbach did not make any order against persons unknown because at that time it was accepted by the Claimant that service had not been affected in accordance with the Court's earlier direction, to which I will return. The case in this regard was listed before me on 12 June to consider the Claimant's application for interim relief against persons unknown, including not only unidentified persons already occupying the Claimant's land but also newcomers who might be affected by the Order sought at a subsequent date.
5. At the conclusion of the hearing on 12 June I granted the applications both to renew the existing interim injunction order against the named Defendants and to grant an interim

order against persons unknown. I said that I would reserve judgement as to the reasons for that decision. This is that reserved judgement.

THE BACKGROUND

6. The Claimant's land to which these applications relate is demarcated on a plan annexed to the interim injunction order. The Claimant provided a statement from Karen Maguire, dated 18 April 2024, to accompany their claim and application. Karen Maguire is the lead officer for trespass and encampment who thus has had dealings with the Meridian Water Regeneration Project. She records that the project has a gross development value of £6billion and will involve the building of 10,000 new homes. The named Defendants have all residing in the area that is to be cleared by Taylor Woodrow as part of, and in preparation for, these works. On 11 January 2024 she asked for letters and notices to be served on the named Defendants and on 2 February 2024 the Canal and River Trust ('CRT') placed a mooring suspension notice on the relevant part of the River Lea.
7. On 18 April 2024 the Claimant filed a Part 8 claim in trespass and nuisance and to prevent alleged anti-social behaviour. There were five named Defendants (including Stephen May, who is no longer a party to these proceedings). The Sixth Defendant was persons unknown.
8. There was a hearing in respect of that application, before Rory Dunlop KC, sitting as a Deputy High Court Judge, on 1 May 2024. There was by that time before the Court also a further statement from a process server, Aron Graves, of 25 April 2024, indicating what steps had been taken with a view to bringing documents relating to the claim to the attention of the Defendants. Mr Hoar of counsel appeared at that hearing for the Claimant, as he did on 12 June. The Second and Fifth Defendants appeared in person. There was no attendance by, or appearance for, the other Defendants on that occasion, although Mr David Snell spoke on behalf of his son, Charles, as well as for himself.
9. The judge announced that he was adjourning the application part heard to a date between 14 and 17 May 2024. A reserved judgment was handed down on 3 May 2024 and the judge's associated order, which included further directions for the adjourned hearing, was sealed on 7 May 2024. The reasons for the adjournment are relevant to the present applications.
10. First, the judge was not satisfied that the Defendants had had sufficient notice of the application to provide a fair chance to be heard, where there was sufficient justification for proceeding without proper notice. There was a letter before the judge from the Community Law Partnership ('CLP') referring to the Second Defendant, David Snell, as their client and indicating that legal aid funding was being sought. The Fifth Defendant, Michal Wujek indicated that he was also considering instructing CLP. Both Defendants sought an adjournment.
11. The judge made specific direction in his order setting out the means by which service was to be effected on persons unknown, pursuant to CPR 6.15(1). In short, he directed that the application and evidence bundle be affixed to any vehicle, vessel and/or encampment on the relevant part of the Claimant's land. It was in part because this direction had not been complied with in relation to service on persons unknown that

His Honour Judge Auerbach did not consider the application relating to such persons at the adjourned hearing on 14 May.

12. Secondly, Rory Dunlop KC adjourned the case on 1 May because he sought clarification and explanation of the figures given in Ms Maguire’s witness statement. At paragraph 3 Ms Maguire stated that abridgment of time for service was necessary because of a fear *“that if this application is not proceeded with immediately there will be at least 21 days before the Claimant is able to obtain the relief they seek against the Defendants and in that time the Council will face financial penalties of around £142,000 per week and there is a risk of significant damage could be sustained to the locations that the proposed Order seeks to protect ...”*. She also provided a breakdown of those figures at paragraph 32. At paragraphs 40 and 41 of his judgment ([2024] EWHC 1061 (KB)) the judge noted that he had been told that the Claimant had not yet incurred any financial penalties, as the mitigation, by way of fencing that had been put in place by Taylor Woodrow around the area being occupied by the Defendants, had so far been effective. The judge said that he was very troubled by this, as he could have been misled into believing that the Claimant had already been paying penalties at the rate of £142,000 since the issuing of the claim.
13. He gave directions for further evidence to be produced about this aspect for the adjourned hearing. That further evidence was served before the hearing on 14 May, before His Honour Judge Auerbach. It included a second witness statement of Ms Maguire, dated 7 May 2024, and a statement of Rauf Iqbal, Strategic Infrastructure Works Construction Programme Manager, also of 7 May 2024. The further statement of Ms Maguire addressed the steps that the Claimant had taken to address the housing needs of the named Defendants, and the statement of Mr Iqbal provided the sought clarification and explanation of the figures set out in Ms Maguire’s first statement. Mr Iqbal’s statement, and the exhibits thereto set out further detail about the risk that the Claimant may have to pay contractual compensation in the terms she had set out. This further evidence was found by His Honour Judge Auerbach to be important to the issue of the impact to the Claimant if the relief sought was not granted.
14. At the hearing before His Honour Judge Auerbach on 14 May Mr Hoar of counsel once again appeared for the Claimant. The Second Defendant, David Snell, and the Fifth Defendant, Michal Wujek, each again appeared in person. David Snell was again also appearing on behalf of his son, Charles Snell. Mr Snell, who was still unrepresented, did not apply for an adjournment. Mr Wujek did, both because he was still unrepresented and because of issues that he had with English not being his first language. In that regard, the judge found (at paragraph 23 of his judgment) *“I considered that Mr Wujek had, taking account of the first postponement, now had a fair opportunity to obtain legal representation. His command of English is excellent – he had expressed himself fluently and articulately to me. Any issues about service could be considered by me as part of my overall consideration. His being a litigant in person was not, as such, a reason not to proceed. I would make appropriate allowances for that. He could put in any documents he had brought with him on which he wished to rely. If I granted an injunction I would allow time to comply.”*
15. Following that hearing, for reasons set out in his reserved judgment ([2024] EWHC 1206 (KB)), the judge granted the interim junction sought against the named Defendants, and adjourned consideration of any further direction in relation to those

defendants and interim relief sought against persons unknown. It is those adjourned matters that were aired before me on 12 June. Given that the evidence and law relevant to the further interim injunction sought against the named Defendants before me is the same as that considered by His Honour Judge Auerbach I shall refer to his findings as I address the relevant issues below. I should make clear that I have not taken his consideration of the evidence, being findings in support of the granting of interim relief only, as definitive findings of fact. Rather, I have re-considered the evidence for myself and the decision I have reached is based on my own assessment of the evidence, albeit informed by his review of that same material.

SERVICE

16. Statements as to service were provided by Aron Graves dated 25 April 2024, Frederick Chatfield dated 10 May 2024, Jonathan Chatfield, dated 3 June 2024, and David Shaw, dated 6 June 2024. By reference to those statements, and the exhibits attached thereto, I am satisfied that sufficient steps have been taken to affect service both on the named Defendants and persons unknown of the claim form, application notice, witness statements in support and the orders made on 1 and 21 May 2024. In particular, the directions as to service by the alternative method specified by Rory Dunlop KC in his order of 1 May have been complied with. In addition, the Claimant confirmed that they had emailed a copy of the hearing bundle and the skeleton argument for the hearing on 12 June to the National Bargee Travellers' Association ('NBTA'). An email had been sent from the NBTA to Ms Maguire of 9 February 2024 written expressly on behalf of Mr Snell, referring to the suspension notice that had been delivered to his boat in relation to the suspension of mooring on the relevant stretch by the CRT from 7 February 2024. This suggested that the NBTA had an interest in the application, and they were thus afforded the opportunity to attend to assist the named Defendants and/or to make submissions on behalf of persons unknown if that considered that appropriate.

MATTERS RELATING TO THE NAMED DEFENDANTS

17. At the hearing on 12 June, there was no attendance by or on behalf of the NBTA. The only named defendant to attend was Mr Wujek, the Fifth Defendant. I was informed by Mr Wujek, and accepted, that the Second Defendant, David Snell, was unwell and thus unable to attend, as he had on previous occasions, to speak on behalf of both himself and his son, the First Defendant. He also informed me that the Third Defendant, Abdellah Tayeb, was unwell. I therefore considered the submissions that had been made by or on behalf of the other Defendants at the earlier hearings, and especially that on 14th May, in approaching the Claimant's application for a further or renewed interim injunction against the named Defendants.
18. At the hearing, Mr Wujek informed me that he was still in the process of obtaining representation from the Community Law Partnership ('CLP') but that there had been issues in relation to paperwork which had delayed this. He also said that the lawyer that he was liaising with had told him that he was too busy at present to deal with the case before the hearing on 12. I did not understand Mr Wujek to be seeking to adjourn the hearing on this basis. Had he done so, in accordance with the approach adopted by His Honour Judge Auerbach (at paragraph 23 of his judgment), I would have refused the application. I am satisfied that Mr Wujek has had a fair opportunity to obtain legal representation, indeed the period since 14 May has represented a further such opportunity since that already

identified by His Honour Judge Auerbach at that time.

19. The lawyer at CLP with whom Mr Wujek had spoken had also informed Mr Wujek that he was entitled to the services on an interpreter and Mr Wujek made an application for the hearing to be adjourned for that purpose. He explained that he had a good understanding of English, and the ability to communicate well in English, but that legal terminology was beyond him, and it was in that regard that he considered that an interpreter would assist. I considered this application with care. It is clearly important that any defendant, and in particular an unrepresented one, both understands the proceedings and is able to make any representations or submissions to the Court that they wish both fully and to their best advantage. I share Judge Auerbach's assessment that Mr Wujek has an excellent command of English, and he was able to express himself fluently and articulately to me, as he was on 14 May. Moreover, I note that his reason for wanting an interpreter was to assist him with legal terminology and its implications. That is properly the role of a lawyer not an interpreter, and I have already explained why I would not have adjourned the hearing for a lawyer to represent Mr Wujek. In my discussions with Mr Wujek at the hearing, I was confident that no terminology obscured his ability to understand and address the issues that fell to be decided on 12 June.
20. The evidence from Ms Maguire (in her second statement and the correspondence that she exhibits thereto) shows, and Mr Wujek agreed, that he has been referred to the Claimant's STEPS programme, which provides support for obtaining training and employment. He has also made an application for Universal Credit. He has three adult dogs and at least one puppy. Mr Wujek explained to me, as he had at previous hearings, that he has depression and bipolar disorder and wants to keep his dogs because he says they are essential to his mental well-being. Ms Maguire states that Mr Wujek has been advised that he can make a homeless application but has so far not done so, because he is concerned that he will be parted from his dogs. Her evidence outlines her efforts to find an organisation that is willing to take the dogs. There are ongoing enquiries being made to find a social landlord who might take him with the adult dogs. At the hearing on 14 May, a further email of 8 May was provided which indicated that a flat had been found which could accommodate the dogs, Mr Wujek reported that he had rejected the offered flat because it involved a move to South London and the garden attached to the flat, and the flat itself, were too small for the dogs. In this regard, Mr Hoar submitted, and I accept, that the local authority was required to assist Mr Wujek with accommodation but this did not have to be located within their Borough, and that whilst efforts were made also to accommodate the dogs this was beyond the ambit of their legal obligations.
21. Mr Wujek had told the Claimant at one point that if possible he would wish to return with the dogs to live in Poland. Ms Maguire says that the Claimant looked into this but ascertained that transporting the dogs would not be possible. Mr Wujek explained to me that he had a house in Poland to which he could move with the dogs, but that the necessary preliminary steps for such a move, such as vaccinations for the dogs, had not been completed. Indeed, it became clear that he had not started on such steps because he considered the move to Poland a last resort. He wanted to remain in the UK, and had work here. Mr Wujek made a number of wider ranging criticisms of the Claimant and of the way that the site was being secured. In this context, he described the activities of unknown third parties who were fly tipping at the location, and to others who had also lived there in the past, for example a gentleman called Martin who had lived both in a tent and a boat on the site, the latter having sunk more recently.

22. By reference to the evidence provided by Ms Maguire, and the representations made at earlier hearings by David Snell, it is clear that the Claimant has agreed with the CRT's proposal to move the boat occupied by the First and Second Defendants (the Snells) to any of three proposed designated mooring locations elsewhere on the River Lea Navigation System, at the Claimant's cost. They were advised of the latest position in an email of 15 April 2024 and asked which of the three options they preferred. In an email of 20 April 2024 David Snell described his and his son's health conditions and set out their particular reasons for objecting to the new locations to which the Claimant had proposed that their boat be moved. He referred to an email that he had sent to a Councillor in February 2023. He stated that they are willing to move to housing but set out their particular requirements and referred to reasonable adjustments under the Equality Act 2010. I have considered, and agree with the analysis of the application of that Act by His Honour Judge Auerbach (at paragraphs 72-74 of his judgement).
23. Ms Maguire's evidence demonstrates that the Snells have been told what they need to do to make a homelessness application, and there is an email of 2 May from Ms Maguire to her colleagues in the Housing Advice Service raising their case as a housing application, identifying in summary their health issues, and providing the contact email that she has for David Snell. She also recorded that by the date of her second statement no formal application or supporting evidence can be found on the Claimant's systems. That accords with David Snell's representations on 14 May, to the effect that he had not made an application, with the necessary supporting information and evidence, so as to enable the Claimant's relevant team to assess their need including whether they have a priority need. He said at that hearing that he did not believe that the Claimant would be able to offer suitable housing for him and his son. The statement of David Shaw relating to the service of the order of 14 May on the First Defendant, and the accompanying photograph, suggest that he has returned to live in the boat shared with his father.
24. On the information before me, confirmed by Mr Wujek at the hearing, it appears that the Fourth Defendant, Abdellah Tayeb (or Castro) also still has a boat currently moored at the site. He owns a number of dogs which are with him. Mr Maguire in her first statement described him as compliant with requests to move, although he had not done so by the time of the hearing on 14 May and it was the agreed position of the Claimant and Mr Wujek that by the time of the hearing on 12 June that he had still not done so.
25. Mr Wujek told me that those who are working on site were not doing any work where his shed, or for that matter the boats occupied by the other named Defendants, were located. I note David Snell made a similar observation on 14 May. However, the evidence before me plainly shows that the Meridian Water project covers this location, and the evidence makes clear that clearance and construction works need to take place along the relevant stretch of the waterway.

THE CLAIMANT'S STANDING AND THE STRENGTH OF ITS CASE

26. I have been provided with a draft injunction order which addresses both the named Defendants and persons unknown. In relation to the named Defendants, the focus of the application and evidence presented is on the basis that the Defendants are trespassing and/or that there is nuisance deriving from the trespass. In relation to persons unknown, the application and evidence also seek to establish that additional relief through a

prohibition on fly tipping, anti-social behaviour and nuisance. There are other considerations that are specific to the latter injunction directed to persons unknown to which I will return.

27. Before I can entertain either application of interim injunctive relief, I must first be satisfied that the Claimant has the power to institute the application that it makes and I should evaluate the strength of the evidence in support of the Claimant's case, applying a higher standard than that of "serious question to be tried" deriving from *American Cyanamid v Ethicon Limited* [1975] UKHL 1; [1975] AC 396.
28. Section 222 of the Local Government Act 1972 confers upon a local authority the power to institute civil proceedings in its own name, where the authority considers it 'expedient for the promotion or protection of the interests of the inhabitants of their area'. The Claimant considers it expedient here for such purposes to institute proceedings for the relief sought and to protect its land from trespass. In *Richmond London Borough Council v Trotman* ([2024] EWHC 9 (KB)), His Honour Judge Blair KC, sitting as a judge of the High Court, found that a local authority that owns the riverbank '*has the necessary legal standing to bring proceedings in its own name for the protection of the interests of the inhabitants of its area in a claim for an injunction to prevent a public nuisance*' (at paragraph 55). I am satisfied that the Claimant has the necessary legal standing to institute this claim, and, on the evidence, is doing so because it considered it expedient to promote or protect the interests of the inhabitants of the area.
29. Moreover, in accordance with the approach in *Trotman*, the evidence provided demonstrates the Claimant also to have standing to bring this claim as a landowner. The land in question extends to parts of the River Lea abutting the Claimant's land on the banks of the river. The River Lea is a non-tidal river. As such, the riparian owner of both banks of a relevant stretch of the river owns the river bed, and has the right of access to and egress from the water.
30. In *Ackerman v London Borough of Richmond* [2017] EWHC 84 (Admin), it was held that the permanent mooring of a boat which obstructed free access from the land to the river constitutes both a private and a public nuisance. There, Beatson LJ found (paragraph 28) that '*in my judgment it was legitimate for the respondent to regulate the way in which the appellant and others occupy the river bank, land held for the benefit of the whole community, to the detriment of other uses of the land and river bank*'. In the recent judgment of *Royal Borough of Kingston v Salzer* [2022] EWHC 3081 (KB), which concerned repeated breaches of mooring byelaws and trespass on a local authority's land abutting the River Thames, Jeremy Hyam KC, sitting as a Judge of the High Court, set out, at paragraph 20, that the claimant local authority had the proprietary right, through its leasehold and other interests, to prevent mooring by land in which it held those interests.
31. As His Honour Judge Auerbach found (at paragraph 41 of his judgement): "*A distinction must be drawn between boats which may stop temporarily in the course of navigating along the river, and those which are not just, as it were, passing through. In relation to the latter, the unauthorised attachment of a boat by mooring to the Claimant's land will constitute a trespass, as will a material stationing of the boat, even if not by physical mooring to the land (such as by mooring to a post standing on the river bed).*"
32. Ms Maguire's evidence shows that the Claimant became aware of the occupation of the

boats and land by the named Defendants during the course of the clearance works for the Meridian Water Regeneration Project. None had sought or obtained permission to reside there. Mooring on the relevant stretch of the river was suspended by the CRT on 7 February 2024, and notices to that effect were posted. The email from the NBTA of 9 February 2024, to which I have already referred, makes clear that this notice was drawn specifically to the attention of the First and Second Defendants. The CRT deems the continued presence of the unauthorised vessels on this stretch of the river to be a nuisance. I am satisfied that the evidence before me, taking fully into account that which was said by Mr Wujek on 12 June and what had been said both by him and by the Second Defendant, David Snell, at earlier hearings, establishes that the named Defendants were, and are properly characterised as trespassers.

33. In *Salzer*, Jeremy Hyam KC considered (at paragraph 35) “...whether, in defence to injunctive proceedings brought by the Council he was, through his evidence essentially arguing that the Council had acquiesced in his past conduct such that it would now be unconscionable for the Council to insist on its strict rights of enforcement against him.” He concluded (at paragraph 57) that “Given the long history of overstaying, or more colloquially “squatting” on council moorings I consider that the grant of injunctive relief to restrain future repetition, in circumstances where it has been sought by the Council as a remedy of last resort, is an entirely proper exercise of discretion for the Court.” Adopting a similar approach here, given that the Claimant took steps to address the occupancy of the named Defendants when it became aware of it, and the steps that it has taken since including the obtaining of injunctive relief on 14 May which has not resulted in the named Defendants relinquishing occupation, I am satisfied that there is no basis for concluding that there has been anything that would amount to acquiescence by the Claimant with respect to the continuing presence of any of the Defendants.
34. I have considered whether those conclusions are undermined or affected by the fact that some of the trespassers in issue lived on boats, or through the application of Article 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’).
35. The circumstances in which the occupier of a boat may defend a claim for an injunction preventing its mooring by a riverbank on the grounds that it was his home and that the injunction would be a disproportionate breach of his right to a private life pursuant to Article 8 were considered in *Salzer*. Express reliance was there placed (at paragraph 45) on the observations of Lord Neuberger as to the application of Article 8 in *Manchester City Council v Pinnock* [2011] UKSC 45 ; [2011] 2 AC 104 , which concerned possession proceedings against a local authority tenant, Lord Neuberger, for the Court, concluded at paragraph [61]: “First, it is only where a person’s “home” is under threat that article 8 comes into play, and there may be cases where it is open to argument whether the premises involved are the defendant’s home (e.g. where very short-term accommodation has been provided). Secondly, as a general rule, article 8 need only be considered by the court if it is raised in the proceedings by or on behalf of the residential occupier. Thirdly, if an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained.”
36. Against that background here, my conclusions are as follows:

- (a) For the purposes of the present application, the boats occupied by the First, Second and Fourth Defendants (the Snells and Mr Tayeb) are their current homes, and the structure in which the Fifth Defendant, Mr Wujek, is living is also his current home. The combination of what was said by the Second and Fifth Defendants on 14 May and what was said by Mr Wujek on 12 June has raised an Article 8 issue, and I proceed on the basis that granting the relief sought would interfere with their Article 8 rights.
 - (b) That interference is to be viewed in the context that the Snells' boat can be moved. Alternative moorings have been identified and the Claimant will support the process.
 - (c) In the case of the Fifth Defendant, I accept Mr Hoar's submissions that Mr Wujek has long known that he did not have permission to live on the site, and the Claimant has sought to work with him to rehouse both himself and his dogs. In that context, and especially by reference to a relocation to Poland, Mr Wujek has not taken advantage of any of a series of opportunities to make arrangements.
 - (d) In the cases of each of the named Defendants, the Claimant has a statutory housing duty and has been encouraging them to engage with that process. While I appreciate that David Snell and Michal Wujek has each expressed concerns, I agree with His Honour Judge Auerbach (at paragraph 69) that "*...the statutory homelessness regime provides a fair and adequate mechanism, designated by Parliament, for evaluating and accommodating their particular needs and circumstances; and there would be other redress available to them, if, having for their part followed that process, they considered that the Claimant had not properly met its duties to them.*"
 - (e) The Claimant is acting so as to vindicate its rights both as local authority and as property owner. There is a very strong, if not unanswerable, case that these Defendants are trespassers. Further, if I am satisfied that there is a significant risk of harm to the Claimant if relief is not granted (which I address below), it will be demonstrated that, in terms of the balancing exercise required for Article 8(2) purposes, the interference with their Article 8(1) rights in this case, by the granting of the relief sought, would be justified and not disproportionate.
37. Taking account of this analysis, and also very much taking into account the fact that the named Defendants have not abided by the requirements of the Interim Injunction Order made on 14th May, which I am satisfied was served on each of them, I am satisfied that the Claimant has a very strong, if not unanswerable, case that the continuing presence of all of the Defendants against whom it seeks interim relief, within the area in respect of which that relief is sought, is an actionable trespass, as well as a nuisance. Subject to the particular considerations that arise in relation to persons unknown, these conclusions also have implications for the injunctive relief sought against them.

THE IMPACT OF NOT GRANTING RELIEF

38. In relation both to the grant of interim injunctive relief, and the application of Article 8 in doing so, it is necessary to consider the prejudice to the various parties if the relief sought is or is not granted. In the case of the named Defendants, this will mean the loss of their present homes or the locations in which their homes are presently situated. I have already set out my conclusions in that regard.
39. In the case of the Claimant, this relates to the financial implications if the Meridian Water Regeneration Scheme is delayed or disrupted. It was this issue that particularly concerned the Court on 1 May, in the context of the potentially misleading aspects of Ms Maguire's

statement. Like His Honour Judge Auerbach before me (from paragraph 58 of his judgement), I have therefore considered with care the evidence as to the consequences for the Claimant of the ongoing situation and the impact if the relief sought, and granted by the injunction order of 14 May, is now withheld. Again, these considerations are of direct relevance not only against the named Defendants but against persons unknown.

40. First, the evidence shows the timetable for the Meridian Water Regeneration Project to be as follows. The documents show that the start date was in December 2023. Access to the waterfront for works to make ready for the bridge construction was required from 28 February 2024. On 29 January 2024 Taylor Woodrow served an early warning notice under the contract referring to the presence of boaters and encampments on the bank. On 5 March 2024, the notification of compensation event was served. The steps hitherto taken by Taylor Woodrow are plainly by way only of partial mitigation to enable progress to be made pending full access being enabled. I am satisfied, against that chronology, that the continued presence of the named Defendants concerned, and for that matter the similar presence of other persons unknown, is disrupting, and will continue to disrupt, the progress of the works, and in particular the projected timetable.
41. Regarding compensation, the second statement of Ms Maguire, and in particular the witness statement of Mr Iqbal, shows that Taylor Woodrow had not by the time of the grant of injunctive relief on 14 May, claimed compensation in any specific amount. But the terms of the contract, and the 5 March 2024 notice, mean that the Claimant is on risk of such a claim. The figures given in Ms Maguire's first witness statement relating to the payment of financial penalties of around £142,000 per week, were an estimate of the potential weekly exposure provided by the project supervisor, AECOM. In addition, the Claimant faces the risk of other potential significant financial consequences in the longer term relating to funding arrangements, if this phase of the project does not progress or complete to the time. By way of example, if the project could not go ahead as planned, monies provided by central government might have to be reimbursed. I also accept that delays to the completion of the project would have a wider impact on the Claimant's citizens.
42. It is in that context that I have concluded that the Claimant is acting so as to vindicate its rights both as local authority and as property owner against those properly construed as trespassers. There is a significant risk of the harms that I have described if relief is not granted, and accordingly, in terms of the balancing exercise required for Article 8(2) purposes, the interference with their Article 8(1) rights by the granting of the relief sought is justified and is not disproportionate.

NEWCOMERS AND PERSONS UNKNOWN

43. The conclusions I have reached as to the Claimant's standing, the strength of its case, the impact on the Claimant were relief not to be granted and as to the balancing exercise under Article 8, ECHR all inform the approach to the further injunctive relief sought by the Claimant against persons unknown. As Mr Hoar accepted this relates both to persons who may also have been trespassing on the site as at 12 June and newcomers who arrived on site after that date. This further relief was not addressed in detail on 14 May, because service had not yet been addressed. That position has now been remedied.

44. In *Wolverhampton City Council and others London Gypsies and Travellers and others* [2023] UKSC 47; [2024] 2 WLR, the Supreme Court considered whether and, if so, the circumstances in which ‘newcomer’ injunctions may be imposed. After a detailed and careful consideration of the competing arguments, potential issues and justifications for such orders, the Court concluded (at paragraph 167) that “...*there is no immovable 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.*” The Court also made clear (at paragraph 170) that such newcomer injunctions were not “constitutionally improper” and ‘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.’
45. In terms of alternative remedies, the Supreme Court specifically addressed the alternatives of possession orders against squatters (at paragraph 166), and the use of byelaws (at paragraph 172). In relation to the former, the Court observed that “...*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.*” In relation to the latter, the Court said “*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*”.
46. The Court set out (at paragraph 167) that the granting of a newcomer injunction was “only likely to be justified as a novel exercise of an equitable discretionary power” in the following circumstances (referred to hereafter as the *Wolverhampton* principles):
- (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). ...*
 - (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 ...; 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."*

47. In *Valero Energy v Persons Unknown & Bencher & Ors* [2024] EWHC 134, Ritchie J summarised the Supreme Court's guidance in *Wolverhampton City Council* in relation to the granting of injunctive relief against persons unknown and/or newcomers on either an interim or final basis, from paragraph 57. He endorsed that approach, by reference to that summary, in *High Speed Two (HS2) Ltd and another v Persons Unknown and others* [2024] EWHC 1277 (KB), (at paragraph 30). Ritchie J's summary of the guidance as to the matters that must be demonstrated, excluding the first four paragraphs which apply only to applications for summary judgment, is as follows:

Balance of convenience - compelling justification

(5) In interim injunction hearings, pursuant to American Cyanamid v Ethicon [1975] AC 396, for the Court to grant an interim injunction against a defendant the balance of convenience and/or justice must weigh in favour of granting the injunction. However, in PU cases, pursuant to Wolverhampton, this balance is angled against the applicant to a greater extent than is required usually, so that there must be a "compelling justification" for the injunction against PUs to protect the claimant's civil rights. In my judgment this also applies when there are PUs and named defendants.

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

Damages not an adequate remedy

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

(B) Procedural Requirements - Identifying PUs

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

The terms of the injunction

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

The prohibitions must match the claim

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

Geographic boundaries

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

APPLICATION OF THE *WOLVERHAMPTON* PRINCIPLES

48. From the evidence served in support of the application, and taking into account all that I have heard and read from the earlier rulings of Rory Dunlop KC and His Honour Judge Auerbach sitting as Judges of the High Court, I am satisfied that the Claimant has standing as both local authority and landowner in relation to what can strongly be argued to be trespass on their land by persons unknown. Such persons have either occupied boats moored in the relevant part of the River Lea or have resided on the Claimant's land adjacent to the relevant part of the river. No such persons had any right to moor on the part of the river owned by the Claimant without its permission as landowner. No public right of navigation alters that position in respect of this non-tidal stretch of the river. Such persons have also, like those of the named Defendants occupying boats, interfered with that public right of navigation, and have prevented the Claimant, as riparian owner, from accessing its land. I am satisfied that the Claimant has a very strong, if not unanswerable, case that such persons are indeed trespassing, and causing a nuisance. The same analysis of the balancing exercise required for Article 8(2) purposes that I addressed in the context of the named Defendants would apply in relation to persons unknown who had occupied the site before the granting of interim injunctive relief. Such relief would be justified and not disproportionate.
49. The evidence, most graphically in the photographs exhibited by Ms Maguire, demonstrates that such persons have deposited large quantities of rubbish. This was, incidentally, confirmed by Mr Wujek by reference to certain of the photographs to which he took me. I am satisfied that the accumulation of large quantities of such waste has caused, and would continue to cause, a serious risk to public health, which the Claimant as local authority has a duty to address. The evidence further establishes that such persons have been responsible for anti-social behaviour.
50. The evidence of persons unknown occupying the site, and the activities of the named Defendants in having done so, establish a proper basis for concluding that newcomers are likely to seek to establish similar occupancy in the future, and to cause serious risk to public health through the further accumulation of waste. Similarly, by reference to the evidence of behaviour by persons unknown in the past, there is a proper basis for concluding that newcomers would be likely to cause a public nuisance, and be responsible for anti-social behaviour. By reference to the approach of the Supreme Court in *Manchester City Council v Pinnock*, there is no proper basis to assert that the Article 8 rights of any such newcomer would be engaged if they sought to establish occupation after the granting of any interim injunctive relief. Their connection with the area would be fleeting, and their status as trespassers unanswerable.
51. As enjoined by reference to decision of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23 (as referred to by Ritchie J in *Valero Energy* at para.57, paragraph 5), I have considered whether there is any likelihood that the rights of any newcomer under Article 11, ECHR might be engaged. I have seen no evidence that any of the trespassers in the defined Areas

have been assembling or protesting about political or related matters; or for that matter protesting against the development itself. I am satisfied that those rights are not here engaged.

52. Moreover, I accept Mr Hoar's submission that barring trespassers who might be protesting against the development could be argued to be proportionate where the development has the planning consent of the local planning authority, which has thus gone through the required consultation and democratic exercise within the planning process. The balancing exercise that would be required under Article 11(2) would necessarily take into account the Claimant's contractual duty to deliver the development for the benefit of local residents and to prevent it from being delayed where the Claimant would be likely to face severe financial consequences that would affect its ability to deliver public services if such delay occurred.
53. I am satisfied, by reference to the evidence of Ms Maguire and Mr Iqbal, that the mooring of boats and other forms of trespass on the Claimant's land and/or in the relevant part of the river will create the likelihood of further delays in the infrastructure work being conducted pursuant to the Meridian Water Regeneration Project. Such delays, I am satisfied, would risk liability for hundreds of thousands of pounds per month in compensation and damages of tens of millions of pounds should the delay put the completion project in jeopardy. Such delays and such financial consequences would have a wider impact on the community for which the Claimant is responsible.
54. Applying the principles set out by the Supreme Court in *Wolverhampton City Council*, to those findings, I am satisfied that the narrow balance of convenience justifies an interim injunction against the current trespassers and against newcomers, and that it is just and convenient to do so. By reference to those principles, I should also make clear that:
- (1) I am satisfied that the Claimant has demonstrated, as at least strongly arguable a compelling need for the protection of civil rights in the locality which is not adequately met by any other available remedies. The Claimant has a lawful right to control those occupying on, or mooring adjacent to its land, to remove those barring that access, and to prevent the build-up of rubbish that risks public health. The Claimant has demonstrated a pressing need to prevent any further delay to the infrastructure work, thereby avoiding the onerous financial consequences that would otherwise flow. I am satisfied that no other remedy could provide the necessary protection for the engaged rights. I am also satisfied that the Article 8 and 11 rights of any newcomer are not engaged, and that, even if they were, the balance required would weigh overwhelmingly in favour of permitting the interference consequent on the relief sought by the Claimant. The injunction order is constrained by both territorial and temporal limitations in that the area to which it relates is clearly defined, and is an area within the scope of the Meridian Water Regeneration Project's works. The interim order will last until the trial hearing in this matter, but the order provides for application to vary and discharge on two working day's notice.
 - (2) Procedural protection for the rights (including Convention rights) of those persons unknown who might be affected by the interim order are achieved not only through the provision for variation or discharge of the order on application, but by requiring that the Claimant publish the order, claim form, application notice, evidence in

support, notification of the return date and notification of the right of any person affected to apply to set aside or vary the order on the four corners of the areas affected; and through a page of the Claimant's website. I have also directed that the order be drawn to the attention of the NBTA. I am also satisfied that the injunction order is set out in clear English and that the areas to which it relates are defined by the plan that was annexed to the interim injunction of 14 May and which I direct be annexed to this interim order.

- (3) I am satisfied that the Claimant has complied in full with the disclosure duty which attaches to the making of a without notice application. In particular, despite the issues that had been raised on 1 May in relation to Ms Maguire's first statement, the evidence relied on by the Claimant does now address its legal ownership of the land, its relevant contractual relationships relating to the development of the land, the purpose of that development and the steps that it has taken to engage with identified occupiers and attempt to find them alternative accommodation. Having tested the matter with Mr Hoar, I have not identified any other disclosure that might affect the Court's assessment of the tests to be applied in applications for newcomer injunctions.

55. For all of these reasons, I am satisfied that it is just and convenient to renew the grant of the relief sought against the named Defendants and to grant the relief sought against persons unknown, including newcomers.

THE TERMS OF THE ORDER

56. At the hearing on 12 June, the terms of the draft interim injunction were considered. The order addresses first the named Defendants and then persons unknown. In relation to the named Defendants given that this is in effect a renewal of the interim order granted on 14 May, I do not consider it necessary to include a new delayed date by which the order should come into effect. The Defendants have now had, in my judgment, ample time to make arrangements for their onward movement given that the order made on 14 May did not come out of the blue. As His Honour Judge Auerbach observed, each had been aware "*for some weeks now that this day may well be coming.*" They have also had the further time granted between the making of the order on 14 May and its prohibitions coming into effect. The Claimant will wish to consider how the prohibitions within the order are to be brought into effect as against any Defendant who is ill, or require further time to make arrangements to depart.
57. When the interim order was made on 14 May, His Honour Judge Auerbach removed the requirements included in the draft (paragraphs (d)-(f)), which related to fly tipping, anti-social behaviour and the causing of nuisance. He considered, rightly in my view that those sub-paragraphs were unnecessary "*as, on the evidence, they essentially address matters consequent upon occupation*". On the evidence, I am satisfied that those prohibitions are justified in relation to persons unknown and newcomers. There is evidence that persons unknown have left considerable rubbish in the past, and there is real scope for newcomers leaving such waste, causing such nuisance or engaging in such anti-social behaviour even if they are on site only transiently. They may confront contractors and others working on site, or dump rubbish at the site whether or not they moor a boat there, for example.

58. The order includes directions to prepare for and secure the further and final hearing of the Claimant's application for an injunction going forward. The Court is able to accommodate a hearing in February 2025, and I have made directions for the service of any defence evidence, and any further evidence by the Claimant, with that date in mind. Such a timetable will also allow for any named Defendant to secure legal representations. Mr Wujek agreed that the timetable would give him sufficient time for these purposes. The order also addresses errors that had been made by the Claimant in the spelling of Mr Wujek's name.
59. Following the hearing on 12 June, at my request the Claimant produced a revised draft order with the relevant plan attached to it. The final wording of the order has, of course, been determined by me; and the finalised order, approved by me, has been sealed by the Court. The Claimant is responsible for its personal service.

1.

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION



No. QB-2020-002702

[2024] EWHC 239 (KB)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 19 January 2024

Before:

MR JUSTICE RITCHIE

B E T W E E N :

(1) MULTIPLEX CONSTRUCTION EUROPE LIMITED

(2) LUDGATE HOUSE LIMITED

(A company incorporated in Jersey)

(3) SAMPSON HOUSE LIMITED

(A company incorporated in Jersey)

Claimants

- and -

PERSONS UNKNOWN ENTERING IN OR REMAINING AT
THE CLAIMANTS' CONSTRUCTION SITE AT BANKSIDE YARDS
WITHOUT THE CLAIMANTS' PERMISSION

Defendants

MR T MORSHEAD (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Claimants.

THE DEFENDANTS did not attend and were unrepresented.

J U D G M E N T

MR JUSTICE RITCHIE:

- 1 In this case, by an application dated 21 December 2023, the three Claimants apply for a final prohibitory injunction against persons unknown to last for approximately three years, until February 2027. The evidence in support is provided by Mr Wortley in a witness statement dated 21 December 2023 and a later witness statement dated 18 January 2024. The procedure set out in the Notice of Application asked for an on-paper consideration of a temporary further interim injunction pending a hearing. This is the hearing relating to the application for the final injunction.
- 2 Going to the chronology of these proceedings, the relevant property is Bankside Yards, Blackfriars Road, London, SE1 9UY (“the Site”). The owners are the second and third Claimants and the main contractors on site are the first Claimant, who are entitled to possession.
- 3 An application for an interim injunction was made on 27 July 2020 and an interim *ex parte* injunction was made by Soole J on 30 July 2020 until 21 January 2021. Judgment was given by Soole J, which I have read and incorporate into this judgment.
- 4 The *ex parte* interim injunction was probably extended by Bourne J in January, but I have not seen the order and this judgment is subject to that order being confirmed as in existence by the Claimants’ leading counsel, which I understand will take place this afternoon. The order that was actually put in the bundle was from another case. However, it is clear that there was a return date for the *ex parte* injunction because a witness statement was filed by Martin Wilshire on 25 January 2021, who is Director of Health and Safety at the first Claimant, that set out two recent incidents, despite the interim injunction. The first was dated before the interim injunction and involved something not particularly relevant. Four males were pointing at a crane on the Site and when the security services on Site made themselves apparent, the four males went away. They never entered the Site. The second is more worrying, because it occurred on 5 January 2021 and an unnamed person climbed a scaffold gantry on the Site but left when security was deployed. This was a direct action which was relevant to and potentially in breach of the injunction ordered by Soole J.
- 5 Hearsay evidence was given by Mr Wortley about urban exploring and videos of this taking place in London on cranes at various unknown locations, but also in White City. There was in Warsaw, which may not be the most relevant piece of evidence that I have ever read, but it at least showed that urban exploring by climbing buildings and cranes has prevalent in London and Europe.
- 6 Moving on from the order which was probably made by Bourne J, a further order was made by Stewart J on 4 March 2021, which recited the orders of Soole J (and Bourne J of 26 January 2021), which gives me some succour about the order of Bourne J and was based on the witness statement of Martin Wilshire which I have just recited. This extended the order of Bourne J to 19 May 2021. On 6 May 2021, Eady J extend the order of Stewart J to 26 July 2021. On 20 July 2021, Davis J extended the order of Eady J to January 2022. Master Dagnall, on 26 October 2021, joined the third Claimant to the claim.
- 7 In a witness statement dated 23 February 2022 in support of extending the interlocutory injunction further, Stuart Wortley informed the Court that a third crane was soon to be erected, updated the Court on urban explorers spotted in Blackfriars (no-one had entered the Site) and referred to evidence from Mr Wilshire and Mr Clydesdale, who believed that, despite the prevalence of urban explorers in London, the Site had not been chosen because

of the injunction being plastered all over the Site in accordance with the orders. Mr Wortley sought a final injunction in that witness statement. Exhibited to the witness statement was the judgment of Eyre J in *Mace v Persons Unknown* [2022] EWHC 329, which I have read, which gives a useful summary of the general risk in London of urban exploring and climbing on sites and of some attempts to enter the Site itself.

- 8 By an order of HHJ Shanks, sitting as a Deputy High Court Judge, on 3 March 2022, the interim injunction was extended until 31 December 2023. Pursuant to the expiry of that order, Mr Wortley filed his witness statement for this hearing on 21 December 2023; it updated the facts relating to trespasses on Site. There had only been one trespass. Therefore, Mr Wortley suggested the injunctions were having the desired effect. The trespass occurred on 20 December 2023, when two individuals entered the Site. They were intercepted by security and left. The reasons why the Claimants were seeking the injunction were the same as before and, in summary, they were urban exploring (which means climbing on building sites), which is inherently dangerous and puts the perpetrators, security and the public at risk and, of course, it puts the builders on Site at risk. The suggestion was made that the Site is an obvious target because it has cranes and other high structures. It is suggested that the injunctions were being effective as deterrents to urban explorers and it suggested that the balance of convenience, which I describe as the “balance of justice,” favoured further restraint. This witness pointed out that the interlocutory injunctions did not restrain lawful activity because they were restricted wholly to the Site and asserted that damages would not be an adequate remedy, only an injunction would. The witness referred also to an injunction granted by Sweeting J at Elephant and Castle on a building site there and I have read the judgment of Sweeting J in that case. The solicitor for the Claimants, Mr Wortley, requested that the injunction be granted until 15 February 2027.
- 9 By an order made by Jefford J on 21 December 2023, a short, temporary extension of the injunction was granted to the date of this hearing. A further witness statement was filed on 18 January 2024 by Mr Wortley relating to the service of notice of the order made by Jefford J and also updated the Court that there had been no further incidents. I have taken into account the skeleton argument provided by Mr Morshead KC, for which I am very grateful, and in discussion during the hearing the conclusion that I reached was that the proper procedure for granting a final injunction in the light of the recent case law had not been properly followed.
- 10 It seems to me, following the decision made in *Wolverhampton Council & Ors v London Gypsies and Travellers* [2023] UKSC 47 and [2024] 2 WLR 45, that final injunctions can be granted but that power does not override the necessary notifications to persons unknown to bring a final hearing before the Court. It is not for me to advise on the appropriate methods, but one method that is available is through the summary judgment procedure. Another, of course, is to list the final hearing and to call witnesses or to have permission to rely on written witness statements, if that is granted. Neither of those procedures has been followed and so it seems to me that it would be improper for me to treat this as a final hearing, it being *ex parte* and no notification having been given through alternative service to any unknown persons. As for the appropriate method for alternative service for bringing a final hearing or for an application for summary judgment, that is a matter for the Claimants to consider and, if necessary, obtain the relevant order upon. Therefore, I refuse to consider a final order, but I do consider it correct to consider a further interim order.
- 11 The grounds for granting an interim order, since the *Wolverhampton* case, it seems to me involve not less than 13 factors, which I will run through very briefly.

1 – Substantive requirements

- 12 There must be a civil cause of action identified in the claim form and particulars of claim. The usual feared or *quia timet* torts relied upon are trespass, damage to property, private or public nuisance, tortious interference with trade contracts, conspiracy, and consequential damage. In this case it is trespass, but not pure trespass. It is trespass allied specifically in the particulars of claim to urban exploration by way of climbing high on buildings causing a substantial risk as outlined above.

2 – Sufficient evidence to prove the claim

- 13 There must be sufficient evidence before the Court to justify the Court finding that the claim has a reasonable prospect of success. For the reasons set out in the previous judgment of Soole J and the reasons accepted by the other judges which I have set out above, I do consider that there is sufficient evidence to justify a finding that there is not only a real issue to be tried, but that the Claimant has a realistic prospect of success.

3 – Whether there is a realistic defence

- 14 Whilst this is not a summary judgment application it is an *ex parte* application. As the Supreme Court made clear in *Wolverhampton*, it is incumbent upon the Claimants to put before the Court the potential defences of the persons unknown and for those to be considered. That has been briefly touched upon in the skeleton argument of Mr Morshead, particularly in relation to Human Rights. This is not a case which involves a breach of the Human Rights of the persons unknown by way of freedom of speech or freedom of assembly. Rather, the case only concerns matters which take place on the Claimants' land. For the reasons that are explained in the skeleton argument in paras. 40 through to 47 there is no reason to suppose that anyone's Convention rights are engaged by the relief sought in this claim. I do not consider that s.12(3) of the *Human Rights Act* is breached by the continuation of the interim injunctions.

4 – The balance of convenience and compelling justification

- 15 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.

5 – Whether damages are an adequate remedy

- 16 It is quite clear to me that damages could not be an adequate remedy for severe personal injury either caused to building site workers, security service staff, emergency workers or members of the public. Compensation may follow but insurance will probably not be in place and in any event money does not cure serious injuries.

6 – The procedural requirements

17 The PUs must be clearly identified 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.

In this case, I have departed from the practice used by the other High Court judges and deputy High Court judges in this case by requiring the Claimants to add the words “climb or climbing” in the definition of PUs. I was concerned that the scope of the interlocutory injunctions granted to date and sought in future would cover homeless people who sought to enter the Site and sleep under a tarpaulin, or youths who sought to drink alcopops on Site but had no intention of climbing anywhere. If those were the perpetrators which were to be restrained by this injunction, I would not have granted it. In my judgment it is not the purpose of this jurisdiction in the High Court to make PU injunctions against mere vagrants or trespassers, there must be something more and the full requirements must be satisfied. In this case, for those who climb high structures and create real risks of substantial harm to those I have listed above, the factors are satisfied. In the interim order I will make the definition of PUs has been altered to include climbing. I am satisfied that it better mirrors the substance of the claim form and the witness statements in support.

7 – The terms of the injunction

18 The prohibitions must be set out in clear words and should not be framed in legal technical terms (like the word “tortious”, for instance). I am afraid I use that word a lot, but it is not to be used in the terms of the injunction. Further, if and insofar 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. In this case, the behaviour is clearly and plainly stated in the terms of the injunction as “trespass plus climbing” or “staying on the site plus climbing” and I am satisfied that that is sufficiently tight. There is no risk of this breaching the rights of persons unknown on public highways or in public areas because it only relates geographically to the Site.

8 – Prohibitions must match the pleaded claim

19 In this case they do, now that the words “climbing” are added.

9 – The geographical boundaries

20 The boundaries are set out in clear plans which were attached to the previous injunctions and will be attached to the injunction which I grant.

10 – Temporal limits - duration

21 The duration of any final injunction should only be such as is proven to be reasonably necessary to protect the Claimants’ legal rights in the light of the evidence of past tortious activity and the future feared or *quia timet* tortious activity. In this case, I am not granting a final injunction, I am granting a further interim injunction and I consider that a year or approximately a year is an appropriate duration for that to keep costs down and because there is no evidence currently before me that the general public wishes to stop urban exploration or abseiling on building sites.

11 – Service

- 22 Understanding that PUs are, by their nature, not identified, the proceedings, the evidence, the summary judgment application (if one is made) and any draft order and notice of a hearing must be served by alternative means which have been considered and sanctioned by the Court. In this case, the application is *ex parte* and I consider that is appropriate in the circumstances. However, if it was a final hearing, then appropriate and authorised alternative service would need to be proven.

12 – The right to set aside or vary

- 23 PUs must be given the right to apply to set aside or vary the injunction on shortish notice, as set out in the judgment in *Wolverhampton*. They are given that right in the order that I have made and they were given that right in the previous interlocutory orders. I note that nobody took that right up.

13 – Review

- 24 At least in relation final orders, they are not final in PU cases, they are *quasi* final. Final orders in PU cases are clearly not final, they are *quasi* final in that they need to be reviewed in accordance with the judgment of the Supreme Court in *Wolverhampton*. Provision needs to be made for reviewing the injunction in future and the regularity of reviews depends on the circumstances. In this case, I do not need to consider review because it is a further interlocutory injunction that I am granting.

Conclusion

- 25 Having run through the 13 factors I do consider, on the balance of convenience, that it is appropriate to grant a further interim injunction and I do so. I will consider the terms of the injunction as discussed with leading counsel when they are sent through to my clerk. I understand that no costs are required and, hence, the order will say “no costs on the application”.
-

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2024] EWHC 854 (KB)



No. QB-2022-000406

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 28 February 2024

Before:

MR JUSTICE SWEETING

B E T W E E N :

(1) 1 LEADENHALL GP LIMITED
(2) 1 LEADENHALL NOMINEE LIMITED
(3) MULTIPLEX CONSTRUCTION
EUROPE LIMITED

Claimants

- and -

PERSONS UNKNOWN ENTERING IN OR
REMAINING AT THE CONSTRUCTION SITE AT
1 LEADENHALL STREET, LONDON EC3V 1PP
WITHOUT THE CLAIMANTS' PERMISSION

Defendants

MR Y VANDERMAN (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Claimants.

THE DEFENDANTS did not appear and were not represented.

J U D G M E N T

MR JUSTICE SWEETING:

- 1 The claimant seeks to extend a two year injunction granted by Fraser J from 15 February 2022 to 29 February 2024 which expires tomorrow. The extension sought is until 28 March 2025. This is to continue to prohibit dangerous trespasses on to the claimant's construction site by urban explorers until the projected date for practical completion of the works. An extension was anticipated at paras.2 to 3 of the order of Fraser J, and he provided an accelerated mechanism for this to be effected.
- 2 The claim relates to 1 Leadenhall Street, where the claimants are constructing a 35-storey building in the City of London. The projected date for practical completion of the works at the site has been pushed back to 28 March 2025, thus explaining the need for an extension to that date.
- 3 I have previously granted an injunction in respect of a site at Elephant and Castle, also intended to prevent trespass on to a building site on which a tall building was being erected with the assistance of cranes. I quote from what I said in that judgment to give some background in relation to "urban exploring":

"Such activity is inherently dangerous and involves risks for other people such as the Claimants' employees or contractors and the emergency services and others who have to assist if those attempting to scale cranes or buildings get into difficulties. There have been well publicised fatalities both in this country and elsewhere as a result of urban exploring leading to falls from high buildings and other structures. The Claimants' experience is that when challenged urban explorers will often run away. Attempts to do so feature in videos posted online. This is in itself dangerous in the context of a construction site where there may be an elevated risk of falls and other injury to those who are not familiar with the layout, who have not received specific training and who are not wearing safety equipment. Where there is an incursion by trespassers, equipment and structures on site, including cranes, must be checked before work can resume. This means that one of the potential consequences of such trespass is delay and interruptions to work on site with associated financial loss".

- 4 On the basis of the evidence filed in support of this application for renewal of the injunction, urban exploring, carrying with it the problems which I have referred to, remains a significant issue for this site and other major construction sites on central locations in London.
- 5 Since the order in this case was made by Fraser J, the Supreme Court has given judgment in *Wolverhampton City Council v London Gypsies and Travellers* [2024] 2 WLR 45, where it decided that injunctions could in certain circumstances be granted against persons unknown who were "newcomers".
- 6 That case has itself recently been considered in detail in *Valero* [2024] EWHC 134 KB, a protest case, where Richie J set out the test to be applied in the light of the Supreme Court's judgment.

- 7 I have helpfully been taken through both cases by Mr Vanderman in the course of his submissions. I am satisfied that the injunctive relief claimed satisfies the criteria in *Wolverhampton*, and helpfully set out in the form of a checklist in the Valero case; it would have done so at the time of the making of the original order.
- 8 There remains a need for the injunction against the background I have set out above. The terms of the order have been the subject of detailed submissions by Mr Vanderman. There are a few minor alterations which are needed, to reflect the decision in *Wolverhampton*, since orders of this type are of a novel kind. They do not require elaborate provisions as to service but require proper notice to be given to those who are affected and who, by their nature, cannot be identified and are likely to remain unidentifiable during the life of the injunction.
- 9 The old distinction between interim and final injunctions no longer applies to this new form of injunctive relief; they combine elements of interim and final injunctions, in particular that the court is not arriving at a settled decision in relation to underlying legal issues. It remains open at all stages for those who may be affected to make applications to the court, hence the necessity for proper notice, both in advance of the granting of such an injunction and after it has been brought into effect. Such orders also have some of the attributes of a final injunction, since there is no need for a return date on which the matter can be finally argued out because it is unlikely that there will be any defendants other than those who will remain “persons unknown”.
- 10 The Supreme Court suggested – for understandable reasons in those circumstances – that there should be a temporal limit. In the context of travellers, that was identified as a period of one year. There are particular reasons for having a period of that length in relation to gipsy and traveller injunctions sought by local authorities. In this case the extension of the injunction by way of a further order is for a period of just over a year, but I do not consider that the Supreme Court was intending to lay down any wider timetable than that which it suggested might be appropriate in the rather different context of traveller injunctions.
- 11 For those reasons, I extend the injunction in the terms of the new order sought, subject to the very minor amendments which were discussed in the course of arguments. If the order can be amended in that form, I will approve and sign it in due course.
- 12 I am grateful for Mr Vanderman’s helpful submissions.
-

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This transcript has been approved by the Judge

Court of Appeal

A

***National Highways Ltd v Persons Unknown and others**

[2023] EWCA Civ 182

2023 Feb 16; 23

Dame Victoria Sharp P, Sir Julian Flaux C, Lewison LJ

B

Injunction — Final — Anticipatory — Highway authority applying for summary judgment seeking final anticipatory injunction prohibiting protestors from disrupting strategic road network — Whether necessary for authority to prove protestors had already committed threatened torts in order to obtain injunction — CPR r 24.2

The claimant highway authority brought claims in trespass, private nuisance and public nuisance in connection with a series of protests in which the protesters were blocking motorways and other roads that formed part of the strategic road network. Having obtained interim anticipatory injunctions against a number of named defendants and “persons unknown”, the claimant applied for summary judgment under CPR Pt 24¹ seeking a final anticipatory injunction against all defendants. The judge granted a final injunction against 24 named defendants who had already been found to have been in contempt of court for breaching the interim injunctions, but granted only an interim injunction against the 109 remaining named defendants and the unnamed defendants. The claimant appealed on the ground that the judge had erred in law in concluding that summary judgment for a final injunction could not be granted against the defendants if the claimant had not shown on the balance of probabilities that they had already committed the tort of trespass or nuisance.

C

D

On the appeal—

Held, allowing the appeal, that when considering whether an anticipatory injunction (whether final or interim) ought to be granted, it was not a necessary criterion that the defendant should have already committed the threatened tort; that, rather, the essence of an anticipatory injunction was that the tort was threatened and that, for some reason, the claimant’s cause of action was not complete; that the test to be applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendant had no real prospect of successfully defending the claim for an injunction; that it followed that the judge in the present case had erred in law in assuming that, before summary judgment for a final anticipatory judgment could be granted, the claimant had to demonstrate that each defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed; that, further, in applying the test under rule 24.2, the fact that very few of the defendants had served a defence or any evidence or otherwise engaged with the proceedings, despite having been given ample opportunity to do so, was of considerable relevance as supporting the claimant’s case that the defendants had no real prospect of successfully defending the claim for an injunction at trial; that if the judge had applied the right test under rule 24.2 and had proper regard to the requirement in rule 24.5 that, if a respondent to a summary judgment application wished to rely on written evidence, he should file and serve such evidence he would, and ought to have, concluded that the 109 named defendants and the unnamed defendants had had no realistic prospect of successfully defending the claim at trial;

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¹ CPR r 24.2: “The court may give summary judgment against a . . . defendant on the whole of a claim or on a particular issue if— (a) it considers that . . . (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial . . .”

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R 24.5(1): “If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must— (a) file the written evidence; and (b) serve copies on every other party to the application, at least 7 days before the summary judgment hearing.”

- A and that, accordingly, a final injunction would be granted to the claimant in respect of all the defendants (post, paras 37–43).

Vastint Leeds BV v Persons Unknown [2019] 4 WLR 2 and *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, CA applied.

Decision of Bennathan J [2022] EWHC 1105 (QB) reversed in part.

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

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)

Barking and Dagenham London Borough Council v Persons Unknown [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51, CA

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

- C *City of London Corp'n v Samede* [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043, DC

Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)

Director of Public Prosecutions v Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985, SC(E)

- D *Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd* [2009] EWHC 339 (Ch)
Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

King v Stiefel [2021] EWHC 1045 (Comm); (Note) [2022] 1 All ER (Comm) 990

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

The following additional cases were cited in argument or referred to in the skeleton arguments:

- E *Abaidildinov v Amin* [2020] EWHC 2192 (Ch); [2020] 1 WLR 5120

Barking and Dagenham London Borough Council v Persons Unknown [2021] EWHC 1201 (QB); [2022] JPL 43

Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417

- F *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)

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

Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661; [2007] FSR 3, CA

Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA

- G *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)

Hooper v Rogers [1975] Ch 43; [1974] 3 WLR 329; [1974] 3 All ER 417, CA

Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch)

Lloyd v Symonds [1998] EHLR Dig 278, CA

Secretary of State for Transport v Persons Unknown [2019] EWHC 1437 (Ch)

Ward (AC) & Son Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's

- H Rep IR 301, CA

APPEAL from Bennathan J

On 21 and 24 September and 2 October 2021 the claimant, National Highways Ltd, issued three claim forms using the modified CPR Pt 8 procedure provided by CPR r 65.43 by which it applied for interim

anticipatory injunctions against the defendants, persons unknown, who from 13 September 2021 onwards had been involved in protests organised by Insulate Britain in and around London and south-east England, blocking highways forming part of the strategic road network (“SRN”). Interim injunctions without notice were granted (i) on 21 September 2021 by Lavender J in relation to the M25, (ii) on 24 September 2021 by Cavanagh J in relation to parts of the SRN in Kent and (iii) on 2 October 2021 by Holgate J in relation to M25 feeder roads. The injunctions were originally made only against persons unknown but contained an express obligation on the claimant to identify and add named defendants. On 1 October 2021 May J ordered that 113 people arrested for participation in the protests be added as named defendants. On the return date of 12 October 2021 the three injunctions were continued until trial or further order and the claims were ordered to proceed together. The claimant continued to add further named defendants as protests continued.

On 22 October 2021 the claimant applied under CPR Pt 81 for an order committing certain defendants to prison for contempt of court for alleged breaches of the M25 injunction. The committal applications were determined on 17 November 2021 (*National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB)), on 15 December 2021 (*National Highways Ltd v Buse* [2021] EWHC 3404 (QB)) and on 2 February 2022 (*National Highways Ltd v Springorum* [2022] EWHC 205 (QB)), with 24 of the 133 named defendants (“the contemnor defendants”) being found to have been in contempt of court.

Also on 22 October 2021 the claimant filed consolidated particulars of claim in three actions, claiming that the conduct of the protesters constituted (i) trespass; (ii) private nuisance; and/or (iii) public nuisance. In October and November 2021 the claims were served on the named defendants. No named defendants were added after November 2021. On 24 March 2022 the claimant applied for summary judgment under CPR r 24.2 and final anticipatory injunctions against all defendants. By orders dated 9 and 12 May 2022 Bennathan J [2022] EWHC 1105 (QB) dismissed the application in part, granting summary judgment and a final injunction against the 24 contemnor defendants but refusing to grant summary judgment and granting an interim injunction against the remaining 109 named defendants and the unnamed defendants.

By an appellant’s notice filed on or about 3 November 2022 and with the permission of and pursuant to the orders of the Court of Appeal (Whipple LJ) dated 27 October 2022 and 8 November 2022, the claimant appealed on the ground that the judge had erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on the claimant to show, on the balance of probabilities, that the defendants had already committed the torts in question. Pursuant to CRP rr 6.15(3)(b) and 23.4(2)(c) permission was given for the appeal to be heard without notice, the defendants having seven days from the date of the order within which to apply to set it aside or vary it, service of documents by posting being dispensed with pursuant to CPR rr 6.15 and 6.27, leave being given to serve by electronic means as detailed in the order.

The facts are stated in the judgment of the court, post, paras 2–25.

A *Myriam Stacey KC, Admas Habteslasie and Michael Fry* (instructed by *DLA Piper UK LLP*) for the claimant.

David Crawford and Matthew Tulley, two of the named defendants, in person on behalf of the 109 named defendants.

The court took time for consideration.

B 23 February 2023. **SIR JULIAN FLAUX C** handed down the following judgment of the court.

Introduction

C 1 This is the judgment of the court. The appellant, National Highways Ltd (“NHL”) appeals, with the permission of Whipple LJ, against various paragraphs of the orders of Bennathan J dated 9 and 12 May 2022. By those orders, the judge dismissed in part the application of NHL for summary judgment (“the SJ application”) by which NHL sought a final anticipatory or quia timet injunction (i) against 133 named defendants who were Insulate Britain (“IB”) protesters who had been arrested by the police at various demonstrations on motorways and other roads and (ii) against persons unknown. The judge granted a final injunction against 24 of the 133 named D defendants, consisting of those who had been found to be in contempt of court but otherwise refused to grant a final injunction, although he did grant an anticipatory injunction on an interim basis against the remaining 109 named defendants and against persons unknown, on essentially the same terms as the final injunction.

E *Factual and procedural background*

F 2 NHL is the highways authority for the strategic road network (“SRN”), pursuant to section 1A of the Highways Act 1980, and has the physical extent of the highway vested in it. NHL commenced three sets of proceedings in response to a series of protests organised by IB which began on 13 September 2021 in and around London and south-east England. The protests involved protesters blocking highways forming part of the SRN, normally by sitting down on the road surface or gluing themselves to the road surface. The protests created a serious risk of danger and caused serious disruption to the public using the SRN and more generally.

3 NHL made urgent applications for interim injunctions to restrain the conduct of the protesters:

G (1) In QB-2021-003576, Lavender J granted an interim injunction on 21 September 2021 in relation to the M25.

(2) In QB-2021-003626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent.

(3) In QB-2021-003737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 “feeder” roads.

H (4) On the return date of 12 October 2021, the three injunctions were continued until trial or further order and the claims were ordered to proceed together.

4 Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur a number of disclosure orders were made, providing for chief constables of the relevant police forces to

disclose to NHL the identity of those arrested during the course of the protests, together with material relating to possible breaches of the injunctions. On 1 October 2021, May J ordered that 113 people arrested for participation in the protests be added as named defendants. NHL continued to add further named defendants as protests continued. In October and November 2021 the claims were served on named defendants. No named defendants have been added since November 2021.

5 On 22 October 2021, NHL filed consolidated particulars of claim in the three actions. The case was pleaded on the basis that the conduct of the protesters constituted (1) trespass; (2) private nuisance; and/or (3) public nuisance. The pleading described the protests that had already taken place and contended that they exceeded the rights of the public to use the highway and that the obstruction and disruption caused by the protests was a trespass on the SRN which endangered the life, health, property or comfort of the public and/or obstructed the public in the exercise of their rights. Paras 18 and 19 of the pleading set out the basis for the anticipatory injunction sought: “there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the roads” and referred to open expressions of intention by the defendants to continue to cause obstruction to the SRN, unless restrained. Although a claim for damages was made in the pleading, that has not been pursued by NHL.

6 On the same day as the pleading was filed, NHL made its first contempt application in relation to breaches of the M25 Injunction, given that notwithstanding the injunction, blocking and disruption of the M25 by IB protesters was continuing. This was determined on 17 November 2021. Two further contempt applications in relation to breaches of the M25 injunction were made on 19 November 2021 and 17 December 2021, determined on 15 December 2021 and 2 February 2022 respectively. 24 of the 133 defendants (to whom we will refer as “the contemnor defendants”) were found to have been in contempt of court.

7 On 23 November 2021, defences were served on behalf of three of the named defendants. Mr Horton and Mr Sabitsky stated in identical terms that they had never trespassed on the SRN and had no intention of doing so. Proceedings against them were discontinued. Mr Tulley admitted being involved in protests on the M25 on three days in September 2021. He asserted that he was not involved in the IB protests covered by the injunctions but admitted being involved in IB protests not covered by the injunctions. He has remained a defendant. No other defences have been served and up to and including the hearing before the judge there was no engagement with the proceedings and no statements that the other defendants were not intending to continue the protests.

8 On 24 March 2022, NHL issued the SJ application in the interests of finality. Although it would have been entitled to apply for default judgment against all the remaining named defendants other than Mr Tulley, it was explained in the witness statement in support of the SJ application of Ms Laura Higson, an associate at DLA Piper UK LLP, NHL’s solicitors, that this procedure was adopted to afford the defendants the opportunity to engage with the merits of the claim. The SJ application was served on the named defendants, but as already indicated, they chose not to serve defences or otherwise engage with the merits of the claim.

A 9 Ms Higson's witness statement sets out details of the protests which had already occurred and the risk of future protests, including quoting an IB press release of 7 February 2022 on its website which stated:

"We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.

B "Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it.

"We haven't gone away. We're just getting started."

C Ms Myriam Stacey KC, on behalf of NHL, explained that it was because of this two to three year time frame that the draft order served with the SJ application sought a final injunction until a date in April 2025.

10 Ms Higson also quoted another IB press release dated 15 February 2022 stating that it had joined Just Stop Oil. She referred to a presentation by Roger Hallam, a leading figure within both organisations, who said:

D "Thousands of people will be going onto the streets and onto the motorways to the oil refineries and they will be sitting down."

11 She referred to the disclosure orders and to the fact that each of the named defendants had been arrested on suspicion of conduct which constituted a trespass and/or nuisance on the roads subject to the interim injunctions. In 28 sub-paragraphs of para 51 of the statement she set out details of all the arrests between 13 September and 2 November 2021. At

E para 60 she summarised the evidence before the court and at para 61 said that on the basis of that evidence there was a real and imminent risk of further unlawful acts of trespass and nuisance on the parts of the SRN covered by the interim injunctions and that risk was unlikely to abate in the near or medium future. The court was accordingly invited to accede to the SJ application.

12 The SJ application was heard by the judge on 4 and 5 May 2022.

F *The judgment below*

13 Having set out the background to the claims, the judge referred to the SJ application at para 5. He evidently considered summary judgment a distinct process from the grant of a final injunction, since, at para 4 of the judgment, he says that the application for a final injunction is being made "in addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at paras 24–36 then with the injunction at paras 37–49 of the judgment.

G 14 It is also evident, both from what the judge said in the course of argument and in the summary judgment section of the judgment, that he considered that summary judgment could not be granted unless NHL could establish tortious liability of the named defendants in respect of the protests which had taken place in the past. At para 25 the judge said that an injunction was a remedy, not a cause of action, then at para 26 that summary judgment under CPR Pt 24 was available for a cause of action not a remedy. He then identified the causes of action pleaded by NHL as trespass, public nuisance and private nuisance.

15 Having summarised the law on those torts, he then found, at para 32, that, in relation to the 24 contemnor defendants, there was sufficient evidence to give summary judgment under Part 24 against them based on the judgments of the Divisional Court finding them in contempt. The factual summaries in those cases gave sufficient details for the judge to conclude that there was no realistic basis to believe there would be any issue if there were to be a trial.

16 However, at para 33, the judge said that the position of the other named defendants was different. He said the only evidence against them was in the 28 sub-paragraphs of para 51 of Ms Higson's witness statement, the first two of which he then quoted. He said, at para 34, that at no point did she identify which defendant was arrested on what date or give details of the activities which led to the arrest. He noted that Ms Stacey relied upon the fact that, apart from the three defences we have mentioned above, none of the defendants had served a defence to the claim.

17 At para 35 he concluded, in relation to the question whether NHL had shown that there was no real prospect of a successful defence to the claims by the 109 named defendants, that NHL's evidence was "manifestly inadequate" for a number of reasons. The first was, so the judge said:

"I would have to be satisfied in each case. As a matter of common sense, it is highly likely that many of the defendants *have* committed the three torts alleged but I am not able to take a broad brush approach that 'lumps together' all 109 in a case where I am dealing with important and fundamental rights."

The judge then went on to cite examples of individual defendants who had been arrested, but in relation to whom it transpired that they had not committed any of the torts. He concluded, at para 36, that the consequence of his decision was that he had been persuaded to grant both a final injunction in respect of the 24 contemnor defendants and an interim injunction in respect of the 109 and the unknown defendants.

18 The judge then turned to the question of injunction. At para 37 he cited the test for the grant of an interim injunction in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

"the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protesters, some of whom may have no assets, damages would obviously not be an adequate remedy."

19 At para 38 the judge adopted the summary of Marcus Smith J in *Vastint Leeds BV v Persons Unknown* ("*Vastint*") [2019] 4 WLR 2 as to the effect of Court of Appeal decisions on anticipatory injunctions. He said there were two questions he had to address:

"(1) Is there a strong possibility that the defendants will imminently act to infringe the claimants' rights?

"(2) If so, would the harm be so 'grave and irreparable' that damages would be an inadequate remedy[?]" I note that the use of those two

A words raises the bar higher than the similar test found within *American Cyanamid*.”

20 Counsel who appeared before the judge for various environmental campaigners who were not IB protesters pointed out that the protests described by NHL were all in 2021 and had not been repeated at that stage in May 2022. The judge said at para 39 that was a fair point but was
B outweighed by some of the public declarations made by IB. The judge said:

“Once a movement vows ‘to cause more chaos across the country in the coming weeks’ and threatens ‘a fusion of other large-scale blockade-style actions you have seen in the past’, the claimant must be entitled to seek the court’s protection without waiting for major roads to be blocked. In my view the scale of the protests being discussed, and those that have
C already occurred, are sufficient to meet the heightened test of harm so ‘grave and irreparable’ that damages would be an inadequate remedy.”

21 At para 40 the judge concluded that the criteria in section 12 of the Human Rights Act 1998 were satisfied and did not prevent the grant of an injunction. At para 41 the judge cited two Court of Appeal cases dealing with injunctions against persons unknown: *Ineos Upstream Ltd v Persons
D Unknown* (“*Ineos*”) [2019] 4 WLR 100 and *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802. He summarised the combined effect of those cases as being:

“(1) The courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].

“(2) The terms must be sufficiently clear and precise to enable persons
E potentially effected [sic] to know what they must not do [*Ineos* and *Canada Goose*].

“(3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant’s rights [*Canada Goose*].”

22 The judge then referred to cases where the balance between the
F competing rights of protesters and others have been considered, starting with *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act 1998 came into force and has to be read with a degree of caution in the light of *Director of Public Prosecutions v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the district judge dismissing the
G prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *Director of Public Prosecutions v Cuciurean* [2022] QB 888, saying at para 44:

“The limits to *Ziegler* were made clear in *Director of Public Prosecutions v Cuciurean* in which Lord Burnett CJ held that *Ziegler* did
H not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier’s rights under article 1 of Protocol 1, by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not

allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway.” A

23 It is worth noting, at this point, that under regulation 15 of the Motorways Traffic (England and Wales) Regulations 1982 (SI 1982/1163), pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey to that provision, it was not relied upon by NHL, either before the judge or before this court. B

24 The judge cited *City of London Corp'n v Samede* [2012] PTSR 1624 where Lord Neuberger of Abbotsbury MR said that political and economic views were at the top end of the scale in terms of views whose expression the Convention for the Protection of Human Rights and Fundamental Freedoms is invoked to protect. At para 48 he said, in drawing together the various legal threads: C

“in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*Jones and Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the claimant’s rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protesters to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*National Highways Ltd v Heyatawin* [2022] Env LR 17].” D

25 At para 49, in balancing the competing interests, he said: E

“The general character of the views held by IB protesters are properly described as ‘political and economic’ and as such are at the ‘top end of the scale’, as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protesters themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson’s statement, above. Judging the future risks of protests against IB’s past conduct I approved the terms of the draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads.” F

The ground of appeal

26 NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the G

- A named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show, on the balance of probabilities, that all defendants had actually already committed the torts in question.

The submissions

- B 27 Ms Stacey submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* [2019] 4 WLR 100, para 34(1). This form of injunction was granted when the claimant's rights were threatened, but, for whatever reason, the claimant's cause of action was not complete: per Marcus Smith J in *Vastint* [2019] 4 WLR 2, para 31(2):
- C

“Quia timet injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory.”

- D 28 The court's jurisdiction to grant quia timet or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint*, para 27. Ms Stacey referred to the two-stage test for considering whether to grant a quia timet injunction, set out by Marcus Smith J in *Vastint*, adopted by the judge in the present case and which we quoted at para 19 above. In relation to the first stage, whether there is a strong possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey drew attention to the factors identified by Marcus Smith J at para 31(4), in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public, such as missing a hospital appointment or a funeral or having an accident.
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- F 29 In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey submitted that, whilst the law had been in a state of flux the decision of the Court of Appeal in *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295 (“*Barking*”) represents the law as it currently stands. In that case, this court held that there was power under section 37 of the Senior Courts Act 1981 to grant a final injunction against persons who were unknown and unidentified, so-called “newcomers”. This court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose* [2020] 1 WLR 2802.
- G

- H 30 The Supreme Court heard the appeal from the decision of the Court of Appeal in *Barking* on 8 and 9 February 2023 and judgment is reserved. In answer to the question from the court as to what would happen if we follow the decision of the Court of Appeal in *Barking* and the Supreme Court concludes that the Court of Appeal decision was wrong, Ms Stacey pointed out that the terms of the order for an injunction (whether the final or interim form) provided for a review hearing before the High Court in April 2023 to determine whether the injunction should be discharged in whole or in part.

31 She asked this court to note that the judge had dealt with the conditions to be satisfied in granting an injunction against persons unknown at para 41 of his judgment and that there was no issue that the conditions were met. The judge had been referred to the decision of the Court of Appeal in *Barking* and no part of his judgment was founded on the notion that it was wrongly decided.

32 In relation to summary judgment under CPR Pt 24, Ms Stacey submitted that there was no suggestion in CPR r 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd (trading as OpenAir) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at para 24.2.3 of *Civil Procedure 2022*, vol 1. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ application.

33 Ms Stacey also relied upon the statement by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) also cited at para 24.2.3:

“21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the court will be entitled to draw a line and say that—even bearing well in mind all of those points—it would be contrary to principle for a case to proceed to trial.

“22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up . . .”

34 Ms Stacey relied upon CPR r 24.5 which refers to the requirement that, if a respondent to a summary judgment application wishes to rely on written evidence, he should file and serve such evidence. She submitted that there was a process and an expectation that a respondent who wishes to oppose a summary judgment application should put in evidence. Other than the three defendants who served defences, the named defendants in the present case had not put in any evidence or defence, either formally or informally, and had not otherwise engaged with the court process. The judge had erroneously dismissed this failure to serve defences and evidence as irrelevant to the SJ application. Ms Stacey submitted that the fact that the named defendants had an opportunity to file a defence and did not do so was self-evidently a factor to be weighed in the assessment of the issue which the judge had to decide on the SJ application, which was whether on the evidence, the defendants had no real prospect of successfully defending the claim for a final precautionary injunction. She submitted that there was no real prospect of any defence succeeding and no reasonable basis to expect any further evidence would be forthcoming at trial.

35 At the hearing of the appeal, some 20 of the named defendants attended court. Three of those were contemnors against whom the judge granted a final injunction and in respect of whom there was no appeal before the court. The other 17 were some of the 109 defendants.

A One of them, David Crawford, was deputed to address the court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

B 36 The difficulty which the named defendants face is that none of their points was made before the judge because they simply failed to engage in the proceedings. In relation to the test for the grant of an anticipatory injunction, the judge considered the evidence which was before him and concluded that there was a real and imminent risk of the torts of trespass and nuisance being committed so as to justify the grant of the injunction against the 109 named defendants, albeit on an interim basis. There was and is no cross-appeal by
C the defendants against any part of the judgment dealing with the grant of an injunction. The matters which Mr Crawford and Mr Tulley put forward cannot be relied upon before this court as a basis for challenging the judge's conclusion as to real and imminent risk and as to the appropriateness of granting an injunction.

D *Discussion*

37 Although the judge did correctly identify the test for the grant of an anticipatory injunction, in para 38 of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that before summary judgment for a final anticipatory injunction could be granted NHL
E had to demonstrate, in relation to each defendant, that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.

38 As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should
F have already committed the relevant tort which is threatened. *Vastint* [2019] 4 WLR 2 was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at para 31(1) the effect of authorities which do draw a distinction between final prohibitory injunctions and final
G mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.

39 There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at para 31(2) quoted at para 27 above makes clear, for some reason the claimant's cause of
H action is not complete. It follows that the judge fell into error in concluding, at para 35 of the judgment, that he could not grant summary judgment for a final anticipatory injunction against any named defendant unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.

40 The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR r 24.2, namely, whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial.

41 It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see para 35(5) of the judgment), the defendants' general attitude was of disinterest in court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly, it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel* [2021] EWHC 1045 (Comm). If the judge had applied the right test under CPR r 24.2 and had had proper regard to CPR r 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that, accordingly, NHL was entitled to a final injunction against those defendants.

42 Although *Barking* [2023] QB 295 was cited to the judge and he refers to it at para 36 of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown, as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

43 The only aspect of the final and interim injunctions granted by the judge and the final injunctions sought by NHL which caused us any concern is the reference in paragraphs 10.1 and 11.1 of the injunction order dated 12 May 2022 to "tunnelling within 25m of the Roads". We are not aware of any such tunnelling having occurred or having been threatened by the IB protesters and Ms Stacey was not able to identify any such threats. In the circumstances, it seems to us that these words should be expunged from the injunctions granted by the judge and from the final injunction which we will grant. Subject to that one point, the appeal is allowed.

Appeal allowed.

CATHERINE MAY, Solicitor

Court of Appeal

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

[2019] EWCA Civ 515

2019 March 5, 6; April 3

Longmore, David Richards, Leggatt LJJ

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

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

On the appeal—

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

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

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

APPEAL from Morgan J

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

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

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

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

Heather Williams QC, Blinne N   Ghr  laigh and Jennifer Robinson (instructed by *Leigh Day*) for the sixth defendant.

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

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

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

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

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

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

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

The claimants

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

The defendants

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

6 The second defendant is described as:

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

7 The third defendant is described as:

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

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

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

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

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

The judgment

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

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

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

13 The judge then commented, at para 21:

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

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

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

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

This appeal

17 Permission to appeal has been granted on three grounds:

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

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

Persons unknown: the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of the law to this case

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

Width and clarity of the injunctions granted by the judge

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

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

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

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

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

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

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

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

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

Geographical and temporal limits

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

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

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

"(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.

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

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

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

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

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

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

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

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

Disposal

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

Conclusion

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

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

A

[COURT OF APPEAL]

HOOPER v. ROGERS

1974 May 1, 2;
June 10Russell, Stamp and
Scarman L.JJ.

B

Injunction—Mandatory injunction—Jurisdiction to grant—Quia timet injunction—Excavation causing process of soil erosion—Proven probability of eventual damage to nearby house—Whether injunction premature—Degree of future injury—Principles to be applied—Whether jurisdiction to make order

C

The plaintiff and the defendant were owners of adjacent farmhouses and owners and occupiers in common of the immediately surrounding land, which sloped steeply down from the plaintiff's farmhouse. The defendant, using a bulldozer, deepened a track, which cut across the slope, thereby interfering with its natural angle of repose and exposing it to a process of soil erosion which would eventually deprive the footings of the plaintiff's farmhouse of support and cause it to collapse. The plaintiff brought a successful action in the county court, inter alia, for damages in lieu of an injunction ordering the defendant to reinstate the natural angle of repose of the slope.

D

On appeal by the defendant contending that the judge had no jurisdiction to grant a mandatory quia timet injunction:—

E

Held, dismissing the appeal, that as there was no evidence that any step other than that sought by way of the mandatory injunction would avoid the proven probability of damage to the plaintiff's farmhouse, an injunction would not be premature (post, p. 49E-F); that the degree of future injury was not an absolute standard but justice should be done between the parties having regard to all the relevant circumstances; and that, in the circumstances of the present case, it was open to the judge to hold that he could have made the mandatory order and to grant damages in lieu (post, p. 50C-D).

F

Earl of Ripon v. Hobart (1834) 3 My. & K. 169 and *Fletcher v. Bealey* (1885) 28 Ch.D. 688 considered.

Per Scarman L.J. The plaintiff's position, as co-occupier of the land where the act he complains of was done, is an irrelevant coincidence unless it can be used to raise a defence of contributory negligence or volenti non fit injuria (post, p. 51D-E).

G

The following cases are referred to in the judgments:

Fletcher v. Bealey (1885) 28 Ch.D. 688.

Hall v. Beckenham Corporation [1949] 1 K.B. 716; [1949] 1 All E.R. 423.

Laugher v. Pointer (1826) 5 B. & C. 547.

Ripon (Earl of) v. Hobart (1834) 3 My. & K. 169.

H

The following additional cases were cited in argument:

Attorney-General v. Nottingham Corporation [1904] 1 Ch. 673.

Lemos v. Kennedy Leigh Development Co. Ltd. (1961) 105 S.J. 178, C.A.

Morris v. Redland Bricks Ltd. [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969] 2 All E.R. 576, H.L.(E.).

West Leigh Colliery Co. Ltd. v. Tunncliffe & Hampson Ltd. [1908] A.C. 27, H.L.(E.).

A

APPEAL from Judge Chope at Launceston County Court.

On March 9, 1972, the plaintiff, Albert Edgar Hooper, as owner of Pengold Farm, Crackington Haven, Cornwall, brought proceedings for an injunction and damages against the defendant, Digory Arthur Rogers, alleging that track-excavating operations carried out by the defendant in December 1971 constituted a nuisance and/or an unlawful interference with the plaintiff's rights and property. The plaintiff claimed, *inter alia*, (1) an injunction restraining the defendant from carrying out further work; (2) a mandatory injunction requiring the defendant, *inter alia*, to replace and consolidate the excavations with quarry rubble; and (3) damages not exceeding £750. On July 20, 1973, Judge Chope gave judgment for the plaintiff for £750. The defendant appealed on the grounds (1) that the principles upon which a *quia timet* mandatory injunction may be granted, or damages awarded in lieu, are that (a) there is a very strong probability that grave damage will occur, and (b) such damage is imminent; (2) that the evidence did not show that there was a very strong probability of grave damage to the plaintiff's farmhouse, or that such damage was imminent; and (3) that there was no ground in law or fact upon which the judge could properly award an injunction or damages in lieu.

B

C

D

The facts are stated in the judgment of Russell L.J.

Bruce Maddick for the defendant. The plaintiff failed to show that damage to his farmhouse was imminent; and it is necessary for the making of a *quia timet* injunction for damage to be certain and imminent, a fear that damage will occur in the future is not sufficient. *Earl of Ripon v. Hobart* (1834) 3 My. & K. 169, 172, 176-177, established the requirements of certainty and imminency in the granting of a *quia timet* injunction. Reliance is also put on *Fletcher v. Bealey* (1885) 28 Ch.D. 688, *per* Pearson J. at p. 698.

E

In *Lemos v. Kennedy Leigh Development Co. Ltd.* (1961) 105 S.J. 178 the Court of Appeal upheld a finding that in 1959 a danger which might occur in 1962 was not sufficiently imminent, though there was a definite future risk if nothing was done.

F

For the purposes of the appeal the court should view the case as though it were an action for support. Certainly, the parties are tenants in common of the track and the defendant was wrong to remove part of the bank, but the case was not concerned simply with damage to the bank but principally with future damage to the plaintiff's farmhouse which brings the case within the support type of action.

G

The damages awarded were based on the cost of preventing potential danger to the farmhouse, but the plaintiff's loss is not the cost of preventing damage to the farmhouse by infilling. If the damages are to be regarded as common law damages, the defendant's answer is that there is no tort until damage has been sustained.

H

The plaintiff could not succeed at common law because he has suffered no damage to his house. In an action in nuisance based upon deprivation of support it is necessary to show actual damage, even

A future certain damage is not enough. [Reference was made to *Winfield and Jolowicz on Tort*, 9th ed. (1971), pp. 563-564; and *West Leigh Colliery Co. Ltd. v. Tunncliffe & Hampson Ltd.* [1908] A.C. 27.]

[SCARMAN L.J. Would you accept that although at common law no damages can be recovered where injury is merely threatened, where injury has already occurred compensation can be recovered for damage which would occur in the future?]

B Generally that must be so, but the present is a very special case because no tort has been committed against the plaintiff in regard to the house. It would put the matter in a different light if a trespasser had taken the defendant's action rather than a tenant in common. [Reference was made to *Morris v. Redland Bricks Ltd.* [1970] A.C. 652.]

C *Graham Neville* for the plaintiff. The defendant has wrongly used his ownership of the land so as to cause a substantial interference with the plaintiff's rights as joint owner of the land. The tort, be it in nuisance or negligence, is the interference with the rights of the plaintiff by moving the earth about without consent in such a way as to interfere with the plaintiff's enjoyment of his land. The plaintiff has established that that tort caused damage, part of the damage flowing as a result being the future damage to the house. The support cases are different because they rely on damage to constitute the tort, a cause of action not arising until damage occurs and there can be no claim in respect of prospective damage.

D A joint owner can certainly commit a nuisance against another joint owner if he uses the land in such a way as to interfere with that other's enjoyment of the land, but damage has to be proved before the cause of action arises.

E If the plaintiff cannot establish any right to damages at common law in regard to the house, he must rely on a quia timet application, the question then being whether the case is one in which the court would have jurisdiction to order the defendant to restore the angle of the bank. It is clear on authority that damages can be awarded in lieu of a quia timet injunction. The judge found a very real probability of damage and reliance is made on *Fletcher v. Bealey*, 28 Ch.D. 688, 698. That case had rather different facts, the onset of the damage there being of such a nature that the plaintiff would receive sufficient warning to enable him to bring an action in time. The present case comes within the second leg of Pearson J.'s observations at p. 698. It was not necessary to take any particular step at the time the action was brought in *Fletcher*, whereas in the present case the erosion must be stopped now or very soon, there being no further remedy which is likely to be of assistance in the future.

G In *Attorney-General v. Nottingham Corporation* [1904] 1 Ch. 673, which was a public nuisance case, there was no use of the word "imminent."

H *Lemos v. Kennedy Leigh Development Co. Ltd.*, 105 S.J. 178, was a very different case on its facts; there was an assurance by the defendant that he would take all possible precautions to avoid the risk of damage.

In *Morris v. Redland Bricks Ltd.* [1970] A.C. 652 reliance is made on

the use of the words "grave damage will accrue to him in the future," in Lord Upjohn's first general principle at p. 665. His third principle, at p. 666, seems to relate only to measure of damages and really seems to be aimed at a situation of someone asking for a quia timet injunction where to repair would cost half a million pounds while the damage to the plaintiff does not exceed £2,000. In such a case the court would not make an order to repair, but this point does not really come into the present case except in the sense of being something which the court should take into account when ordering damages. A B

Maddick in reply. An example of the sort of situation envisaged in the passage in *Fletcher*, 28 Ch.D. 688, 698, would be the case of a plaintiff with a house next to a factory chimney which he alleges is in danger of falling; the chimney would fall in seconds, and, accordingly, it would be impossible for the plaintiff to protect himself against future damage. The present is not such a case. C

In *Attorney-General v. Nottingham Corporation* [1904] 1 Ch. 673 and *Morris v. Redland Bricks Ltd.* [1970] A.C. 652 imminence was not in question and there was no need to mention it.

[RUSSELL L.J. A mandatory injunction is relevant in a now or never type of case, is it not?]

It is relevant in a now or probably never type of case. In any event the plaintiff has the right to infill himself as a co-occupier of the track though it is conceded that in so far as he incurred expense in so doing he would be entitled to claim therefor against the defendant. But on the present action the plaintiff is not entitled to recover against the defendant. D

Cur. adv. vult. E

June 10. The following judgments were read.

RUSSELL L.J. This appeal from Launceston County Court arises out of an episode in December 1971, when the defendant procured the levelling and deepening of a track on a piece of land known as Town Place. He did this without warning to the plaintiff and in a most high-handed manner. In about the centre of this land are two semi-detached buildings. The one to the east, Pengold farmhouse, belongs to the plaintiff, the other belongs to the defendant and is not occupied. The title to the rest of Town Place was not very closely investigated below, but I think that we must proceed upon the assumption that it was and is beneficially owned and occupied by the parties in common. The lie of the land is that it descends towards the east from the plaintiff's farmhouse fairly steeply. The track in question goes north from the north-east corner of the plaintiff's farmhouse for some 100 feet or so, turns hairpin right and continues south-east for some 250 feet and turns hairpin left slightly east of north steeply down to a stream which is the boundary between Town Place and some of the defendant's fields. From this description it will appear that the middle stretch of the track cuts across a steep slope, the west edge being at its nearest point some 80 feet from the farmhouse. The gouging out by bulldozer and deepening of the track in this middle section withdrew support from the F G H

A west bank of the track. Below, the judge concluded that the defendant had been guilty of a nuisance by his activities, causing damage totalling some £40 under two heads, both related to the effect of those activities on the occupation of the plaintiff of Town Place. There is no appeal in respect of that finding; it was not suggested below that an action laid in nuisance was not sustainable in law by one co-owner in occupation against another co-owner in occupation, and I do not propose to examine that matter.

B The most serious complaint by the plaintiff was based upon the threat to the support of his farmhouse which on the evidence was created by withdrawal of support from the west edge of the track, or perhaps, to put it more correctly, by the interference by the defendant's activities with the natural angle of repose of the hillside. What was forecast was erosion of the soil in an easterly direction, starting at the west edge of the track, continuing backwards up the hill towards the plaintiff's farmhouse, depriving some trees between the track and the farmhouse of their root hold until they would fall over and no longer help to bind the soil on the slope, with the process ending in the footings of the farmhouse being deprived of earth support and the building being damaged and collapsing: all this, it was said, being aided by the nature of the terrain and the prevailing westerly gales and rain. The judge awarded damages under this head based on the cost of reinstating the track to its former condition by replacing the cubic yardage of soil removed and consolidating it: this would be considerably more than the £750 limit, and judgment was accordingly given for £750. The defendant appeals on the ground that no damages based upon the threat to the support of the farmhouse could be awarded.

E It is, I apprehend, clear that in respect of the support of the farmhouse no damages at common law could have been awarded. It is established by authority binding upon this court (a) that damage is the gist of the action in nuisance, (b) that in an action for damages based upon deprivation of support to land or buildings it is necessary to establish that the land or buildings have been physically damaged by the withdrawal of support, and (c) that damages cannot be awarded at common law in a case of probable or even certain future physical damage to the land or buildings from loss of support based upon a present decline in the market value of the land due to such probable or certain future physical damage. But this is a case in which a mandatory order was sought upon the defendant to take such steps as were necessary to reinstate the excavated track to its former condition so as to restore to the slope the angle of repose of the soil and thus avert the threat of future removal of support to the farmhouse. The award of damages could only be supported as equitable damages under the Chancery Amendment Act 1858 (Lord Cairns's Act) in lieu of such an injunction. The injunction, mandatory in character, would be quia timet, as preventing an apprehended legal wrong, the legal wrong requiring in this case physical damage to the farmhouse for its constitution or (save the mark) perfection.

H In this connection I would observe that, in so far as there may be an argument in respect of any effect on Town Place itself that an action in nuisance would not lie by one occupying co-owner against the other, it does not seem to me that any such difficulty should lie in the plaintiff's path in

relation to his wholly-owned farmhouse, even if the point of law were open to the defendant in this court, which it is not.

A

The case in this court therefore boils down to the question whether it is one in which the judge could have (however unwisely in the context of the relationship of unremitting hostility between the parties) made a mandatory order for the reinstatement of the natural angle of repose of the slope, having regard to the evidence of the probable ultimate outcome, in terms of removal of support to the farmhouse, of the defendant's interference with that natural angle of repose. The whole contention of counsel on behalf of the defendant is that there was here no case on which a mandatory order could have been made—*quia timet*: and, consequently, there was no scope for an award of equitable damages in lieu under Lord Cairns's Act. I observe that it was, at least tentatively, conceded that if the plaintiff expended £750 (or even more) on infilling and consolidating the track, the plaintiff as co-owner would be entitled in a separate action to claim against the defendant as co-owner contribution to the cost of certainly 50 per cent. and perhaps 100 per cent. I do not think it right to assume against the defendant that this must be so: we have not sufficiently examined the situation in law between co-owners in common occupation. Accordingly, I do not think that this case should be decided against the plaintiff upon the assumption that he is entitled in right of his co-ownership to reinstate the track and recover in other proceedings the cost of so doing. It might even be that to the co-owned land the acts of the defendant were beneficial.

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Before considering authority related to the circumstances in which injunctions *quia timet*, and mandatory injunctions in particular, may be ordered, I would refer to the evidence of the situation in this case. I have already described in general terms the lie of the land and the threat to the farmhouse.

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Mr. Borton, a surveyor, inspected the site on behalf of the plaintiff in January 1972. He inspected again in January and June 1973, and observed erosion from the west of the track. He considered that there was a long-term danger to the plaintiff's farmhouse by the process that I have already described. He said that if (as had been done) you dig out the bottom, the top follows. He could not give a time when the erosion would reach the farmhouse. His remedy was either to fill back the track and consolidate or (more expensively) build a retaining wall on the west edge of the track as dug out.

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The judgment contains these passages:

"The evidence of Mr. Borton, which I accept, is that there is a real probability, not just a possibility—a real probability—of prejudice to the plaintiff's house if nothing is done. He says that when you take out the bottom, then the top follows. . . . The trees at the top of the bank will be in jeopardy with the continual erosion, and there is a long-term danger to the building. . . . I do not agree that it is all speculative. I am satisfied that unless something is done, judging by what has happened already since December 1971, particularly with regard to the terrain, the trees on the bank to the west of the track will certainly be in jeopardy as continuing falls of soil and shillet occur and continuing erosion occurs, and that unless the soil on that

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A bank is retained there is, as Mr. Borton says, a probability in the course of time that the plaintiff's premises will be in jeopardy. . . . I accept the evidence of Mr. Borton as to the reality of the risk, and I find there is a real risk."

The situation is, therefore, as found by the judge, that there is a real probability that in time the activities of the defendant will result in actual damage to the plaintiff's house by removal of support unless the activities are prevented from having that effect by infilling the track and consolidating. No evidence was called to suggest that at a later stage, when the threat became more imminent in point of time, preventive measures would be available higher up the slope nearer to the farmhouse. In those circumstances, was there jurisdiction to make a mandatory order on the defendant to take those steps had the judge in his discretion decided to do so? The defendant contends not. For the defendant it was contended that a mandatory injunction could not have been ordered because the injury to the farmhouse was, on the evidence, neither certain nor "imminent." Reliance was placed upon passages in the judgment of Brougham L.C. in *Earl of Ripon v. Hobart* (1834) 3 My. & K. 169, in particular at pp. 176 and 177, as showing that imminence was a requirement. That was an application on affidavit evidence for an interlocutory injunction to restrain the defendants from operating a steam engine to drain certain lands on the ground that its operation would throw so much water into the River Witham that it would damage the banks: there was voluminous and conflicting evidence on whether damage would result. I do not regard the use of the word "imminent" in those passages as negating a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely. But here the operation has been performed, and there was no evidence that any other step would avoid the proven probability of damage to the farmhouse than the step sought by way of mandatory injunction: it could not be said to be premature.

Our attention was next drawn to *Fletcher v. Bealey* (1885) 28 Ch.D. 688, a decision of Pearson J. A paper manufacturer was anxious lest a deposit of vat waste from alkali works on land upstream should leak into the river and pollute the water which the plaintiff used in his manufacture. At the trial he sought an injunction quia timet to restrain the dumping of vat waste. The decision, as summarised in the headnote, was as follows:

"Held, that, it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger."

Pearson J. said, at p. 698:

"There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage

will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the damage is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.”

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Again it seems to me that “imminent” is used in the sense that the circumstances must be such that the remedy sought is not premature; and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.

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In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances. I am not prepared to hold that on the evidence in this unusual case the judge was wrong in considering that he could have ordered the defendant to fill in and consolidate the road at the suit of the plaintiff as owner of the farmhouse, or that he was wrong in ordering damages in lieu of such an order. I would dismiss the appeal.

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STAMP L.J. I entirely agree with the judgment which has been delivered, and I too would dismiss the appeal.

SCARMAN L.J. I agree with the judgment delivered by Russell L.J. I wish, however, to add a few words on the topic which was not canvassed below but is basic to the case the plaintiff seeks to establish. He has to prove that the threat of damage to his land arises from acts or omissions of the defendant on his, the defendant's, land. In *Salmond on Torts*, 16th ed. (1973), p. 52, one finds this passage:

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“As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises.”

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The plaintiff is certainly the occupier of the threatened farmhouse; but he is also, together with the defendant, in occupation of the land where occurred the act complained of. Does his occupation of the land where the excavations were done destroy the possibility of a cause of action in nuisance? Indeed, if the occupier of the farmhouse had been somebody other than the plaintiff, could not such a person have established a cause of action against the plaintiff himself? The reason for an occupier's liability for nuisance created on his land was concisely stated by Finnemore J. in *Hall v. Beckenham Corporation* [1949] 1 K.B. 716. Finnemore J. there said, at p. 724: “. . . an owner of private property can prevent people from coming on to his land and committing a nuisance there.”

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A Sir Charles Abbott C.J. in *Laugher v. Pointer* (1826) 5 B. & C. 547, 576, 100 years earlier put it thus:

“I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another.”

B Whatever may be the rights and duties inter se of co-occupiers of land, neither can prevent the other from coming on to the land; and the plaintiff would have needed instant and extraordinary legal skill as well as a preternatural foresight of the defendant's intentions to have prevented the excavations complained of by the exercise of his authority as co-occupier: in fact he did try, and failed.

C The truth is that, without notice to, or the consent of, the plaintiff, the defendant exercised his authority as occupier so as to do the work which constituted the threat to the plaintiff's farmhouse. If it be said that the plaintiff can now come upon the land and abate the nuisance, that is also a right possessed by a stranger whose land has been subjected to nuisance. Since the availability to a stranger of the extra-judicial remedy of abatement does not deprive him of the right to come to court, I see no reason why on this account the plaintiff should be non-suited.

D In my view, the plaintiff's position, as co-occupier of the land where the act he complains of was done, is an irrelevant coincidence unless it can be used to raise a defence of contributory negligence or volenti non fit injuria, neither of which is to be found in this case. He has only to show that land of which he is the occupier is damaged, or threatened, by a wrongful act done upon land of which the defendant is an occupier, and either created, continued or adopted by the defendant, to establish his cause of action. In the present case he has established a threat of harm created by the defendant: and, for the reasons given by Russell L.J. that is enough to entitle him to the relief he seeks.

Appeal dismissed with costs.

F Solicitors: *Boxall & Boxall for Blight, Broad & Skinnard, Callington; Peacock & Goddard for Peter, Peter & Sons, Bude.*

C. N.

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Supreme Court

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***Secretary of State for the Environment, Food and
Rural Affairs v Meier and others**

[2009] UKSC 11

2009 June 10, 11;
Dec 1

Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe,
Baroness Hale of Richmond JJSC,
Lord Neuberger of Abbotsbury MR,
Lord Collins of Mapesbury JSC

B

Injunction — Trespass — Order for possession — Gipsies and travellers — Travellers in trespassory occupation of area of woodland owned by Secretary of State — Fear of travellers moving to other areas of woodland also owned by Secretary of State but distinct from that occupied by defendants — Secretary of State's application for possession order against defendants in respect of other land — Whether power in court to grant — Injunction to restrain occupation — Whether appropriate — Government guidance on unauthorised encampments — Effect and relevance — CPR Pt 55

C

A number of travellers, including the defendants, established an unauthorised encampment in an area of woodland owned by the claimant Secretary of State and managed by the Forestry Commission. The Secretary of State issued proceedings alleging trespass and seeking an order for possession of the occupied site and of a number of other unoccupied woodland sites in the vicinity likewise vested in him and managed by the commission. He also sought an injunction to restrain the defendants from re-entering the occupied site or entering the other sites. The recorder made an order of possession of the occupied site but refused the application for possession in so far as it extended to the unoccupied sites. he also refused the injunction sought. The Court of Appeal allowed an appeal by the Secretary of State, unanimously in respect of the wider possession order and by a majority in respect of the injunction.

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On appeal by the defendants—

Held, allowing the appeal in part, (1) that a possession claim against trespassers involved the person entitled to possession seeking recovery of the land in question and, accordingly, an order for possession of land not occupied by the trespassers and of which the owner enjoyed uninterrupted possession could not be justified; that where trespassers were encamped in part of a wood a possession order might be made against them in respect of the whole wood; but that, however desirable it might be to fashion or develop a remedy to meet a practical problem such as that which arose in the present case, the Court of Appeal had had no power to make an order for possession of areas of woodland not occupied by the defendants and wholly detached and separated from the area occupied by them (post, paras 7–12, 20, 38–41, 59, 63–67, 71, 78, 95, 96–98).

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Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48 and *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, CA disapproved.

University of Essex v Djemal [1980] 1 WLR 1301, CA distinguished.

(2) That where a trespass was threatened, and particularly where a trespass was being committed and had been committed in the past by the defendant, an injunction to restrain it was, in the absence of good reasons to the contrary, appropriate even though there appeared to be little prospect of enforcing it by imprisonment or sequestration; that it would not be appropriate to set aside the injunction granted by the Court of Appeal unless it had been plainly wrong to grant it or there had been an error of principle in the reasoning leading to its grant, neither of which was established; that the effect and purpose of government guidance on unauthorised

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- A encampments, relied on by the defendants, was not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed; and that, accordingly, the grant of the injunction should be upheld (post, paras 3, 20, 39, 79, 83–84, 87–88, 95).

Per Baroness Hale of Richmond JSC. I would not see procedural obstacles as necessarily precluding the “incremental development” sanctioned in the *Drury* case provided that an order could be specifically tailored against known individuals who have already intruded on the claimant's land, are threatening to do so again and have been given a proper opportunity to contest the order. It would be helpful if the rules so provided so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case (post, para 40).

Decision of the Court of Appeal [2008] EWCA Civ 903; [2009] 1 WLR 828; [2009] PTSR 357; [2009] 1 All ER 614 reversed in part.

The following cases are referred to in the judgments:

- C *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Connors v United Kingdom (2005) 40 EHRR 189
Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] 1 AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)
- D *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320; [2007] Bus LR 925; [2007] 1 All ER 1087; [2007] 1 All ER (Comm) 571, HL(E)
Gledhill v Hunter (1880) 14 ChD 492
Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch); [2004] Env LR 196
Hemmings v Stoke Poges Golf Club [1920] 1 KB 720, CA
Henderson v Squire (1869) LR 4 QB 170
McPhail v Persons, Names Unknown [1973] Ch 447; [1973] 3 WLR 71; [1973] 3 All ER 393, CA
- E *Manchester Airport plc v Dutton* [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA
Manchester Corpn v Connolly [1970] Ch 420; [1970] 2 WLR 746; [1970] 1 All ER 961, CA
Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303; [2009] QB 450; [2009] 2 WLR 621; [2009] Bus LR 168; [2008] 2 All ER (Comm) 1099, CA
- F *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48
R v Wandsworth County Court, Ex p Wandsworth London Borough Council [1975] 1 WLR 1314; [1975] 3 All ER 390, DC
Secretary of State for the Environment, Food and Rural Affairs v Drury [2004] EWCA Civ 200; [2004] 1 WLR 1906; [2004] 2 All ER 1056, 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)
- G *South Cambs District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 PLR 88, CA
Thompson v Elmbridge Borough Council [1987] 1 WLR 1425, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
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
- H The following additional cases were cited in argument:
Jephson Homes Housing Association v Moisejevs [2001] All ER 901, CA
Kanssen v Secretary of State for the Environment, Food and Rural Affairs [2005] EWHC 1024 (Admin); [2005] NPC 76; [2005] EWCA Civ 1453, CA
Leicester City Council v Aldwinckle (1991) 24 HLR 40, CA

APPEAL from the Court of Appeal

This was an appeal by the second and fifth defendants, Sharon Horie and Lesley Rand, by leave of the House of Lords (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Neuberger of Abbotsbury) given on 11 February 2009 from the decision of the Court of Appeal (Pill, Arden and Wilson LJ; Wilson LJ dissenting in part) allowing an appeal by the Secretary of State for the Environment, Food and Rural Affairs from Mr Recorder Norman in the Poole County Court, sitting at Southampton.

The facts are stated in the judgment of Lord Neuberger of Abbotsbury MR.

Richard Drabble QC and *Marc Willers* (instructed by *Community Law Partnership, Birmingham*) for the second and fifth defendants.

John Hobson QC and *John Clargo* (instructed by *Whitehead Vizard, Salisbury*) for the Secretary of State.

The court took time for consideration.

1 December 2009. The following judgments were handed down.

LORD RODGER OF EARLSFERRY JSC

1 If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corp'n v Connolly* [1970] Ch 420.

2 Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633, were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Intended Trespassers upon Chineham Incinerator Site* [2004] Env LR 196. Similarly, in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88, the Court of Appeal (Brooke LJ and Clarke LJ) granted an injunction against persons unknown "causing or permitting

A hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land” adjacent to a gipsy encampment in rural Cambridgeshire (para 3). Brooke LJ commented, at para 8: “There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule.” See the discussion of such injunctions by B Jillaine Seymour, “Injunctions Enjoining Non-Parties: Distinction without Difference” [2007] CLJ 605–624.

3 The present case concerns travellers who set up camp on the Forestry Commission’s land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included “persons unknown”. C Despite this, the Commission sought an injunction against all the defendants, including those described as “All persons currently living on or occupying the claimant’s land at Hethfelton”. The recorder declined to grant an injunction on the view that it would be disproportionate. But the Court of Appeal [2009] 1 WLR 828, by a majority, reversed the recorder on this point and granted an order that

D “The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the fourth respondent shall mean ‘those people trespassing on, living on, or occupying the land E known as Hethfelton Wood on any date between 13 February 2007 and 3 August 2007 save for those specifically identified as first, second, third, fifth and sixth respondents.’”

In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as F to suggest that it was inherently useless: he simply took the view, at para 76, that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis.

4 This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can bring an action for recovery of the land. That is what the Commission did in G the present case: they raised an action in Poole County Court for recovery of “land at Hethfelton nr Wool and all that land described on the attached schedule all in the county of Dorset”. In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they H anticipated, the defendants might well set up camp once they left Hethfelton.

5 The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in the *Drury* case

[2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not.

6 Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport plc v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See *Megarry & Wade, The Law of Real Property*, 7th ed (2008), para 4-026. To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land—or, more fully, "that the said AB do recover against the said CD possession" of the land: see *Cole, The Law and Practice in Ejectment* (1857), p 786, Form 262. The fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Asscn for the South East* [1971] Ch 204, 209C–210B.

7 *In re Wykeham Terrace* and *Manchester Corp'n v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were tackled by a new RSC Ord 113, the provisions of which, with some alteration of the details, have been incorporated into the current rule 55 of the CPR. In the present case no issue arises about the wording of rule 55. But I would certainly not interpret "occupied" in rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8 The intention behind the relevant provisions of rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are—or, at least, were at the relevant time—in possession, rather than mere occupation, of the Commission's land at Hethfelton.

A *Wonnacott, Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

B 9 By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. But in that case the defendant trespassers were not represented and so the point was not fully argued.

C 10 Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative offices of the University of Essex, had been occupying another part of the university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university—in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C–D, per Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, the *Heyman* case was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in the *Drury* case.

E 11 Mummery LJ [2004] 1 WLR 1906, 1916, para 35 described Wilson J's approach in the *Drury* case as "pragmatic". And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

F 12 I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes, etc, on these remoter areas of land. Doubtless, adequate arrangements could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission

land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language. A

13 Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14 The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children. B
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15 Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work. D

16 I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Bucks District Council v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gipsies living in caravans in breach of planning controls because an injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambs District Council v Persons Unknown* [2004] 4 PLR 88 which I mentioned in para 2. E
F

17 Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Bucks District Council v Porter* [2003] 2 AC 558, at para 32, in connection with a possible injunction against gipsies living in caravans in breach of planning controls: G

“When granting an injunction the court does not contemplate that it will be disobeyed . . . Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent.” H

A Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

B 18 But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is one for the Master of the Rolls and the Rule Committee who have the leisure and facilities to consider the issues.

C 19 For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER OF GESTINGTHORPE JSC

D 20 I agree with all the other members of the court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief made by Lord Rodger at the end of his judgment.

BARONESS HALE OF RICHMOND JSC

F 21 Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but only because he thought the wider possession order a sufficient remedy in the circumstances.

H 22 The approach in the *Drury* and *Heyman* cases was rightly described by Mummery LJ in the *Drury* case, at para 35, as "pragmatic", depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23 The situation in the *Djemal* case was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the university buildings. The university wanted an order covering the whole of the university premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the university, holding that there was jurisdiction to cover “the whole of the owner’s property in respect of which *his right of occupation has been interfered with*”: per Buckley LJ, at p 1304 (emphasis added). Shaw LJ reasoned that the right of the university to possession of the site and buildings was “indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises”: p 1305 (emphasis added). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will be noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24 The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can—indeed, one of their problems is that they are impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25 The questions raised by this case and the *Djemal* case should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. 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. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26 If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27 In considering the nature and scope of any judicial remedy, the parallel existence of a right of self-help against trespassers must not be

- A forgotten, because the rights protected by self-help should mirror the rights that can be protected by judicial order, even if the scope of self-help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on Ejectment* (1857), a comprehensive textbook written after the Common Law Procedure Act 1852 (15 & 16 Vict c 76), there is considerable discussion (in chapter VII) of the comparative merits of self-help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was “by no means clear”: whether no force at all, or only reasonable force, might be used against the trespasser.
- B
- C Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises without lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a “displaced residential occupier” or “protected intending occupier”: section 6(1A), as inserted by Criminal Justice and Public Order Act 1994, section 72(2). This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without offending against the criminal law. But in any event, the use of self-help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.
- D
- E

28 Lord Denning MR in the *McPhail* case, at pp 456–457, considered that the statutes of forcible entry did not apply because the trespassing squatters were not in possession of the land at all. He quoted *Pollock on Torts*, 15th ed (1951), p 292:

- F “A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.”

- A trespasser who merely interferes with the right to possession or occupation of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one’s property.
- G

- 29 Although Cole contemplated that self-help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning MR thought that the statutes of forcible entry did apply to protect them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.
- H

30 However, Lord Denning's basic point, at p 457 B-C, is important here: "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary." It seems clear that the right of self-help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *University of Essex v Djemal* [1980] 1 WLR 1301 in possession of the university's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see the *McPhail* case, at p 456F. Were these new travellers in possession of Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31 If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like the *Djemal* case becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32 As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land*, Cambridge University Press, (2006) p 1, the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head lease if he collects rents from the subtenants, but he will not be in physical occupation of tangible land.

33 The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors

A was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873–1875: see AWB Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2nd ed (1986), ch VII).

B 34 The question for us is whether the remedy of a possession action should be limited to deciding disputes about “possession” in the technical sense described by Wonnacott. The discussion in *Cole on Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

D 35 It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Pt 55 which is inconsistent with this view, far from it. The distinction is drawn between a “possession claim” which is a claim for the recovery of *possession of land* (rule 55.1(a)) and a “possession claim against trespassers” which is a claim for the *recovery of land* which the claimant alleges is “occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . .” (rule 55.1 (b)). The object is to distinguish between the procedures to be used where a tenant remains in occupation after the end of his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting “only”: not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of it. There is then provision for taking action against “persons unknown”. But the remedy in each case is the same: an order for physical removal from the land.

G 36 It was held in *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314 that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37 This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in the *Drury* case [2004] 1 WLR 1906, para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the “whole” may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the “estate” from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38 The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with “persons unknown”. They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of “persons unknown” from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39 Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word “recover”, I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40 However, I would not see these procedural obstacles as necessarily precluding the “incremental development” which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant’s land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought

A through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the “scatter-gun” form of the usual order (though it is not one prescribed by the Rules).

41 It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

B **LORD NEUBERGER OF ABBOTSBURY MR**

42 There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] 1 AC 367), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 189). The present appeal, however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43 Travellers often set up their camps in wooded areas. Many woods and forests in this country are managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs. The functions of the Commission are “promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products . . .”: section 1(2) of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to such areas.

44 All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the recorder who heard this case at first instance said, “[given] the public access that it affords to its land and its needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected”.

45 In 2004, the Office of the Deputy Prime Minister issued *Guidance on Managing Unauthorised Camping*. This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are “unacceptable” (for instance, because they involve traffic hazard or public health risks) and those which are “acceptable” (para 5.4). It further recommends that the “management of unauthorised camping must be integrated” (para 4.8), and states that “each encampment location must be considered on its merits” (para 5.4). The 2004 Guidance also indicates that specified welfare inquiries should be undertaken in

relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidance before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46 One of the woods managed by the Commission is Hethfelton Wood, near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the inquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR r 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie and “Persons Names Unknown”. Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine-year-old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47 Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation, which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath, which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48 In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of “all that land described on the attached schedule all in the county of Dorset”. That schedule set out more than 50 separate woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to 13, and the plan showed that those 13 woods (“the other woods”) were spread over an area of Dorset around 25 miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including “Persons Names Unknown”) restraining them “from re-entering [Hethfelton] or from entering [the other woods]”. Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR r 55.6, together with copies of the injunction application.

A 49 The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in the surrounding area. The Commission's evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

C 50 The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

D 51 The recorder decided to grant an order for possession against the defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the recorder that consideration would be given to that guidance before any wider order for possession or any injunction was enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[the] claimant do forthwith recover the land known as Hethfelton Wood".

F 52 The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the recorder's refusal to grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and the injunction, and the Court of Appeal [2009] 1 WLR 828 allowed the appeal. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

G 53 In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move on to other such woods once an order for possession was made in relation to Hethfelton.

54 Arden LJ also said, in disagreement with the recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill LJ and Wilson LJ agreed. Arden LJ also considered that, for the same reasons, the recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

55 The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

An order for possession of land not occupied by the defendants

56 In the *Drury* case [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

57 The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action; (b) an injunction would be of limited, if any, real use; (c) in those circumstances, the law should provide another remedy; (d) a wider order for possession would be of much more practical value than an injunction; (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant *quia timet* injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances: see at paras 20–24, 34–36 and 42–46, per Wilson J, Mummery LJ and Ward LJ respectively.

58 Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as

A quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

B 59 None the less, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation—or, in
C so far as they can be invoked for that purpose, by practice directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in the *Drury* case.

60 The power of the county court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it “jurisdiction to
D hear and determine any action for the recovery of land”. The concept of “recovery” of land was the essence of a possession order both before and after the procedure was recast by sections 168 et seq of the Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land: see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447,
E 457–458. None the less, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land*, p 22, “an action for recovery of land (ejectment) is an action to be put into possession of an estate in land. The
F complaint is that the claimant is not currently ‘in’ possession of it, and . . . wants . . . to be put ‘in’ possession of it”. See also *Simpson, A History of the Land Law*, 2nd ed (1986), pp 144–145 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496, per Sir George Jessel MR.

61 As Sir George Jessel MR explained, an action for ejectment and its successor, recovery of land, was normally issued “to recover possession from
G a tenant” or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on trespass *quare clausum fregit*, physical intrusion on to the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within 12 years the ousting trespasser will often have acquired title by “adverse possession”.) Accordingly, in cases
H where a trespasser is actually in possession of land, an action for recovery of land, ie, for possession, is appropriate, as Lord Denning MR implicitly accepted in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457–458.

62 This analysis is substantially reflected in the provisions of the Civil Procedure Rules and in the currently prescribed form of order for

possession. CPR Pt 55 is concerned with possession claims, and CPR r 55.1 provides: A

“(a) ‘a possession claim’ means a claim for the recovery of possession of land (including buildings or parts of buildings); (b) ‘a possession claim against trespassers’ means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not . . .” B

The special features of a possession claim against trespassers are that the defendants to the claim may include “persons unknown”, such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing is two days (or five days for residential property) rather than the 28 days for other possession claims: see CPR rr 55.3(4), 55.6, and 55.5(2) and (3). C

63 The drafting of CPR r 55.1 is rather peculiar in that, unlike that in rule 55.1(a), the definition in rule 55.1(b) does not include the word “possession”. Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word “possession” in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of “a possession claim”, like the definition of “land”, in rule 55.1(a) may well be carried into sub-rule (b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person “entitled to possession” seeking “recovery” of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers: see *Civil Procedure 2009*, vol 1, p 114, para 4PD-003, table 1. That form orders the defendant to “give the claimant possession” of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do “recover” the land in question from the defendants, that is the mirror image of ordering that the defendants “give” the claimant possession. D
E

64 The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land. F
G

65 This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty). H

66 However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to

- A assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property.
- B Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving on to another property, perhaps miles away, owned by the claimant.
- C 67 Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established: see, for example, albeit in a landlord and tenant context, *Henderson v Squire* (1869) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an
- D irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.
- E 68 The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR r 55.1(b). Such “a claim” may be brought “for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without . . . consent . . .” Given that such a
- F claim is limited to “land . . . occupied only by” trespassers, it is not immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).
- G 69 The Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 nonetheless decided that a university could be granted a possession order under RSC Ord 113, r 1, which was (in relation to the issue in this case) in similar terms to CPR r 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly
- H practical decision arrived at to deal with a fairly widespread problem at the time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trespassers, they would simply move to another part of the campus.
- 70 As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as

lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Ord 113, r 1.

71 However, this is not the occasion formally to consider the correctness of the decision in the *Djermal* case [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in the *Drury* case [2004] 1 WLR 1906) relied on it, and the defendants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed.

72 The Court of Appeal's conclusion in the *Drury* case, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in the *Djermal* case [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48, which represented an "incremental development of the ruling in [the *Djermal* case]", as Mummery LJ [2004] 1 WLR 1906, para 35 put it. However, it seems to me that the decision in the *Drury* case was an illegitimate extension of the reasoning and decision in the *Djermal* case. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned, bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership.

73 Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in the *Drury* case has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the county court by applying for a warrant of possession under CPR Sch 2, CCR Ord 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the sheriff under RSC Ord 45, r 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in the *Drury* case [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal: see RSC Ord 45, r 5(1) and, in relation to the county court, CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is

A to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession. They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

B 74 There is also some apparent force as a matter of principle in the notion that the courts should be able to grant a precautionary wider order for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether C in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

D 75 What the claimant is really seeking in the present case is an order that, if the defendant goes on to the other woods, the claimant should be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A quia timet injunction involves the court forbidding the defendant from doing something which he may do and which he would not be entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order E requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

F 76 Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute G a warrant (or writ) of possession against all those in occupation: see *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, 209–210; *R v Wandsworth County Court, Ex p Wandsworth London Borough Council* [1975] 1 WLR 1314, 1317–1319; *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431–1432; and the full discussion in *Wonnacott, Possession of Land*, pp 146–152. It would therefore be wrong H in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. None the less, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without

having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him. A

77 Quite apart from this, a warrant of possession to execute an order for possession made in the county court in a claim for possession against trespassers can only be issued without leave within three months of the order: CPR Sch 2, CCR Ord 24, r 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in the *Drury* case [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area. B

78 In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following the *Drury* case, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *University of Essex v Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him. C D

Should an injunction be refused as it will probably not be enforced?

79 That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. None the less, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate. E F

80 However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CPR Sch 2, CCR Ord 29 and section 38 of the County Courts Act 1984 (RSC Ord 45, r 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] 2 AC 558 local planning authorities were seeking injunctions to restrain gipsies from remaining on land in breach of planning law, and Lord Bingham of Cornhill said, at para 32, that "[t]he court should ordinarily be slow to make an order which it would not . . . be willing, if need be, to enforce by imprisonment". G H

A 81 On the other hand, in the same paragraph of his opinion, Lord Bingham also said that “[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate”. A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may none the less properly decide to grant the injunction. Thus, the court may take the view that the defendants are more likely not to trespass on the claimant’s land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

D 82 It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR r 55.5(2). However, as Lord Rodger observed, if the court were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

F 83 In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

H 84 In the present case, neither the recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well be that a case could have been (and may well have been) developed along those lines, it was not adopted by the recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant.

It does not appear to me that either of those points has been established in this case. A

The effect of the 2004 Guidance on the grant of an injunction

85 The recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced. B

86 As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the defendants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods. C D

87 However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the court when considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us. E F G

88 Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare inquiries in relation to defendants who might not move on to a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in H

A mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare inquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

B 89 Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the defendants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the Guidance could do so.

C 90 If the defendants were to trespass on to land covered by the injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

D 91 Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden LJ and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

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The implications of this analysis

92 As I have explained, the thinking of the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or

imprisonment. In the light of the terms of CPR Sch 1, RSC Ord 45, r 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of CPR Sch 1, RSC Ord 45, r 3(1) and CPR Sch 2, CCR Ord 26, r 17(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the county court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93 However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered on to the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the “writs in aid of” other writs, such as a writ of possession or a writ of delivery: see for instance CPR Sch 1, RSC Ord 46, r 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal): see *Civil Procedure 2009*, vol 1, p 2099, para sc 46.3.3. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see *Cole on Ejectment*, pp 692–694. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered on to the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the county court to issue a warrant of restitution in such circumstances.

94 Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rule Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in the *Drury* case [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *University of Essex v Djemal* [1980] 1 WLR 1306.

Disposal of this appeal

95 Accordingly, it follows that, for my part, I would allow the defendants’ appeal to the extent of setting aside the wider possession order

- A made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS OF MAPESBURY JSC

- 96 At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906, the Court of Appeal had legitimately extended
 B *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not
 C in possession.

- 97 But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the university, and was correctly decided. I agree, in particular, that it can be justified on the basis that the university's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy is available to a person whose possession or occupation has been interfered with, as Lady
 D Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary
 E element: Harris, "The Concept of Possession in English Law", in *Oxford Essays in Jurisprudence* (ed Guest, 1961) p 69, at p 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, eg, in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] 1 WLR 320, para 30 and *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2009] QB 450, para 182.

- F 98 I would therefore allow the appeal to the extent of setting aside the wider possession order.

Appeal allowed in part.
Parties to make written submissions
on costs.

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

Case No: QB-2022-BHM-000044

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

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

Date: 20/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

Between :

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

Claimants

- and -

FOUR CATEGORIES OF PERSONS UNKNOWN

-and-

ROSS MONAGHAN AND
58 OTHER NAMED DEFENDANTS

Defendants

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

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

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

Hearing dates: 26-27 May 2022

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. If and when it is completed HS2 will be a high speed railway line between London and the North of England, via the Midlands. Parts of it are already under construction. The First Claimant in this case, High Speed Two (HS2) Limited, is the company responsible for constructing HS2. It is funded by grant-in-aid from the Government (ie, sums of money provided to it by the Government in support of its objectives).
2. To avoid confusion, in this judgment I will refer to the railway line itself as HS2, and separately to the First Claimant as the company carrying out its construction. The Second Claimant is responsible for the successful delivery of the HS2 Scheme.
3. This is an application by the Claimants, by way of Claim Form and Application Notice dated 25 March 2022, for injunctive relief to restrain what they say are unlawful protests against the building of HS2 which have hindered its construction. They say those protesting have committed trespass and nuisance.
4. There is a dedicated website in relation to this application where the relevant files can be accessed: <https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings>. I will refer to this as ‘the Website’.
5. Specifically, the Claimants seek: (a) an injunction, including an anticipatory injunction, to protect HS2 from unlawful and disruptive protests; (b) an order for alternative service; and (c) the discharge of previous injunctions (as set out in the Amended Particulars of Claim (APOC) at [7]). The latter two matters are contained in the Amended Draft Injunction Order of 6 May 2022 at Bundle B, B049.
6. There are four categories of unnamed defendant (see Appendix 1 to this judgment). There are also a large number of named defendants.
7. The Claimants have made clear that any Defendant who enters into suitable undertakings will be removed from the scope of the injunction (if granted). The named Defendants to whom this application relates has been in a state of flux. The Claimants must, upon receipt of this judgment, in the event I grant an injunction, produce a clear list of those Defendants (to be contained in a Schedule to it) to whom it, and those to whom it does not apply (whether because they have entered into undertakings, or for any other reason).
8. The Application Notice seeks an interim injunction (‘... Interim injunctive relief against the Defendants at Cash's Pit, and the HS2 Land ...’). However, Mr Kimblin KC, as I understood him, said that what he was seeking was a final injunction.
9. I note the discussion in *London Borough of Barking and Dagenham v Persons Unknown* [2022] 2 WLR 946, [89], that there may be little difference between the two sorts of injunction in the unknown protester context. However, in this case there are named Defendants. Some of them may wish to dispute the case against them. Mr Moloney on behalf of D6 (who has filed a Defence) objected to a final injunction. I cannot, in these circumstances, grant a final injunction. There may have to be a trial. Any injunction that I grant must therefore be an interim injunction. The Claimant’s draft injunction provides for a long-stop date of 31 May 2023 and also provides for annual reviews in May.

10. The papers in this case are extremely voluminous and run to many thousands of pages. D36, Mark Keir, alone filed circa 3000 pages of evidence. There are a number of witness statements and exhibits on behalf of the Claimants. The Claimants provided me with an Administrative Note shortly before the hearing. I also had two Skeleton Arguments from the Claimants (one on legal principles, and one on the merits of their application); and a Skeleton Argument from Mr Moloney KC and Mr Greenhall on behalf of D6, James Knaggs. There were then post-hearing written submissions from the Claimants and on behalf of Mr Knaggs. There are also written submissions from a large number of defendants and also others. These are summarised in Appendix 2 to this judgment. A considerable bundle of authorities was filed. All of this has taken time to consider.
11. The suggested application on behalf of D6 to cross-examine two of the Claimants' witnesses was not, in the end, pursued. I grant any necessary permission to rely on documents and evidence, even if served out of time.
12. The land over which the injunction is sought is very extensive. In effect, the Claimants seek an injunction over the whole of the proposed HS2 route, and other land which I will describe later. I will refer to the land collectively as the HS2 Land. The injunction would prevent the defendants from: entering or remaining upon HS2 Land; obstructing or otherwise interfering with vehicles accessing it or leaving it; interfering with any fence or gate at its perimeter.
13. The Application Notice also related to a discrete parcel of land known as Cash's Pit, in Staffordshire. Cotter J granted a possession order and an injunction in respect of that land on 11 April 2022, on the Claimants' application, and adjourned off the other application, which is now before me.

Democracy and opposition to HS2

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

"UPON the Claimants' application by an Application Notice dated 25 March 2022

...

AND UPON the Claimants confirming that this Order is not intended to prohibit lawful protest which does not involve trespass upon the HS2 Land and does not block, slow down, obstruct or otherwise interfere with the Claimants' access to or egress from the HS2 Land."

16. HS2 is the culmination of a democratic process. In other words, it is being built under specific powers granted by Parliament. As would be expected in relation to such a major national infrastructure project, the scheme was preceded by extensive consultation, and it then received detailed consideration in Parliament. As early as 2009, the Government published a paper, 'Britain's Transport Infrastructure: High Speed Two'. The process which followed thereafter is described in the first witness statement of Julie Dilcock (Dilcock 1), [11] et seq. She is the First Claimant's Litigation Counsel (Land and Property). She has made four witness statements (Dilcock 1, 2, 3 and 4.)
17. The HS2 Bills which Parliament passed into law were hybrid Bills. These are proposed laws which affect the public in general, but particularly affect certain groups of people. Hybrid Bills go through a longer Parliamentary process than purely Public Bills (ie, in simple terms, Bills which affect all of the public equally). Those particularly affected by hybrid Bills may submit petitions to Parliament, and may state their case before a Parliamentary Select Committee as part of the legislative process.
18. HS2 is in two parts: Phase 1, from London to the West Midlands, and Phase 2a, from the West Midlands – Crewe.
19. Parliament voted to proceed with HS2 via, in particular, the High Speed Rail (London - West Midlands) Act 2017 (the Phase One Act) and the High Speed Rail (West Midlands - Crewe) Act 2021 (the Phase 2a Act) (together, the HS2 Acts). There is also a lot of subordinate legislation.
20. Many petitions were submitted in relation to HS2 during the legislative process. For example, in *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch), [16]-[18], the evidence filed on behalf of the Claimants in relation to the Phase One Act was that:

“... the Bill which became the Act was a hybrid Bill and, as such, subject to a petitioning process following its deposit with Parliament. In total [the Claimants' witness] says 3,408 petitions were lodged against the Bill and its additional provisions, 2,586 in the Commons and 822 in the Lords and select committees were established in each House to consider these petitions.

17. She says the government was able to satisfy a significant number of petitioners without the need for a hearing before the committees. In some cases in the Commons this involved making changes to the project to reduce impacts or enhance local mitigation measures and many of these were included in one of the additional provisions to the Bill deposited during the Commons select committee stage.

18. Of the 822 petitions submitted to the House of Lords select committee, the locus of 278 petitions was successfully challenged. Of the remaining 544 petitions, the select committee heard 314 petitions in formal session with the remainder withdrawing, or choosing not to appear before the select committee, mainly as a result of successful prior negotiation with the Claimants.”

21. In his submissions of 16 May 2022, Mr Keir said at [5] that HS2 was a project which ‘the people of the country do not want but over which we have been roundly ignored by Parliament’. In light of the above, I cannot agree. ‘What the public wants’, is reflected in what Parliament decided. That is democracy. Those who were against HS2 were not ignored during the legislative process. People could petition directly to express their views, and thousands did so. Their views were considered. Parliament then took its decision to approve HS2 knowing that many would disagree with it. It follows, it seems to me, that the primary remedy for those who do not want HS2 is to elect MPs who will cancel it. (In fact, whilst not directly relevant to the matter before me, I understand that the original planned leg of the route towards Leeds/York from the Midlands has now been abandoned).
22. All of this is, I hope, consistent with what the Divisional Court said in *DPP v Cuciurean* [2022] EWHC 736 (Admin). That concerned a criminal conviction under s 68 of the Criminal Justice and Public Order Act 1994 (aggravated trespass) arising out of a protest against HS2. Lord Burnett of Maldon CJ said at [84]:

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

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

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

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

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

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

25. These earlier decisions contain a great deal of information about HS2 and the protests against it. I do not need to repeat all of the detail in this judgment: the reader is referred to them. As I have said, the Claimants' draft order proposes the discharge of these earlier injunctions as they will be otiose if the present application is granted as it will encompass the relevant areas of land.
26. Richard Jordan is the First Claimant's Interim Quality and Assurance Director and was formerly its Chief Security and Resilience Officer. In that role, he was responsible for the delivery of corporate security support to the First Claimant in line with its security strategy, and the provision of advice on all security related matters. In his witness statement of 23 March 2022 (Jordan 1) he described the nature of the protests against HS2. I will return to his evidence later.

The Claimants' land rights

27. Parliament has given the Claimants a number of powers over land for the purposes of constructing HS2.
28. Dilcock 1, [14]-[16], explains that on 24 February 2017 the First Claimant was appointed as nominated undertaker pursuant to s 45 of the Phase One Act by way of the High Speed Rail (London-West Midlands) (Nomination) Order 2017 (SI 2017/184).
29. Section 4(1) of the Phase One Act gives the First Claimant power to acquire so much of the land within the Phase One Act limits as may be required for Phase One purposes. The First Claimant may acquire rights over land by way of General Vesting Declaration (GVD) or the Notice to Treat (NTT) or Notice of Entry (NoE) procedures.
30. Section 15 and Sch 16 of the Phase One Act give the First Claimant the power to take temporary possession of land within the Phase One Act limits for Phase One purposes. So, for example, [1] of Sch 16 provides:

“(1) The nominated undertaker may enter upon and take possession of the land specified in the table in Part 4 of this Schedule -

(a) for the purpose specified in relation to the land in column (3) of the table in connection with the authorised works specified in column (4) of the table,

(b) for the purpose of constructing such works as are mentioned in column (5) of the table in relation to the land, or

(c) otherwise for Phase One purposes.

(2) The nominated undertaker may (subject to paragraph 2(1)) enter upon and take possession of any other land within the Act limits for Phase One purposes.

(3) The reference in sub-paragraph (1)(a) to the authorised works specified in column (4) of the table includes a reference to any works which are necessary or expedient for the purposes of or in connection with those works.”

31. ‘Phase One purposes’ is defined in s 67 and ‘Act limits’ is defined in s 68. The table mentioned in [1(1)(a)] is very detailed and specifies precisely the land affected, and the works that are permitted.
32. In relation to Phase 2a, on 12 February 2021 the First Claimant was appointed as nominated undertaker pursuant to s 42 of the Phase 2a Act by way of the High Speed Rail (West Midlands - Crewe) (Nomination) Order 2021 (SI 2021/148).
33. Section 4(1) of the Phase 2a Act gives the First Claimant power to acquire so much of the land within the Phase 2a Act limits as may be required for Phase 2a purposes. Again, the First Claimant may acquire land rights by way of the GVD, NTT and NoE procedures.
34. Section 13 and Sch 15 of the Phase 2a Act give the First Claimant the power to take temporary possession of land within the Phase 2a Act limits for Phase 2a purposes. Paragraph 1 of Sch 15 is broadly analogous to [1] of Sch 16 to the Phase One Act that I set out earlier.
35. It is not necessary for me to go much further into all the technicalities surrounding these provisions. Suffice it to say that the Claimants have been given extremely wide powers to obtain land, or take possession of it, or the right to immediate possession, even where they do not acquire freehold or leasehold title to the land in question. In short, if they need access to land in order to construct or maintain HS2 as provided for in the HS2 Acts then, one way or another, they have the powers to do so providing that they follow the prescribed procedures.
36. So for example, [4(1) and (2)] of Sch 16 to the Phase 1 Act provide:

“(1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.

(2) The nominated undertaker may not, without the agreement of the owners of the land, remain in possession of land under paragraph 1(1) or (2) after the end of the period of one year beginning with the date of completion of the work for which temporary possession of the land was taken.”
37. The Claimants have produced plans showing the HS2 Land coloured pink and green. These span several hundred pages and can be viewed electronically on the Website. There have been two versions: the HS2 Land Plans, and the Revised HS2 Land Plans.

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

“29. The First or the Second Claimant are the owner of the land coloured pink on the HS2 Land Plans, with either freehold or leasehold title (the “Pink Land”). The Claimants’ ownership of much of the Pink Land is registered at HM Land Registry, but the registration of some acquisitions has yet to be completed. The basis of the Claimants’ title is explained in the spreadsheets named “Table 1” and “Table 3” at JAD2. Table 1 reflects land that has been acquired by the GVD process and Table 3 reflects land that has been acquired by other means. A further table (“Table 2”) has been included to assist with cross referencing GVD numbers with title numbers. Where the Claimants’ acquisition has not yet been registered with the Land Registry, the most common basis of the Claimants’ title is by way of executed GVDs under Section 4 of the HS2 Acts, with the vesting date having passed.

30. Some of the land included in the Pink Land comprises property that the Claimants have let or underlet to third parties. At the present time, the constraints of the First Claimant’s GIS data do not allow for that land to be extracted from the overall landholding. The Claimants are of the view that this should not present an issue for the present application as the tenants of that land (and their invitees) are persons on the land with the consent of the Claimants.

31. The Claimants’ interest in the Pink Land excludes any rights of the public that remain over public highways and other public rights of way and the proposed draft order deals with this point. The Claimant’s interest in the Pink Land also excludes the rights of statutory undertakers over the land and the proposed draft order also deals with this point.

32. The First Claimant is the owner of leasehold title to the land coloured blue on the HS2 Land Plans (the “Blue Land”), which has been acquired by entering into leases voluntarily, mostly for land outside of the limits of the land over which compulsory powers of acquisition extend under the HS2 Acts. The details of the leases under which the Blue Land is held are in Table 3.

33. The First Claimant has served the requisite notices under the HS2 Acts and is entitled to temporary possession of that part of the HS2 Land coloured green on the HS2 Land Plans (“the Green Land”) pursuant to section 15 and Schedule 16 of the Phase One Act and section 13 and Schedule 15 of the Phase 2a Act. A

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

39. The plans were then revised, as Ms Dilcock explains in Dilcock 3 at [39]. Hence, my calling them the Revised HS2 Land Plans. There is now just pink and green land.
40. The land coloured pink is owned by the First or Second Claimants with either freehold or leasehold title. The land coloured green is land over which they have temporary possession (or the immediate right to possession) under the statutory powers I have mentioned. Land which has been let to third parties has been removed from the scope of the pink land (see Dilcock 3, [39]).
41. Ms Dilcock has produced voluminous spreadsheets as Ex JAD2 setting out the bases of the Claimants’ right to possession of the HS2 Land.
42. Ms Dilcock gives some further helpful detail about the statutory provisions in Dilcock 3, [28] et seq. At [31]-[34] she said:

“31. As explained by Mr Justice Holland QC at paragraphs 30 to 32 of the 2019 *Harvil Rd Judgment (SSfT and High Speed Two (HS2) Limited -v- Persons Unknown* [2019] EWHC 1437 (Ch)), the First Claimant is entitled to possession of land under these provisions provided that it has followed the process set down in Schedules 15 and 16 respectively, which requires the First Claimant to serve not less than 28 days’ notice to the owners and occupiers of the land. As was found in all of the above cases, this gives the First Claimant the right to bring possession proceedings and trespass proceedings in respect of the land and to seek an injunction protecting its right to possession against those who would trespass on the land.

32. For completeness and as it was raised for discussion at the hearing on 11.04.2022, the HS2 Acts import the provisions of section 13 of the Compulsory Purchase Act 1965 on confer the right on the First Claimant to issue a warrant to a High Court Enforcement Officer empowering the Officer to deliver possession of land the First Claimant in circumstances where, having served the requisite notice there is a refusal to give up possession of the land or such a refusal is apprehended. That procedure is limited to the point at which the First Claimant first goes to take possession of the land in question (it is not available in circumstances where possession has been secured by the First Claimant and trespassers subsequently enter onto the land). The process does not require the involvement of the Court. The availability of that process to the First Claimant does not preclude the First Claimant from seeking an order for possession from the Court, as has been found in all of the above mentioned cases.

33. Invoking the temporary possession procedure gives the First Claimant a better right to possession of the land than anyone else – even the landowner. The First Claimant does not take ownership of the land under this process, nor does it step into the shoes of the landowner. It does not become bound by any contractual arrangements that the landowner may have entered into in respect of the land and is entitled to possession as against everyone. The HS2 Acts contain provisions for the payment of compensation by the First Claimant for the exercise of this power.

34. The power to take temporary possession is not unique to the HS2 Acts and is found across compulsory purchase - see for example the Crossrail Act 2008, Transport and Works Act Orders and Development Consent Orders. It is also set to be even more widely applicable when Chapter 1 of the Neighbourhood Planning Act 2017 is brought into force.”

43. Ms Dilcock goes on to explain that:

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

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

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

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

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

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

The Claimants' case

48. The Claimants' action is for trespass and nuisance. They say that pursuant to their statutory powers they have possession of, or the right to immediate possession of, the HS2 Land and therefore have better title than the protesters. Their case is that the protests against HS2 involve unlawful trespass on the HS2 Land; disruption of works on the HS2 Land; and disruption of the use of roads in the vicinity of the HS2 Land, causing inconvenience and danger to the Claimants and to other road users. They say all of this amounts to trespass and nuisance.
49. Mr Kimblin on behalf of the Claimants accepted that he had to demonstrate trespass and nuisance, and a real and imminent risk of recurrence. He said, in particular, that the protests have: on numerous occasions put at risk protesters' lives and those of others (including the Claimants' contractors); caused disruption, delay and nuisance to works on the HS2 Land; prevented the Claimants and their contractors and others (including members of the public) from exercising their ordinary rights to use the public highway or inconvenienced them in so doing, eg by blocking access gates. Further, he said that the Defendants' actions amount to a public nuisance which have caused the Claimants particular damage over and above the general inconvenience and injury suffered by the public, including costs incurred in additional managerial and staffing time in order to deal with the protest action, and costs and losses incurred as a result of delays to the HS2 construction programme; and other costs incurred in remedying the alleged wrongs and seeking to prevent further wrongs.
50. Based on previous experience, and on statements made by protesters as to their intentions, the Claimants say they reasonably fear that the Defendants will continue to interfere with the HS2 Scheme along the whole of the route by trespassing, interfering with works, and interfering with the fencing or gates at the perimeter of the HS2 Land and so hinder access to the public highway.
51. They argue, by reference in particular to the evidence in Mr Jordan's and Ms Dilcock's statements and exhibits, that there is a real and imminent risk of trespass and nuisance in relation to the whole of the HS2 Land, thus justifying an anticipatory injunction.
52. They say that Defendants, or some of them, have stated an intention to continue to take part in direct action protests against HS2, moving from one parcel of land to another in order to cause maximum disruption.
53. Thus, the Claimants say they are entitled to a route wide injunction, extensive though this is. They draw an analogy with the injunctions granted over thousands of miles of roads in relation to continuing and moving road protests by a group loosely known as 'Insulate Britain': see, in particular, *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB) (Lavender J); *National Highways Limited v Persons Unknown and others* [2022] EWHC 1105 (QB) (Bennathan J).
54. I have the Revised HS2 Land Plans in hard copy form. I have studied them. They are clear, detailed and precise. I reject any suggestion that they are unclear. They clearly

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

The Defendants' cases

55. Mr Moloney addressed me on behalf of Mr Knaggs (D6), and I was also addressed by a number of unrepresented defendants (and others). I thought it appropriate to allow anyone present in court to address me, in recognition of the strength of feeling which HS2 generates. I exercised my case management powers to ensure these were kept within proper bounds. I had in mind an approach analogous to that set out by the Court of Appeal in *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160, [63]. Mr Kimblin did not object to this course.
56. I have considered all of the points which were made, whether orally or in writing. The failure to mention a particular point in this judgment does not mean that it has been overlooked. I am satisfied that everyone had the opportunity to make any point they wanted.
57. D6's case can be summarised as follows. Mr Moloney submitted that the Claimants are not entitled to the relief which they seek because (Skeleton Argument, [2]): (a) they are seeking to restrain trespass in relation to land to which there is no demonstrated immediate right of possession; (b) they are seeking to restrain lawful protest on the highway; (c) the test for a precautionary injunction is not met because of a lack of real and imminent risk, which is the necessary test for which a 'strong case' is required; (d) it is wrong in principle to make a final injunction in the present case (I have dealt with that); (e) the definition of 'Persons Unknown' is overly broad and does not comply with the *Canada Goose* requirements (see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, [82]); (f) the service provisions are inadequate; (g) the terms of the injunction are overly broad and vague; (h) discretionary relief should not be granted; and (i) the proposed order would have a disproportionate chilling effect.
58. Developing these arguments, Mr Moloney said that the Claimants have not yet taken possession of much of the HS2 Land – which can only arise in the statutorily prescribed circumstances - and so its possessory right needed to found an action in trespass had not yet crystallised and its application was premature. There is hence a fundamental difference between land where works are currently ongoing or due to commence imminently (for which, subject to notification requirements, the Claimants have a cause of action in trespass at the present date) and land where works are not due to commence for a considerable period (for which no cause of action in trespass currently arises for the Claimants). He distinguished the earlier injunctions in relation to land where work had commenced on that basis.
59. Notwithstanding the decision of the Court of Appeal in *Barking and Dagenham* to the effect that final injunctions may in principle be made against persons unknown, they remain inappropriate in protest cases in which the Article 10 and 11 rights of the individual must be finely balanced against the rights of the Claimants.
60. Next, Mr Moloney submitted that there was not the necessary strong case of a real and imminent danger to justify the grant of a precautionary injunction. He said the Claimant had to establish that there is a risk of actual damage occurring on the HS2 Land subject

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

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

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

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

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

63. I can deal with this submission now. I think it is unmeritorious. Paragraph 3 of the draft injunction prohibits various activities eg, [3(b)], ‘obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land ...’. However, [4(a)] provides that nothing in [3], ‘shall prevent any person from exercising their rights over any open public right of way over the HS2 Land’. Paragraph 4(c) provides that nothing in [3], ‘shall prevent any person from exercising their lawful rights over any public highway’. Contrary to the submission, such people therefore do not fall within [3] and do not need the First Claimant’s consent. I also find it difficult to envisage that a walk or protest on a public footpath would infringe [3(a)]. As I have already said, the proposed order does not prevent lawful protest.
64. In [54(ii)] D6 also argued that the injunction would include those present on HS2 land which has been sublet. It was argued that a person present on sublet HS2 land with the permission of the sub-lessor, but without the consent of HS2, is covered by the definition of D2.
65. Again, I can deal with that point now. As I have set out, the Revised HS2 Land Plans produced by Ms Dilcock exclude let land; the original version of the Plans did not

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

“AND UPON the Claimants confirming that they do not intend for any freeholder or leaseholder with a lawful interest in the HS2 Land to fall within the Defendants to this Order, and undertaking not to make any committal application in respect of a breach of this Order, where the breach is carried out by a freeholder or leaseholder with a lawful interest in the HS2 Land on the land upon which that person has an interest.

AND UPON the Claimants confirming that this Order is not intended to act against any guests or invitees of any freeholder or leaseholder with a lawful interest in the HS2 Land unless that guest or invitee undertakes actions with the effect of damaging, delaying or otherwise hindering the HS2 Scheme on the land held by the freeholder or leaseholder with a lawful interest in the HS2 Land.”

66. Mr Moloney then went on to criticise the proposed methods of service in the draft injunction at [8]-[11] as being inadequate. The fundamental submission is that the steps for alternative service cannot reasonably be expected to bring the proceedings to the attention of someone proposing to protest against HS2 (Skeleton Argument, [98]).
67. Various points about the wording of the injunction were then made to the effect, for example, that it was too vague (Skeleton Argument, [105] et seq).
68. Turning to the points made by those who addressed me in court, I can summarise these (briefly, but I hope fairly) as follows. There were complaints about poor service of the injunction application. However, given those people were able to attend the hearing, service was obviously effective. It was said that HS2 would ‘hammer another nail into the coffin of the climate crisis’, and that land and trees should be nurtured. It was then said that there was no need for another railway line. It was in the public interest to protest against HS2 which is a ‘classist project’. It was said that there had been violence, and racist and homophobic abuse of protesters by HS2 security guards, who had acted in a disproportionate manner. Many of the written submissions also complained about the behaviour of HS2’s security guards. The injunction would condone that behaviour. Some named defendants said that there was insufficient evidence against them. The injunction was intended to ‘terrorise’ and ‘coerce’, and the judiciary was being ‘weaponised’ against protest (a point I have already rejected). It was a ‘fantasy’ to say that HS2 would benefit the environment; there had been environmental damage and the First Claimant had failed to honour the environmental obligations it said it would fulfil. It was said that the First Claimant was committing ‘wildlife crimes’ on a daily basis. Several people indicated they had signed undertakings and so should not be enjoined (as I have said, any such persons who have entered into appropriate undertakings will be exempted from the scope of any injunction). There had been an impact on journalistic freedom to report on HS2. The maps showing HS2 Land are hard to make out and/or are unclear.

69. In reply, Mr Kimblin said there was nothing about the application which was novel. The grant of injunctions against groups of unknown protesters to prevent trespass and nuisance had become common in recent times. He accepted the land affected was extensive, but pointed to injunctions over the country's road networks granted in recent years which are even more extensive. He said, specifically in relation to the green land and in response to the First Claimant's right of possession not having 'crystallised', that all of the relevant statutory notices had been served, and the First Claimant therefore had the right to take immediate possession of that land at a time of its choosing where it was not already in actual possession. That was sufficient. He also said that there is a system for receiving complaints, and that complaints were frequent and were always investigated. There was always scope to amend the order if necessary, and Mr Kimblin ended by emphasising that the injunction would have no effect on, and would not prevent, lawful protest.
70. Turning to the material filed by Mr Keir, I reiterate I am not concerned with the merits of HS2. Parliament has decided that question. The grounds advanced by Mr Keir are that: (a) the area of land subject to this claim is incorrect in a number of respects; (b) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (c) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (d) the project is harmful and should not have been consented to, or has not been properly consented to, by Parliament.
71. Appendix 2 to this judgment sets out in summary form points made by those who filed written submissions. I have considered these points.

Discussion

Legal principles

72. The first part of this section of my judgment addresses the relevant legal principles. Many of these have emerged recently in cases concerned with large scale protests akin to those involved in this matter.

(i) Trespass and nuisance

73. I begin with trespass and nuisance, the Claimants' causes of action.
74. A landowner whose title is not disputed is *prima facie* entitled to an injunction to restrain a threatened or apprehended trespass on his land: Snell's Equity (34th Edn) at [18-012].
75. It has already been established that even the temporary possession powers in the HS2 Acts give the Claimants sufficient title to sue for trespass. The question of trespass on HS2 Land was considered in *Secretary of State for Transport and another v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch) at [7]. [30]-[32]. The judge said:

"7. There are subject to the order three different categories of land. First of all, there is land within the freehold ownership of the First Claimant that is coloured blue on both sets of plans, and is referred to as "the blue land". Secondly, there is land acquired by the First Claimant pursuant to its compulsory purchase powers

in the High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 Act"). That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans

....

30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act ...

31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and 'take possession'. That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.

32. In paragraph 40 of his judgment in *Ineos* at first instance [*Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)], Mr. Justice Morgan says this:

"The cause of action for trespass on private land needs no further exposition in this case."

Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass."

76. Mr Moloney for D6 sought to distinguish this and other HS2 cases on the basis that work was ongoing on the sites in question, and so the First Claimant was in possession, whereas the present application related to green land which the First Claimant was not currently in possession of.
77. In relation to trespass, all that needs to be demonstrated by the claimant is a better right to possession than the occupiers: *Manchester Airport plc v Dutton* [2000] QB 133, 147. In that case the Airport was granted an order for possession over land for which it had been granted a licence in order to construct a second runway, but which it was not yet in actual possession of.
78. I can therefore, at this point, deal with D6's 'prematurity' point. As I have said, Mr Kimblin was quite explicit that the Claimants do, as of now, have the right to immediate possession over the green land because the relevant statutory notices have been served, albeit (to speak colloquially) the diggers have not yet moved in. That does not matter, in

my judgment. I am satisfied that the Claimants do, as a consequence, have a better title to possession than the current occupiers – and certainly any protesters who might wish to come on site. Actual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ’s judgment at p151; the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled. That is what the First Claimant has in relation to the green land.

79. This conclusion is supported by what Warby LJ said in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)] (emphasis added):

“9. The following general principles are well-settled, and uncontroversial on this appeal.

(1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.

(2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol (‘A1P1’). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has *the right to possession*, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest.”

80. In relation to defences to trespass, genuine and *bona fide* concerns on the part of the protestors about HS2 or the proposed HS2 Scheme works do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *Samede*, [63].
81. A protestor’s rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access: see the passage from Warby LJ’s judgment in *Cuciurean* I quoted earlier, *Harvil Road*, [136]; and *DPP v Cuciurean* at [45]-[49] and [73]-[77]. There is no right to undertake direct action protest on private land: *Crackley and Cubbington*, [35], [42]. In the most recent of these decisions, *DPP v Cuciurean*, the Lord Chief Justice said:

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

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

47. We now return to *Richardson* [*v Director of Public Prosecutions* [2014] AC 635] and the important statement made by Lord Hughes JSC at [3]:

‘By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights

were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences.'

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

48. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

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

...

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

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

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

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

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

- 82. I will return to the issue of Convention rights later.
- 83. The second cause of action pleaded by the Claimants in the APOC is nuisance. Nuisances may either be public or private.
- 84. A public nuisance is one which inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere or neighbourhood of its operation. It may, however, affect some to a greater extent than others: *Soltau v De Held* (1851) 2 Sim NS 133, 142.
- 85. Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land: *Bamford v Turnley* (1862) 3 B & S; *West v Sharp* [1999] 79 P&CR 327, 332:

"Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right

of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

86. The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [13]; and can be an unlawful interference with one or more of the claimant's rights of way over land privately owned by a third party: *Gale on Easements*, 13-01.

87. In *Cuadrilla*, [13], the Court said:

"13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20-181."

88. The position in relation to actions which amount to an obstruction of the highway, for the purposes of public nuisance, is described in *Halsbury's Laws*, 5th ed. (2012). [325], where it is said (in a passage cited in *Ineos*, [44], (Morgan J)): (a) whether an obstruction amounts to a nuisance is a question of fact; (b) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (c) generally, it is a nuisance to interfere with any part of the highway; and (d) it is not a defence to show that although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public.

89. In *Harper v G N Haden & Sons* [1933] Ch 298, 320, Romer LJ said:

"The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others."

90. A member of the public has a right to sue for a public nuisance if he has suffered particular damage over and above the ordinary damage suffered by the public at large: *R v Rimmington* [2006] AC 459, [7], [44]:

“44. The law of nuisance and of public nuisance can be traced back for centuries, but the answers to the questions confronting the House are not to be found in the details of that history. What may, perhaps, be worth noticing is that in 2 Institutes 406 Coke adopts a threefold classification of nuisance: public or general, common, private or special. Common nuisances are public nuisances which, for some reason, are not prosecutable. See *Ibbetson, A Historical Introduction to the Law of Obligations*, p 106 nn 62 and 65. So for Coke, while all public nuisances are common, not all common nuisances are public. Later writers tend to elide the distinction between common and public nuisances but, throughout, it has remained an essential characteristic of a public nuisance that it affects the community, members of the public as a whole, rather than merely individuals. For that reason, the appropriate remedy is prosecution in the public interest or, in more recent times, a relator action brought by the Attorney General. A private individual can sue only if he can show that the public nuisance has caused him special injury over and above that suffered by the public in general. These procedural specialties derive from the effect of the public nuisance on the community, rather than the other way round.

(ii) *The test for the grant of an injunction*

91. In relation to remedy, the starting point, if not the primary remedy in most cases, will be an injunction to bring the nuisance to an end: *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322-323, per A L Smith LJ; *Hunter v Canary Wharf Ltd* [1997] AC 655, 692 per Lord Goff; *Lawrence v Fen Tigers Ltd and others* [2014] AC 822, [120]-[124] per Lord Neuberger. In that case his Lordship said at [121] (discussing when and whether damages rather than an injunction for nuisance should be granted):

“I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not.”

92. The High Court may grant an injunction (whether interlocutory or final) in all cases in which it appears to the court to be just and convenient: s 37(1) of the Senior Courts Act 1981 (the SCA 1981).
93. The general function of an interim injunction is to ‘hold the ring’ pending final determination of a claim (*United States of America v Abacha* [2015] 1 WLR 1917). The basic underlying principle of that function is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or another: *National Commercial Bank Jamaica Limited v Olint Corp Ltd (Practice note)* [2009 1 WLR 105 at [17].

94. The general test for the grant of an interim injunction requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience): *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
95. The threshold for obtaining an injunction is normally lower where wrongs have already been committed by the defendant: *Secretary of State for Transport and HS2 Limited v Persons Unknown* [2019] EWHC 1437 (Ch) at [122] to [124]. Snell's Equity states at [18-028]:

“In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts.”
96. This, it seems to me, is not a rule of law but one of evidence which broadly reflects common sense. Where a defendant can be shown to have already infringed the claimant's rights (eg, by committing trespass and/or nuisance), then the court *may* decide that that weighs in the claimant's favour as tending to show the risk of a further breach, alongside other evidence, if the claimant seeks an anticipatory injunction to restrain further such acts by the defendant.
97. However, *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [44]-[48] (CA) makes clear, in light of s 12(3) of the Human Rights Act 1998, that the Court must be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried (see also *Crackley and Cubbington*, [35]). ‘Likely’ in this context usually means more likely than not: *Cream Holdings Limited v Banerjee* [2005] 1 AC 253, [22].
98. This is accepted by the Claimants (Principles Skeleton Argument, [19]), and it is the test that I will apply. The draft injunction has a long stop date and will be subject to regular review by the court, as I have said. There is the usual provision allowing for applications to vary or discharge it.
99. Where the relief sought is a precautionary injunction (formerly called a *quia timet* injunction, however Latin is no longer to be used in this area of the law, per *Barking and Dagenham*, [8]), the question is whether there is an *imminent* and *real* risk of harm: *Ineos* at [34(1)] (Court of Appeal) and the first instance decision of Morgan J ([2017] EWHC 2945 (Ch)), [88].
100. ‘Imminent’ means that the circumstances must be such that the remedy sought is not premature. In *Hooper v Rogers* [1975] Ch 43, 49-50, Russell LJ said:

“I do not regard the use of the word ‘imminent’ in those passages as negating a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely.

...

In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and *quia timet* injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances.”

101. In *Canada Goose*, [82(3)] the Court said:

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

102. As I have already said, one of the points made by Mr Moloney is that the ‘imminent and real’ test is not satisfied over the whole of the HS2 route because over much of it, work has not started and there have been no protests.

(iii) *The Canada Goose requirements*

103. I turn to the requirements governing the sort of injunction which the Claimants seek in this case against unknown persons (ie, D1-D4). So, for example, I set out the definition of D2 earlier.

104. The guidelines set out by the Court of Appeal in *Canada Goose*, [82], are as follows:

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

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

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

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as ‘persons

unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

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

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

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

105. In *National Highways Limited*, [41], Bennathan J said this:

"41. Injunctions against unidentified defendants were considered by the Court of Appeal in the cases of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 [*"Ineos"*] and *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 [*'Canada Goose'*]. I summarise their combined affect as being:

(1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].

(2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].

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

106. The authorities in this area, including in particular, *Canada Goose*, were reviewed by the Court of Appeal in *Barking and Dagenham*. Although some parts of the decision in

Canada Goose were not followed, the guidelines in [82], were approved (at [56]) and I will apply them.

107. The parts of *Canada Goose* which the Court of Appeal in *Barking and Dagenham* disagreed with were the following paragraphs (see at [78] of the latter decision), where the Court also made clear they were not part of its *ratio*:

“89. A final injunction cannot be granted in a protester case against ‘persons unknown’ who are not parties at the date of the final order, that is to say newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the ‘persons unknown’ and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at para 17) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.”

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

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against ‘persons unknown’, it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption’s category 1. Subject

to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also ‘persons unknown’ who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.”

108. Some points emerging from the discussion of these paragraphs in *Barking and Dagenham* are as follows:

- a. the Court undoubtedly has the power under s 37 of the SCA 1981 to grant final injunctions that bind non-parties to the proceedings ([71]).
- b. the remedy can be fairly described as ‘exceptional’, albeit that formulation should not be used to lay down limitations on the Court’s broad discretion. The categories in which such injunctions can be granted are not closed and they may be appropriate in protest cases ([120]);
- c. there is no real distinction between interim and final injunctions in the context of injunctions granted against persons unknown ([89] and [93]). While the guidance regarding identification of persons unknown in *Canada Goose* was given in the context of an application for an interim injunction, the same principles apply in relation to the grant of final injunctions ([89]; see also [102] and [117];
- d. as to the position of a non-party who behaves so as satisfy the definition of persons unknown only after the injunction has been granted (ie, a ‘newcomer’), such a person becomes a party on knowingly committing an act that brings them within the description of persons unknown set out in the injunction: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, [32]. There is no need for a claimant to apply to join newcomers as defendants. There is ‘no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort’: *Boyd*, [30];
- e. procedural protections available to ensure a permanent injunction against persons unknown is just and proportionate include the provision of a mechanism for review by the Court: ‘Orders need to be kept under review. ‘For as long as the court is concerned with the enforcement of an order, the action is not at end’ ([89]); ‘... all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases’ ([91]); ‘It is good practice to provide for a periodic review, even when a final order is made’ ([108]);
- f. in the unauthorised encampment cases, the Court of Appeal has suggested that borough-wide injunctions should be limited to one year at a time before a review: *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, [106].

109. So far as keeping the injunction in this case under review is concerned, the draft order provides for a long stop date of 31 May 2023, when it will expire unless renewed (at [3]). It also provides for yearly reviews around May time (ie roughly the anniversary of the

hearing before me) in order ‘to determine whether there is a continued threat which justifies continuation of this Order’ (at [15]), and there are the usual provisions allowing for persons affected to apply to vary or discharge it (at [16] and [18]).

(iv) *Geographical scope of the order sought*

110. I turn to the question of the geographical scope of the injunction sought. As I have said, the proposed injunction stretches along the whole of the HS2 route. Massive tracts of land are potentially affected. The Claimants say that of itself is not a bar to injunctive relief, to which there is no geographical limit (at least as a matter of law).

111. Specifically in relation to trespass and nuisance, the Claimants said that this Court (Lavender J) was not troubled by a 4,300 mile injunction against environmental protesters along most of the Strategic Roads Network (namely motorways and major A roads) in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB), [24(7)]:

“... the geographical extent is considerable, since it covers 4,300 miles of roads, but this is in response to the unpredictable and itinerant nature of the Insulate Britain protests”.

112. See also his judgment at [15], and also Bennathan J’s judgment at [2022] EWHC 1105 (QB), [3], where they referenced other geographically wide-ranging injunctions against environmental road protesters. For example, on 24 September 2021 Cavanagh J granted an interim injunction which applied to the A2, A20, A2070, M2 and M20 in Claim No QB-2021-003626.

113. Lavender J at [24(7)(c)] found additionally that if a claimant is entitled to an injunction, it would not be appropriate to require it to apply for separate injunctions for separate roads, requiring the claimant in effect to ‘chase’ protesters around the country from location to location, not knowing where they will go next:

114. For these reasons, the Claimants submitted that there is a real and imminent risk of torts being carried out unless this injunction is granted across the whole of the HS2 Land.

115. The Claimants also submitted that although an individual protest may appear small in the context of HS2 as a whole, that was not a reason to overlook its impact. They relied on *DPP v Cuciurean*, [87], where the Lord Chief Justice said:

“87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to ‘only’ £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.”

(v) *European Convention on Human Rights*

116. I turn next to the important issue of the European Convention on Human Rights (the ECHR). The ECHR is given effect in domestic law by the Human Rights Act 1998 (the HRA 1998). Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Court is a public authority: s 6(3)(a).
117. The key provisions for these purposes are Article 10 (freedom of expression); Article 11 (freedom of assembly); and Article 1 of Protocol 1 (A1P1) (right to peaceful enjoyment of property).
118. Articles 10 and 11 provide:

“Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

Article 11 Freedom of assembly and association

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

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

119. A1P1 provides:

“Article 1 Protection of property

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

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

120. Articles 10 and 11 potentially pull in one direction (that of the Defendants) whilst A1P1 pulls in the Claimants’ favour. That tension was one of the matters discussed in *DPP v Cuciurean*, [84]:

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

121. Section 12 provides:

“12. - Freedom of expression.

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

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

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

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

(3) No such relief is to be granted so as to restrain publication before trial unless the

court is satisfied that the applicant is likely to establish that publication should not be allowed.”

122. ‘Publication’ in s 12(3) has been interpreted by the courts as extending beyond the literal meaning of the word to encompass ‘any application for prior restraint of any form of communication that falls within Article 10 of the Convention’: *Birmingham City Council v Afsar* [2019] ELR 373, [60]-[61].

123. It is convenient here to deal with a point raised in particular by D6 about whether the First Claimant, as (at least) a hybrid public authority, can rely on A1P1. He flagged up this point in his Skeleton Argument and Mr Moloney also addressed me on it. After the hearing Mr Moloney and Mr Greenhall filed further submissions arguing, in summary, that: (a) the First Claimant is a core public authority, alternatively a hybrid public authority and a governmental organisation, being wholly owned by the Secretary of State and publicly funded: see *Aston Cantlow* [2004] 1 AC 546; (b) the burden lies on the First Claimant to establish in law and in fact that it may rely on its A1P1 rights; (c) so far as previous cases say otherwise, they are wrongly decided or distinguishable; (d) the exercise of compulsory purchase powers falls within ‘functions of a public nature’; (e) thus, the First Claimant may not rely on A1P1 rights in support of the application.

124. The Claimants filed submissions in response.

125. I am satisfied that the First Claimant can pray in aid A1P1, and the common law values they reflect, and that the approach set out in *DPP v Cuciurean* and other cases is binding upon me. The point raised by D6 was specifically dealt with by the Court of Appeal in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [28]:

“28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean’s rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a ‘non-

governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law ...”

126. D6's submissions are also inconsistent with Warby LJ's judgment in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)], which I quoted earlier.
127. D6's submissions are also inconsistent with the approach of Arnold J (as he then was) in *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch). The judge accepted the submission that the Authority had AIP1 rights which went into the balance against the protesters' Article 10/11 rights, at [22]:

“22. In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1 AC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each.”

128. The Olympic Authority was unquestionably a public body. The judge described it at [2] as:

“... an executive non-departmental public body and statutory corporation established by section 3 of the London Olympic Games and Paralympic Games Act 2006 to be responsible for the planning and delivery of the Olympic Games 2012, including the development and building of Games venues.”

129. In a later judgment in the same case ([2012] EWHC 1114 (Ch)), the judge said:

“23. The protestors who have addressed me have made the point that they have sought to engage with the planning process in the normal way, and they have considered the possibility of seeking judicial review. As is so often the case, they say that they are handicapped by the lack of professional legal representation and the lack of finances to instruct lawyers of the calibre instructed by the ODA. They have also sought to engage normal democratic processes in order to make their points. It is because those processes have failed, as the protestors see it, that they have engaged in their protests.

24. That is all very understandable, but it does not, in my judgment, detract from the basic position which confronts the court. The ODA has rights as exclusive licensee of the land in question under Article 1 of the First Protocol to the Convention. As I observed in my judgment on 4 April 2012, the protestors' rights under Articles 10 and 11 are not unqualified rights. They must give way, where it is necessary and proportionate to do so, to the Convention rights of others, and specifically in the present case, of the ODA. The form of injunction sought by the ODA and which I granted on the last occasion does not, in and of itself, prevent or inhibit lawful and peaceful protest. It does not prevent or inhibit the protestors who wish to protest about the matters I have described from doing so in ways which do not interfere with the ODA's enjoyment of its rights in respect of the land

130. Articles 10 and 11 were considered in respect of protest on the highway in *Samede* at [38] – [41]. The Court said:

“38. This argument raises the question which the Judge identified at the start of his judgment, namely ‘the limits to the right of lawful assembly and protest on the highway’, using the word ‘protest’ in its broad sense of meaning the expression and dissemination of opinions. In that connection, as the Judge observed at [2012] EWHC 34 (QB), para 100, it is clear that, unless the law is that ‘assembly on the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied’ – quoting Lord Irvine LC in *DPP v Jones* [1999] 2 AC 240, 259E. However, as the Judge also went on to say at [2012] EWHC 34 (QB), para 145:

‘To camp on the highway as a means of protest was not held lawful in *DPP v Jones*. Limitations on the public right of assembly on the highway were noticed, both at common law and under Article 11 of the Convention (see Lord Irvine at p 259A-G, Lord Slynn at p 265C-G, Lord Hope of Craighead at p 277D-p 278D, and Lord Clyde at p 280F). In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping.’

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

40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the Judge said at [2012] EWHC 34 (QB), para 155:

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

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the Judge accepted that the topics of concern to the Occupy Movement were ‘of very great political importance’ - [2012] EWHC 34 (QB), para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov* [2008] ECHR 1170, para 45:

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

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

131. However, there is a more restrictive approach (ie, more restrictive against protest) where the protest takes place on private land. This approach was explained by the Strasbourg Court in *Appleby v United Kingdom* [2003] 27 EHRR 38, [43], [47]. The applicants had been prevented from collecting signatures in a private shopping centre for a petition against proposed building work to which they objected. They said this violated their rights under Articles 10 and 11. The Court disagreed:

“43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.

...

47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.“

132. The passage from *Samede I* set out earlier was cited with approval by the Supreme Court in *DPP v Ziegler* [2022] AC 408 at [17], [72], [74] to [77], [80] and [152]. In that case, the defendants were charged with obstructing the highway, contrary to s 137 of the Highways Act 1980, by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the road and making it difficult for police to remove them by locking themselves to structures.
133. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted ‘without lawful ... excuse’ within the meaning of s 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under Articles 10 and 11 of the ECHR. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants’ actions had been unreasonable and therefore without lawful excuse. The

prosecution appealed by way of case stated, pursuant to s 111 of the Magistrates Courts Act 1980.

134. The Divisional Court allowed the prosecution's appeal, holding that the district judge's assessment of proportionality had been wrong. The defendant appealed to the Supreme Court. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under Articles 10 or 11 by reason of the prosecution.
135. The Supreme Court allowed the defendants' appeal. It highlighted the features that should be taken into account in determining the issue of proportionality, as including: (a) the place where the obstruction occurred; (b) the extent of the actual interference the protest caused to the rights of others, including the availability of alternative thoroughfares; (c) whether the protest had been aimed directly at an activity of which protestors disapproved, or another activity which had no direct connection with the object of the protest; (d) the importance of the precise location to the protestors; and (e) the extent to which continuation of the protest breaches domestic law.
136. At [16] and [58], the Supreme Court endorsed what have become known as the '*Ziegler* questions', which must be considered where Articles 10 and 11 are engaged:
 - a. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?
 - b. If so, is there an interference by a public authority with that right?
 - c. If there is an interference, is it 'prescribed by law'?
 - d. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?
 - e. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
137. This last question can be sub-divided into a number of further questions, as follows:
 - a. Is the aim sufficiently important to justify interference with a fundamental right?
 - b. Is there a rational connection between the means chosen and the aim in view?
 - c. Are there less restrictive alternative means available to achieve that aim?
 - d. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?
138. Also, in *Ziegler*, [57], the Supreme Court said:

"57. Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society'. In *Kudrevicius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that 'The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a

gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly. Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles."

139. The structured approach provided by the *Ziegler* questions is one which the Court of Appeal has said courts would be 'well-advised' to follow at each stage of a process which might restrict Article 10 or 11 rights: *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [13]. Also in that case, at [28]-[34], the Court summarised the relevant Convention principles:

"28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a 'non-governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10 (2) and 11 (2) of the ECHR qualify the rights created by articles 10 (1) and 11 (1) respectively. Article 10 (2) relevantly provides that:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of health or morals, for the protection of the reputation or rights of others... or for maintaining the authority... of the judiciary."

29. Article 11 (2) relevantly provides:

"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society ... for the protection of the rights and freedoms of others."

30. There is no doubt that the right to freedom of expression and the right of peaceful assembly both extend to protesters. In *Hashman v United Kingdom* (2000) EHHR 241, for example, the European Court of Human Rights held that the activity of hunt

saboteurs in disrupting a hunt by the blowing of hunting horns fell within the ambit of article 10 of the ECHR. In *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624 protesters who were part of the 'Occupy London' movement set up a protest camp in the churchyard of St Paul's Cathedral. This court held that their activities fell within the ambit of both article 10 and also article 11.

31. On the other hand, articles 10 and 11 do not entitle a protester to protest on any land of his choice. They do not, for example, entitle a protester to protest on private land: *Appleby v United Kingdom* (2003) 37 EHHR 38; *Samede* at [26]. The Divisional Court so held in another HS2 protest case, involving Mr Cuciurean himself who at that time was living in a tunnel for the purpose of disrupting HS2: *DPP v Cuciurean* [2022] EWHC 736 (Admin). In that case the court (Lord Burnett CJ and Holgate J) said at [45]:

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

32. Even the right to protest on a public highway has its limits. In *DPP v Ziegler* protesters were charged with obstructing the highway without lawful excuse. The Supreme Court held that whether there was a 'lawful excuse' depended on the proportionality of any interference with the protesters' rights under articles 10 and 11. Lords Hamblen and Stephens said at [70]:

'It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional

action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'.

33. But that proportionality exercise does not apply in a case in which the protest takes place on private land. In *DPP v Cuciurean* the court said:

"66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.

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

34. Where a land owner, such as the claimants in the present case, seeks an injunction restraining action which is carried on in the exercise of the right of freedom of expression or the right of peaceful assembly (or both) on private land, the time for the proportionality assessment (to the extent that it arises at all) is at the stage when the injunction is granted. Any 'chilling effect' will also be taken into account at that stage: see for example the decision of Mr John Male QC in *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252 (Ch), especially at [104] to [121], [158] to [167] and [176] (another case of protest predominantly on the highway); and the decision of Lavender J in *National Highways Ltd v Heyatawin* [2021] EWHC 3081 (QB) (also a case of protest on the highway). Once the injunction has been granted then, absent any appeal or application to vary, the balance between the competing rights has been struck: see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB) at [44]; *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) at [30]."

140. The Claimants say that, in having regard to the balance of convenience and the appropriate weight to be had to the Defendants' Convention rights, there is no right to protest on private land (*Appleby*, [43] and *Samede*, [26]) and therefore Articles 10 and 11 rights are not engaged in relation to those protests (see *Ineos* at [36], and *DPP v Cuciurean*, [46], [50] and [77]). In other words, there is no 'freedom of forum' for protest (*Ibid*, [45]). A protest which involves serious disruption or obstruction to the lawful activities of other parties may amount to 'reprehensible conduct', so that Articles 10 and 11 are not violated: *Ibid*, [76].
141. The Claimants say that constant direct action protest and trespass to the HS2 Land is against the public interest and rely on *DPP v Cuciurean*, [84], which I quoted earlier. They placed special weight on the Lord Chief Justice's condemnation of endless 'guerrilla tactics'.
142. To the extent that protest is on public land (eg by blocking gates from the highway), to which Articles 10 and 11 do apply, the Claimants say that the interference with that right represented by the injunction is modest and proportionate.

(vi) Service

143. I turn to the question of service. This was something which I canvassed with counsel at the preliminary hearing in April. It is a fundamental principle of justice that a person cannot be subject to the court's jurisdiction without having notice of the proceedings: *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, [14].
144. The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant: *Cameron*, [21], and *Cuciurean v Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 357, [14] – [15], [25] – 26], [60] and [70]; *Canada Goose*, [82]. Posting on social media and attaching copies at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants: *Canada Goose*, [50]:

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

145. There is a difference between service of proceedings, and service of an injunction order. A person unknown is a newcomer, and is served and made a party to proceedings, when they violate an order of which they have knowledge; it is not necessary for them to be personally served with it: *Barking and Dagenham*, [84]-[85], [91], approving *South*

Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429, [34]. In the former case, the Court of Appeal said:

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

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

...

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

146. Service provisions must deal with the question of notice to an unknown and fluctuating body of potential defendants. There may be cases where the service provisions in an order

have been complied with, but the person subject to the order can show that the service provisions have operated unjustly against him or her. In such a case, service might be challengeable: *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [60].

147. In *National Highways Limited*, [50]-[52], Bennathan J adopted the following solution in relation to an injunction affecting a large part of the road network:

“50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.

51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB [Insulate Britain] and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.

52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J [in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB)], that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction.”

Merits

148. The second part of this section of the judgment addresses the merits of the Claimants' application in light of these principles.

149. I plan to deal with the following topics: (a) trespass and nuisance; (b) whether there is a real and imminent risk of unlawfulness; (c) whether there are sufficient reasons to grant the order against known defendants; (d) whether are sufficient reasons to grant the order against unknown defendants; (e) scope of the order; (f) service and knowledge.

150. At [6] and [7] of their Merits Skeleton Argument the Claimants said this:

“6. The purpose of the order, if granted, is simply to allow the First and Second Claimant to get on with building a large piece of linear infrastructure. Its purpose is not to inhibit normal activities generally, nor to inhibit the expression of whatever views may be held. The fundamental disagreement with those who appear to defend these proceedings is as to what constitutes lawful protest. The Claimants say that they are faced with deliberate interference with their land and work with a view to bringing the HS2 Scheme to a halt.

7. That is not lawful, and it is not lawful protest.”

(i) Trespass and nuisance

151. I begin with the question of title over the HS2 Land. I am satisfied, as other judges have been on previous occasions, that HS2 has sufficient title over the HS2 Land to bring an action in trespass against trespassers. I set out the statutory scheme earlier, and it is described in Dilcock 1, [10] *et seq* and Dilcock 4, [21], *et seq*.

152. I am therefore satisfied that the Claimants are entitled to possession of all of the land comprising the HS2 Land. The fact they are not actually in possession (yet) of all of it does not matter, for the reasons I have already explained. The statutory notices have been served and they are entitled to immediate possession. That is all that is required.

153. I note D36’s (Mark Keir’s submissions) about the Revised HS2 Land Plans produced by Ms Dilcock. I am satisfied that the points he made are fully answered by Ms Dilcock, in particular, in Dilcock 4, [21] *et seq*.

154. Turning to the evidence of trespass relied on by the Claimants, I am satisfied that the evidence is plentiful. Jordan 1 is lengthy and contains much detail. It is accompanied by many pages of exhibits containing further specifics. I am satisfied that this evidence shows there has been many episodes of trespass by (primarily) persons unknown – but also by known persons - both on Cash’s Pit, and elsewhere along the HS2 Scheme route. Mr Jordan’s evidence is that trespassing activities have ranged widely across the HS2 Land as protesters carry out their direct-action activities:

“10. Those engaged in protest action opposed to the HS2 Scheme are made up of a broad cross-section of society, including concerned local residents, committed environmentalists, academics and also numerous multi-cause transient protestors whom have been resident at a number of protest camps associated with a number of different ‘causes’. Groups such as Extinction Rebellion (often known as ‘XR’) often garner much of the

mainstream media attention and widely publicise their actions. They often only travel into an area for a short period (specific 'days of action' or 'weeks of action'), however once present they are able to execute comprehensive and highly disruptive direct action campaigns, whipping up an almost religious fervour amongst those present. Their campaigns often include direct action training, logistical and welfare support and complimentary media submissions, guaranteeing national media exposure. Such incidents have a significant impact on the HS2 Scheme but make up only a proportion of overall direct action protest against the HS2 Scheme, which occurs on an almost daily basis.

11. By way of explanation of a term that will be found in the evidence exhibited to this statement, activists often seek to anonymise themselves during direct action by referring to themselves and each other as "Bradley". Activists also often go by pseudonyms, in part to avoid revealing their real identities. A number of the Defendants' pseudonyms are provided in the schedule of Named Defendants and those working in security on the HS2 Scheme are very familiar with the individuals involved and the pseudonyms they use.

12. On a day to day basis direct action protest is orchestrated and conducted by both choate groups dedicated to disruption of the HS2 Scheme (such as HS2 Rebellion and Stop HS2) and inchoate groups of individuals who can comprise local activists and more seasoned 'core' activists with experience of conducting direct action campaigns against numerous "causes". The aims of this type of action are made very explicitly clear by those engaged in it, as can be seen in the exhibits to this statement. It is less about expressing the activists' views about the HS2 Scheme and more about causing direct and repeated harm to the HS2 Scheme in the form of delays to works, sabotage of works, damage to equipment, psychological and physical injury to those working on the HS2 Scheme and financial cost, with the overall aim of 'stopping' or 'cancelling' the HS2 Scheme.

13. In general, the Claimants and their contractors and sub-contractors have been subject to a near constant level of disruption to works on the HS2 Scheme, including trespass on and obstruction of access to the HS2 Land, since October 2017. The Defendants have clearly stated - both to contractors and via mainstream and social media - their intention to significantly slow down or stop work on the HS2 Scheme because they are opposed to it. They have trespassed on HS2 Land on multiple occasions and have issued encouragement via social media to others to come and trespass on HS2 Land. Their activities have impeded the First Claimant's staff, contractors and sub-contractors going about their lawful business on the HS2 Land and hampered the work on the HS2 Scheme, causing delays and extremely significant costs

to the taxpayer and creating an unreasonably difficult and stressful working environment for those who work on the HS2 Land.”

155. At [14]-[15] Mr Jordan wrote:

“At page 1 [of Ex RJ1] is a graphic illustration of the number of incidents experienced by the Claimants on Phase One of the HS2 Scheme that have impacted on operational activity and the costs to the Claimant of dealing with those incidents. That shows a total of 1007 incidents that have had an impact on operational activity between the last quarter of 2017 and December 2021. Our incident reporting systems have improved over time and refined since we first began experiencing incidents of direct action protest in October 2017 and it is therefore considered that the total number of incidents shown within our overall reporting is likely fewer than the true total.

15. The illustration also shows the costs incurred in dealing with the incidents. These costs comprise the costs of the First Claimant’s security; contractor security and other contractor costs such as damage and repairs; and prolongation costs (delays to the programme) and show that a total of £121.62 million has been incurred in dealing with direct action protest up to the end of December 2021. The HS2 Scheme is a publicly funded project and accordingly the costs incurred are a cost to the tax-payer and come from the public purse. The illustration at page 2 shows the amount of the total costs that are attributable to security provision.”

156. At [29.1] under the heading ‘Trespass’ Mr Jordan said:

“Put simply, activists enter onto HS2 Land without consent. The objective of such action is to delay and disrupt works on the HS2 Scheme. All forms of trespass cause disruption to the HS2 Scheme and have financial implications for the Claimants. Some of the more extreme forms of trespass, such as tunnelling (described in detail in the sections on Euston Square Gardens and Small Dean below) cause significant damage and health and safety risks and the losses suffered by the Claimants via the costs of removal and programme delay run into the millions of pounds. In entering onto work sites, the activists create a significant health and safety hazard, thus staff are compelled to stop work in order to ensure the safety of staff and those trespassing (see, for example, the social media posts at pages 38 to 39 about trespassers at the HS2 Scheme Capper’s Lane compound in Lichfield where there have been repeated incursions onto an active site where heavy plant and machinery and large vehicles are in operation, forcing works to cease for safety and security reasons. A video taken by a trespasser during an incursion on 16

March 2022 and uploaded to social media is at Video (7). Worryingly, such actions are often committed by activists in ignorance of the site operations and or equipment functionality, which could potentially result in severe unintended consequences. For example, heavy plant being operated upon the worksite may not afford the operator clear sight of trespassers at ground level. Safety is at the heart of the Claimants' activities on the HS2 Scheme and staff, contractors and sub-contractors working on the HS2 Land are provided with intensive training and inductions and appropriate personal protective equipment. The First Claimant's staff, contractors and sub-contractors will always prioritise safety thus compounding the trespassers' objective of causing disruption and delay. Much of the HS2 Land is or will be construction sites and even in the early phases of survey and clearance works there are multiple hazards that present a risk to those entering onto the land without permission. The Claimants have very serious concerns that if incidents of trespass and obstruction of access continue, there is a high likelihood that activists will be seriously injured."

157. Mr Jordan went on to describe (at [29.1.1] et seq) some of the activities which protesters against HS2 have undertaken since works began. As well as trespass these include: breaching fencing and damaging equipment; climbing and occupying trees on trespassed land; climbing onto vehicles (aka, 'surfing'); climbing under vehicles; climbing onto equipment, eg, cranes; using lock-on devices; theft, property damage and abuse of staff, including staff being slapped, punched, spat at, and having human waste thrown at them; obstruction; (somewhat ironically) ecological and environmental damage, such as spiking trees to obstruct the felling of them; waste and fly tipping, which has required, for example, the removal of human waste from encampments; protest at height (which requires specialist removal teams); and tunnelling.
158. Mr Jordan said that some protesters will often deliberately put themselves and others in danger (eg, by occupying tunnels with potentially lethal levels of carbon dioxide, and protesting at height) because they know that the process of removing them from these situations will be difficult and time-consuming, often requiring specialist teams, thereby maximising the hindrance to the construction works.
159. I am also satisfied that the Claimants have made out to the requisite standard at this stage their claim in nuisance, for essentially the same reasons.
160. The HS2 Scheme is specifically authorised by the HS2 Acts, as I have said. Whilst mindful of the strong opposition against it in some quarters, Parliament decided that the project was in the public interest.
161. I am satisfied that there has been significant violence, criminality and sometimes risk to the life of the activists, HS2 staff and contractors. As Mr Jordan set out in Jordan 1, [14] and [23], 129 individuals were arrested for 407 offences from November 2019 - October 2020.
162. I accept Mr Jordan's evidence at [12] of Jordan 1, which I set out earlier, that much of the direct action seems to have been less about expressing the activists' views about the HS2

Scheme, and more about trying to cause as much nuisance as possible, with the overall aim of delaying, stopping or cancelling it via, in effect, a war of attrition.

163. At [21.2] of Jordan 1, he wrote:

“21.2 Interviews with the BBC on 19.05.2020 and posted on the Wendover Active Resistance Camp Facebook page. D5 (Report Map at page 32) was interviewed and said: ‘The longevity is that we will defend this woodland as long as we can. If they cut this woodland down, there will still be activists and community members and protectors on the ground. We’re not just going to let HS2 build here free will. As long as HS2 are here and they continue in the vein they have been doing, I think you’ll find there will be legal resistance, there’ll be on the ground resistance and there will be community resistance.’ In the same interview, another individual said: ‘We are holding it to account as they go along which is causing delays, but also those delays mean that more and more people can come into action. In a way, the more we can get our protectors to help us to stall it, to hold it back now, the more we can try and use that leverage with how out of control it is, how much it is costing the economy, to try to bring it to account and get it halted.’ A copy of the video is at Video 1.”

164. I am entirely satisfied that the activities which Mr Jordan describes, in particular in [29] et seq of Jordan 1, and the other matters he deals with, constitute a nuisance. I additionally note that even following the order made in relation to Cash’s Pit by Cotter J on 11 April 2022, resistance to removal in the form of digging tunnels has continued: Dilcock 4, [33]-[43].

165. It is perhaps convenient here to mention a point which emerged at the hearing when we were watching some of the video footage, and about which I expressed concern at the time. There was some footage of a confrontation between HS2 security staff and protesters. One clip appeared to show a member of staff kneeling on the neck of a protester in order to restrain them. One does not need to think of George Floyd to know that that is an incredibly dangerous thing to do. I acknowledge that I only saw a clip, and that I do not know the full context of what occurred. I also acknowledge that there is evidence that some protesters have also been guilty of anti-social behaviour towards security staff. But I hope that those responsible on the part of the Claimants took note of my concerns, and will take steps to ensure that dangerous restraint techniques are not used in the future.

166. I also take seriously the numerous complaints made before me orally and in writing about the behaviour of some security staff. I deprecate any homophobic, racist or sexist, etc, abuse of protesters by security guards (or indeed by anyone, in any walk of life). I can do no more than emphasise that such allegations must be taken seriously, investigated, and if found proved, dealt with appropriately.

167. Equally, however, those protesting must also understand that their right to do so lawfully – which, as I have said, any order I make will clearly state - comes with responsibilities, including not to behave unpleasantly towards men and women who are

just trying to do their jobs.

(ii) Whether there is a real and imminent risk of continued unlawfulness so as to justify an anticipatory injunction

168. I am satisfied that the trespass and nuisance will continue, unless restrained, and that the risk is both real and imminent. My reasons, in summary, are: the number of incidents that have been recorded; the protesters' expressed intentions; the repeated unlawful protests to date that have led to injunctions being granted; and the fact that the construction of HS2 is set to continue for many years.

169. The principal evidence is set out in Jordan 1, [20], et seq. Mr Jordan said at [20]:

“20. There are a number of reasons for the Claimants' belief that unlawful action against the HS2 Scheme will continue if unchecked by the Court. A large number of threats have been made by a number of the Defendants and general threats by groups opposed to the HS2 Scheme to continue direct action against the HS2 Scheme until the HS2 Scheme is “stopped”. These threats have been made on a near daily basis - often numerous times a day - since 2017 and have been made in person (at activist meetings and to staff and contractors); to mainstream media; and across social media. They are so numerous that it has only been possible to put a small selection of examples into evidence in this application to illustrate the position to the Court. I have also included maps for some individuals who have made threats against the HS2 Scheme and who have repeatedly engaged in unlawful activity that show where those individuals have been reported by security teams along the HS2 Scheme route (“Report Map”). These maps clearly demonstrate that a number of the Defendants have engaged in unlawful activity at multiple locations along the route and the Claimants reasonably fear that they will continue to target the length of the route unless restrained by the Court.”

170. In *Harvil Road*, [79]-[81], the judge recorded statements by protesters in the evidence in that case which I think are a broad reflection of the mind-set of many protesters against HS2:

“79. 'Two arrested. Still need people here. Need to hold them up at every opportunity.'

...

‘No, Lainey, these trees are alongside the road so they needed a road closure to do so. They can't have another road closure for 20 days. Meanwhile they have to worry BIG time about being targeted by extinction rebellion and, what's more, they're going to see more from us at other places on the route VERY soon. Tremble HS2, tremble.

...

“We have no route open to us but to protest. And however much we have sat in camp waving flags, and waving at passersby tooting their support, that was never and will never be the protest that gets our voices heard. We are ordinary people fighting with absolute integrity for truth that is simple and stark. We are ordinary people fighting an overwhelming vast government project. But we will be heard. We must be heard.”

81. I fully accept that this expresses the passion with which the Fourth Defendant opposes the HS2 scheme and while they may not indicate that the Fourth Defendant will personally breach any order or be guilty of any future trespass, I think there is, I frankly find, a faintly sinister ring to these comments which in light of all that has gone before causes me to agree with Mr. Roscoe and the Claimants that there is a distinct risk of further objectionable activity should an injunction not be granted.”

171. Other salient points on the same theme include the following (paragraph numbers refer to Jordan 1):

- a. Interview with *The Guardian* on 13 February 2021 given by D27 after he was removed from the tunnels dug and occupied by activists under HS2 Land at Euston Square Gardens, in which he said: ‘As you can see from the recent Highbury Corner eviction, this tunnel is just a start. There are countless people I know who will do what it takes to stop HS2.’ In the same article he also said: ‘I can’t divulge any of my future plans for tactical reasons, but I’m nowhere near finished with protesting.’
- b. In March 2021 D32 obstructed the First Claimant’s works at Wormwood Scrubs and put a call out on Twitter on 24 March 2021 asking for support to prevent HS2 route-wide. He also suggested targeting the First Claimant’s supply chain.
- c. On 23 February 2022 D6 stated that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they, ‘will just hit all the other gates’ and ‘if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate’ ([21.12]).
- d. D6 on 24 February 2022 stated if the Cash’s Pit camp is evicted, ‘we’ll just move on. And we’ll just do it again and again and again’ ([21.13]).
- e. As set out in [21.14] on 10 March 2022 D17, D18, D19, D31, D63 and a number of persons unknown spent the morning trespassing on HS2 Land adjacent to Cash’s Pit Land, where works were being carried out for a gas diversion by Cadent Gas and land on which archaeological works for the HS2 Scheme were taking place. This incident is described in detail at [78] of Jordan 1. In a video posted on Facebook after the morning’s incidents, D17 said:

“Hey everyone! So, just bringing you a final update from down in Swynnerton. Today has been a really – or this morning today - has been a really successful one. We’ve blocked the gates for several hours. We had the team block the gates down at the main compound that we usually block and we had – yeah, we’ve had people running around a field over here and grabbing stuff and getting on grabbers and diggers (or attempting to), but in the meantime, completely slowing down all the works. There are still people blocking the gates down here as you can see and we’ve still got loads of security about. You can see there’s two juicy diggers over there, just waiting to be surfed and there’s plenty of opportunities disrupt – and another one over there as well. It’s a huge, huge area so it takes a lot of them to, kind of, keep us all under control, particularly when we spread out. So yeah. If you wanna get involved with direct action in the very near future, then please get in touch with us at Bluebell or send me a message and we’ll let you know where we are, where we’re gonna be, what we’re gonna be doing and how you can get involved and stuff like that. Loads of different roles, you’ve not just, people don’t have to run around fields and get arrested or be jumping on top of stuff or anything like that, there’s lots of gate blocking to do and stuff as well, yeah so you don’t necessarily have to be arrested to cause a lot of disruption down here and we all work together to cause maximum disruption. So yeah, that’s that. Keep checking in to Bluebell’s page, go on the events and you’ll see that we’ve got loads of stuff going on, and as I say pretty much most days we’re doing direct action now down in Swynnerton, there’s loads going on at the camp, so come and get involved and get in touch with us and we’ll let you know what’s happening the next day. Ok, lots of love. Share this video, let’s get it out there and let’s keep fucking up HS2’s day and causing as much disruption and cost as possible. Coming to land near you.”

Hence, comments Mr Jordan, D17 was here making explicit threats to continue to trespass on HS2 Land and to try to climb onto vehicles and machinery and encourages others to engage in similar unlawful activity.

- f. Further detail is given of recent and future likely activities around Cash’s Pit and other HS2 Land in the Swynnerton area at Jordan 1, [72]-[79] and Dilcock 4, [33], et seq.
172. These matters and all of the other examples quoted by Mr Jordan and Ms Dilcock, to my mind, evidence an intention to continue committing trespass and nuisance along the whole of the HS2 route.
173. I also take into account material supplied by the Claimants following the hearing that occupation of Cash’s Pit has continued even in the face of Cotter J’s order of 11 April 2022 and that committal proceedings have been necessary.

174. The Claimants reasonably anticipate that the activists will move their activities from location to location along the route of the HS2 Scheme. Given the size of the HS2 Scheme, the Claimants say that it is impossible for them to reasonably protect the entirety of the HS2 Land by active security patrol or even fencing.

175. I have carefully considered D6's argument that the Claimants must prove that there is an imminent danger of very substantial damage, and (per Skeleton, [48]):

“The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction.”

176. I do not find this a persuasive argument, and I reject it. Given the evidence that the protesters' stated intention is to protest wherever, and whenever, along HS2's route, I am satisfied there is the relevant imminent risk of very substantial damage. To my mind, it is not an attractive argument for the protesters to say: 'Because you have not started work on a particular piece of land, and even though when you do we will commit trespass and nuisance, as we have said we will, you are not entitled to a precautionary injunction to prevent us from doing so until you start work and we actually start doing so.' As the authorities make clear, the terms 'real' and 'imminent' are to be judged in context and the court's overall task is to do justice between the parties and to guard against prematurity. I consider therefore that the relevant point to consider is not now, as I write this judgment, but at the point something occurs which would trigger unlawful protests. That may be now, or it may be later. Furthermore, protesters do not always wait for the diggers to arrive before they begin to trespass. The fact that the route of HS2 is now publicly available means that protesters have the means and ability to decide where they are going to interfere next, even in advance of work starting.

177. In other words, adopting the *Hooper v Rogers* approach that the degree of probability of future injury is not an absolute standard, and that what is to be aimed at is justice between the parties, having regard to all the relevant circumstances, I am satisfied that (all other things being equal) a precautionary injunction is appropriate given the protesters' expressed intentions. To accede to D6's submission would, it seems to me, be to licence the sort of 'guerrilla tactics' which the Lord Chief Justice deprecated in *DPP v Cucicirean*.

178. Here I think it is helpful to quote Morgan J's judgment in *Ineos*, [87]-[95] (and especially [94]-[95]), where he considered an application for a precautionary injunction against protests at fracking sites where work had not actually begun:

“87. The interim injunctions which are sought are mostly, but not exclusively, claimed on a *quia timet* basis. There are respects in which the Claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a *quia timet* basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to,

seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the Claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will approach the present applications as if they are made solely on the *quia timet* basis.

88. The general test to be applied by a court faced with an application for a *quia timet* injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in *London Borough of Islington v Elliott* [2012] EWCA Civ 56, per Patten LJ at 29, as follows:

‘29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.”

89. In *London Borough of Islington v Elliott*, the court considered a number of earlier authorities. The authorities concerned claims to *quia timet* injunctions at the trial of the action. In such cases, particularly where the injunction claimed is a mandatory injunction, the court acts with caution in view of the possibility that the contemplated unlawful act, or the contemplated damage from it, might not occur and a mandatory order, or the full extent of the mandatory order, might not be necessary. Even where the injunction claimed is a prohibitory injunction, it is not enough for the claimant to say that the injunction only restrains the defendant from doing something which he is not entitled to do and causes him no harm: see *Paul (KS) (Printing Machinery) v Southern Instruments (Communications)* [1964] RPC 118 at 122; there must still be a real risk of the unlawful act being committed. As to whether the contemplated harm is ‘imminent’, this word is used

in the sense that the circumstances must be such that the remedy sought is not premature: see *Hooper v Rogers* [1975] Ch 43 at 49-50. Further, there is the general consideration that 'Preventing justice excelleth punishing justice': see *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] Ch 235 at 242, quoting the Second Institute of Sir Edward Coke at page 299.

90. In the present case, the Claimants are applying for *quia timet* injunctions on an interim basis, rather than at trial. The passage quoted above from *London Borough of Islington v Elliott* indicated that different considerations might arise on an interim application. The passage might be read as suggesting that it might be easier to obtain a *quia timet* injunction on an interim basis. That might be so in a case where the court applies the test in *American Cyanamid* where all that has to be shown is a serious issue to be tried and then the court considers the adequacy of damages and the balance of justice. Conversely, on an interim application, the court is concerned to deal with the position prior to a trial and at a time when it does not know who will be held to be ultimately right as to the underlying dispute. That might lead the court to be less ready to grant *quia timet* relief particularly of a mandatory character on an interim basis.

91. I consider that the correct approach to a claim to a *quia timet* injunction on an interim basis is, normally, to apply the test in *American Cyanamid*. The parts of the test dealing with the adequacy of damages and the balance of justice, applied to the relevant time period, will deal with most if not all cases where there is argument about whether a claimant needs the protection of the court. However, in the present case, I do have to apply section 12(3) of the Human Rights Act 1998 and ask what order the court is likely to make at a trial of the claim.

92. I have dealt with the question of *quia timet* relief in a little detail because it was the subject of extensive argument. However, that should not obscure the fact that the decision in this case as to the grant of *quia timet* relief on an interim basis is not an unduly difficult one.

93. What is the situation here? On the assumption that the evidence does not yet show that protestors have sought to subject Ineos to their direct action protests, I consider that the evidence makes it plain that (in the absence of injunctions) the protestors will seek to do so. The protestors have taken direct action against other fracking operators and there is no reason why they would not include Ineos in the future. The only reason that other operators have been the subject of protests in the past and Ineos has not been (if it has not been) is that Ineos is a more recent entrant into the industry. There is no reason to think that (absent injunctions) Ineos will be treated any differently in the future

from the way in which the other fracking operators have been treated in the past. I therefore consider that the risk of the infringement of Ineos' rights is real.

94. The next question is whether the risk of infringement of Ineos' rights is imminent. I have described earlier the sites where Ineos wish to carry out seismic testing and drilling. It seems likely that drilling will not commence in a matter of weeks or even months. However, there have been acts of trespass in other cases on land intended to be used for fracking even before planning permission for fracking had been granted and fracking had begun. I consider that the risk of trespass on Ineos' land by protestors is sufficiently imminent to justify appropriate intervention by the court. Further, there have already been extensive protests outside the depots of third party contractors providing services to fracking operators. One of those contractors is P R Marriott. Ineos uses and intends to use the services of P R Marriott. Accordingly, absent injunctions, there is a continuing risk of obstruction of the highway outside P R Marriott's depot and when that contractor is engaged to provide services to Ineos, those obstructions will harm Ineos.

95. To hold that the risk of an infringement of the rights of Ineos is not imminent with the result that the court did not intervene with injunctions at this stage would leave Ineos in a position where the time at which the protestors might take action against it would be left to the free choice of the protestors without Ineos having any protection from an order of the court. I do not consider that Ineos should be told to wait until it suffers harm from unlawful actions and then react at that time. This particularly applies to the injunctions to restrain trespass on land. If protestors were to set up a protest camp on Ineos land, the evidence shows that it will take a considerable amount of time before Ineos will be able to recover possession of such land. In addition, Ineos has stated in its evidence on its application that it wishes to have clarity as to what is permitted by way of protest and what is not. That seems to me to be a reasonable request and if the court is able to give that clarity that would seem to be helpful to the Claimants and it ought to have been considered to be helpful by the Defendants. A clear injunction would allow the protestors to know what is permitted and what is not."

179. This part of the judgment was not challenged on appeal: see at [35] of the Court of Appeal's judgment: [2019] 4 WLR 100.
180. I think my conclusion is consistent with this approach, and also to that taken by the judges in the *National Highways* cases, where the claimants could not specifically say where the next road protests were going to occur, but could only say that there was a risk they could arise anywhere, at any time because of the protesters' previous behaviour. That uncertainty did not defeat the injunctions.

181. I find further support for my conclusion on this aspect of the Claimants' case in the history of injunctive relief sought by the Claimants over various discrete parcels of land within the HS2 Land. These earlier injunctions are primarily described in Dilcock 1 at [37]–[41]. They show a repeat and continued pattern of behaviour.

(iii) Whether an injunction should be granted against the named Defendants

182. I set out the *Canada Goose* requirements earlier. One of them is that in applications such as this, defendants whose names are known should be named. The basis upon which the named Defendants have been sued in this case is explained in Dilcock 1 at [42]–[46]:

“42. The Claimants have named as Defendants to this application individuals known to the Claimants (sometimes only by pseudonyms) the following categories of individuals:

42.1 Individuals identified as believed to be in occupation of the Cash's Pit Land whether permanently or from time to time (D5 to D20, D22, D31 and D63);

42.2 the named defendants in the Harvil Road Injunction (D28; D32 to D34; and D36 to D59);

42.3 The named defendants in the Cubbington and Crackley Injunction (D32 to D35); and

42.4 Individuals whose participation in incidents is described in the evidence in support of this claim and the injunction application and not otherwise named in one of the above categories.

43. It is, of course open to other individuals who wish to defend the proceedings and/or the application for an injunction to seek to be joined as named defendants. Further, if any of the individuals identified wish to be removed as defendants, the Claimants will agree to their removal upon the giving of an undertaking to the Court in the terms of the injunction sought. Specifically, in the case of D32, who (as described in Jordan 1) has already given a wide-ranging undertaking not to interfere with the HS2 Scheme, the Claimants have only named him because he is a named defendant to the proceedings for both pre-existing injunctions. If D32 wishes to provide his consent to the application made in these proceedings, in view of the undertaking he has already given, the Claimants will consent to him being removed as a named defendant.

44. This statement is also given in support of the First Claimant's possession claim in respect of the Cash's Pit Land and which the Cash's Pit Defendants have dubbed: “Bluebell Wood”. The

unauthorised encampment and trespass on the Cash's Pit Land is the latest in a series of unauthorised encampments established and occupied by various of the Defendants on HS2 Land (more details of which are set out in Jordan 1).

45. The possession proceedings concern a wooded area of land and a section of roadside verge, which is shown coloured orange on the plan at Annex A of the Particulars of Claim ("Plan A"). The HS2 Scheme railway line will pass through the Cash's Pit Land, which is required for Phase 2a purposes and is within the Phase 2a Act limits.

46. The First Claimant is entitled to possession of the Cash's Pit Land having exercised its powers pursuant to section 13 and Schedule 15 of the Phase 2a Act. Copies of the notices served pursuant to paragraph 4(1) of Schedule 15 of the Phase 2a Act are at pages 30 to 97 of JAD3. For the avoidance of doubt, these notices were also served on the Cash's Pit Land addressed to "the unknown occupiers". Notices requiring the Defendants to vacate the Cash's Pit Land and warning that Court proceedings may be commenced in the event that they did not vacate were also served on the Cash's Pit Land. A statement from the process server that effected service of the notices addressed to "the unknown occupiers" and the Notice to Vacate is at pages 98 to 112 of JAD3 and copies of the temporary possession notice addressed to the occupiers of the Cash's Pit Land and the notice to Vacate are exhibited to that statement."

183. Appendix 2, to which I have already referred, summarises the defences which have been filed, and the representations received from non-Defendants. The main points made are (with my responses), in summary, as follows:

- a. The actions complained of are justifiable because the HS2 Scheme causes environmental damage. That is not a matter for me. Parliament approved HS2.
- b. The order would interfere with protesters' rights under Articles 10 and 11. I deal with the Convention later.
- c. Lawful protest would be prevented. As I have made clear, it would not and the draft order so provides.
- d. The order would restrict rights to use the public highway and public rights of way. These are specifically carved out in the order (paragraph 4).
- e. Concern about those who occupy or use HS2 Land pursuant to a lease or licence with the First Claimant. That has now been addressed in the Revised Land Plans.
- f. Complaints about HS2's security guards. I have dealt with that.

(iv) Whether there are reasons to grant the order against persons unknown

184. I am satisfied that the Defendants have all been properly identified either generally, where they are unknown, or specifically where their identities are known. Those who have been identified and joined individually as Defendants to these proceedings are the ‘named Defendants’ and are listed in the Schedule on the RWI website. The ‘Defendants’ (generally) includes both the named Defendants and those persons unknown who have not yet been individually identified. The names of all the persons engaged in unlawful trespass were not known at the date of filing the proceedings (and are largely still not known). That is why different categories of ‘persons unknown’ are generically identified in the relevant Schedule. That is an appropriate means of seeking relief against unknown categories of people in these circumstances: see *Boyd and another v Ineos Upstream Ltd and others* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose*, [82], which I set out earlier.
185. I am satisfied that this is one of those cases (as in other HS2 and non-HS2 protest cases) in which it is appropriate to make an order against groups of unknown persons, who are generically described by reference to different forms of activity to be restrained. I quoted the principles contained in *Canada Goose*, [82] earlier. I am satisfied the order meets those requirements, in particular [82(1) and (2)].
186. I am satisfied that the definitions of ‘persons unknown’ set in Appendix 1 are apt and appropriately narrow in scope in accordance with the *Canada Goose* principles. The definitions would not capture innocent or inadvertent trespass.
187. I accept (and as is clear from the evidence I have set out) that the activists involved in this case are a rolling and evolving group. The ‘call to arms’ from D17 that I set out earlier was a clear invitation to others, who had not yet become involved in protests – and hence by definition were not known - to do so. The group is an unknown and fluctuating body of potential defendants. It is not effective to simply include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant.

(v) *Scope*

188. Paragraphs 3-6 provide for what is prohibited:

“3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:

- a. entering or remaining upon the HS2 Land;
- b. obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or
- c. interfering with any fence or gate on or at the perimeter of the HS2 Land.

4. Nothing in paragraph 3 of this Order:

a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.

b. Shall affect any private rights of access over the HS2 Land.

c. Shall prevent any person from exercising their lawful rights over any public highway.

d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.

e. Shall extend to any interest in land held by statutory undertakers.

5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to):

a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;

b. digging, erecting any structure or otherwise placing or leaving any object or thing on the carriageway which may slow or impede the safe and uninterrupted passage of vehicles or persons onto or from the HS2 Land;

c. affixing or attaching their person to the surface of the carriageway where it may slow or impede the safe and uninterrupted passage of vehicles onto or from the HS2 Land;

d. affixing any other object to the HS2 Land which may delay or impede the free passage of any vehicle or person to or from the HS2 Land;

e. climbing on to or affixing any object or person to any vehicle in the vicinity of the HS2 Land; and

f. slow walking in front of vehicles in the vicinity of the HS2 Land.

6. For the purposes of paragraph 3(c) prohibited acts of interference shall include (but not be limited to):

a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the HS2 Land;

b. the prohibition includes carrying out the aforementioned acts in respect of the fences and gates; and

c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate.”

189. Subject to two points, I consider these provisions comply with *Canada Goose*, [82], in that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the Claimants seeks to prevent. I also consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. The ‘carve-outs’ in [4] make clear that ordinary lawful use of the highway is not prohibited. I do not agree with D6’s submission (Skeleton Argument, [52], et seq).

190. The two changes I require are as follows. The first, per *National Highways*, Lavender J, at [22] and [24(6), a case in which Mr Greenhall was involved, is to insert the word ‘deliberately’ in [3(b)] so that it reads:

“3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:

...

b. *deliberately* obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or

191. The second, similarly, is to insert the word, ‘deliberate’ in [5(f)] so that it reads, ‘*deliberate* slow walking ...’

192. I have also considered the point made by D6 that ‘vicinity’ in [5(f)] is unduly vague. I note that in at least two cases that term has been used in protester injunctions without objection. In *Canada Goose*, [12(14)], it was used to prevent the use of a loudhailer ‘within the vicinity of’ Canada Goose’s store in Regent Street. There was no complaint about it, and although the application failed ultimately, that was for other reasons. Also, in *National Highways Limited v Springorum* [2022] EWHC 205 (QB), [8(5)], climate protesters were enjoined from blocking, obstructing, etc, the M25, which was given an extensive definition in the order. One of the terms prevented the protesters from ‘tunnelling in the vicinity of the M25’. No objection was taken to the use of that term. Overall, I am satisfied that in the circumstances, use of this term is sufficiently clear and precise.

193. As to the wide geographical scope of the order, I am satisfied, for reasons already given, that the itinerant nature of the protests, as in the *National Highways* cases, justifies such an extensive order.

(vi) *Convention rights*

194. This, as I have said, is an important part of the case. The right to peaceful and lawful protest has long been cherished by the common law, and is guaranteed by Articles 10 and 11 of the ECHR and the HRA 1998. However, these rights are not unlimited, as I explained earlier.
195. I begin by emphasising, again, that nothing in the proposed order will prevent the right to conduct peaceful and lawful protest against HS2. I set out the recitals in the order at the beginning of this judgment.
196. I am satisfied there would be no unlawful interference with Article 10 and 11 rights because, in summary: (a) there is no right of protest on private land, and much, although not all, of what protesters have been doing has taken place on such land; and (b) there is no right to cause the type and level of disruption which would be restrained by the order; (c) to the extent that protest takes place on the public highway, or other public land, the interference represented by the injunction is proportionate.
197. Turning, as I must in accordance with the Court of Appeal's guidance, to the *Zeigler* questions, I will set them out again for convenience (adapted to the present context), and answer them in the following way:

Would what the defendants are proposing to do be exercise of one of the rights in Articles 10 or 11?

198. I am prepared to accept in the Defendants' favour that further continued protests of the type they have engaged in in the past potentially engages their rights under these Articles. In line with the principles set out earlier, I acknowledge that Articles 10 and 11 do not confer a right of protest on private land, per *Appleby*, and much of what the Claimants seeks the injunction to restrain relates to activity on private land (in particular, by the unknown groups D1, D2 and D4). But I accept - as I think the Claimants eventually accepted in post-hearing submissions at least - that some protests may on occasion spill over onto the public highway (per Jordan 1, [29.2] in relation to eg, blocking gates), and that such protests do engage Articles 10 and 11.

If so, would there be an interference by a public authority with those rights?

199. Yes. The application for, and the grant of, an injunction to prevent the Defendants interfering with HS2's construction in the ways provided for in the injunction is an interference with their rights by a public authority so far as it touches on protest on public land, such as the highway, where Articles 10 and 11 are engaged.

If there is an interference, is it 'prescribed by law'?

200. Yes. The law in question is s 37 of the SCA 1981 and the cases which have decided how the court's discretion to grant an anticipatory injunction should be exercised: see *National Highways Ltd*, [31(2)] (Lavender J).

If so, would the interference be in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?

201. Yes. It would be for the protection the Claimants' rights and freedoms, and those of their contractors and others, to access and work upon HS2 Land unhindered, in accordance with the powers granted to them by Parliament which, as I have said already, determined HS2 to be in the public interest. The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests.

If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This involves considering the following: Is the aim sufficiently important to justify interference with a fundamental right? Is there a rational connection between the means chosen and the aim in view? Are there less restrictive alternative means available to achieve that aim? Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others ?

202. These are the key questions on this aspect of the case, it seems to me.
203. The question whether an interference with a Convention right is 'necessary in a democratic society' can also be expressed as the question whether the interference is proportionate: *National Highways Limited*, [33] (Lavender J).
204. In *Ziegler*, Lords Hamblen and Stephens stated in [59] of their judgment that:
- “Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.”
205. Lords Hamblen and Stephens also quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *Samede*

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

40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: ‘it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors’ views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself

or by the level of support it seems to command ... the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention ... the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.’

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were ‘of very great political importance’: para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia*, para 45: ‘any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means ...’ The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate.”

206. I have set out this passage, as Lavender J did in *National Highways Limited*, [35], because, given the nature of some of the submissions made to me, I want to underscore the point I made at the outset that I am not concerned with the merits of HS2, or whether it will or will not cause the environmental damage which the protesters fear it will. I readily acknowledge that many of them hold sincere and strongly held views on very important issues. However, it would be wrong for me to express either agreement or disagreement with those views, even if I had the institutional competence to do so, which I do not. Many of the submissions made to me consisted of an invitation to me to agree with the Defendants’ views and to decide the case on that basis. But just like Lavender J said in relation to road protests, that is something which I cannot do, just as I could not decide this case on the basis of disagreement with protesters’ views.

207. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment in *Ziegler* the factors which may be relevant to the assessment of the proportionality of an interference with the Article 10 and 11 rights of protestors blocking traffic on a road.
208. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary: (a) the peaceful nature of the protest; (b) the fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder; (c) the fact that the defendants did not commit any criminal offences other than obstructing the highway; (d) the fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; (e) the fact that the protest related to a 'matter of general concern'; (f) the limited duration of the protest; (g) the absence of any complaint about the defendants' conduct; and (h) the defendants' longstanding commitment to opposing the arms trade.
209. As Lavender J said in his case at [39], this list of factors is not definitive, but it serves as a useful checklist. I propose now to discuss how they should be answered in this case.
210. The HS2 protests have in significant measure not been peaceful. There have been episodes, for example, of violence, intimidation, criminal damage, and assault, as described by Mr Jordan. There have been many arrests. Even where injunctions have been obtained, protesters have resisted being removed (most recently at Cash's Pit, as described in Dilcock 4 and in other material). It follows that the protests have given rise to considerable disorder. The protesters are specifically targeting HS2, and in that sense are in a somewhat different position to the protesters in the *National Highways Ltd* case, whose protests were aimed at the public as a means of trying to influence government policy. But the HS2 protests do also affect others, such as contractors employed to work on the project (for example Balfour Beatty), those in HS2's supply chain, security staff, etc. I accept that the HS2 protests relate to a matter of general concern, but on the other hand, at the risk of repeating myself, the many and complicated issues involved – including in particular environmental concerns – have been debated in Parliament and the HS2 Acts were passed. The HS2 protests are many in number, continuing, and are threatened to be carried on in the future along the whole of the HS2 route without limit of time. The disruption, expense and inconvenience which they have caused is obvious from the evidence. I do not think that I am in any position to assess the public mood about HS2 protests. No doubt some members of the public are in favour and no doubt some are against. As I have already said, I accept that the defendants are expressing genuine and strongly held views.
211. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows.
212. Firstly, by committing trespass and nuisance, the Defendants are obstructing a large strategic infrastructure project which is important both for very many individuals and for the economy of the UK, and are causing the unnecessary expenditure of large sums of public money. In that context, I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion. I base that

conclusion primarily on the considerable disruption caused by protests to date and the repeated need for injunctive relief for specific pockets of land.

213. Second, I also accept that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow for the unhindered completion of HS2 by the Claimants over land which they are in possession of by law (or have the right to be). Prohibiting activities which interfere with that work is directly connected to that aim.
214. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7].
215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.
216. Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this: (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in *Ziegler*, the HS2 protests are not directed at a specific location which is the subject of the protests. They have caused repeated, prolonged and significant disruption to the activities of many individuals and businesses and have done so on a project which is important to the economy of this country. Finally on this, the injunction is to be kept under review by the Court, it is not without limit of time, and can and no doubt will be discharged should the need for it disappear.
217. Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:
 - a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour

continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.

- b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.
- c. The balance of convenience strongly favours the making of the injunction.

(vii) Service

218. Finally, I turn to the question of service and whether the service provisions in the injunction are sufficient.

219. The passages from [82] of *Canada Goose* I quoted earlier show that the method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings (ie, the application) to their attention.

220. I considered service of the application at a directions hearing on 28 April 2022. At that hearing, I made certain suggestions recorded in my order at [2] as to how the application for the injunction was to be served:

“Pursuant to CPR r. 6.27 and r. 81.4 as regards service of the Claimants’ Application dated 25 March 2022:

a. The Court is satisfied that at the date of the certificates of service, good and sufficient service of the Application has been effected on the named defendants and each of them and personal service is dispensed with subject to the Claimants’ carrying out the following additional methods within 14 days of the date of this order:

i. advertising the existence of these proceedings in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website.

ii. where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the papers in the proceedings within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish notice boards in the same approximate location.

iii. making social media posts on the HS2 twitter and Facebook pages advertising the existence of these proceedings and the web address of the HS2 Proceedings website.

b. Compliance with 2 (a)(i), (ii) and (iii) above will be good and sufficient service on “persons unknown”

221. The injunction at [7]-[11] provides under the heading ‘Service by Alternative Method – This Order’

“7. The Court will provide sealed copies of this Order to the Claimant’s solicitors for service (whose details are set out below).

8. Pursuant to CPR r.6.27 and r.81.4:

a. The Claimant shall serve this Order upon the Cash’s Pit Defendants by affixing 6 copies of this Order in prominent positions on the perimeter of the Cash’s Pit Land.

b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:

i. Affixing 6 copies in prominent positions on the perimeter each of the Cash’s Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.

ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.

iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.

iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.

c. Service of this Order on Named Defendants may be effected by personal service where practicable and/or posting a copy of this Order through the letterbox of each Named Defendant (or leaving in a separate mailbox), with a notice drawing the recipient’s attention to the fact the package contains a court order. If the premises do not have a letterbox, or mailbox, a package containing this Order may be affixed to or left at the front door or other prominent feature marked with a notice drawing the recipient’s attention to the fact that the package contains a court order and should be read urgently. The notices shall be given in prominent lettering in the form set out in Annex B. It is open to any Defendant to contact the Claimants to identify an alternative

place for service and, if they do so, it is not necessary for a notice or packages to be affixed to or left at the front door or other prominent feature.

d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.

e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has as at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk

9. Service in accordance with paragraph 8 above shall:

a. be verified by certificates of service to be filed with Court;

b. be deemed effective as at the date of the certificates of service; and

c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.

10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.

11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been on, the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court.”

222. Further evidence about service is contained in Dilcock 3, [7], et seq, and Dilcock 4, [7] et seq. I can summarise this as follows.

223. Before I made my order, Ms Dilcock explained that the methods of service used by the Claimants as at that date had been based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this application. She said the methods of service to that date had been effective in publicising the application.

224. She said that there had been 1,371 views (at 24 April 2022) of the Website: Dilcock 3, [11]; By 17 May 2022 (a week or so before the main hearing, and after my directions

had come into effect) there had been 2,315 page views, of which 1,469 were from unique users: Dilcock 4, [17]. So, in round terms, there were an additional 1,000 views after the directions hearing.

225. Twitter accounts have shared information about the injunction application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: Dilcock 3, [16].
226. A non-exhaustive review of Facebook shows that information about the injunction and/or the link to a fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: Dilcock 3, [17].
227. Dilcock 4, [7] – [17], sets out how the Claimants complied with the additional service requirements pursuant to my directions of 28 April 2022. Those measures are not reliant on either notice via website or social media. The Claimants say that they complement and add to the very wide broadcasting of the fact of the proceedings.
228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.
229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75].

Final points

230. I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly. I also reject the suggestion that the First Claimant lacks ‘clean hands’ so as to preclude injunctive relief.

Conclusion

231. I will therefore grant the injunction in the terms sought in the draft order of 6 May 2022 in Bundle B at B049 (subject to any necessary and consequential amendments to reflect post-hearing matters and in light of this judgment).

APPENDIX 1

UNNAMED DEFENDANTS **(TAKEN FROM THE AMENDED PARTICULARS OF CLAIM** **DATED 28 APRIL 2022 – WITH TRACKED CHANGED REMOVED)**

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")

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

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

APPENDIX 2

SUMMARY OF DEFENDANTS' RESPONSES

Name	Received and reference in the papers	Summary
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because not demonstrated immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land <i>and</i> existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) [D/3]	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) [D/4]	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) [D/7]	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) [D/8]	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) [D/10]	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) [D/12]	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20 th May.

D29 – Jessica Maddison	Defence (16.05.22) [D/14]	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) [D/15]	Complaint about lack of time to prepare for initial hearing.
	Application for more time – N244 (04.04.22)	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) [D/36/179-D/37/2916]	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) [D/16]	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) [D/17]	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) [D/19]	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – dispute over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 [D/20]	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizabeth Farbrother	11.05.22 [D/23]	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) [D/23]	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) [D/24]	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction

		is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRow, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) [D/25]	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) [D/26]	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) [D/27]	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) [D/28]	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) [D/29]	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) [D/30]	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) [D/31]	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) [D/32]	Consider themselves "persons unknown" by living nearby and using nearby PRow. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) [D/33]	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) [D/34]	Concerns about public access to PRow re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) [D/35]	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of houses purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		

Val Saunders “statement in support of the defence against the Claim QB-2022-BHM-00044”	Undated [D/37/2493] (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith “Witness statement” “statement in support of the defence...”	14.05.22 [D/37/2509-2520] (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – “statement in support of the defence...”	Undated [D/37/2674-2691] (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – “Seven arguments against HS2”	Undated 2692-2697	Merits of scheme. Argues for scrapping.
Brenda Bateman – “statement in support of the defence...”	Undated 2698-2699	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – “statement in support of the Defence...”	Undated 2700-2701	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – “Defence against the claim...”	Undated 2702-2703	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – “Statement in support of the Defence...”	Undated 2704	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – “Statement in support of the Defence...”	Undated 2705-2710	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – “Witness Statement”; “Statement in support of the Defence...”	12.05.22 2711-2714	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2’s land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – “statement in support of the Defence...”	Undated 2715-2716	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – “statement in support of the Defence...”	9.05.22 2717-2718	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being

		able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – “Statement in support of the Defence...”	Undated 2719	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – “statement in support of the Defence...”	Undated 2724-2731	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – “statement in support of the Defence...”	Undated 2735	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – “Statement”	Undated 2737-2740	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – “In support of the Defence...”	15.5.22 2742	Merits of scheme. Protests are therefore valid.
Ann Hayward – Letter regarding RWI	6.05.22 2743-2744	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – “statement in support of the Defence”	15.05.22 2745-2746	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 2747-2751	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.

Anonymous (near Cash's Pit occupant)	Undated 2752-2753	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence..."	Undated 2754-2755	Criticism of merits of Scheme, argument re right to protest.

1 Q.B.

It is interesting to note that the conclusion that a payment made under a mistake but in discharge of a debt is irrecoverable is consistent with the *American Law Institute, Restatement of the Law, Restitution* (1937), to which Mr. Sumption took us. In section 33 it is stated that the holder of a cheque or other bill of exchange who, having paid value in good faith therefor, receives payment from the drawee without reason to know that the drawee is mistaken is under no duty of restitution to him although the drawee pays because of a mistaken belief that he has sufficient funds of the drawer. The commentary states that the payee is entitled to retain the money which he has received as a bona fide purchaser, and the illustrations given by way of typical cases include the payment by a bank of a cheque drawn on it by a customer who has insufficient funds to cover the cheque, the payment going to discharge a mortgage debt.

For these reasons as well as those given by Waller L.J. I would reject the bank's contentions on the third issue.
It follows that I, too, would allow this appeal.

*Appeal allowed with costs.
Leave to appeal refused.*

Solicitors: Davies Arnold Cooper, Stones Porter.

[Reported by PAUL MAGRATH ESQ., Barrister]

[COURT OF APPEAL]

MANCHESTER AIRPORT PLC. v. DUTTON AND OTHERS

1999 Feb. 5; 23

Kennedy, Chadwick and Laws L.JJ.

Practice—Possession of land—Summary proceedings—Licensee having right of occupation but not exclusive possession—Trespassers entering land before licence granted—Whether licensee having sufficient interest to obtain possession order—R.S.C., Ord. 113, r. 1

The plaintiff was granted a licence by the landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. The works involved the felling and lopping of certain trees so as to reduce the height of obstacles in the flight path. Three days before the grant of the licence the defendants, who were opposed to the works, entered the wood without permission with the intention of making it difficult or impossible for the works to be carried out. The district judge granted the plaintiff an order for possession of the wood under R.S.C., Ord. 113.¹ An appeal by the defendants on the

¹ R.S.C., Ord. 113, r. 1: see post, p. 138c-d.

ground that the plaintiff did not have a sufficient interest in the wood to seek an order for possession since the licence granted did not give it exclusive possession of the land was dismissed.

On appeal by the defendants:—

Held, dismissing the appeal (Chadwick L.J. dissenting), that a licensee with a right to occupy land, whether or not he was in actual occupation, was entitled to bring an action for possession against a trespasser in order to give effect to the rights under the licence; that an estate in or a right to exclusive possession of the land was not required before an order under the summary procedure in R.S.C., Ord. 113 could be obtained, but a licensee's remedy was strictly limited to enforcement of the rights he enjoyed under the licence; that the plaintiff's right to occupy the wood for the purpose of carrying out the specified works gave rise to a sufficient interest for the purposes of Order 113; and that, accordingly, the plaintiff was entitled to possession as against the defendants (post, pp. 147C–E, 149H–150C, 151C–D, F–152A).

Decision of Steel J. affirmed.

The following cases are referred to in the judgments:

- Allan v. Liverpool Overseers* (1874) L.R. 9 Q.B. 180
Appah v. Parncliffe Investments Ltd. [1964] 1 W.L.R. 1064; [1964] 1 All E.R. 838, C.A.
Danford v. McNulty (1883) 8 App.Cas. 456, H.L.(E.)
Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233; [1970] 3 W.L.R. 538; [1970] 3 All E.R. 326
Manchester Corporation v. Connolly [1970] Ch. 420; [1970] 2 W.L.R. 746; [1970] 1 All E.R. 961, C.A.
National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.)
Radaich v. Smith (1959) 101 C.L.R. 209
Street v. Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289, H.L.(E.)
University of Essex v. Djemal [1980] 1 W.L.R. 1301; [1980] 2 All E.R. 742, C.A.
Wiltshire County Council v. Frazer (1983) 82 L.G.R. 313, C.A.
Wykeham Terrace, Brighton, Sussex, In re, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch. 204; [1970] 3 W.L.R. 649

The following additional cases were cited in argument:

- Pasmore v. Whitbread & Co. Ltd.* [1953] 2 Q.B. 226; [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361, C.A.
Philippis v. Philippis (1878) 4 Q.B.D. 127, C.A.

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

- Ashburn Anstalt v. Arnold* [1989] Ch.1; [1988] 2 W.L.R. 706; [1988] 2 All E.R. 147, C.A.
Delaney v. T. P. Smith Ltd. [1946] K.B. 393; [1946] 2 All E.R. 23, C.A.
Devon Lumber Co. Ltd. v. MacNeill (1987) 45 D.L.R. (4th) 300
Hull v. Parsons [1962] N.Z.L.R. 465
Lows v. Telford (1876) 1 App.Cas. 414, H.L.(E.)
Lyons v. The Queen (1984) 14 D.L.R. (4th) 482
Malone v. Laskey [1907] 2 K.B. 141, C.A.

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- A *Marcroft Wagons Ltd. v. Smith* [1951] 2 K.B. 496; [1951] 2 All E.R. 271, C.A.
Marsden v. Miller (1992) 64 P. & C.R. 239, C.A.
Mehta v. Royal Bank of Scotland Plc., The Times, 25 January 1999
Moore v. MacMillan [1977] 2 N.Z.L.R. 81
Oldham v. Lawson (No. 1) [1976] V.R. 654
Portland Managements Ltd. v. Harte [1977] Q.B. 306; [1976] 2 W.L.R. 174;
 [1976] 1 All E.R. 225, C.A.
Simpson v. Knowles [1974] V.R. 190

B

APPEAL from Steel J.

- By an originating summons under R.S.C., Ord. 113 dated 7 August 1998 the plaintiff, Manchester Airport Plc., applied for an order against the defendants, Lee Dutton, Neville Longmire, Lance Crooks, Philip Benn, Norman Stoddard, Maxine Radcliffe and persons unknown, to recover possession of land known as part of Arthur's Wood, Styal, in the county of Cheshire, on the ground that they were entitled to possession and that the persons in occupation were in occupation without licence or consent. On 18 September 1998 District Judge Freeman in the Manchester District Registry joined Christopher Maile as a defendant, dismissed Lance Crooks, Philip Benn and Maxine Radcliffe as defendants and made the order for possession. An appeal by the defendants was dismissed by Steel J. on 26 October 1998.

D

- By a notice of appeal dated 19 January 1999 the defendants sought an order that the plaintiff be refused possession of Arthur's Wood, Styal on the grounds, inter alia, that the judge was wrong in law in finding that the licence granted to the plaintiff by the National Trust gave it a title to the land sufficient for it to make an application for summary possession against the defendants by way of the special procedure in Order 113; that the judge ought to have taken more account of the facts that the plaintiff had never been in occupation of the land, that the licence granted to the plaintiff did not grant it exclusive possession of the land and that the National Trust was prevented in law from so granting exclusive possession; that the judge placed excessive reliance on the commercial interests of the plaintiff by fully taking into account the argument that it was wrong to expect the onus of seeking possession to fall back on the title holder of the land; that the judge ought to have taken more account of the obligations placed by Parliament on the licensor to prevent by all lawful means the encroachment on land in its care, and to protect and preserve such land, and the resulting question on the lawfulness of the licence granted to the plaintiff; and that having regard to the fact that the plaintiff clearly had no title to the land and had never been in possession of the land the judge ought to have ruled that the plaintiff had no locus standi to seek possession against the defendants.

F

G

The facts are stated in the judgment of Chadwick L.J.

H

Christopher Maile, in person for all the defendants. The licence granted to the plaintiff by the National Trust was limited to carrying out works on the land. The plaintiff had no interest in the land and, therefore, no right to take possession proceedings against trespassers: see *Street v. Mountford* [1985] A.C. 809. Since the defendants were on the land before the licence was granted, the plaintiff cannot claim as occupier but must rely on the

title. To obtain an injunction against a trespasser a licensee needs total control of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. R.S.C., Ord. 113 requires absolute title and exclusive possession. There is no case where a licensee has obtained possession under that Order. *Philipps v. Philipps* (1878) 4 Q.B.D. 127 set the criteria for possession cases: a title to the land needs to be established with documentary evidence.

By the National Trust Act 1907 (7 Edw. 7, c. cxxxvi) the Trust's land is inalienable. The Trust can only grant a limited licence. It cannot give exclusive possession to anyone. The plaintiff cannot claim as successor to the National Trust since to claim through a predecessor in title the same title must continue: *Pasmore v. Whitbread & Co. Ltd.* [1953] 2 Q.B. 226. A licensee therefore has no locus standi to apply for summary possession against a trespasser who was on the land before the licence was granted.

Timothy King Q.C. and *Mark J. Forte* for the plaintiff. Order 113 is available to any party with sufficient interest in land to justify a claim to possession under general principles of law. Order 113 was designed to deal with squatters and other people occupying land and does not demand that the plaintiff has a good title. The Order is purely procedural, providing a summary vehicle for obtaining possession.

Historically the right to sue for possession lay only with those with absolute title to the land or with a lesser title derived from the absolute title. The right of a legal tenant to sue for possession against a landlord has developed to include the rights of a licensee to sue in trespass where he enjoys exclusive possession: see *Clerk & Lindsell on Torts*, 17th ed. (1995), p. 843, para. 17-12, pp. 846-848, paras. 17-16, 17-17, 17-18, p. 869, para. 17-57. The concept of "exclusive possession" is a developing concept. The test whether a licensee may sue a licensor in trespass should not be the same test as that where the licensee sues trespassers with no interest in the land. A licensee may have possession of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. The right to possession is relative: see *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175.

The plaintiff has a right against all the world except the National Trust, which has no objection to the proceedings. The licence gives the plaintiff the right to enter and occupy the land which confers a sufficient interest in the land to entitle the plaintiff to take possession proceedings. Since the grant of the licence the plaintiff has been in occupation of the land: contrast *University of Essex v. Djemal* [1980] 1 W.L.R. 1301 and *Wiltshire County Council v. Frazer* (1983) 82 L.G.R. 313. Even if he had never entered into occupation, the licence gives him a sufficient right to immediate possession as against bare trespassers who claim no interest in the land.

Maile replied.

Cur. adv. vult.

23 February. The following judgments were handed down.

CHADWICK L.J. This is an appeal against an order made on 26 October 1998 by Steel J. in the Manchester District Registry. By her

1 Q.B.

A order the judge dismissed an appeal by four of the six named defendants to these proceedings, as originally constituted, against an order for possession made by the district judge on 18 September 1998 under R.S.C., Ord. 113, r. 6. The district judge had ordered that the plaintiff, Manchester Airport Plc. ("the airport company"), do recover possession of a piece of land forming part of Arthur's Wood, Styal, Cheshire, in which the named defendants and other persons unknown were said to be encamped.

B The property known as Arthur's Wood was conveyed to the National Trust for Places of Historic Interest or Natural Beauty ("the National Trust") by a conveyance dated 5 August 1980. It has been common ground in these proceedings that the National Trust thereby became, and has remained, the owner of that property. The wood is situate at or near to the proposed second runway for Manchester Airport. In order to comply with conditions which will govern the operation of the proposed second runway (when completed) the airport company—as the operator of Manchester Airport—needs to create an obstacle limitation surface ("O.L.S."). That requires, as I understand it, a reduction in height of obstacles within the flight path. For that purpose the airport company need to carry out certain works ("the O.L.S. works") within Arthur's Wood. Put shortly, the O.L.S. works appear to involve the lopping, or in some cases the felling, of trees. The defendants are opposed to the carrying out of those works on environmental and, I think, ecological grounds.

D On or about 19 June 1998 the defendants or others entered Arthur's Wood and set up encampments—including tree-houses, ropewalks and a tunnel. It is accepted that they did so without licence or permission from the National Trust; and that as against the National Trust they are trespassers. It may, I think, be inferred that it was, and remains, the defendants' intention that their occupation will make it difficult or impossible for the airport company to carry out the O.L.S. works.

E On 22 June 1998, very shortly after the defendants had taken up occupation within Arthur's Wood, the National Trust granted a licence to the airport company. So far as material the terms of that licence are contained within the first three clauses:

F "1. In consideration of the agreements on behalf of [Manchester Airport Plc.] hereinafter contained [the National Trust] gives [Manchester Airport Plc.] and its contractors and agents licence to enter and occupy that part of Arthur's Wood Styal Cheshire shown edged red on the attached plan ('the land') for the purpose set out in this agreement.

G "2. The purpose for which the licence is granted is to enable the works agreed between the parties and set out in the document appended hereto and titled 'Trees affected by Obstacle Limitation Surface—Arthur's Wood' ('the works') to be carried out. [The National Trust] gives no warranty that the premises are legally or physically fit for the purposes specified in this clause.

H "3. This licence shall subsist from the date hereof until 31 March 1999 provided that if the works have not been completed to the satisfaction of the parties by this date this licence shall be extended by such reasonable period for the completion of the works as the parties shall agree."

The document which is said, in clause 2, to be appended to that licence has not been put in evidence; but the description in clause 2 suggests that the O.L.S. works are restricted to the topping, lopping or felling of trees. Clause 5 provides that the licence is personal to the airport company and that the rights granted shall only be exercised by the airport company, its contractors and agents.

It was in those circumstances that the airport company commenced these proceedings on 7 August 1998 by the issue of an originating summons. The defendants were, as I have indicated, six named individuals and "persons unknown." The summons is expressed to be a summons under Order 113. The airport company, as plaintiff, sought an order that it recover possession of the land edged red on the plan annexed to the summons (being a copy of the plan attached to the licence of 22 June 1998) "on the ground that they are entitled to possession and that the persons in occupation are in occupation without licence or consent."

Order 113, r. 1 is in these terms:

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

The district judge made the order sought. Four of the six named defendants appealed from that order. The appeal came before Steel J., sitting in Manchester. Their case was presented to her, as it was in this court, by the fourth named defendant, Christopher Maile, in person. Steel J. recorded his principal submission in these terms:

"The appellant submits that [Ord. 113, r. 1] is very specific in its terms, and Manchester Airport, the plaintiff in this case, has no locus standi to apply for such an order [for possession]. A person who is entitled to claim possession under this Order has to have a title, has to have an absolute title and exclusive possession, and a licence to occupy which was granted to the respondents in this case, submits Mr. Maile, from 21 June 1998 does not give exclusive possession to the airport authority. The plaintiff, Manchester Airport, as a licensee concede in this case that they have no absolute title to the land which is the subject of this application. They have no exclusive possession to that land, but on behalf of the plaintiff it is submitted that they do have the locus standi to claim possession under Ord. 113, rr. 1 and 6. The appellant limits his case to this comparatively narrow issue of law, that the whole proceedings have been misconceived."

The judge described Mr. Maile's submission as a narrow but important proposition of law. She expressed her conclusion in these terms:

"I am satisfied, as was the district judge, that as a licensee, although they have no absolute title or exclusive possession, in this case the plaintiff has the locus standi to bring these proceedings, and that is determined by the nature of the rights which were granted to the plaintiff, a right to occupy. The licence gives the right of possession

1 Q.B.

A and this is, I am satisfied, a right of possession which does not give an absolute title, but it does nevertheless give a power against trespassers. That is very different from the position of proving possession against those with an interest in the property. It is not in issue that the defendant and others in this case are trespassers on this land. They do not in this case claim an interest in the property. I am satisfied that this licence gives the respondent power to seek possession against trespassers. Also that the Order 113 procedure by originating summons was the correct means by which the plaintiff sought to claim that power."

B The judge dismissed the appeal. It is from that order that the four defendants appeal to this court. The issue, as defined by the grounds set out in the notice of appeal, is in substance the same as that before the judge: whether the licence granted to the airport company by the National Trust on 22 June 1998 gave to the airport company an interest in the land sufficient to enable it to seek an order for possession under the summary procedure contained in R.S.C., Ord. 113.

C Order 113 was introduced in 1970 by the Rules of the Supreme Court (Amendment No. 2) Order 1970 (S.I. 1970 No. 944), shortly after the decision of this court in *Manchester Corporation v. Connolly* [1970] Ch. 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right—that is to say, against trespassers. The Order does not extend or restrict the jurisdiction of the court. In *University of Essex v. Djemal* [1980] 1 W.L.R. 1301, 1304 Buckley L.J. explained the position in these terms:

D "I think the Order is in fact an Order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession."

F As that passage makes clear, Buckley L.J. made those remarks in the context of a claim by the owner of the relevant property. The question, in *University of Essex v. Djemal*, was whether the university could obtain an order excluding those involved in a student protest from the whole of the campus, or only from such part of the campus actually in their occupation, as the judge had held in the court below. He was not addressing the question which arises in the present case: whether the plaintiff had a right to possession at all. But, it is plain from his remarks that he would have taken the view that that was a question which had to be determined under the general law. If the right does not exist under the general law, there is nothing in the new procedure introduced in Order 113 which can have the effect of conferring that right.

H An order for possession, if made under Order 113, must be in the form prescribed by rule 6(2)—that is to say in Form 42A in R.S.C., Appendix A.

The court orders that the plaintiff do recover possession of the land described in the originating summons. An order in that form is an order in rem, enforceable by a writ of possession. The nature of a writ of possession was explained by Lord Diplock in *Manchester Corporation v. Connolly* [1970] Ch. 420, 428–429:

“The writ of possession was originally a common law writ (though it is now regulated, as I say, by Ord. 45, r. 3) under which it was ordered that the plaintiff recover possession of the land. Like other common law remedies it did not act in personam against the defendant. It authorised the executive power as represented by the sheriff to do certain things, perform certain acts, in this particular case to evict from land persons who are there and to deliver possession of the land to the plaintiff.”

A writ of possession to enforce an order made under Ord. 113, r. 6 must be in Form 66A of the prescribed forms: see Ord. 113, r. 7(2). The writ is addressed to the sheriff; it recites that it has been ordered that the plaintiff do recover possession of the land; and it commands the sheriff “that you enter the said land and cause [the plaintiff] to have possession of it.” A writ in that form has been issued in the present proceedings, but is stayed pending the outcome of this appeal.

It is against that background that I consider the question whether the airport company has shown that it has a right to possession of the relevant part of Arthur’s Wood which is of the quality necessary to support the order for possession made in these proceedings and the writ of possession issued consequent upon that order. It is essential to keep in mind that it is not contended by the airport company that it is, or ever has been, in actual possession of the wood (or of any part of it) to the exclusion of the defendants. It has been common ground that the defendants had entered the wood and encamped there before the licence of 22 June 1998 was granted. This is not a case in which the plaintiff can rely on its own prior possession to recover possession of land from which it has been ousted. The airport company must rely on the title (if any) which it derives under the licence.

It is relevant, also, to have in mind that it has not been contended by the defendants that, in appropriate circumstances, the airport company might not be entitled to a personal remedy against one or more of them; for example, a remedy by way of injunction to restrain them, individually, from interfering with the carrying out of the O.L.S. works under the terms of the licence. There have been no claims for injunctions in the present proceedings—for reasons which are understandable in the circumstances—and the availability or otherwise of remedies in personam is not in issue on this appeal. The issue is whether the rights which the airport company acquired under the licence of 22 June 1998 enable it to evict the defendants from the wood with the assistance of the sheriff under a writ of possession.

It is necessary to consider, first, the powers of the National Trust in relation to the grant of that licence. The National Trust is a statutory corporation, established by the National Trust Act 1907 (7 Edw. 7, c. cxxxvi), for the purposes of promoting the permanent preservation for

1 Q.B.

A the benefit of the nation of lands and buildings of beauty or historic interest and, as regards lands, the preservation (so far as practicable) of their natural aspect, features and animal and plant life: see section 4 of that Act. The power of the National Trust to acquire land must, in the absence of some specific power such as that conferred by section 4 of the National Trust Act 1937 (1 Edw. 8 & 1 Geo. 6, c. lvii) (power to acquire land to hold for investment purposes), be a power to acquire that land for the purposes of promoting its permanent preservation for the benefit of the nation. That is the statutory objective to which, *prima facie*, the power to acquire land is ancillary. There has been no suggestion in the present case that Arthur's Wood was acquired for any purpose other than its permanent preservation for the benefit of the nation. Land which is acquired for that purpose is inalienable: see section 21(2) of the Act of 1907.

C Section 12 of the National Trust Act 1939 (2 & 3 Geo. 6, c. lxxxvi) is in these terms, so far as material:

"Notwithstanding anything in section 21 . . . of the Act of 1907 . . . the National Trust may grant any easement or right (not including a right to the exclusive possession of the surface) over or in respect of any property made inalienable by or under the said section . . ."

D It is plain, therefore, that the licence of 22 June 1998, whatever its terms, could not confer on the airport company a right to exclusive possession of the surface of Arthur's Wood. It could not do so because the National Trust had no power to grant such a right. The airport company do not contend otherwise. In those circumstances the question is whether some right enjoyed by the airport company under the licence of 22 June 1998 (being a right less than a right to exclusive possession) can be the basis for an order for possession—that is to say, for an order in rem—made under Order 113.

F It has long been understood that a licensee who is not in exclusive occupation does not have title to bring an action for ejectment. The position of a non-exclusive occupier was explained by Blackburn J. in *Allan v. Liverpool Overseers* (1874) L.R. 9 Q.B. 180, 191–192, in a passage cited by Davies L.J. in this court in *Appah v. Parncliffe Investments Ltd.* [1964] 1 W.L.R. 1064, 1069–1070 and by Lord Templeman in the House of Lords in *Street v. Mountford* [1985] A.C. 809, 818. The question in *Allan v. Liverpool Overseers* was whether a steamship company was liable to be rated in respect of its occupation of certain sheds which it occupied under licence from the Mersey Docks and Harbour Board. As Blackburn J. pointed out, liability for rates fell on a person who had exclusive occupation:

H "The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass for it. A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and although his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case

of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable."

That passage, as it seems to me, provides clear authority for the proposition that an action for ejectment—the forerunner of the present action for recovery of land—as well as an action for trespass can only be brought by a person who is in possession or who has a right to be in possession. Further, that possession is synonymous, in this context, with exclusive occupation—that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title (save in so far as he has reserved a right to enter).

The position of a licensee has received attention in the context of the statutory protection afforded to residential occupiers. Mr. Maile referred us to well known passages in the speech of Lord Templeman in *Street v. Mountford* [1985] A.C. 809. The question, in that case, was whether the rights conferred on the occupier of rooms by an agreement described as a licence were such that the occupier had a tenancy protected by the Rent Acts. Lord Templeman referred to what he described as the traditional view, at p. 816:

"The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

He went on to give an example germane to the facts in the present case:

"My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted. For example, an owner of land could grant a licence to cut and remove standing timber. Alternatively the owner could grant a tenancy of the land with the right to cut and remove standing timber during the term of the tenancy. The grant of rights relating to standing timber therefore required careful consideration in order to decide whether the grant conferred exclusive possession of the land for a term at a rent and was therefore a tenancy or whether it merely conferred a bare licence to remove the timber."

1 Q.B.

In the present case the question is not whether the agreement of 22 June 1998 creates a tenancy or a licence. It does not create a tenancy, for it is a gratuitous agreement under which no rent is payable. Nor, in the present case, is the question whether the airport company, as occupier under a licence, has exclusive possession or a right to exclusive possession. That question is determined by the inability of the National Trust, in the exercise of its statutory powers, to grant a right to exclusive possession. The question is whether a person who has a right to occupy under a licence but who does not have any right to exclusive possession can maintain an action to recover possession. But, in that context, the observations of Windeyer J. in the High Court of Australia, in *Radaich v. Smith* (1959) 101 C.L.R. 209, 222, adopted with approval by Lord Templeman in *Street v. Mountford* [1985] A.C. 809, 827, are of relevance:

"What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives . . . A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass . . . All this is long established law: see *Cole on Ejectment* (1857), pp. 72, 73, 287, 458."

The lessee, having a right to exclusive possession, could, before entry into possession, maintain an action for ejectment. A licensee, if he did not have a right to exclusive possession, could not bring ejectment. A tenant or a licensee who was in actual possession—that is to say, in occupation in circumstances in which he had exclusive possession in fact—could maintain an action for trespass against intruders; but that is because he relied on the fact of his possession and not on his title.

The licence in the present case, as it seems to me, is a clear example of a personal permission to enter the land and use it for some stipulated purpose. In my view, it would be contrary to what Windeyer J. described as "long established law" to hold that it conferred on the airport authority rights to bring an action in rem for possession of the land to which it relates.

Faced with what may be stigmatised as the traditional view, Mr. King, on behalf of the airport company, sought to persuade us that the law as to the recovery of possession was in a state of change or development. He submitted that it was no longer necessary to establish a right to exclusive possession in order to maintain an action for ejectment. There was now a concept of "relative possession." He referred to the view expressed by the editors of *Clerk & Lindsell on Torts*, 17th ed. (1995), when commenting upon the passage in the judgment of Blackburn J. in *Allan v. Liverpool Overseers*, L.R. 9 Q.B. 180, 191–192 which I have set out. They observe, at p. 848, para. 17–18:

"The typical Victorian lodger described above by Blackburn J. as having a non-exclusive possession has to be distinguished from the typical modern occupational licensee, for 'in recent years it has been

established that a person who has no more than a licence may yet have possession of the land,' and the terms of the licence may confer a sufficient right of possession."

The quotation is from the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233, 257, to which I shall return. But it is important to set the passage which I have just cited in context. The question addressed in that passage is not the question in this case. The question there addressed is whether a licensee who is in actual occupation may have the protection of the law of trespass against intruders; not whether a licensee who is not in occupation can evict a trespasser who is already on the property. This appears from the first two sentences of paragraph 17-18:

"It would seem that exclusive possession against the landlord as a test for the nature of the occupant's interest is not conclusive as to the occupant's possessory interest vis-à-vis third parties. The terms of an occupational licence may give the licensee such a degree of control over access as to entitle him to the protection of the law of trespass against intruders."

It is this concept which, as it seems to me, Lord Upjohn had in mind when he said, in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175, 1232:

"Furthermore . . . the [deserted] wife's occupation is not exclusive against the deserting husband for he can at any moment return and resume the role of occupier without the leave of the wife. Nevertheless, I cannot seriously doubt that in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has dominion over the house and she could clearly bring proceedings against trespassers; so I shall for the rest of this opinion assume that the wife was and is in exclusive occupation of the matrimonial home at all material times."

Mr. King placed much reliance on that passage; but, to my mind, it is of no assistance to his argument. I would accept, without hesitation, that a deserted wife who has remained in occupation of the former matrimonial home after the departure of her husband has exclusive occupation in the sense required to bring an action against intruders; but that is because her occupation has the necessary possessory quality and she does not need to rely upon her title. I would not accept—and I do not think that Lord Upjohn was intending to suggest—that a deserted wife who goes out of occupation upon or after the departure of her husband has title to bring an action to recover possession against a squatter who goes into occupation of the empty house.

Nor do I think that the airport company gains assistance from the decision of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233. The defendant, a building contractor, had been allowed into occupation of a site owned by the plaintiff council under a building contract. The council had sought to determine the contract by notice under its terms. The contractor refused to vacate the site. The council brought proceedings for injunctions

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A restraining the contractor from "entering, remaining or otherwise trespassing" on the site. Megarry J. explained the position, at p. 268:

"The contractor is in de facto control of the site, and whether or not that control amounts in law to possession, the injunction would in effect expel the contractor from the site and enable the borough to re-assert its rights of ownership."

B Megarry J. refused to grant what he regarded as a mandatory injunction on an interlocutory application because he was not satisfied that the council had made out a sufficiently strong case for that remedy in advance of trial. But, in the course of his judgment, he considered a submission that the contractor was in possession of the site—in which case the injunctions sought would, clearly, have been inappropriate. In that context he said, at p. 257:

C "I do not think that I have to decide these or a number of other matters relating to possession. First, I am not at all sure that the matter is determined by the language of the contract. It is in a standard form"—containing R.I.B.A. conditions—"and may be used in a wide variety of circumstances. In some, the building owner may be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site. Second, in recent years it has been established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily denied to a licensee."

D The reference, in a judgment delivered in 1971, to the fact that "in recent years it has been established that a person who has no more than a licence may yet have possession of the land" was, I think, a reference to the dichotomy, finally put to rest by the decision of the House of Lords in *Street v. Mountford* [1985] A.C. 809, between "licence" and "tenancy" in the context of the Rent Acts. There is no doubt that a licensee may have a right to exclusive possession without thereby becoming a tenant—for example where the licence is gratuitous—but that will depend on the terms of the licence. In any event, that is not this case. The licence of 22 June 1998 does not confer any right to exclusive possession. Further, a contractor who enters a site under a building contract may, on the facts, take possession of the site; but, as Megarry J. held, that will require an examination of the facts.

E The National Trust is not party to these proceedings and has taken no direct part in them. But the airport company has put in evidence (i) a letter dated 15 August 1998 from George Davies & Co., solicitors for the National Trust, and (ii) an affidavit sworn on 24 September 1998 by the area manager, Cheshire and Greater Manchester, of the National Trust. F The letter of 15 August 1998 refers to the licence of 22 June 1998 and continues in these terms:

G "We also confirm that it has been agreed that Manchester Airport Plc. will be responsible for the provision of security measures including

security, fencing and patrols in relation to Arthur's Wood to prevent the intrusion by protesters or other trespassers and for the eviction of any such protesters or trespassers. In addition, Manchester Airport Plc. are entitled to control access and egress to the part of Arthur's Wood as licensed."

The area manager deposes:

"The licence itself clearly gives the airport a right to occupy as well as enter the specified site. The terms of occupation have always been understood to mean the control of access and egress to and from the site. The National Trust does not at present nor does it intend to play any part in the day to day works or the ground control of the site although reserve the right as licensor to enter should the need arise. Such control is presently effected by Manchester Airport Plc. and shall be for the duration of the licence, subject to extension."

If the letter of 15 August 1998, and the subsequent affidavit, are intended to do no more than set out the National Trust's views as to the legal effect of the licence dated 22 June 1998, they are, as it appears to me, of no assistance. The legal effect of a written document is a matter for the court which has to give effect to its terms. The "right as licensor to enter should the need arise" is not reserved in any express term of the licence; it exists, in my view, because the licence grants no right of possession which would enable the airport company to exclude the National Trust. The right to control access to and egress from the site is not mentioned in the licence; nor is there, in the licence, any mention of responsibility for security measures. It is, I think, to be inferred that these are matters which are said to have been agreed between the National Trust and the airport company subsequent to the grant of the licence. It may be that they owe something to the solicitors' researches into *Clerk & Lindsell* after the present problems first arose. But I do not, myself, find it possible to give them any weight. They are, as it seems to me, equivocal. They are consistent with an arrangement under which the airport company is to act as the agent of the National Trust in relation to the security of the site. They are not, of themselves, evidence as to the existence of any right to possession, or title, having been granted to the airport company; a fortiori, in circumstances in which the power of the National Trust to grant such a right is circumscribed by statute.

There was no material, in the present case, on which the judge could reach the conclusion that the airport company was in de facto possession of the relevant part of Arthur's Wood; and, for my part, I do not think that she did reach that conclusion. She treated the question as one which turned on the construction of the licence. In my view the judge was in error when she held, in a passage in her judgment to which I have already referred, that:

"The licence gives the right of possession and this is, I am satisfied, a right of possession which does not give absolute title, but it does nevertheless give a power against trespassers."

She did not make the distinction, essential in cases of this nature, between a plaintiff who is in possession and who seeks protection from those who

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A interfere with that possession, and a plaintiff who has not gone into possession but who seeks to evict those who are already on the land. In the latter case (which is this case) the plaintiff must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant. I would have allowed this appeal.

B LAWS L.J. I gratefully adopt the account of the facts set out in the judgment of Chadwick L.J. As there appears, the defendants or others (to whom I will compendiously refer as "the trespassers") entered Arthur's Wood and set up their encampments before the grant of the licence by the National Trust to the airport company. Moreover it appears (and I will assume it for the purpose of the appeal) that the airport company has not to date gone into occupation of the land under the licence.

C In those circumstances, the question which falls for determination is whether the airport company, being a licensee which is not de facto in occupation or possession of the land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport company could have obtained an order for possession; at least if it was in effective control of the land. Clause 1 of the licence confers a right to occupy the whole of the area edged red on the plan. The places where the trespassers have gone lie within that area. The airport company's claim for possession would not, were it in occupation, fall in my judgment to be defeated by the circumstance that it enjoys no title or estate in the land, nor any right of exclusive possession as against its licensor (which the National Trust had no power to grant). This, as it seems to me, is in line with the passage in Lord Upjohn's speech in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175, 1232 which Chadwick L.J. has already cited, and is supported by the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233; and it is clearly consonant with the view of the editors of *Clerk & Lindsell on Torts*, p. 848, para. 17-18. Nor, I think, would such a claim be defeated by the form of possession order required in Order 113 proceedings (Form 42A) or by the prescribed form of the writ of possession (Form 66A). As Chadwick L.J. has said, the writ commands the sheriff "that you enter the said land and cause [the plaintiff] to have possession of it." If the airport company was in de facto occupation of the site, such an order would be perfectly appropriate as against the trespassers, notwithstanding that the order for possession is said to be a remedy in rem.

H But if the airport company, were it in actual occupation and control of the site, could obtain an order for possession against the trespassers, why may it not obtain such an order *before* it enters into occupation, so as to evict the trespassers and enjoy the licence granted to it? As I understand it, the principal objection to the grant of such relief is that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which as a mere licensee the airport company plainly lacks. It is clear that this was the old law: see the passages from *Cole on Ejectment* cited in the High Court of Australia by

Windeyer J. in *Radaich v. Smith*, 101 C.L.R. 209, 222, in a passage agreed to by Lord Templeman in *Street v. Mountford* [1985] A.C. 809, 827, to which Chadwick L.J. has made reference.

However, in this I hear the rattle of mediaeval chains. Why was ejectment only available to a claimant with title? The answer, as it seems to me, lies in the nature of the remedy before the passing of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). Until then, as Cole vividly describes it in *Cole on Ejectment* (1857), ch. 1, pp. 1-2:

"actions of ejectment were in point of form pure fictions . . . The action was commenced . . . by a declaration, *every word of which was untrue*: it alleged a *lease* from the claimant to the nominal plaintiff (*John Doe*); an *entry* by him under and by virtue of such lease; and his subsequent *ouster* by the nominal defendant (*Richard Roe*): at the foot of such declaration was a notice addressed to the *tenants in possession*, warning them, that, unless they appeared and defended the action within a specified time, *they would be turned out of possession*. This was the only comprehensible part to a non-professional person . . . and (curiously enough) the only matter in issue was a fact or point *not alleged in the declaration*, viz. whether the claimant on the day of the alleged demise, and from thence until the service of the declaration, was *entitled to demise* the property claimed or any part thereof; i.e. whether he was himself then legally entitled to actual possession, and consequently to dispose of such possession: if not, it is obvious that the defendants might very safely admit that he did *in fact* make the alleged demise . . .

"The whole proceeding was an ingenious fiction, dextrously contrived so as to raise in every case the only real question, viz. the claimant's title or right of possession . . . and whereby the delay and expense of special pleadings and the danger of variances by an incorrect statement of the claimant's title or estate were avoided. But it was objectionable, on the ground that fictions and unintelligible forms should not be used in courts of justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form. This has been attempted with considerable success in the Common Law Procedure Act 1852."

The Act of 1852 introduced a simplified procedure without fictions. The form of writ prescribed by sections 168 to 170 of the Act required an allegation that the plaintiff was "entitled [to possession], and to eject all other persons therefrom." Section 207, however, provided: "The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used."

Blackstone's Commentaries, 1st ed., Book III (1768), ch. 11, pp. 202-203 confirms the earlier fictional character of the procedure:

"as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by Rolle C.J., who then sat in the court of upper

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bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title."

The lesson to be learnt from these ancient forms is that the remedy by way of ejectment was *by definition* concerned with the case where the plaintiff asserted a better title to the land than the defendant; and the fictions, first introduced in the latter half of the 16th century and in effect maintained until 1852, were designed to cut out the consequences of pleading points that might be taken if the plaintiff did not plead his case as to the relevant legal relationships with complete accuracy. Rolle C.J.'s manoeuvre, and more so the Act of 1852, were in their way ancestors of the Access to Justice reforms to civil procedure which will come into effect on 26 April 1999.

In my judgment the old learning demonstrates only that the remedy of ejectment was simply not concerned with the potential rights of a licensee: a legal creature who, probably, rarely engaged the attention of the courts before 1852 or for some time thereafter. It is no surprise that Blackburn J. in *Allan v. Liverpool Overseers*, L.R. 9 Q.B. 180, dealing with a question whether a licensee of docks premises was liable to rates, stated, at pp. 191-192:

"A lodger in a house . . . is not in exclusive occupation . . . because the landlord is there for the purpose of being able . . . to have his own servants to look after the house . . . Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession; and he is not rateable."

As one might expect this is wholly in line with the old law. But I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who do not enjoy *de facto* occupation. The mistake inheres in this: if the action for ejectment was by definition concerned *only* with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee; it does not imply the further proposition that *no* remedy by way of possession can now be granted to a licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. The proposition that a plaintiff not in occupation may only obtain the remedy if he is an estate owner assumes that he must bring himself within the old law of ejectment. I think it is a false assumption.

I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no

voice in the question; it cannot speak beyond its own limits. Cases such as *Radaich v. Smith*, 101 C.L.R. 209 and *Street v. Mountford* [1985] A.C. 809 were concerned with the distinction between licence and tenancy, which is not in question here.

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser.

In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology), "ubi jus, ibi sit remedium."

In all these circumstances, I consider that the judge below was right to uphold the order for possession. I should add that in my view there is as a matter of fact here no question of the writ of possession interfering with the prior rights of the National Trust; so much is demonstrated by the letter from the Trust's solicitors of 15 August 1998 and the affidavit of the Trust's area manager of 24 September 1998. These materials have already been set out by Chadwick L.J. With deference to his contrary view I would attach some importance to them. I agree, of course, that they do not qualify the terms of the licence; but they seem to me to show as a matter of evidence that execution of the writ of possession granted in the airport company's favour would not on the facts infringe any claims or obstruct any acts on the land by the licensor or anyone claiming under it.

For all the reasons I have given, I would dismiss this appeal.

KENNEDY L.J. The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick L.J. In *Wiltshire County Council v. Frazer* (1983) 82 L.G.R. 313, 320 Stephenson L.J. said that for a party to avail himself of the Order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson L.J. went on, at p. 321, to consider what the words of the rule require. They require:

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A

“(1) Of the plaintiff, that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendants. (2) That the defendants, whom he seeks to evict from [the land], should be persons who have entered into or have remained in occupation of it without his licence or consent [or that of any predecessor in title of his].”

B

C

D

In my judgment those requirements are met in this case. The plaintiff does have a right to possession of the land granted to it by the licence. It is entitled “to enter *and occupy*” (my emphasis) the land in question. The fact that it has only been granted the right to enter and occupy for a limited purpose (specified in clause 2 of the licence) and that, as I would accept, the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to me to be critical. What matters, in my judgment, is that the plaintiff has a right to possession which meets the first of the requirements set out by Stephenson L.J., and the defendants have no right which they can pray in aid to justify their continued possession. If it is said that such an approach blurs the distinction between different types of right and different types of remedy it seems to me that is the effect of the wording of Order 113, and the understandable object of the law has always been to grant relief to a plaintiff seeking possession who can rely on a superior title. In *Danford v. McAnulty* (1883) 8 App.Cas. 456, 462 Lord Blackburn said that:

E

“in ejectment, where a person was in possession those who sought to turn him out were to recover *upon the strength of their own title*; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out *must show a superior legal title to his*.” (Emphasis added.)

That case was not, of course, concerned with a licence to occupy for a limited purpose but the emphasis on giving a remedy to the party who has a better right seems to me to be instructive.

F

The decision in *In re Wykeham Terrace, Brighton, Sussex, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch. 204 demonstrated the weakness of the procedure prior to the existence of Order 113. On an ex parte application the court was unable to enter judgment or make a final order against unnamed squatters who were not a party to the proceedings. Stamp J., at p. 212, observed that:

G

“No doubt a different, and perhaps a better process ... could be provided to meet particular cases and more particularly a case where unknown persons are in occupation of land claimed by the plaintiff.”

H

Order 113 was then drafted and came into operation on 20 July 1970. As I have already said it does not in my judgment require of a plaintiff that he demonstrate a right to exclusive possession and therefore, as it seems to me, it need not be confined to giving protection to those who can demonstrate that they possess an estate in land. If it is approached in that way then, as it seems to me, decisions such as *Street v. Mountford* [1985] A.C. 809, on which Mr. Maile relied, no longer give rise to any difficulty,

and the court is able to give a remedy in a situation in which a remedy plainly ought to be provided.

For those reasons, in addition to those set out in the judgment of Laws L.J., I would dismiss this appeal.

*Appeal dismissed with costs.
Leave to appeal refused.*

28 June 1999. The Appeal Committee of the House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hope of Craighead) dismissed a petition by the defendant, Christopher Maile, for leave to appeal.

Solicitors: Legal Department, Manchester Airport Plc., Manchester.

[Reported by SUSAN DENNY, Barrister]

[COURT OF APPEAL]

REGINA v. SECRETARY OF STATE FOR THE HOME
DEPARTMENT, *Ex parte HINDLEY*

1998 Oct. 5, 6, 7;
Nov. 5

Lord Woolf M.R., Hutchison and Judge L.JJ.

Prisons—Prisoners' rights—Release on licence—Mandatory life sentence prisoner—Tariff element of determinate length provisionally fixed but not communicated to prisoner—Whole life tariff subsequently fixed and communicated—Policy of review of whole life tariff limited to considerations of retribution and deterrence but later amended to take account of exceptional circumstances—Whether increase from determinate tariff to whole life tariff lawful—Whether review policy lawful—Criminal Justice Act 1991 (c. 53), s. 35—Crime (Sentences) Act 1997 (c. 43), s. 29

In 1966 the applicant and a co-defendant were convicted of the murder of two children and received mandatory life sentences. The applicant was also convicted of being an accessory after the fact to the murder of a third child, of which the co-defendant was convicted, and was sentenced to a determinate custodial term. Immediately following the trial the judge expressed the expectation to the Home Office that the applicant would be kept in prison for "a very long time" and that her co-defendant would not be released in any foreseeable future. Review of any question of release was deferred until 1982 when, in response to the Secretary of State's request, the Lord Chief Justice recommended that, while he would never release her co-defendant, no term less than

Chancery Division

Vastint Leeds BV v Persons unknown

[2018] EWHC 2456 (Ch)

2018 July 20; Sept 24

Marcus Smith J

Injunction — Trespass — Quia timet — Proper approach to exercise of court's discretion

The claimant had the immediate right of possession of an industrial site which was in the process of being developed. Despite taking a number of measures to secure the site, the claimant apprehended a threat of trespass from entry involving caravans by travellers seeking to occupy the site, from persons organising and participating in raves, and persons seeking to use the site for fly-tipping. It was contended that the acts of trespass envisaged posed a safety risk to the trespassers themselves, the claimant's contractors and staff, and could result in the claimant incurring considerable expense, which in practice would be irrecoverable. The claimant sought a quia timet injunction against persons unknown restraining them from entering the site.

On the claim —

Held, that a quia timet injunction would be granted in respect of threatened incursions by persons seeking to establish a more than temporary or more than purely transient occupation of the site, and persons organising, involved in, or participating in raves (post, paras 39).

Statement of the established law relating to the granting of final quia timet relief (post, para 31).

CLAIM

By an application notice dated 27 April 2018, the claimant, Vastint Leeds BV, sought an interim injunction against persons unknown enjoining them, without the consent of the claimant, from entering or remaining on the site, the former Tetley Brewery site, Leeds. By a claim form dated 30 April 2018 and amended by the order of Marcus Smith J on 4 July 2018, the claimant sought a final injunction in similar terms. The interim injunction was granted on 4 May 2018 by Hildyard J and ran until 4 July 2018. On 4 July 2018 the order was continued by Marcus Smith J until 31 July 2018.

The facts are stated in the judgment, post, paras 1–5, 8–18.

Brie Stevens-Hoare QC (instructed by *Fieldfisher llp*) for the claimant.

The court took time for consideration.

24 September 2018. **MARCUS SMITH J** handed down the following judgment.

A. Introduction

1 The claimant, Vastint Leeds BV ("Vastint"), has the immediate right to possession of a site known as the "Former Tetley Brewery Site" in Leeds. Before me, this property was referred to as the "Estate".

2 By Part 8 proceedings commenced on 30 April 2018 and amended by my order of 4 July 2018, Vastint seeks a final injunction against "persons unknown" enjoining them, without the consent of Vastint, from entering or remaining on the "Site". The Site comprises five discrete portions of land within the overall Estate.

3 By an application notice dated 27 April 2018, Vastint sought interim relief, in broadly similar terms, also against "persons unknown". That relief was granted by Hildyard J on 4 May 2018. Hildyard J's order (which was endorsed with a penal notice) made provision for the service of his order by ensuring that notices were affixed to the perimeter of and entrances to the Site. Personal service was not, however, dispensed with.

4 The interim injunction ran until 4 July 2018, which date was expressed to be the "return date" for the interim injunction. However, Hildyard J's order made clear that the return date was to be treated as the trial of the action, without pleadings or disclosure: see para 5.

5 The matter next came before me, in the interim applications court, on 4 July 2018. At that hearing, I indicated certain reservations in making a final order on that occasion. I continued the order of Hildyard J until 31 July 2018 or further order, and made clear that the matter should come back to me, for final hearing, before that date. In the event, the final hearing took place on 20 July 2018. This is my judgment on that final hearing.

6 Vastint seeks a quia timet injunction against persons unknown. It will be necessary to consider both the rules regarding the grant of final quia timet relief (in section D below) and the rules regarding the joinder as defendants of “persons unknown” (in section C below). Matters have been complicated by the fact that none of the “persons unknown” have appeared before me, and I have only heard submissions from Vastint. The manner in which I dispose of this matter is described in section E below.

7 Before considering the rules regarding the grant of final quia timet relief and the rules regarding the joinder as defendants of “persons unknown”, it is necessary briefly to describe the facts as presented in the evidence before me.¹

B. The facts

8 As much of the Site is unoccupied, Vastint has implemented a number of security measures, including but not limited to fencing on the perimeter of the Site, regular security patrols and weekly inspections of vacant properties.

9 Vastint is unable to eliminate entirely the risk of further trespass to the Site despite the security measures it has put in place.

10 The existence of unoccupied buildings on the Site gives rise to safety concerns prior to development taking place: some of the buildings are unsafe and structurally unstable, and there are hazardous materials and substances like asbestos on the Site.

11 During each of the three phases of the development of the Site, there will be different or increased safety risks on the Site arising out of work being done on the Estate and/or the Site, for example: (during demolition), unstable structures and hazardous substances; (during remediation) large excavations; and (during construction) risks from equipment and machinery.

12 There have been four incidents of trespass, primarily involving caravans, at the Estate (including, but not solely, in relation to the Site) in 2011, 2016, 2017 and 2018. Recently, persons unknown have triggered alarms at the Site; these alarms have been sufficient to warn off these persons, but there are further cases of trespass or (at least) attempted trespass.

13 There have also been a number of incidents, primarily involving actual or attempted illegal raves, taking place at a site in East London owned by another member of the group of which Vastint is a part (Vastint UK BV). In the case of this, East London, site, a final injunction against persons unknown was granted by this court in February 2017.

14 There is an increase in gangs using commercial properties for illegal fly-tipping. No specific instances of professional squatters running fly-tipping operations have been identified, but Vastint has incurred clean-up costs of approximately £25,000 after rubbish and unwanted items were left on the Estate and/or the Site following the four incidents mentioned in para 12 above. Other members of the same corporate group have also suffered delay and incurred clean-up costs as a result of fly-tipping elsewhere.

15 There is an emerging illegal rave culture. No specific instances of proposed or attempted illegal raves at the Site have been identified. Vastint relies upon what happened at the East London site, and newspaper articles commenting on the rise of illegal raves; it considers that an empty warehouse on a part of the site known as the “Asda land” may be an attractive location for illegal raves.

16 On 29 May 2018, a high-profile incident occurred at a development site in Blackburn where 20 caravans and 25 vehicles caused significant damage to the value of £100,000.

17 As at 13 June 2018, it was anticipated that demolition would commence in autumn 2018. Remediation (which remains to be agreed) would then follow either at the end of 2018 or early 2019 and, subject to the progress of the first two phases, construction may commence in autumn 2019. There is no evidence before me regarding the anticipated duration of the construction phase of the works.

18 The position, in light of the evidence, may be described as follows:

(1) Despite Vastint taking a number of measures to ensure the physical integrity of the Site, the threat of trespass remains. That threat is said to emanate from three, specific, sources: (a) Entry involving caravans, by travellers, seeking to establish a more than temporary, or more than purely transient, occupation of the Site. (b) Entry of persons organising, involved in, or participating in, raves. (c) Entry of persons seeking to use the Site for fly-tipping.

(2) The evidence regarding the level of the threat from these sources becomes more exiguous as the three sources, described in the preceding sub-paragraph, are individually considered: (a) There is evidence of actual past entry onto the Estate and/or the Site involving caravans. I do not consider that it is especially profitable to differentiate between trespass involving the Estate and trespass involving the Site. One (the Site) is a subset of the other (the Estate), and in my judgment, trespass onto the Estate albeit not involving the Site is good evidence of a risk of this sort of trespass to the Site. (b) There is no evidence of actual past entry onto the Estate or the Site for the purpose of raves. Vastint's concern regarding this particular threat is informed by what has occurred at the East London site of its sister company, combined with the existence of premises on the Site (the Asda land) which are attractive to those organising raves. (c) There is limited evidence of actual past entry onto *other* Vastint group properties for the purposes of fly-tipping, and there are cases involving the property of third parties, including third party developers.

(3) In terms of the risks that exist in the case of trespass, these are twofold: (a) First, there are risks to the health and safety of those trespassing (to whom Vastint owes a limited duty of care) as well as risks to the health and safety of those having to deal with such trespass (which persons will include employees and contractors engaged by Vastint, to whom a rather more extensive duty of care will be owed). Obviously, were injury or worse to be sustained by a person, that is only compensable in damages in the most rudimentary way. It is clearly better that the trespass—and the consequent risk to health and safety—not occur. (b) Secondly, Vastint may well, in the case of trespass, incur significant costs in dealing with such trespass which (albeit theoretically recoverable from the trespasser) are likely to prove in practice irrecoverable.

(4) In terms of the benefits that an injunction enjoining persons (or a class of person) from entering the Site would confer, these are threefold: (a) First, it was stressed to me that the effect of a court order, enjoining entry, was (in Vastint's experience) a material one; and that this effect was over-and-above the deterrence provided by Vastint's other measures to maintain the integrity of the Site. In short, an injunction, if granted, would have a real effect in preserving the Site from trespass. (b) Secondly, Vastint considered that an injunction would not only affect the conduct of potential trespassers, but also would underline the seriousness of the position to the police, who might be more responsive in the case of any trespass in breach of a court order. (c) Thirdly, given that the order sought by Vastint will be buttressed by a penal notice, Vastint would have easier recourse to the court's contempt jurisdiction. (I say easier because, although both Hildyard J and I ordered service of the interlocutory injunctions in this case by additional means (see para 3 above), personal service was *not* dispensed with. Accordingly, unless personal service *is* dispensed with, it would be necessary for an order to be personally served on a party in breach, and for the order to continue to be breached, before committal proceedings could be contemplated.)

C. Proceedings and orders against persons unknown

19 It was established in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 that following the introduction of the CPR, there was no requirement that a defendant must be named in proceedings against him/her/it, but merely a direction that the defendant should be named (if possible).

20 The naming of a defendant thus ceased to be a substantive requirement for the purpose of issuing proceedings, but rather became a question for the case management of the court. In all the circumstances, is it appropriate that, instead of identifying a defendant by name, for the defendant be identified in some other way?

21 The manner in which a defendant can be identified other than by name will vary according to the circumstances of the particular case. Three particular instances may be described:

(1) Where there is a specific defendant, but where the name of that defendant is simply not known. In such a case, it may be appropriate to describe the defendant by reference to an alias, a photograph, or some other descriptor that enables those concerned in the proceedings—including the defendant—to know who is intended to be party to the proceedings.

(2) Where there is a specific *group* or *class* of defendants, some of whom are known but some of whom (because of the fluctuating nature of the group or class or for some other reason) are unknown. In such a case, the persons unknown are defined by reference to their association with that particular group or class.

(3) Where the identity of the defendant is defined by reference to *that defendant's future act of infringement*. In such a case, the identity of the defendant cannot be immediately established: the defendant is established by his/her/its (future) act of infringement.

22 It is this third class of unknown defendant that is in play here. Accordingly, it is appropriate to pay particular attention to the extent to which the courts have sanctioned the joining of persons to proceedings on this basis.

(1) In *Bloomsbury* itself, the Vice-Chancellor stated, at para 21 as follows:²

“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) *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658, the Court of Appeal considered the effect of an injunction granted pursuant to section 187B of the Town and Country Planning Act 1990, which provided for the making of injunctions against persons unknown. The Court of Appeal concluded, at para 32 that a person became a party to proceedings by the very act of infringing the order: “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.”

(3) In *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch) at [119], Morgan J expressed a degree of concern about orders having this effect, but concluded, at para 121 that (particularly in light of the *South Cambridgeshire* decision) this procedure was now open to claimants in cases outside section 187B of the Town and Country Planning Act 1990.

23 At first sight, the notion that a person, through the very act of infringing an order, becomes: (i) a party to the proceedings in which that order was made; (ii) bound by that order; and (iii) in breach of that order, seems counter-intuitive.

24 However, aside from the fact that the making of such orders is now settled practice, *provided* the order is clearly enough drawn (a point I revert to below), it actually works extremely well within the framework of the CPR. Until an act infringing the order is committed, *no-one* is party to the proceedings. It is the act of infringing the order that makes the infringer a party. It follows that—as a non-party—any person affected by the order (provided he or she has not breached it) may apply to set the order aside pursuant to CPR r 40.9. CPR r 40.9 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.” Thus, were a person to become aware of such an order, and consider the order improperly made, that person (if “directly affected” by the order) could apply to set it aside without more. It is simply that such a person would have to do so *before* infringing the order, whilst still a non-party. It is entirely right that even court orders wrongly made should be obeyed until set aside or varied, and CPR r 40.9 does no more than emphasise the importance of such an approach.³

25 In terms of how such an order might be framed, the Vice-Chancellor gave the following guidance in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9:

(1) First, that the description of the defendant should not involve a legal conclusion, such as is implicit in the use of the word “trespass”, para 9.

(2) Secondly, that it is undesirable to use a description such as “intending to trespass”, because that depends on the subjective intention of the individual which is not necessarily known to the outside world, and in particular the claimant, and is susceptible of change.⁴

D. *Quia timet* injunctions

26 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 describes a *quia timet* injunction in the following terms: “A *quia timet* (since he fears) injunction is an injunction granted where no actionable wrong has been committed, to prevent the occurrence of an actionable wrong, or to prevent repetition of an actionable wrong”: see also *Proctor v Bayley* (1889) 42 Ch D 390, 398.

27 The jurisdiction is a preventive jurisdiction and may be exercised both on an interlocutory or interim basis or as a final or perpetual injunction. In this case, of course, a final injunction is sought. That injunction will—if granted—be time limited to the period the perimeter around the Site is in place.

28 *Hooper v Rogers* [1975] Ch 43; [1974] 3 WLR 329 was a case where the Court of Appeal was considering the circumstances in which a *mandatory*⁵ final *quia timet* injunction was being sought. Russell LJ, with whom Stamp and Scarman LJ agreed, articulated the circumstances in which such an injunction would be granted, at p 50:

“In different cases, differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth, it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances.”

29 *Gee, Commercial Injunctions*, 6th ed (2016), para 2-035 similarly, suggests that the circumstances in which a quia timet injunction will be granted are relatively flexible:

“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, 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.”

30 However, in *Islington London Borough Council v Elliott* [2012] EWCA Civ 56; [2012] 7 EG 90, Patten LJ, with whom Longmore and Rafferty LJ agreed, formulated an altogether more stringent test, at paras 29–31:

“29. The court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.

“30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that: ‘it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action.’

“31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said: ‘On the basis of the judge’s finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7 January 1997 was quia timet. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20 June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant

will do something which will cause the plaintiff irreparable harm—that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. “Preventing justice excelleth punishing justice”—see *Graigola Merthyr Co Ltd v Swansea Corpn* [1928] Ch 235, 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see *Attorney-General v Nottingham Corpn* [1904] 1 Ch 673, 677). ... In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22 April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction quia timet was appropriate in the circumstances of this case.”

31 From this, I derive the following propositions:

(1) A distinction is drawn between final *mandatory* and final *prohibitory* quia timet injunctions. Because the former oblige the defendant to do something, whilst the latter merely oblige the defendant not to interfere with the claimant’s rights, it is harder to persuade a court to grant a mandatory than a prohibitory injunction. That said, the approach to the granting of a quia timet injunction, whether mandatory or prohibitory, is essentially the same.

(2) Quia timet injunctions are granted where the breach of a claimant’s rights is threatened, but where (for some reason) the claimant’s cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory. On the other hand, as in *Hooper v Rogers*, the cause of action may be substantially complete. In *Hooper v Rogers*, an act constituting nuisance or an unlawful interference with the claimant’s land had been committed, but damage not yet sustained by the claimant but was only in prospect for the future.

(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?

(4) There will be multiple factors relevant to an assessment of each of these two stages, and there is some overlap between what is material to each. Beginning with the first stage—the strong possibility that there will be an infringement of the claimant’s rights—and without seeking to be comprehensive, the following factors are relevant: (a) If the anticipated infringement of the claimant’s rights is entirely anticipatory—as here—it will be relevant to ask what other steps the claimant might take to ensure that the infringement does not occur. Here, for example, Vastint has taken considerable steps to prevent trespass; and yet, still, the threat exists. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. As *Spry, Equitable Remedies*, 9th ed (2013) notes at p 393: “One of the most important indications of the defendant’s intentions is ordinarily found in his own statements and actions”. (c) Of course, where acts that may lead to an infringement have *already* been committed, it may be that the defendant’s intentions are less significant than the natural and probable consequences of his or her act. (d) The time-frame between the application for relief and the threatened infringement may be relevant. The courts often use the language of imminence, meaning that the remedy sought must not be premature. (*Hooper v Rogers* [1975] Ch 43, 50)

(5) Turning to the second stage, it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant’s rights, how effective will a

more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material: (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions.

E. Disposition

(1) Strong probability of a breach of Vastint's rights, unless the defendant is restrained

32 Applying the two-stage test as I have described it, Vastint labours under the considerable disadvantage that it cannot, with any specificity at all, identify the persons likely to trespass on its property. Of course, I accept entirely that this court has jurisdiction to permit proceedings and make orders, even final orders, against "persons unknown", who are only defined by reference to their future acts: see paras 21–24 above. But, I must recognise, as a strong indicator against the granting of an injunction, that Vastint lacks altogether any evidence regarding the attitude of the anticipated defendants.

33 On the other hand, Vastint has taken careful and responsible steps to secure the Site and to prevent trespass on it. Despite these measures, as I have described (see para 18(2) above), there has been actual past entry onto the Estate and/or the Site involving caravans. A future incursion by caravans may very well occur; it is impossible to say when. I consider that, as regards this threatened infringement of Vastint's rights, that the first stage of the test has been made out, and that there is a strong probability that, unless restrained by injunction, there will be a future infringement of Vastint's rights by way of trespass.

34 As regards the entry of persons organised, involved in or participating in raves, the evidence amounts to a combination of: (i) this having happened on another site owned by the Vastint group in East London; (ii) there being a building suitable for, and attractive to the organisers of, raves on the Site; and (iii) various attempts unlawfully to access the Site which do not appear to be related to caravans. With some hesitation, I conclude that there is a strong probability that, unless restrained by injunction, Vastint's rights will be infringed by such persons.

35 The evidence as regards fly-tipping is exiguous at best: in relation to the Estate, it is speculation, and there is no evidence of a substantial risk of infringement beyond the assertion that this is something that goes on at (development) sites elsewhere in England and Wales.

(2) Gravity of resulting harm

36 The harm that Vastint envisages as arising out of an act of trespass has been described in para 18(3) above. It is clear that the risks to health and safety (to trespassers, staff and contractors) that Vastint has identified are serious risks to life and limb that ought, if possible, to be avoided.

37 Additionally, there are the significant costs that Vastint would incur in the case of removing trespassers from the Site. Although I accept that, in theory, such costs are compensable in damages, this court should look to the reality of the situation, and recognise that such costs—in theory recoverable from the trespassers—are unlikely ever to be recovered.⁶

38 I am satisfied that the second limb of the test is met.

(3) The appropriate order in this case

39 For the reasons I have given, it is appropriate to grant a quia timet injunction in respect of threatened incursions by: (1) Persons seeking to establish a more than temporary or more than purely transient occupation of the Site. (2) Persons organising, involved in, or participating in raves.

40 Vastint contended for an order in the following terms: "Those defendants who are not already in occupation of [the Site]⁷ must not enter or remain on Site without the written consent of [Vastint] ..." The duration of the order is time limited to the period in which the perimeter surrounding the Site is in place.

41 The precise formulation of the order is a matter to be considered by Vastint in light of this judgment. However, as drafted, the order extends to *any* person entering the Site without the written consent of Vastint. I do not consider such an order to be workable, satisfactory or appropriate. Because this directly affects the scope of the order I am prepared to make, it is necessary that I should say why I have come to this view:

(1) As I pointed out in argument, as framed, this order would involve police officers and other public authorities entering the property in the lawful execution of their duties being in

breach of the order. Vastint has sought to deal with this by a recital to the order, whereby Vastint acknowledges “that this order does not apply to police officers, fire fighters, paramedics or others properly forming part of an emergency service related to the protection of or health and welfare of the public”. Aside from the fact that this is quite a vague formulation, it is inappropriate for so important a “carve out” to feature in a recital to an order. So far as I can see, a police officer entering the Site in the execution of his lawful duty would be in breach of the order; it is simply that Vastint, by its recital, would be in difficulty in enforcing the order.

(2) Clearly, the Site is being developed. That will involve large numbers of persons *legitimately* working on the Site. I anticipate that the identity of the persons so involved will fluctuate over time, with existing members of this group leaving it, and new members joining it. As the order is drafted, each such person will require Vastint’s written consent to be on the Site in order to avoid their being in breach of the order. I have not been addressed on the workability of this. Suffice it to say that I have considerable concerns, and I do not consider that the order, as drafted, meets the criteria framed by the Vice-Chancellor and set out in para 22(1) above.

(3) As framed, the order applies to any person entering the Site without Vastint’s written consent, subject to the recital that I have described. Its ambit is not confined to the two classes of unknown defendants in respect of whom I have found there to be a substantial risk that they will infringe Vastint’s property rights. It extends to *any* trespasser. I consider that quia timet injunctive relief must be tailored to the threat that is feared and should not be wider than is strictly necessary to deal with this threat.

42 Resisting a narrower order than the one it put forward, Vastint made a number of points:

(1) First, it was suggested that the order as drafted followed the suggested form of words of the Vice-Chancellor in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. That is not, in fact, the case. The wording suggested by the Vice-Chancellor at para 10 was as follows:

“Persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [the addresses were then set out] *in connection with the ‘Global Day of Action Against Incinerators’ (or similarly described event) on or around 14 July 2003.*” (Emphasis added.)

The Vice-Chancellor sought to target his order to the class of defendant constituting the threat to the claimants’ rights: the order in the present case must do the same.

(2) Secondly, it was suggested that it might not be possible to define, with sufficient clarity, the “persons unknown” to whom the order was directed and/or that such narrow drafting would give rise to argument about whether a given person had or had not infringed the order. There are two answers to this point: (a) First, as a matter of principle, it seems to me that unless the ambit of the order can clearly be drawn, so that it is clear, it ought not to be granted. I do not consider, in this case, that an appropriate order cannot be drafted. (b) Secondly, for the reason given in para 41 above, the draft order as framed by Vastint is itself unsatisfactorily clear, because I am satisfied that Vastint has given insufficient consideration as to how written consent to be present on the Site will be given to the large and fluctuating workforce that will be properly present on the Site.

(3) Thirdly, it was suggested that singling out specific classes of unknown defendants might suggest that for all other persons, not so identified, this court was somehow sanctioning the tort of trespass. I do not accept that. Anyone entering the Site without consent will be a trespasser: it is simply that, as regards those unknown defendants identified by the order, particular (and very serious) consequences attach should they breach the order.

(4) Final matters

43 When the matter was before me on 4 July 2018, I extended the interim relief granted by Hildyard J until 31 July 2018 or further order. Given the date on which this judgment is being circulated in draft (26 July 2018), and given the work that needs to be done in relation to the order, it is appropriate that I extend the interim relief to 30 September 2018 or further order, so that a properly drafted final order can be put in place before then.

44 Finally, the interim orders made by Hildyard J and myself made provision for service by additional means, but did not dispense with personal service. This was described to me as an additional safeguard for persons infringing the order, in that committal proceedings could not be commenced against infringing parties without personal service. Given the narrower class of defendant to which the final order I envisage will apply and given the importance of proper enforcement of the order in case of breach, it is appropriate that process envisaged for bringing these proceedings and the orders made pursuant to these proceedings to the attention

of potential defendants should constitute the *only* form of service, and that personal service be dispensed with.

Notes

1. The evidence before me comprised: (i) witness statement of Daniel Owen Christopher Talfan Davies dated 27 April 2018; (ii) witness statement of Michael Denis Cronin dated 27 April 2018; (iii) witness statement of Simon Schofield dated 27 April 2018; (iv) second witness statement of Daniel Owen Christopher Talfan Davies dated 13 June 2018; (v) second witness statement of Michael Denis Cronin dated 13 June 2018; (vi) witness statement of Luke Alan Evans dated 13 June 2018; (vii) third witness statement of Daniel Owen Christopher Talfan Davies dated 18 July 2018.

2. Affirmed in *Cameron v Hussain* [2017] EWCA Civ 366 at [50], [53] and [54].

3. It may be that a person infringing the order—and so a party—could apply under CPR r 39.3 to have the order set aside. That, as it seems to me, involves something of a strained reading of CPR r 39.3, since at the time the order was made, such a person would not have been a party.

4. As regards the second point, it is worth noting that there have been later cases where subjective states of mind have been used in the order. Morgan J referred to this in *Ineos* at para 122. See, for example, *Sheffield City Council v Fairhall* [2018] EWHC 1793 (QB).

5. In this case, Vastint does not seek a mandatory but a prohibitive injunction.

6. See *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch), where such irrecoverable costs (as well as safety risks) were taken into account).

7. It is unclear to me what the purpose of the words “who are not already in occupation of the Site” is.

Order accordingly.

SARAH PARKER, Barrister



Neutral Citation Number: [2025] EWHC 1314 (KB)

Case No: QB-2017-005202

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th May 2025

Before :

MR JUSTICE GARNHAM

Between :

**ROCHDALE METROPOLITAN BOROUGH
COUNCIL**

Claimant

- and -

**(90) PERSONS UNKNOWN (BEING MEMBERS
OF THE TRAVELLING COMMUNITY WHO
HAVE UNLAWFULLY ENCAMPED WITHIN
THE BOROUGH OF ROCHDALE)**

Defendant

**(93) PERSONS UNKNOWN forming unauthorised
encampments in the Metropolitan Borough of
Rochdale**

Natalie Pratt (instructed by Sharpe Pritchard) for the Claimant

Hearing dates: 16th May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 28th May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE GARNHAM :

Introduction

1. The claimant in these proceedings, Rochdale Metropolitan Borough Council (hereafter “Rochdale” or “the Borough”), applies for the renewal for a further 12 months of an injunction against Persons Unknown granted by Butcher J on 11 June 2024.
2. That Injunction binds 56 Named Defendants for a period of five years up to and including 7 June 2029, and the 90th and 93rd Defendants (two categories of Persons Unknown) for 12 months. The order in respect of Persons Unknown is due to expire at 00:00 hrs on 8 June 2025. No Application is made in relation to the Named Defendants.
3. The Injunction is a so-called ‘Traveller injunction’. It prohibits unauthorised encampments and the depositing of waste in the Borough. The Injunction is Borough-wide against the Named Defendants but, in relation to Persons Unknown, applies to 334 identified sites which I am told equates to 9.7% of the land area in the Borough.
4. Subject to one matter I return to below, the Application has been served on the “Persons Unknown” in accordance with paragraphs 5 and 7 of the Order of Butcher J and on three Traveller organisations, namely London Gypsies and Travellers; Friends, Families and Travellers; and the Derbyshire Gypsy Liaison Group who were the Appellants in the Supreme Court case of the Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors [2023] UKSC 47 (hereafter “Wolverhampton”).
5. The Claimants correctly acknowledge that, following the Supreme Court’s decision in Wolverhampton, an injunction against newcomer Persons Unknown is technically always sought and granted on a without notice basis, but there remains an important obligation to take all reasonable steps to draw the Application to the attention of Persons Unknown. In my judgment that obligation has been met in all cases except Site 334, where an error was made which meant the relevant steps were not taken until 14 May.

Procedural Background

6. This matter was last before me on 19 February 2018 when I granted an interim injunction. On 11 June 2024, Butcher J granted the Injunction in the form now before the court against the 56 Named Defendants for a period of five years, and against Persons Unknown for a period of 12 months. Butcher J’s judgment is reported at [2024] EWHC 1653 (KB). A power of arrest was attached to the Injunction.
7. The Injunction (and the interim relief before it) prohibit the forming of unauthorised encampments and the depositing of controlled waste (such as fly-tipping). As against Persons Unknown, the relief was granted on an interim basis over 325 sites in the Borough. In June 2024, nine further sites were added so that the Injunction now applies to 334 sites (the “Injunction Sites”). Members of the Travelling community are not prohibited from entering the Injunction sites or encamping lawfully on those sites, nor are they in breach of the Injunction if they establish an unauthorised encampment elsewhere.

8. It is argued by the Claimants that the 334 sites were “carefully selected by reference to the Claimant’s analysis of the sites that were frequently targeted by unauthorised encampments visiting the Borough”. It is said that those sites include sensitive and vulnerable sites, such as industrial areas, sports and recreation facilities, schools and other public amenities, where it is said greater harm is suffered by the inhabitants of the Borough when unauthorised encampments are formed there.
9. The Claimant seeks the injunctive relief in the discharge of its public functions pursuant to s187B of the Town and Country Planning Act 1990 and s222 of the Local Government Act 1972 to restrain breaches of planning control, and to promote or protect the interests of the inhabitants of their administrative areas (including to restrain acts of trespass). The Claimant is the local planning authority for the Borough, such that it has the administrative function of enforcing planning control within the Borough. It is also the local highway authority, in whom the adopted highways are vested.
10. The Injunction was sought in response to the high volume of unauthorised encampments and the harm it is said resulted from those encampments. The harm caused by the encampments was serious and included risks to public health caused by the depositing of untreated human waste, threats and intimidation to the local inhabitants and financial harm to the Claimant in seeking to deter, enforce against and clean up after encampments.
11. These proceedings became part of the Barking & Dagenham litigation from October 2020 onwards, which culminated in the appeal to the Supreme Court in the Wolverhampton case. The Claimant was a successful respondent in the appeal. The Claim had been listed for final hearing on 22 November 2022, but was adjourned after the Supreme Court granted permission to appeal in Wolverhampton on 25 October 2022.
12. The Claim proceeded to a ‘final’ hearing on 21 May 2024 (although, following Wolverhampton, the relief was only ‘final’ as against the Named Defendants). I am told that throughout the period in which the interim relief was in force, unauthorised encampments continued to form in the Borough (and on Injunction Sites), but had done so less frequently, and were of limited size and duration. Butcher J granted the relief, as described above.

The Evidence

13. The facts relevant to the current application are set out in two lengthy witness statements. The first is the second statement in these proceedings from Mr Stuart Morris; the second is the fourth statement of Mr Anthony Johns. It is not necessary to recite all the detail of those statement here, but the following is of particular significance.
14. Stuart Morris is the Head of Strategic Housing at Rochdale Metropolitan Borough Council and his responsibilities include permanent and temporary stopping provision for Gypsies and Travellers. He explains that the Council is required to make provision for Gypsy and Traveller accommodation within the Borough, and monitors the provision required of it by way of the Greater Manchester Gypsy and Traveller Accommodation Assessment (the ‘GMGTAA’). The GMGTAA was last updated in

December 2024 with a published final report setting out the projected need for caravan pitches to 2040/41.

15. As to permanent provision, he says that the council has its own site at Roch Vale which provides 27 plots and seven council provided chalets. It also leased a site at Heritage Park which was owned and managed by a Traveller family, but that site has recently been closed by the Traveller family. In December 2024, the Greater Manchester Gypsy and Traveller Accommodation Assessment was updated to take into account the new expanded definition of Gypsies and Travellers. During the current year, two further sites have been identified and are being developed. They will provide for six additional permanent pitches which it is anticipated will meet the increased need for pitches.
16. Mr Morris also gives evidence about unauthorised encampments in Rochdale since the grant of the injunction by Butcher J on 11 June 2024. He says these encampments have been almost exclusively on inappropriate and unsafe locations including road verges, industrial and business premises, and car parks serving sports centres and shopping centres. He says that in each case the council has adopted an approach of engagement and negotiation with the occupiers of the sites. That policy has been effective in that, once made aware of the Injunction, Travellers have generally left the relevant site within a few hours or, at most, by the following morning. He says that that approach of engagement and tolerance has meant that it has not been necessary to take legal action to enforce the orders.
17. Mr Morris explains that Rochdale has had contact with neighbouring authorities across Greater Manchester, with whom Rochdale work closely on management of Traveller sites and unlawful encampments, and none of them have raised any issue with the council regarding the displacement of encampments into other areas.
18. Anthony Johns is Rochdale council's service manager for environmental action and enforcement and, amongst other functions, manages officers responsible for attending unauthorised encampments and the enforcement of the injunction. He says in his statement that the council's approach, of taking a "constructive and educational approach by advising those who are forming the encampment about the injunction" has proved effective. He says that the power of arrest is a last resort and has never, in fact, been used. But, he says, it is that power which makes the injunction "so effective".
19. He says that injunctive relief was first sought in response to the high number of unauthorised encampments occurring between January 2015 and September 2017 "many of which caused significant harm to the Borough and had or were associated with... noise nuisances, anti-social behaviour, threats of violence...and fly tipping." Encampment numbers peaked at 69 in 2017, and have since dropped to single figures.
20. Mr. Johns explains that the Injunction sought by the council is not Borough-wide, but is limited to the 334 sites which together cover 15.3 square kilometres. Since the Borough covers an area of 158 square kilometres that is about 9.7% of the total.
21. He explains that sites were identified which required the protection of an injunction. They were chosen because they were sites where encampments would be especially harmful and where either there had been previous encampments or they were of the same nature as sites that were frequently targeted. "Typically those sites include schools, recreational areas and green spaces, business parks and industrial areas".

Encampments were often associated with the depositing of waste, including fly tipping and the depositing of untreated human excrement. There was often a significant clean-up operation required, at great expense to either the council or the landowner, when the encampment was vacated.

22. Mr Johns gives evidence as to the effectiveness of the interim injunction granted in 2018. He says that in 2015 there were 28 encampments, in 2016 there were 40, and in 2017 there were 69. In the remainder of 2018, after the grant of the interim injunction, there were 21 encampments. In 2019, there were 10; in 2020, 13; in 2021, 9; in 2022, 10; in 2023, 12; in 2024, 6. And in the period up until the date of his statement, 25 April 2025, there were 2.
23. The duration of the encampments has also shown a significant decline since the grant of the Injunction. He attributes that to the “council’s ability to move encampments on from protected land swiftly and efficiently with the use of the injunction.” In 2015 the average duration for each encampment was 4.6 days; in 2016, 3.85 days; in 2017, 6.28 days; and in 2018, 1.09 days. In 2023 the average duration was 1.16 days, but for all the other years between 2019 and 2025 it was less than 24 hours.
24. Data collected by the council also shows that the reduction in the frequency and duration of encampments has significantly reduced the harm caused by unauthorised encampments. “In particular, the Borough was experiencing significant fly tipping that was associated with the formation of unauthorised encampments...often on a commercial scale.” I am told that the expression “commercial scale” was used to indicate both the volume of material deposited and also the fact that the fly-tipping was apparently done for profit. Clean up costs were over £25,000 in 2015; £23,000 in 2016; £87,000 in 2017; £944 in 2018 and zero ever since.
25. Mr Johns says that “the Borough’s business parks and industrial areas were often the main target for unauthorised encampments and... these areas suffered a disproportionate number of encampments... Following the grant of the interim injunction the Borough’s business parks and industrial areas were still targeted but there was a significantly reduced number”, down from 126 in 2015-2017 to 16 in 2023-2024. He explains that the Borough’s business and industrial areas are important for the wealth and prosperity of the Borough.
26. According to Mr. Johns, tension often arose between the settled local inhabitants and the Travelling community who were forming unauthorised encampments in the Borough. “The council often received reports of confrontations between members of these two communities...Local residents often became exasperated with the various nuisances associated with encampments.” He says that the council’s experience is that since the grant of the injunctions “reduced frequency and duration of encampments appears to have reduced tensions in the community.” He says that since the grant of the injunction in 2024, he has received no reports from members of the public of any threatening or intimidating behaviour from those forming unauthorised encampments.
27. Mr Johns also notes the disappearance of damage to green spaces or property, previously associated with unauthorised encampments, since the grant of the Injunction.

28. It is acknowledged that there have been some unauthorised encampments since the grant of the Injunction in 2024. There were two in May 2024, one in September 2024, one in October 2024 and two in February 2025. But, as those figures demonstrate, these were much less frequent than had occurred hitherto. In addition, all of them were smaller in size and all were resolved in a matter of hours.

Relevant Legal Principles

29. Against that factual background, I set out what seem to me the relevant legal principles on the following three topics:
- (i) The Court's power to grant injunctive relief and the entitlement of local authorities to seek that relief;
 - (ii) The proper approach to applications against persons unknown; and
 - (iii) The test to be applied to renewed applications for injunctions against persons unknown.

(i) The power to grant and the entitlement to seek

30. The court's power to grant injunctions is derived from the Senior Courts Act 1981, s37, which provides:

(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.

31. The authority of a local authority to seek injunctive relief in cases like the present stems from s187B of the Town and Country Planning Act 1990, which provides that:

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

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

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

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

32. Pursuant to s57(1) of the Town and Country Planning Act 1990 planning permission is required for the carrying out of any development of land. 'Development' is defined to include the carrying out of any building operation on, over or under land or the making of any material change of use of land (**s55(1)**), and the depositing of refuse or waste materials on land (**s55(3)(b)**). Planning permission may be obtained by way of express grant, or by way of deemed grant through permitted development rights. Carrying out development without the required planning permission constitutes a breach of planning control (**s171A(1)**).

33. The breaches of planning control complained of are primarily the material change in the use of the relevant land to a temporary Traveller site, and the depositing of refuse or waste materials, without the requisite planning permission. The decision as to whether something is or is not a breach of planning control is a matter for the local planning authority, or the Secretary of State on appeal, and not the court (***South Buckinghamshire District Council v Porter & Anr* [2003] UKHL 26; [2003] 2 AC 558** at [11], [20], [29] and [30]).
34. That said, the court's power to grant an injunction under s187B remains a discretionary one, albeit that that discretion is not unfettered. The discretion must be exercised judicially meaning, in this context
- ...that the power must be exercised with due regard to the purpose for which it was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for. (Porter at [29] per Lord Bingham).*
35. The Local Government Act 1972, s222 provides that:
1. *Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area –*
 - a) *they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and*
 - b) *they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.*
36. Accordingly, **s222** does not create a cause of action; instead it confers on local authorities a power to bring proceedings to enforce obedience with public law, without the involvement of the Attorney General (***Stoke-on-Trent City Council v B&Q (Retail) Ltd* [1984] AC 754**).
37. The guiding principles as to the exercise of the court's discretion under s222 are identified in ***City of London Corporation v Bovis Construction Ltd* [1992] 3 All ER 697** at 714 (per Bingham LJ), and include:
- ...the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will*

be effective to restrain them: see Wychavon DC v Midland Enterprises (Special Events) Ltd (1986) 86 LGR 83 at 89.

38. Where an injunction is granted under s222, a power of arrest may be attached to the injunction pursuant to the Police and Justice Act 2006, s27.

(ii) Applications against persons unknown

39. In **Wolverhampton**, the Supreme Court, (Lords Reed, Briggs and Kitchin with whom Lords Hodge and Lloyd-Jones agreed), considered a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. The appeal raised the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant an injunction which binds persons who are not identifiable at the time when the order is granted, and who have not at that time infringed or threatened to infringe any right or duty which the claimant seeks to enforce, but may do so at a later date, a class of persons referred to as “newcomers”.

40. At [167] the Supreme Court held that.

...there is no immovable 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.*

41. At [225] the court said

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 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.

(iii) The test to be applied to renewed applications

- 42. An issue has arisen, in some recent cases at first instance level, as to the test that should be applied when applications are made to renew injunctions against persons unknown.
- 43. In ***Basingstoke v Loveridge*, [2024] EWHC 1828 (KB)** Freedman J considered the purpose of the review hearing. He said at [55]:

the continuation of the injunction is something that has to be constrained and checked. It is for that reason that there are the constraints in respect of territorial and temporal limitations. There is a danger in a matter like this that the reaction to the Supreme Court case would be to be involved in tick-boxing so that the case would then be reviewed every year and then continued at the end of the year subject to the tick-boxing.

That would fail to reflect the nature of the guidance given by the Supreme Court, that makes it clear that the remedy is to be carefully scrutinised and only granted in respect of where there is a compelling need for the protection of the rights in the locality.

44. In **High Speed Two (HS2) Ltd v Persons Unknown** [2024] EWHC 1277 (KB) Ritchie J, was considering an application for the continuation of an interim injunction against protesters. In addressing how a review hearing should be approached, he said:

32. ... on a review of an interim injunction against PUs and named Defendants, this Court is not starting de novo. The Judges who have previously made the interim injunctions have made findings justifying the interim injunctions. It is not the task of the Court on review to query or undermine those. However, it is vital to understand why they were made, to read and assimilate the findings, to understand the sub-strata of the quia timet, the reasons for the fear of unlawful direct action. Then it is necessary to determine, on the evidence, whether anything material has changed. If nothing material has changed, if the risk still exists as before and the claimant remains rightly and justifiably fearful of unlawful attacks, the extension may be granted so long as procedural and legal rigour has been observed and fulfilled.

33. On the other hand, if material matters have changed, the Court is required to analyse the changes, based on the evidence before it, and in the full light of the past decisions, to determine anew, whether the scope, details and need for the full interim injunction should be altered. To do so, the original thresholds for granting the interim injunction still apply.

45. In **Arla Foods v Persons Unknown** [2024] EWHC 1952 at [128], Jonathan Hilliard KC (sitting as a Deputy Judge of the High Court) described the annual review process as “...allow[ing] a continued assessment of whether circumstances have changed so as make the continuation of the injunction appropriate.”

46. Morris J took a similar approach in **Transport for London v Persons Unknown & Ors** [2025] EWHC 55 (KB). At [54]-[55] he said:

In the present cases, TfL has already provided detailed evidence at a full trial and the Court has, on two occasions, already made a full determination of the issue of risk and the balance of interests. In my judgment, in those circumstances there needed to be some material change in order to justify a conclusion that the Final Injunctions should not continue. (For example, as in the HS2 case where Phase 2 of the HS project had subsequently been abandoned: see paragraph 40 above).

47. This approach was approved and applied by Hill J in **Valero Energy Ltd v Persons Unknown** [2025] EWHC 207 (KB) (*‘Valero’*) and in **Multiplex Construction Europe Ltd v Persons Unknown** [2025] 2 WLUK 578.

48. When **Basingstoke v Loveridge** came back before the court on a review hearing in March 2025, a somewhat different approach was adopted by the judge. Ms Kirsty Brimelow KC, sitting as a deputy judge of this court, considered the observation of Freedman J at [56] – [57] to the effect that “*As this matter goes forward, there needs*

to be considered the absence of a formally-negotiated stopping policy. As indicated above, at the moment there is an informal policy of limited toleration of encampments. There is only the very beginning of a negotiated stopping policy. It is very difficult to supervise an informal policy of limited toleration of encampments... The court going forward needs to scrutinise very carefully that the local authority is taking steps to procure a formal, negotiated stopping policy.”

49. Perhaps unsurprisingly, in those circumstances, Ms Brimelow held at [25]-[26] in her judgment that she should follow Freedman J’s requirement that there be “*close scrutiny of whether there remained a compelling need for the granting of a further injunction*” and “*in these circumstances, I consider the case should be heard de novo and so invited submissions in line with it being a de novo hearing.*”
50. In ***Test Valley Borough Council & Anr v Persons Unknown*** (unreported), HHJ Sarah Richardson (sitting as a deputy), considered the point at length and gave a detailed ex tempore judgment of which I was provided with a note (no transcript being presently available). She held that the correct test to apply on an annual review is that identified in the authorities of ***HS2***, ***TfL*** and ***Valero***, namely, the Court should ask whether there has been a material change of circumstances. If there has not, and all procedural and legal rigour has been followed, the Order should be continued. If there has, only then should a full ***Wolverhampton*** assessment be conducted to determine whether the relief should be continued, and on what terms. The Judge took the view that the ***HS2*** approach, as adopted in ***TfL*** and ***Valero*** was principled and in keeping with the ***Wolverhampton*** guidance, and was the correct approach to review hearings of this nature. The court should not perform a full ***Wolverhampton*** assessment on review unless there is a material change of circumstances that necessitates the same.
51. In my judgment the correct approach is dictated by the Supreme Court’s judgment in ***Wolverhampton*** and in particular in [225]. This is not a “tick box” exercise, but the matters on which evidence should be adduced and argument focused are (i) how effective the order has been; (ii) whether any reasons or grounds for its discharge have emerged; (iii) whether there is any proper justification for its continuance; and (iv) whether and on what basis a further order ought to be made. The parties should give full disclosure, supported by appropriate evidence, directed towards those questions.
52. There will be cases, such as ***Basingstoke***, where an issue has emerged, whether at the original hearing or in preparation for the renewed hearing, which needs to be addressed expressly at that renewal hearing. Whether that necessitates an expanded renewal hearing or what Ms Brimalow calls a *de novo* hearing will depend on the facts. The position may also be different where the application for further injunctive relief is not made during the currency of the previous order, but after it has expired. But the guiding light will always be the Supreme Court’s judgment in ***Wolverhampton***.

Discussion

53. I address in turn what seem to me the appropriate elements of the analysis, namely:
- i) The existence of any material change of circumstances;
 - ii) The efficacy of the order to date;

- iii) The justification for its continuance;
- iv) Whether any grounds for discharge have emerged;
- v) The basis on which any further order ought to be made; and
- vi) The other Wolverhampton requirements.

(i) Any material change in circumstances?

- 54. In the run of first instance cases discussed above, there is frequent reference to the need for there to be no material change in circumstances if an injunction against persons unknown to is to be continued. It may well be that that expression is used to encompass the points made in [225] of the Wolverhampton case.
- 55. In my judgment, there is indeed value in identifying whether there has been any material change of circumstances but there must then be focus on the requirements set out in the Wolverhampton case.
- 56. Two potential changes of circumstances are mooted.
- 57. First, there has been some significant reduction in the occurrence of unauthorised encampments. But I entirely agree with the submission of Ms Pratt that the reduction in the threat is not evidence that the threat has dissipated, but evidence that the Injunction is having its intended effect.
- 58. Second, there is one change of circumstance from June 2024 to which, very properly, the Claimant drew expressly to the Court's attention, although it is submitted it is not material to the continuation of the Injunction. That change concerns the availability of pitches in the Borough.
- 59. As noted above, in December 2024, the GMGTAA was updated to take into account the new expanded definition of Gypsies and Travellers. Following that update, the Claimant requires a further five permanent pitches to meet the assessed need. In consequence, there is currently a five-pitch shortfall. However, in 2025, the Council has identified and "lined up" two sites that can provide six pitches to meet the shortfall. I accept that in those circumstances the shortfall in supply of permanent pitches was only temporary, and steps have been and are being taken to meet the shortfall.
- 60. In any event, this assessed need relates to pitches for permanent (or seasonal/semi-permanent) residence by members of the Travelling community (ie. those who are settled, or wish to settle, in the Borough). The Injunction being sought, on the other hand, is intended to apply to those persons who are transiting through the Borough, forming temporary encampments in inappropriate and harmful places, and/or undertaking harmful activities such as fly-tipping. There is no evidence that the Borough is experiencing unauthorised encampments because it has a shortfall of permanent pitches.
- 61. In my judgment there has been no material change of circumstance that requires change to, or discharge of, the Injunction. The risk of the formation of unauthorised encampments and resulting harm persists.

(ii) The efficacy of the Order

62. In my judgment it is perfectly clear on the evidence that the Injunction has been highly effective. Whilst there are still unauthorised encampments that occur in the Borough, and occur on Injunction Sites specifically, the frequency and duration of those encampments, and the resulting harm, is greatly reduced.
63. As Mr Johns explains, there has been a significant reduction in the number of unauthorised encampments forming in the Borough. The reduced frequency, duration and size of unauthorised encampments has caused a significant reduction in the harm suffered by reason of those encampments. There have been no deposits of untreated human waste associated with unauthorised encampments since the grant of injunctive relief; the frequency and duration of encampments in industrial areas has reduced; there have been reduced instances of threats to and intimidation of the inhabitants of the Borough, reduced instances of community tension, and reduced instances of property damage (with no instances at all since the grant of the Injunction in June 2024).
64. Incidents of fly-tipping associated with unauthorised encampments, and the cost incurred by the Claimant in clearing the same, have been greatly reduced. Clean-up costs incurred by the Claimant peaked at £87,895.63 in 2017, and have fallen to nil since 2019.
65. All this evidence serves to establish that the Injunction has achieved its objectives.

(iii) Justification for the continuation of the Order

66. In my judgment, it is well established on the evidence that the potential harm which prompted the application for the injunction persists. The fact that, on occasions, unauthorised encampments appear in the Borough (albeit with reduced frequency) demonstrates that continued risk.
67. Furthermore, unauthorised encampments continue to occur in areas geographically close to Rochdale. The fear of the Claimant's officers that should the Injunction be discharged, those encampments will "migrate" into the Borough, and to the 334 protected sites specifically is, in my view, entirely realistic given the history. That is particularly so given that those sites appear, historically, to be especially attractive to those forming unauthorised encampments. On the evidence, it is clear that it is the existence of the Injunction, and the threat of enforcement by arrest, which discourages the establishment of unauthorised encampments, and limits their size and duration of such encampments as do occur.
68. The experience of neighbouring local authorities in the Greater Manchester area supports that conclusion. Of the five local authorities that responded to enquiries from the Claimant, all but one reported a higher number of unauthorised encampments in the last 12 months than in Rochdale. By way of example, Wigan Council reported 64 encampments, which caused £124,000 in removal costs and associated expenses, and £17,248 of council officer time.

(iv) Grounds for Discharge

69. I have been able to detect no possible grounds for the discharge of the order.

(v) *Basis for a further order*

70. The basis for a continuation of the order, both legally and factually is the same as that which justified the grant of the order in 2024. The terms of the order will be similar.

(vi) *The Wolverhampton requirements*

71. For the reasons set out above, in my judgment a full Wolverhampton assessment is not necessary on the facts of this case. I see no ground for going behind the findings of Butcher J.
72. For the sake of completion I can indicate, however, that I have no doubt that there has been clear and comprehensive evidence of wrongful conduct requiring a remedy; there remains a compelling justification for the Injunction; the Claimant has complied with its obligations to consider and provide lawful stopping places for Gypsies and Travellers; the Claimant has considered all reasonable alternative means of controlling or prohibiting unauthorised encampments; and has properly attempted to engage with Gypsy and Traveller communities in an attempt to encourage dialogue and co-operation, and better understand the needs of the respective parties.
73. The order I propose making includes generous liberty to apply provisions, and an obligation to take all reasonable steps to bring the application and any order to the attention of those who may be affected by any order made. It makes provision for (alternative) service (or, more accurately after the Wolverhampton ‘notification’) of the Order and any subsequent continuation application.
74. The order is constrained by territorial and temporal limitations so as to ensure, as far as it practicable, that they neither ‘outflank nor outlast the compelling circumstances relied upon’. It is not borough-wide against Persons Unknown, (nor has it or the interim relief ever been). The Injunction is appropriately limited; the 334 protected sites equate to less than 10% of the Borough and have been carefully selected. They include sensitive sites such as schools, recreational areas, green spaces and business parks, on which the formation of unauthorised encampments is especially harmful. The selected sites are sites that were either targeted frequently prior to the grant of injunctive relief, or are of the same nature as those sites that were frequently targeted.
75. The order’s operation is limited to one-year, with the possibility of continuation upon review. If no further application is made, the Order will expire by the effluxion of time.
76. The proposed respondents are defined as precisely as possible, identified and enjoined where possible. The injunction sought by the Claimant is, in my judgment, clear and precise, it uses everyday terms, when setting out the acts that it prohibits. The prohibited acts correspond closely to the actual or threatened unlawful conduct, and extend no further than the minimum necessary to achieve the purpose for which it was granted.
77. In my judgment there is no reason to depart from the usual position that no undertaking as to damages is required.
78. In my judgment, the test articulated by Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 and approved by Sir Geoffrey Vos MR in *Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 has been subsumed into the

Wolverhampton framework. The Vastint test, however, provides a useful double check. In my judgment, for the reasons set out above, this case satisfies that check. There is a strong possibility that, unless restrained by an injunction, persons unknown will act in breach of the rights which the Claimant is seeking to protect and if that happens the resulting harm would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate.

79. Finally, so far as I can judge, the Claimant has complied with the duty of full and frank disclosure throughout its evidence and submissions.

Conclusion

80. In those circumstances, in my judgment, it is just and convenient to grant the injunctive relief sought.
81. The error in the notification in respect of Site 334, referred to at [5] above, needs to be addressed. In my judgment, the appropriate and proportionate response to that issue is to suspend the operation of the injunction as it affects that site for 28 days. That will give any person affected sufficient time to make an application to the Court under the liberty to apply clause of the Order.
82. The claimant will be granted a one-year continuation of the Injunction as against the 90th and 93rd Defendants, Persons Unknown.



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**

Hearing dates: 24-28 April, 2-5, 9, 11, 12, 15, 17-19, 22-23 May 2023, 23 June 2024, 26 March
2024 and 7 May 2024

Approved Judgment

The Honourable Mr Justice Nicklin :

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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 summoning 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 of 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 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.
- ...
- (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]; *Astellas 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 if 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 to 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 in it 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 drone, 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 it 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 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 perimeter 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 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.

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 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.
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...”

(ii) - Nuisance by interference with enjoyment

Clerk & Lindsell on Torts 24th Ed.

Consolidated

Chapter 19 - Nuisance, Rylands v Fletcher and Similar Liabilities

Section 1. - The Nature of Nuisance

(b) - Scope of private nuisance

(ii) - Nuisance by interference with enjoyment

Examples

19-08



Nuisances of the third kind, causing an interference with the enjoyment of land, are, for example creating smells by the carrying on of an offensive manufacture or otherwise,⁴⁶ causing smoke or noxious fumes to pass on to the claimant's property,⁴⁷ raising clouds of coal dust,⁴⁸ making unreasonable noises,

⁴⁹

 or vibration,⁵⁰ using a building as a hospital for infectious diseases whereby the adjoining owners live in perpetual dread of infection,⁵¹ using a house for prostitution,⁵² allowing travellers to gather to the detriment of the claimant's neighbouring property,⁵³ causing crowds to collect,⁵⁴ watching and besetting a man's house so as to compel him to act in a particular way,⁵⁵ causing excessive heat to pass into an adjacent apartment,⁵⁶ and (conversely) abstracting heat and reducing premises to "arctic conditions".⁵⁷ Dicta in the House of Lords once suggested that nuisances of this third kind "will generally arise from something *emanating* from the defendant's land",⁵⁸ and that the exceptional cases which do not satisfy this requirement⁵⁹ "may go to the limit of the law of nuisance".⁶⁰ However, the need for such a requirement was far from clear, and the mechanistic nature of the concept of emanation meant that it would have been unlikely to contribute to the principled resolution of disputes in so diverse an area of the law. In 2023, however, in *Fearn v Board of Trustees of the Tate Gallery*,⁶¹ the Supreme Court decisively rejected the notion. The Court emphasised "that there is no conceptual or a priori limit to what can constitute a nuisance",⁶² and held that "intense visual intrusion"⁶³ into neighbouring

properties, by photography or otherwise, by those remaining on the defendant's land was capable of constituting a nuisance of the third kind.⁶⁴

Question of degree

19-09



In nuisance of the third kind, “the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves”,⁶⁵ there is no absolute standard to be applied. In *Barr v Biffa Waste Services Ltd*,⁶⁶ the Court of Appeal reversed the trial judge who had denied that odours emanating from the defendant’s waste-tipping site could constitute a common law nuisance unless they crossed a “threshold” of his own imposition relating to the frequency of the interference. It is therefore always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance.

⁶⁷

 The acts complained of as constituting the nuisance, such as noise, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as the time, place, extent or the manner of performance. In organised society, everyone must put up with a certain amount of discomfort and annoyance caused by the legitimate activities of his neighbours. Ordinary domestic use of premises therefore cannot constitute a nuisance, even though interference with the enjoyment of neighbouring premises is caused,⁶⁸ e.g. because that interference results solely from construction defects for which the defendant is not responsible.⁶⁹ In attempting to fix the general standard of tolerance, the vague maxim *sic utere tuo ut alienum non laedas*⁷⁰ has been constantly invoked. However, the maxim is of no use in deciding what is the permissible limit in inconvenience and annoyance between neighbours, and the courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the claimant to the undisturbed enjoyment of his property.⁷¹ No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society⁷². The usefulness of the language of “reasonableness” must not, however, be over-emphasised. The Supreme Court has recently reaffirmed that if a defendant’s activity does not constitute “ordinary” use of premises, then any otherwise actionable interference will not be legitimised simply because, considered in isolation, it was a perfectly “reasonable” use by the defendant of his premises.⁷³ However, of course, it equally does not follow that *merely* because the defendant’s use of his land is novel or unusual that it will automatically constitute a nuisance.⁷⁴ The key concept is that of “reciprocity” between neighbours,⁷⁵ based on an objective assessment of the acceptability or otherwise of the impact of their respective activities (which might *both* be unusual⁷⁶) upon each other. “Whether such an act does constitute a nuisance must be determined

not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact.”⁷⁷

Standard of comfort

- 19-10 A nuisance of this kind, to be actionable, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man. An interference which alone causes harm to something of abnormal sensitiveness does not of itself constitute a nuisance.⁷⁸ A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or for pleasure.⁷⁹ The continuing validity of the abnormal sensitivity principle has been affirmed by the Supreme Court, rejecting a suggestion that the general application of the concepts of foreseeability and reasonable user may have rendered the notion less significant in modern law.⁸⁰ However, once the nuisance is established, the remedies by way of damages or an injunction will extend to delicate and sensitive operations such as the growing of orchids.⁸¹ When it is said that a householder is entitled to have the air in his house untainted and unpolluted by any acts of his neighbour, that means that he is entitled to have “not necessarily air as fresh, free and pure as at the time of building the plaintiff’s house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence”.⁸² Moreover, the discomfort must be substantial not merely with reference to the claimant; it must be of such a degree that it would be substantial to any person occupying the claimant’s premises, irrespective of his position in life, age, or state of health; it must be “an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people”.⁸³ Where a social practice is sufficiently general and widely practised, there is no reason why it should not be protected, though pursued for pleasure and not profit. Thus, to send regularly large volumes of heavy smoke over a field habitually used for sporting activities may well be accounted a nuisance. And normal horticulture is certainly protected. It is not necessary to prove injury to health.⁸⁴ Indeed, it seems that no regard should be had to the needs of insomniacs or invalids.⁸⁵

Television reception

19-11

The question whether interference with television reception is capable of constituting an actionable private nuisance was considered by the House of Lords in *Hunter v Canary Wharf Ltd*,⁸⁶ which arose out of the construction of Canary Wharf Tower in London's docklands. The House held unanimously that where the cause of the interference was the erection of a large building, which blocked the path of the television signal, the claimant would be without a remedy. The situation was treated as analogous to that of loss of a view or prospect, which has for centuries been accepted as giving rise to no cause of action.⁸⁷ This analogy was considered to be appropriate because just as uncertainty as to the degree of protection required renders a right of prospect incapable of acquisition as an easement, so not dissimilar factors applied in the present case:

“Radio and television signals ... come from various directions over a wide area as they cross the developer's property ... Their passage from one point to another is invisible. It would be difficult, if not impossible, for the developer to become aware of their existence before he puts up the new building. If he were to be restricted by an easement from putting up a building which interfered with these signals, he might not be able to put up any substantial structures at all. The interference with his freedom would be substantial. I do not think that it would be consistent with principle for such a wide and novel restriction to be recognised. If that is so for easements, then the same result must follow so far as a remedy in nuisance is concerned.”⁸⁸

This reasoning adopted by the House leaves open the possibility that interference caused in other ways, such as by electronic devices, might nowadays be held to be actionable.⁸⁹ A majority of their Lordships do indeed appear to have taken the view, obiter, that a remedy might be available in such circumstances.⁹⁰ It is submitted that this is in fact the law. The belief that interference with television reception could not ordinarily constitute a sufficient interference with ordinary beneficial enjoyment as to amount to a legal nuisance⁹¹ now seems outdated.⁹²

Character of neighbourhood

- 19-12 In considering the standard of comfort or convenience of living of the average person, the character of the neighbourhood must be taken into account.⁹³ A person who lives in the heart of a large manufacturing town cannot reasonably expect the same purity of air or freedom from noise as in a secluded country district. In *Sturges v Bridgman*,⁹⁴ where the nuisance complained of was that of a noisy trade, Thesiger LJ laid it down that:

“whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances: what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the

traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.”

In *Sturges v Bridgman*, the mortars and pestles of a confectioner created noise in an area consisting largely of consulting rooms of medical practitioners, and liability was established. The approach of Thesiger LJ does not mean, however, that a person who lives in, for example, a noisy neighbourhood can never complain of any additional noise. He can do so if an increased volume of noise is, judged by local standards, so substantial as considerably to detract from the standard of comfort previously prevailing.⁹⁵ Thus in *Thomas v Merthyr Tydfil Car Auction Ltd*,⁹⁶ claimants who lived near the defendants’ business were able to recover damages for nuisance by noise notwithstanding that they lived in an area where “there were business uses and busy roads nearby”. Nevertheless, the defendant is entitled to have the activities impugned by the claimant to be taken into account in assessing the nature of the locality,⁹⁷ but only in so far as they are in fact *lawful*: i.e. to the extent that they do *not* constitute a nuisance. If they are unlawful “they should be notionally stripped out of the locality when assessing its character”.⁹⁸

Relevance of planning permission

19-13 Prior to the decision in *Coventry v Lawrence*,⁹⁹ the extent to which a grant of planning permission could be relied upon by defendants in nuisance cases was a source of some uncertainty. The Supreme Court has now confirmed authoritatively that the long-held view, which was initially put in question by a decision of the High Court in 1995,¹⁰⁰ remains good law. This is that the grant of planning permission cannot, in itself, authorise a nuisance. In *Coventry*, the Supreme Court unanimously restored the decision of the trial judge who had held that noise from a motor-racing stadium constituted a nuisance, and reversed the decision of the Court of Appeal¹⁰¹ which considered that planning permission granted to the defendants had had the effect of making motor-racing a dominant activity within the locality. Lord Neuberger disapproved a distinction drawn by the Court of Appeal, in this and previous cases,¹⁰² between “strategic” planning permission for large-scale developments, which could change the nature of a locality for nuisance purposes, and permission more limited in its scope which could not have this effect.¹⁰³ Although Lord Carnwath disassociated himself from the rejection of this distinction,¹⁰⁴ at least two other Justices agreed with Lord Neuberger on this point,¹⁰⁵ and it is therefore submitted that the proposition that planning permission can have a direct effect upon the nature of a locality for nuisance purposes no longer represents the law. This is not to say, however, that a grant of planning permission will always be irrelevant in nuisance cases. In *Coventry v Lawrence*, the Supreme Court indicated that it may sometimes be of assistance, albeit only as one factor, in determining the “reasonableness”

of the defendant's activity¹⁰⁶; and specific conditions attached to a grant of permission, such as limitations on the hours when it may be undertaken, may provide a useful "benchmark" for a court seeking to incorporate limitations of that kind in its own order.¹⁰⁷

Demolition, rebuilding and construction

- 19-14 Noise and dust caused by demolition, rebuilding and construction operations will not be actionable if the operations are reasonably carried on, and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours. In considering what is reasonable, account must be taken of modern methods. The damages awarded will only be in respect of losses caused by the acts of the defendants which are in excess of what is permissible¹⁰⁸:

"A man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next-door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the dust and noise. For the law, in judging what constitutes a nuisance, does take into consideration both the object and the duration of that which is said to constitute the nuisance."¹⁰⁹

Nevertheless, the claimant merely has to establish that an actionable degree of interference has occurred, the burden is then on the defendant to prove that his actions were reasonable.¹¹⁰ The principle that harm caused by temporary building work is not actionable is, however, confined to mere inconvenience and does not extend to physical damage to property.¹¹¹ Although even physical damage will not result in liability in the absence of negligence, providing it results only from an isolated act as distinct from a continuous occurrence, unless the rule in *Rylands v Fletcher* is applicable.¹¹²

Temporary interference

- 19-15  The duration of an interference is an element in assessing its actionability, together with the character and quality of that interference, but it is not a decisive factor, for a temporary interference

which is substantial will be an actionable nuisance.¹¹³ Though the interference may be actionable even if of temporary or very short duration, it is often said that nuisance requires “a state of affairs”.¹¹⁴

U This does not mean that the actual damage must be of a continuing character. As has been said, “Most nuisances do arise from a long continued condition; and many isolated happenings do not constitute a nuisance. It is, however, clear from the authorities that an isolated happening by itself can create an actionable nuisance.”¹¹⁵ Provided that the defendant’s property was in a state which constituted a potential hazard to his neighbour, the neighbour has a cause of action on the first occasion of damage.

Acts done with the intention of annoying

- 19-16 Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of property.¹¹⁶ In *Hunter v Canary Wharf Ltd*,¹¹⁷ it was suggested, obiter, in the House of Lords that the “malicious erection of a structure for the purpose of interfering with television reception should be actionable in nuisance” in circumstances in which such interference would not be actionable in the absence of malice.¹¹⁸ Thus although malicious abuse of rights is not in itself an actionable wrong,¹¹⁹ malice in this context is an element—often a powerful element—in determining the reasonableness of the user.¹²⁰

Footnotes

46 *Walter v Selfe* (1851) 4 De G. & Sm. 315; *Bamford v Turnley* (1860) 3 B. & S. 62 (brick-burning); *R. v Pierce* (1694) 2 Show. K.B. 327 (soap-boiling); *Crump v Lambert* (1867) L.R. 3 Eq. 409; *Att-Gen v Squires* (1906) 5 L.G.R. 99 (factory chimney); *Aldred’s Case* (1610) 9 Rep. 57b (keeping pigs); *Rapier v London Tramway Co* [1893] 2 Ch. 588 (stables); *Att-Gen v Tod Heatley* [1897] 1 Ch. 560 (rubbish); *Att-Gen v Cole* [1901] 1 Ch. 205 (fat melting); *Adams v Ursell* [1913] 1 Ch. 269 (fish and chip shop); *Wood v Conway Corp* [1914] 2 Ch. 47 (gas fumes); *Bainbridge v Chertsey Urban DC* (1915) 84 L.J. Ch. 626 (sewage farm).

47 *Crump v Lambert* (1867) L.R. 3 Eq. 409; *St Helens Smelting Co v Tipping* (1865) 11 H.L.C. 642; *Salvin v North Brancepeth Coal Co* (1874) L.R. 9 Ch. 705; *Manchester Corp v Farnworth* [1930] A.C. 171; Clean Air Act 1993.

48 *Pwllbach Colliery v Woodman* [1915] A.C. 634.

49 *Ball v Ray* (1873) L.R. 8 Ch. 467; *Broder v Saillard* (1876) 2 Ch. D. 692 (stables); *Inchbald v Robinson* (1869) L.R. 4 Ch. 388 (circus); *Soltau v De Held* (1851) 2 Sim. (N.S.) 133

(ringing bells); *Hawley v Steele* (1877) 6 Ch. D. 521 (rifle range); *Polsue and Alfieri v Rushmer* [1907] A.C. 121 (printing machinery); *Colwell v St Pancras BC* [1904] 1 Ch. 707 (electric station); *Vanderpant v Mayfair Hotel Co* [1930] 1 Ch. 138 (hotel kitchen); *Leeman v Montagu* [1936] 2 All E.R. 1677 (crowing of cockerels); *Metropolitan Properties Ltd v Jones* [1939] 2 All E.R. 202 (electric motor); *Newman v Real Estate Debenture Corp* [1940] 1 All E.R. 131 (banging of doors of lift); *Halsey v Esso Petroleum Co Ltd* [1961] 1 W.L.R. 683 at 696–702 (machinery and traffic); *Dunton v Dover DC* (1977) 76 L.G.R. 87 (playground noise); *Drennan v Walsh* [2023] NICH 6 (quarry). For statutory provisions relating to noise see the Noise Act 1996.

- 50 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch. 287; *Knight v Isle of Wight Electric Light Co* (1904) 73 L.J. Ch. 299; *De Keyser's Royal Hotel v Spicer* (1914) 30 T.L.R. 257; *Hoare v McAlpine* [1923] 1 Ch. 167.
- 51 *Metropolitan Asylum District v Hill* (1881) 6 App. Cas. 193; *Att-Gen v Nottingham Corp* [1904] 1 Ch. 673. See also *Birmingham Development Co v Tyler* [2008] EWCA Civ 859; [2008] B.L.R. 445 (fear must be “well-founded: that is, that the property or activities are actually dangerous”: per Rimer LJ at [55]; original emphasis).
- 52 *Thompson-Schwab v Costaki* [1956] 1 W.L.R. 335. See also *Laws v Florinplace Ltd* [1981] 1 All E.R. 659 (sex shop in residential area).
- 53 *Lippiatt v South Gloucestershire Council* [2000] Q.B. 51 CA.
- 54 *Walker v Brewster* (1867) L.R. 5 Eq. 25; *Bellamy v Wells* (1891) 39 W.R. 158; *Barber v Penley* [1893] 2 Ch. 447; *Chase v London CC* (1898) 62 J.P. 184; *Lyons, Son & Co v Gulliver* [1914] 1 Ch. 631.
- 55 *Church of Jesus Christ of Latter Day Saints v Price* [2004] EWHC 3245 (QB); cf. *Thomas v National Union of Mineworkers* [1986] Ch. 20.
- 56 *Sanders-Clark v Grosvenor Mansions Co* [1900] 2 Ch. 373; *Reinhardt v Mentasti* (1889) 42 Ch. D. 685 (heat from kitchen-stoves renders wine cellar unfit for its purpose).
- 57 *Dublin (South) City Market Co v McCabes Ltd* [1953] I.R. 283 at 311.
- 58 *Hunter v Canary Wharf Ltd* [1997] A.C. 655 at 685 per Lord Goff (emphasis added) (mere existence of defendants’ building not a nuisance). See also *Anglian Water Services v Crawshaw Robbins & Co* [2001] B.L.R. 173 (doubting whether mere deprivation of domestic gas supply could constitute a nuisance).
- 59 See, e.g. *Bank of New Zealand v Greenwood* [1984] 1 N.Z.L.R. 525 (glass roof causing deflected sunlight to throw a dazzling glare on neighbouring premises). See also *Thompson-Schwab v Costaki* [1956] 1 W.L.R. 335 and *Laws v Florinplace* [1981] 1 All E.R. 659.
- 60 *Hunter v Canary Wharf Ltd* [1997] A.C. 655 at 700 per Lord Lloyd.
- 61 [2023] UKSC 4; [2023] 2 W.L.R. 339. See below para.19-152.
- 62 See [2023] UKSC 4; [2023] 2 W.L.R. 339 at [12].
- 63 See [2023] UKSC 4; [2023] 2 W.L.R. 339 at [175] per Lord Sales (dissenting but not on this point).
- 64 Lord Leggatt considered that the facts constituted “a straightforward case of nuisance”, and cited with approval the *Greenwood*, *Costaki* and *Florinplace* cases referred to above (see [2023] UKSC 4; [2023] 2 W.L.R. 339 at [7]–[15]).
- 65 *St Helens Smelting Co v Tipping* (1865) 11 H.L.C. 642 at 650 per Lord Westbury.

- 66 [2012] EWCA Civ 312; [2013] Q.B. 455 esp. at [36] per Carnwath LJ referring to this paragraph in the 20th edn of this work.
- 67 See, e.g. *Murdoch v Glacier Metal Co Ltd* [1998] Env. L.R. 732 CA (no liability for factory noise in view of the character of the neighbourhood); also, *Drennan v Walsh* [2023] NICH 6 at [58] (citing a previous edition of the present work).
- 68 See per Lord Leggatt in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [27].
- 69 See *Baxter v Camden LBC* [2001] Q.B. 1 CA (“owner-occupiers would not be liable one to the other if the party wall between their houses is not an adequate sound barrier so that ordinary noise from one house unreasonably interferes with the use and enjoyment of the other”: per Tuckey LJ at 12).
- 70 i.e. “So use your own property as not to injure your neighbour’s”.
- 71 *Sedleigh-Denfield v O’Callaghan* [1940] A.C. 880 at 903 per Lord Wright.
- 72 *Sedleigh-Denfield v O’Callaghan* [1940] A.C. 880 at 903 per Lord Wright. The test of reasonableness is an objective one for the court and “does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances”: per Sir Terence Etherton MR in *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] 2 W.L.R. 1081 at [38].
- 73 See *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [29]–[33] per Lord Leggatt, citing inter alia *Bamford v Turnley* (1860) 3 B. & S. 62.
- 74 See *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [167] onwards per Lord Sales.
- 75 See *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [34]–[35] per Lord Leggatt.
- 76 cf. per Lord Sales (dissenting) in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [278].
- 77 *Stone v Bolton* [1949] 1 All E.R. 237 at 238–239 per Oliver J (approved as to nuisance [1950] 2 K.B. 201 CA, and on other grounds [1951] A.C. 850).
- 78 *Robinson v Kilvert* (1889) 41 Ch. D. 88 (ordinary heating damaging brown paper —“exceptionally delicate trade”); *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch. 436 (interference with special radio and television relay system)
- 79 *Eastern and South African Telegraph Co v Cape Town Tramways* [1902] A.C. 381 at 383; *Hoare & Co v McAlpine* [1923] 1 Ch. 167; *Whycer v Urry* [1956] J.P.L. 365 (Court of Appeal held practice of ophthalmic optician in a business area too specially delicate for protection); *Cooke v Forbes* (1867) L.R. 5 Eq. 166 (sulphuretted hydrogen damaged coconut matting by reason of delicate nature of its manufacture, injunction refused without prejudice to claim in damages).
- 80 See *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [26] per Lord Leggatt, disapproving dicta of Buxton LJ in *National Rail Infrastructure Ltd v CJ Morris* [2004] EWCA Civ 172; [2004] Env. L.R. 41 at [33]–[35].

- 81 See per Lord Simonds in *McKinnon Industries Ltd v Walker* [1951] 3 D.L.R. 577 at 581. See also per Sir Terence Etherton MR in *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] 2 W.L.R. 1081 at [99].
- 82 per Knight Bruce VC in *Walter v Selfe* (1851) 4 De G. & Sm. 315 at 322; affirmed 19 L.T. 308; *Polsue and Alfieri v Rushmer* [1907] A.C. 121.
- 83 *Walter v Selfe* (1851) 4 De G. & Sm. 315 at 322.
- 84 *Crump v Lambert* (1867) L.R. 3 Eq. 409.
- 85 *Bloodworth v Cormack* [1949] N.Z.L.R. 1058 at 1064 per Callan J; *Murray v Laus* [1960] N.Z.L.R. 126 (noise).
- 86 [1997] A.C. 655.
- 87 See, e.g. *Aldred's Case* (1610) 9 Co. Rep. 57b at 58b per Wray CJ. However, cf. per Lord Cooke of Thorndon who preferred to base the decision on the ground that the erection of the tower was reasonable in the circumstances (“only a lawyer” would suggest “that the amenity of television reception is fairly comparable to a view of the surroundings”: [1997] A.C. 655 at 719).
- 88 [1997] A.C. 655 at 727 per Lord Hope. Presumably the same would go for satellite reception.
- 89 cf. *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch. 436.
- 90 However, cf. per Lord Lloyd in *Hunter v Canary Wharf Ltd* [1997] A.C. 655 at 699 (“interference with television reception is not capable of constituting an actionable private nuisance”).
- 91 See *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch. 436 per Buckley J, *sed quare*.
- 92 cf. *Nor-Video Services v Ontario Hydro* (1978) 84 D.L.R. (3d) 221 Ont. H.C.J.
- 93 cf. per Lord Neuberger in *Coventry v Lawrence* [2014] UKSC 13; [2014] A.C. 822 at [60]: “the concept of ‘the character’ of the locality may be too monolithic in some cases, and a better description may often be something like ‘the established pattern of uses’ in the locality.” See generally S. Steel, “The locality principle in private nuisance” [2017] C.L.J. 145.
- 94 (1879) 11 Ch. D. 852 at 856. See also *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2023] 2 W.L.R. 339 at [38]–[41] (Lord Leggatt); *Ball v Ray* (1873) L.R. 8 Ch. 467 at 470–471.
- 95 *Crump v Lambert* (1867) L.R. 3 Eq. 409; *Polsue and Alfieri v Rushmer* [1906] 1 Ch. 234; *Bosworth-Smith v Gwynnes* (1920) 89 L.J. Ch. 368.
- 96 [2013] EWCA Civ 815; (2013) 149 Con. L.R. 105.
- 97 See e.g. *Jones v Ministry of Defence* [2021] EWHC 2276 (QB).
- 98 See *Coventry v Lawrence* [2014] UKSC 13; [2014] A.C. 822 at [65] per Lord Neuberger. The defendant’s activities will be “lawful” for this purpose if they “have been held to be a nuisance by the court, but the court has then decided to refuse an injunction and award damages instead”: per Lord Neuberger at [69].
- 99 [2014] UKSC 13; [2014] A.C. 822.
- 100 *Gillingham BC v Medway (Chatham) Dock Co Ltd* [1993] Q.B. 343.
- 101 *RDC Promotions v Lawrence* [2012] EWCA Civ 26; [2012] 1 W.L.R. 2127.

- 102 See, e.g. *Wheeler v JJ Saunders Ltd* [1996] Ch. 19 CA.
- 103 [2014] UKSC 13; [2014] A.C. 822 at [86]–[90].
- 104 [2014] UKSC 13; [2014] A.C. 822 at [223].
- 105 See esp. per Lord Mance [2014] UKSC 13; [2014] A.C. 822 at [165], declaring the distinction to be “unsustainable in principle and fairness”; see also per Lord Sumption at [156].
- 106 [2014] UKSC 13; [2014] A.C. 822 at [156] (Lord Sumption) and [218] (Lord Carnwath).
- 107 [2014] UKSC 13; [2014] A.C. 822 at [96] (Lord Neuberger) and [218] (Lord Carnwath).
- 108 *Andreae v Selfridge & Co Ltd* [1938] Ch. 1.
- 109 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch. 409 at 413 per Vaughan Williams LJ; *Phelps v City of London Corp* [1916] 2 Ch. 255; *Harper v GN Haden & Sons Ltd* [1933] Ch. 298.
- 110 See *Andreae v Selfridge & Co Ltd* [1938] Ch. 1 at 9 per Sir Wilfred Greene MR; see also *Hiscox Syndicates Ltd v The Pinnacle Ltd* [2008] EWHC 145 (Ch) at [30].
- 111 *Clift v Welsh Office* [1999] 1 W.L.R. 796 CA.
- 112 See *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685; (2014) 154 Con. L.R. 26. (On continuous occurrences see below, para.19-25, and on the rule in *Rylands v Fletcher* see below, paras 19-41 to 19-59).
- 113 *Bamford v Turnley* (1860) 3 B. & S. 62 at 84 per Bramwell B; *Fritz v Hobson* (1880) 14 Ch. D. 542 at 556; *Knight v Isle of Wight Electric Co* (1904) 73 L.J. Ch. 299; *Colwell v St Pancras BC* [1904] 1 Ch. 707; *Metropolitan Properties Ltd v Jones* [1939] 2 All E.R. 202 (noise lasting three weeks an actionable nuisance); *Matania v National Provincial Bank Ltd* [1936] 2 All E.R. 633 CA (nuisance by temporary dust and noise caused by extensive building alterations sufficiently substantial to be actionable); *Crown River Cruises Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyd’s Rep. 533 (firework display which lasted for only 15 or 20 minutes held to be actionable in nuisance).
- 114 *Stone v Bolton* [1950] 1 K.B. 201 at 208 per Jenkins LJ: “the causing or permitting of a state of affairs from which damage is likely to result.” See more recently the Irish decision in *Donnelly v Hoey* [2024] IEHC 52 at [331]–[338] (single spraying of herbicide over potato field; herbicide spread and damaged apples on neighbouring land: no liability in nuisance, since no state of affairs).
- 115 per Lawton J in *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959 at 969. See also *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm); [2009] 2 Lloyd’s Rep. 1 at [421] per Steel J. The decision of Steel J was subsequently reversed in part, but not on this point: [2010] EWCA Civ 180; [2011] Q.B. 86.
- 116 *Christie v Davey* [1893] 1 Ch. 316; *Hollywood Silver Fox Farm v Emmett* [1936] 2 K.B. 468 (deliberately firing guns to cause vixens to abort); distinguished in *Rattray v Daniels* (1959) 17 D.L.R. (2d) 134 (bulldozing close to mink farm in whelping season, no intention to harm, no negligence, no liability); *Grandel v Mason* [1953] 3 D.L.R. 65 (liable in nuisance and negligence because of knowledge of peculiar sensitivity of mink); distinguishing *Nova Mink v Trans-Canada Airlines* [1951] 2 D.L.R. 241. A modern example might be the deliberate use of electric equipment to interfere with a neighbour’s use of wi-fi.

117 [\[1997\] A.C. 655](#).

118 [\[1997\] A.C. 655](#) per Lord Cooke at 721.

119 See para.1-72.

120 See para.1-74.

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