IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2022-001066**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Bennathan J [2022] EWHC 1105 (QB)

B E T W E E N:

NATIONAL HIGHWAYS LIMITED

Appellant

-and-

(1) PERSONS UNKNOWN CAUSING THE BLOCKING OF, ENDANGERING, OR PREVENTING THE FREE FLOW OF TRAFFIC ON THE M25 MOTORWAY, A2, A20 AND A2070 TRUNK ROADS AND M2 AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23 AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING
(2) MR ALEXANDER RODGER AND 132 OTHERS

Respondents

AUTHORITIES BUNDLE

STATUTE

1. Highways Act 1980, section 130
2. Senior Courts Act 1981, section 37
3. Human Rights Act 1998, sections 6 and 12

CASE LAW

4. ***Barking and Dagenham LBC v Persons Unknown*** [2021] EWHC 1201 (QB) [2022] J.P.L. 43
5. ***DPP v Jones*** [1999] 2 AC 240
6. ***DPP v Ziegler*** [2022] AC 408
7. ***Canada Goose UK Retail Ltd and another v Persons Unknown*** [2020] 1 WLR 417
8. ***Canada Goose UK Retail Ltd v Persons Unknown*** [2020] 1 WLR 2802 (CA)
9. ***Cuadrilla Bowland Ltd and others v Persons Unknown*** [2020] 4 WLR 29 (CA)
10. ***Fourie v Le Roux*** [2007] 1 WLR 320

11. ***Hooper v Rogers*** [1975] Ch 43 (CA)
12. ***Ineos Upstream Ltd v Persons Unknown*** [2019] 4 WLR 100 (CA)
13. ***Lloyd v Symonds*** (unreported) 20 March 1998
14. ***London Borough of Barking and Dagenham and others v Persons Unknown and others*** [2022] 2 W.L.R. 946 (CA)
15. ***London Borough of Islington v Elliott*** [2012] EWCA Civ 56
16. ***Vastint Leeds BV v Persons Unknown*** [2019] 4 WLR 2

TEXTBOOKS

17. *Gee, Commercial Injunctions*, 7th ed (2016) at §2-035
18. *Snell's Equity* at §18-001 to §18-045
19. *Civil Procedure 2022*, pp. 794-811
20. *Injunctions, 14th Edition* (2021), Bean, Parry and Burns, p.4

Highways Act 1980 c. 66
s. 130 Protection of public rights.

Law In Force

Version 1 of 1

1 January 1981 - Present

Subjects
Road traffic

Keywords
Highway authorities' powers and duties; Highways; Public rights of way

130.— Protection of public rights.

(1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.

(2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.

(3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—

(a) the highways for which they are the highway authority, and

(b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.

(4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.

(5) Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient.

(6) If the council of a parish or community or, in the case of a parish or community which does not have a separate parish or community council, the parish meeting or a community meeting, represent to a local highway authority—

(a) that a highway as to which the local highway authority have the duty imposed by subsection (3) above has been unlawfully stopped up or obstructed, or

(b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority,

it is the duty of the local highway authority, unless satisfied that the representations are incorrect, to take proper proceedings accordingly and they may do so in their own name.

(7) Proceedings or steps taken by a council in relation to an alleged right of way are not to be treated as unauthorised by reason only that the alleged right is found not to exist.

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Notes

1 Act amended by Town and Country Planning Act 1990 (c.8), s. 54(1) Power to apply Act conferred by Town and Country Planning Act 1990 (c.8), s. 247(3) Power to exclude Act conferred by Town and Country Planning Act 1990 (c.8), s. 61(3)(b) Act modified by Town and Country Planning Act 1990 (c.8), ss. 28, 54, Sch. 2 Pt. I para. 1(2), Pt. III para. 2, Dartford-Thurrock Crossing Act 1988 (c.20), ss. 3, 19, Sch. 3 para. 9, Channel Tunnel Act 1987 (c.53), s. 35, Sch. 4 paras. 7(1), 10(1) Act amended (in part) by Town and Country Planning Act 1990 (c.8), ss. 27, 28 (1)(2) Act extended by Water Act 1989 (c.15), ss. 58(7), 101(1), 141(6), 160(1)(2)(4), 163, 189(4)–(10), 190, 193(1), Sch. 25 para. 1(2)(xxv)(8), Sch. 26 paras. 3(1)(2), 17, 40(4), 57(6), 58, Electricity Act 1989 (c.29), ss. 112(1)(3), Sch. 16 para. 2(4)(d)(6)(9), Sch. 17 paras. 33, 35(1), Gas Act 1986 (c.44), s. 67(1)(3), Sch. 7 para. 2(1)(xl), Sch. 8 para. 33 Functions of Minister of Transport, except those exercisable jointly with Secretary of State under ss. 258, 300(2), Sch. 1 paras. 7, 8, 14, 15, 18, 19, 21, now exercisable by Secretary of State: S.I. 1981/238, arts. 2(2), 3(2)(3)

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)

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

Law In Force

View proposed draft amended version

Version 2 of 2

1 October 2009 - Present

Subjects
Human rights

Keywords
Declarations of incompatibility; Human rights; Public authorities

6.— Acts of public authorities.

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

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

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

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

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

(a) a court or tribunal, and

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

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

[...][1]

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

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

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

(b) make any primary legislation or remedial order.

Notes

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

Public authorities > s. 6 Acts of public authorities.

s. 12 Freedom of expression.

Law In Force

View proposed draft amended version

Version 1 of 1

2 October 2000 - Present

Subjects
Human rights

Keywords
Freedom of expression; Human rights; Relief; Treaties

12.— Freedom of expression.

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

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

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

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

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

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

(a) the extent to which—

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

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

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

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

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

Neutral Citation Number: [2021] EWHC 1201 (QB)

Case Nos: See Appendix 1

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2021

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

(1) London Borough of Barking and Dagenham **(2) Other Local Authorities** **(see Appendix 1)**	**Claimants**
-and-	
(1) Persons Unknown **(2) Other named Defendants** **(see Appendix 1)**	**Defendants**
-and-	
(1) London Gypsies and Travellers **(2) Friends, Families and Travellers** **(3) National Federation of Gypsy Liaison Groups**	**Interveners**

Caroline Bolton and Natalie Pratt (instructed by **Sharpe Pritchard LLP and LB Barking & Dagenham Legal Services**) for the **1st, 6th, 11th, 16th, 26th, 28th, 33rd and 34th Claimants**
Ranjt Bhose QC and Steven Woolf (instructed by **South London Legal Partnership**) for the **7th and 12th Claimants**
Steven Woolf (instructed by **LB Ealing Legal Services and Reigate & Banstead BC**) for the **4th and 27th Claimants**
Ranjt Bhose QC and Sarah Salmon (instructed by **HB Public Law**) for the **8th Claimant**
Nigel Giffin QC and Simon Birks (instructed by **Walsall MBC Legal Services**) for the **35th Claimant**
Mark Anderson QC and Michelle Caney (instructed by **Wolverhampton CC Legal Services**) for the **36th Claimant**
Marc Willers QC, Tessa Buchanan and Owen Greenhall (instructed by **Community Law Partnership**) for the **Interveners**
Sarah Wilkinson (instructed by **Attorney General**) as **Advocate to the Court**

Hearing dates: 27-28 January 2021

Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

Approved Judgment

The Honourable Mr Justice Nicklin :

1. This judgment is divided into the following sections:

A: Introduction

2. In cases before the Court, injunctions have been granted to local authorities that have targeted, principally, unauthorised encampments on land. Although some have named individual defendants, most injunctions have been granted against "Persons Unknown" with varying descriptions.

3. The background to the claims brought by the local authorities and the scope of the injunctions that had been granted was described by Coulson LJ in ***Bromley London Borough Council -v- Persons Unknown*** **[2020] EWCA Civ 12**; **[2020] PTSR 1043** ("***LB Bromley***").

> [1] This is an appeal against the refusal by the High Court to grant what the judge called "a de facto borough-wide prohibition of encampment and upon entry/occupation ... in relation to all accessible public spaces in Bromley except cemeteries and highways". Although the stated target of the injunction was "persons unknown", it was common ground that the injunction was aimed squarely at the gipsy and traveller community. The points arising from the appeal itself are of relatively narrow compass, but all parties were anxious that, in the light of the recent spate of similar cases, this court should provide some guidance as to how local authorities might address this issue in future.
>
> [2] Numerous similar injunctions have been granted by the High Court in recent years and months. We refer to a number of those judgments below. One common feature of those cases was that the gipsy and traveller community was not represented before the court at either the interim or final hearing. Although that did not stop the judges concerned looking very carefully at the orders which they were being asked to make, I do not doubt that, in an adversarial system, there can be no substitute for reasoned submissions from those against whom an injunction is directed.
>
> [3] This, therefore, was the first case involving an injunction in which the gipsy and traveller community were represented before the High Court. As a result of their success in discharging the interim injunction, it is also the first such case to be argued out at appellate level..."

4. In [4] to [14], Coulson LJ set out the background and history of applications by local authorities and the grant of injunctions against "Persons Unknown" prohibiting unauthorised occupation or use of land ("Traveller Injunctions"). Often, although not exclusively, such injunctions were granted in respect of all public spaces within the relevant local authority area. The Court of Appeal noted a "*long-standing and serious shortage*" of sites for Gypsies and Travellers which threatened their traditional nomadic lifestyle that was part of the Gypsy and Traveller tradition and culture. At the date of the Court of Appeal's decision, there were no transit sites to cater for the needs of the Gypsy and Traveller community in the London Borough of Bromley, or anywhere else in Greater London. The nearest site was a transit site at South Mimms in Hertfordshire. This lack of adequate resource led to increasing incidents of unauthorised occupation and use of land. Coulson LJ noted that there was a reasonably direct correlation between the lack of adequate transit sites and unauthorised occupation and use of land. In 2015, one local authority – Harlow DC (see further [102]-[104] below) – sought and obtained a borough-wide injunction to prevent this unauthorised use and occupation of land.

The perceived success of this injunction led to a surge in applications for Traveller Injunctions by other local authorities. Coulson LJ explained:

> [10] In the South East, the recent spate of wide-ranging injunctions has been aimed at the gipsy and traveller community. This process began in 2015 with ***Harlow District Council -v- Stokes*** **[2015] EWHC 953 (QB)**. The prohibition on encampments in that borough, and the subsequent perception that the injunction had been effective, led to a large number of similar injunctions in 2017–2019. Most of these injunctions, such as the injunction granted in the recent case of ***Kingston upon Thames London Borough Council v Persons Unknown*** **[2019] EWHC 1903 (QB)**, as well as the interim injunction granted in this case, did not identify any named defendants. The second and fourth interveners in this case all obtained similar injunctions following what were uncontested hearings.
>
> [11] It appears that, in total, there are now 38 of these injunctions in place nationwide. It would be unrealistic to think that their widespread use has not led to something of a feeding frenzy in this contentious area of local authority responsibility. First, these injunctions have had the effect of forcing the gipsy and traveller community out of those boroughs which have obtained injunctions, thereby imposing a greater strain on the resources of those boroughs or councils which have not yet applied for such an order. Secondly, they have created an understandable concern amongst those local authorities who have not yet obtained such injunctions to seek them forthwith.

5. The history of these Traveller Injunctions shows how they have developed. They started out targeting actual trespass on land by named individuals. Typically, the local authority would name, as defendants to the proceedings, those who could be identified, and would additionally seek relief against "Persons Unknown", being those who were alleged also to be unlawfully occupying land but whose identity was not known. Before long, however, most local authorities started to take a different approach. Claims were not brought against named individuals. Instead, they were brought simply against "Persons Unknown", using a variety of descriptions (and sometimes no description at all). A further significant change was that Traveller Injunctions were granted in cases on the basis of threatened, rather than actual, unauthorised use or occupation of land. Traveller Injunctions were granted typically for periods of 3 years, although there are examples of longer periods. In a short time, injunctions previously granted against identified trespassers based on evidence of historic trespass had been transformed into *quia timet* injunctions to prohibit threatened unlawful encampment on land by anyone.

6. This judgment addresses some issues of principle that have arisen as to the legal basis for and scope of these Traveller Injunctions. The central issue to be determined is whether a "final injunction" granted against "Persons Unknown" is subject to the principle that final injunctions bind only the parties to the proceedings. The Court of Appeal in ***Canada Goose UK Retail Ltd -v- Persons Unknown*** **[2020] 1 WLR 2802** held that it did. The local authorities in the claims before me contend that it should not.

7. Before I come to the issues that require determination, I need to set out the development of the law affecting Traveller Injunctions and to describe and explain the features of the claims in which they have been granted.

B: The Changing Legal Landscape

8. Since the first Traveller Injunction was granted in 2015, there have been significant developments in the law, principally at appellate level. These decisions concentrate on two aspects: claims and injunctions against "Persons Unknown", and specific considerations in relation to extensive (sometimes borough-wide) Traveller Injunctions and their potential adversely to affect the Article 8 rights of Gypsies and Travellers.

9. Chronologically, the key cases are ***Cameron -v-Liverpool Victoria Insurance Co Ltd*** **[2019] 1 WLR 1471** (Supreme Court, 20 February 2019); ***Ineos Upstream Ltd -v-Persons Unknown*** **[2019] 4 WLR 100** (Court of Appeal, 3 April 2019); ***Bromley LBC -v- Persons Unknown*** **[2020] PTSR 1043** (Court of Appeal, 21 January 2020); ***Cuadrilla Bowland Ltd -v- Persons Unknown*** **[2020] 4 WLR 29** (Court of Appeal, 23 January 2020); and ***Canada Goose UK Retail Ltd -v-Persons Unknown*** **[2020] 1 WLR 2802** (Court of Appeal, 5 March 2020). Of those, ***Cameron***, ***LB Bromley*** and ***Canada Goose*** have the greatest impact upon the grant of Traveller Injunctions.

(1) *Cameron -v- Liverpool Victoria Insurance*

10. In ***Cameron***, the Claimant had brought a claim following a road traffic collision. She had been unable to identify the driver of the other vehicle, but she sought to bring her claim against "*the person unknown driving [the other vehicle] who collided with [the claimant's vehicle]*". There was no prospect of identifying the other driver, but a judgment against him/her would enable the claimant to make a claim under s.151 Road Traffic Act 1988. The District Judge refused to allow the claim. The Court of Appeal allowed the claimant's appeal and held that it was consistent with the CPR, and the policy of the Road Traffic Act 1988, for proceedings to be brought against the unnamed driver, in order that the insurer could be made liable under s.151.

11. The Supreme Court allowed the appeal and held that it was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the Court without having such notice of the proceedings as to enable him to be heard. It was not legitimate to issue (or amend) a Claim Form to bring a claim against an unnamed defendant if it was conceptually impossible to bring the claim to his/her attention. Lord Sumption gave the judgment of the Court. Extracting the key principles from [8]-[26] ("the *Cameron* principles"):

The importance of service of the originating process:

(1) 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. In ***Jacobson -v- Frachon*** **(1927) 138 LT 386, 392,** Atkin LJ described the principles of natural justice as follows:

> "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other

> litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

(2) Service of originating process is central to the domestic litigation process and was required long before statutory rules of procedure were introduced following the Judicature Acts of 1873. Different modes of service were permitted, but each had the common object of bringing the proceedings to the attention of the defendant.

(3) CPR 6.15 does not, in terms, include an express requirement that the method authorised should be likely to bring the proceedings to the person's notice, but "*service*" is defined in the indicative glossary of the Civil Procedure Rules as "*steps required by rules of court to bring documents used in court proceedings to a person's attention*".

(4) However, the whole purpose of service is to inform the defendant of the contents of the Claim Form and the nature of the claimant's case: ***Abela -v- Baadarani* [2013] 1 WLR 2043** [37] *per* Lord Clarke. 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.

(5) CPR 6.16 enables the court to dispense with service of a Claim Form, but it is difficult to envisage the circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware of the proceedings. To do so would expose the defendant to a default judgment without having had the opportunity to be heard or otherwise to defend his/her interests.

Proceedings against "Persons Unknown"

(6) A Claim Form may be issued against a named defendant even though, at the time, it is not known where, how or indeed whether s/he can be served. The legitimacy of issuing a Claim Form against an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it.

(7) The court generally acts *in personam*. An action is completely constituted when the Claim Form is *issued*, but it is not until the Claim Form is *served* that the defendant becomes subject to the court's jurisdiction: ***Barton -v- Wright Hassall LLP* [2018] 1 WLR 1119** [8].

(8) Where it is possible to locate or communicate with the anonymous defendant, and to identify him as the person described in the Claim Form, then it is possible to serve the Claim Form, if necessary, by alternative service under CPR 6.15 (e.g. in ***Brett Wilson LLP -v- Persons Unknown* [2016] 4 WLR 69** alternative service of the Claim Form was effected by e-mail to a website which had published the defamatory material and in trespass cases, CPR 55.6 permits service on the anonymous trespassers by 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).

(9) Nevertheless, the general rule remains that proceedings may not be brought against unnamed parties. Apart from representative actions under CPR 19.6, the only express provision of the CPR that permits claims against an unnamed defendant is CPR 55.3(4), which allows a claim for possession of land to be brought against trespassers whose names are unknown. There are also certain specific statutory exceptions to broadly the same effect, e.g. proceedings for an injunction to restrain "*any actual or apprehended breach of planning controls*" under s.187B Town and Country Planning Act 1990.

(10) The court has permitted actions, and made orders, against unnamed wrongdoers where the identities of some of the alleged wrongdoers were known. They could be sued both personally and as representing unidentified associates, e.g. copyright piracy claims: ***EMI Records Ltd -v- Kudhail* [1985] FSR 36**.

(11) A wider jurisdiction permitting claims against persons unknown was first recognised in ***Bloomsbury Publishing Group plc -v- News Group Newspapers Ltd* [2003] 1 WLR 1633**. Copies of the latest book in the Harry Potter series had been stolen from printers before publication and offered to the press by unnamed persons. Sir Andrew Morritt V-C held that a person could be sued by a description, provided that the description was "*sufficiently certain as to identify both those who are included and those who are not*": [21].

(12) There are therefore two distinct categories of case in which the defendant cannot be named: (1) anonymous defendants who are identifiable but whose names are unknown, e.g. squatters who are identifiable by their location, although they cannot be named ("Category 1"); and (2) defendants who are not only anonymous but cannot even be identified, e.g. most hit-and-run drivers ("Category 2"). The distinction is that in Category 1 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 Category 2 it is not.

(13) In some cases, *quia timet* injunctions have been granted against "Persons Unknown", where the defendants could be identified only as those persons who might in future commit the relevant acts. However, the grant of interim relief before the proceedings have been served (or even issued) is the exercise of an emergency jurisdiction and is both provisional and strictly conditional.

(14) In proceedings against "Persons Unknown" where the court grants an interim injunction to restrain specified acts, the terms of that injunction may mean that a person can become both a defendant and a person to whom the injunction was addressed by doing one of the prohibited acts: ***South Cambridgeshire District Council -v- Gammell* [2006] 1 WLR 658** [32].

(15) Defining an unknown person by reference to something that he has done in the past does not identify anyone. It is impossible to know whether any particular person is the one referred to and there is no way of bringing the proceedings to his/her attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but also to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is not enough that the wrongdoer him/herself knows who s/he is.

(2) *LB Bromley -v- Persons Unknown*

12. ***LB Bromley*** was the first occasion on which the Court of Appeal considered Traveller Injunctions. At first instance, the case was also the first occasion on which the Court had given a reasoned judgment, refusing a Traveller Injunction, after adversarial submissions ([2019] EWHC 1675 (QB)). The Court of Appeal identified judgments in eight other cases at first instance in which Traveller Injunctions were granted, but in which only the local authority had been represented: [38]. As noted by the Court of Appeal, a hallmark of litigation against "Persons Unknown" is the absence of any person opposing the claim. As will appear from this judgment, a legal system based on an adversarial model is vulnerable to failure or error where only one party participates in the proceedings.

13. The Court of Appeal dismissed the local authority's appeal against the refusal to grant an injunction prohibiting trespass on land by "Persons Unknown". Applying the principles set out in ***Ineos Upstream Ltd -v- Persons Unknown*** **[2019] 4 WLR 100**, the Court held:

    (1) that the requirements necessary for the grant of a *quia timet* injunction against "Persons Unknown" were that [29]:

        (a) there had to be a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief;

        (b) it was impossible to name the persons who were likely to commit the tort unless restrained;

        (c) it was possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

        (d) the terms of the injunction had to correspond to the threatened tort and not to be so wide that they prohibited lawful conduct;

        (e) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they could not do; and

        (f) the injunction should have clear geographical and temporal limits;

    (2) that, as a matter of procedural fairness, a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they were not there to put their side of the case [34]; and

    (3) that the nature and extent of the likely harm which the claimant had to show in order to obtain a Traveller Injunction was that of irreparable harm [35].

14. In respect of *quia timet* injunctions to prevent likely trespass, Coulson LJ cited (in [36]) the decision of the Supreme Court in ***Secretary of State for the Environment, Food and Rural Affairs -v- Meier*** **[2009] 1 WLR 828**. That case concerned trespass by a group of Travellers of parts of woodland owned by the Forestry Commission. The claim raised the rather technical issue of whether a possession order could be granted in

relation to land that was not presently occupied by trespassing Travellers, who on the evidence, if evicted from that camp, would simply move to another part of the same woodland. The Supreme Court held that, however desirable it might be to fashion or develop a remedy to meet the practical problem that arose in the case, in a possession claim against trespassers, an order for possession of land not presently occupied by the trespassers could not be justified. Nevertheless, the Court could, in addition to granting a possession order in respect of the land presently occupied by the Travellers, also grant an injunction to prohibit further threatened acts of trespass by the Travellers on other parts of the woodland. Baroness Hale's judgment included the following statement of principle:

> [40] ... 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..."

15. In [40]-[48], Coulson LJ considered the Article 8 rights of the Gypsy and Traveller community. In particular, he identified the following principles established by the decisions of ECtHR in ***Chapman -v- United Kingdom* (2001) 33 EHRR 18**; ***Connors -v- United Kingdom* (2004) 40 EHRR 9**; ***Yordanova -v- Bulgaria* (25446/06, 24 April 2012)**; ***Buckland -v- United Kingdom* (2012) 56 EHRR 16**; ***Winterstein -v- France* (27013/07, 17 October 2013)**:

(1) The occupation of a caravan by a member of the Gypsy and Traveller community was an "*integral part of ... ethnic identity*" and measures affecting the stationing of caravans and/or his/her removal from the site interfered with his/her Article 8 rights not only because it interfered with her home, but also because it affected his/her ability to maintain her identity as a Gypsy/Traveller: ***Chapman*** [73]; ***Connors*** [68]; ***Winterstein*** [142].

(2) There was an emerging international consensus amongst Council of Europe states recognising the special needs of minority communities and an obligation to protect their security, identity and lifestyle: ***Chapman*** [93].

(3) Members of the Gypsy and Traveller community were in a vulnerable position as a minority. In consequence, "*special consideration should be given to their needs and their different lifestyle*" and, to that extent, there was a positive obligation on states to facilitate the Gypsy way of life: ***Chapman*** [96]; ***Connors*** [84]; ***Yordanova*** [129]. The underprivileged status of the community "*must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities, and, if possible, arrangements for alternative shelter*": ***Yordanova*** [133].

(4) Although it was legitimate for the authorities to seek to regain possession of land from persons who did not have a right to occupy it, orders should not be enforced without regard to the consequences upon the Gypsy and Traveller residents or without the securing of alternative shelter for the community: ***Yordanova*** [111] and [126].

(5) The authorities should consider approaches specifically tailored to the needs of the Gypsy and Traveller community: ***Yordanova*** [128].

(6) The fact that a home had been established unlawfully was highly relevant: ***Chapman*** [102].

(7) If no alternative accommodation is available, the interference was more serious than where such accommodation is available: ***Chapman*** [103].

(8) If the person was rendered homeless by the particular decision under challenge, then "*particularly weighty reasons of public interest*" were required by way of justification with the Article 8 rights: ***Connors*** [86].

(9) The mere fact that anti-social behaviour occurred on local authority Gypsy and Traveller sites could not, in itself, justify a summary power of eviction: ***Connors*** [89].

(10) Individuals affected by a planning enforcement notice ought to have a full and fair opportunity to put any relevant material before the decision-maker before enforcement action was taken: ***Chapman*** [106].

(11) Judicial review was not a satisfactory safeguard as it did not establish the facts and because there was no means of testing the individual proportionality of the decision to evict: ***Connors*** [92] and [95]. The loss of a home is the most extreme form of interference with the right to respect for the home under Article 8. Any person at risk of an interference of this magnitude should, in principle, be able to have the proportionality of the measure determined by an independent tribunal, notwithstanding that, under domestic law, his right to occupation has come to an end: ***Buckland*** [65].

16. The relevant statutory provisions and government guidance were identified in [49]-[56], including:

(1) the recognition of Romany Gypsies and Irish Travellers as separate ethnic minorities under the Equality Act 2010, engaging the public sector equality duty under s.149: [49]-[53];

(2) the Department for the Environment Circular 18/94 "*Gypsy Sites Policy and Unauthorised Camping*", which provided that "*it is a matter for local discretion whether it is appropriate to evict an unauthorised gipsy encampment*"; that where there are no authorised sites but an unauthorised encampment is not causing a level of nuisance which cannot be effectively controlled, the authorities should consider providing basic services; that local authorities should try and identify possible emergency stopping places as close as possible to the transit routes used by Gypsies where Gypsy families would be allowed to camp for short periods; that, where Gypsies are unlawfully camped, it is for the local authority to take any necessary steps to ensure that the encampment "*does not constitute a hazard to public health*"; and that "*local authorities should not use their powers to evict gipsies needlessly ... local [authorities] should use their powers in a humane and compassionate way*": [54];

(3) the Home Office *Guide to Effective Use of Enforcement Powers (Part 1; Unauthorised Encampments)*, published in February 2006, which provided that local authorities needed to consider "*whether enforcement is absolutely necessary*": [55]; and

(4) the Department for Communities and Local Government *Guidance on Managing Unauthorised Camping*, published in May 2006, which stressed the importance of striking the balance between "*the needs of all parties*": [56].

17. At first instance, the Judge had been satisfied that the six requirements from ***Ineos*** (see [13(1)] above) were met, but she had refused the injunction on the basis that the relief sought was not proportionate. Upholding the Judge's refusal of the injunction, Coulson LJ held that the Judge had been rightly concerned about the width of the injunction being sought and was entitled to have regard, on the issue of the proportionality of the injunction sought, to:

(1) the absence of any substantial evidence of past criminality;

(2) the absence of any transit or other alternative sites;

(3) the cumulative effect of other injunctions that had been granted in other local authority areas;

(4) the local authority's failure to comply with its public sector equality duty having regard to the absence of an equality impact assessment and lack of proper engagement with the Gypsy and Traveller community; and

(5) the extent of the injunction that was sought, both in terms of duration (five years) and land covered (borough-wide).

18. In the final section of his judgment, Coulson LJ set out the following important "*Wider Guidance*":

> [100] I consider that there is an inescapable tension between the article 8 rights of the gipsy and traveller community (as stated in such clear terms by the European case law summarised at [44]-[48] above), and the common law of trespass. The obvious solution is the provision of more designated transit sites for the gipsy and traveller community. It is a striking feature of many of the documents that the court was shown that the absence of sufficient transit sites has repeatedly stymied any coherent attempt to deal with this issue. The reality is that, without such sites, unauthorised encampments will continue and attempts to prevent them may very well put the local authorities concerned in breach of the Convention.
>
> [101] This tension also manifests itself in much of the guidance documentation to which I have referred at [54]-[56] above. That guidance presupposes that there will be unlawful encampments, and does not suggest, save as a last resort, that such encampments should be closed down, unless there are specific reasons for so doing. There is no hint in the guidance that it is or could be a satisfactory solution to seek a wide injunction of the sort in issue in this case: indeed, on one view, much of that guidance would be irrelevant if the answer was a borough-wide prohibition on entry or encampment.

[102] It therefore follows that local authorities must regularly engage with the gipsy and traveller community (and/or, in the Greater London area, the first intervener). Through a process of dialogue and communication, and following the copious guidance set out above, it should be possible for the need for this kind of injunction to be avoided altogether. "Negotiated stopping" is just one of many ways referred to in the English case law in which this might be achieved.

[103] If a local authority considers that a *quia timet* injunction may be the only way forward, then it will still be of the utmost importance to seek to engage with the gipsy and traveller community before seeking any such order if time and circumstances permit. Welfare assessments should be carried out, particularly in relation to children. An up-to-date EIA will always be important because the impact on the gipsy and traveller community will vary from borough to borough and area to area. In my view, if the appropriate communications, and assessments (like the EIA) are not properly demonstrated, then the local authority may expect to find its application refused.

[104] Three particular considerations should be at the forefront of a local authority's mind when considering whether a *quia timet* injunction should be sought against persons unknown, and where the proposed injunction is directed towards the gipsy and traveller community:

(a) Injunctions against persons unknown are exceptional measures because they tend to avoid the protections of adversarial litigation and article 6 of the Convention.

(b) In order for proportionality (or an equilibrium) to be met in these cases, it is important that local authorities understand and respect the gipsy and traveller community's culture, traditions and practices, in so far as those factors are capable of being realised in accordance with the rule of law. That will normally require some positive action on the part of the authority to consider the circumstances in which the article 8 rights of the members of those communities are "lived rights" i.e. are capable of being realised.

(c) The vulnerability and protected status of the gipsy and traveller community, as well as the integral role that the nomadic lifestyle plays as part of their ethnic identities, will be given weight in any assessment as to the proportionality of an injunction or eviction measure.

(d) The equitable doctrine of "clean hands" may require local authorities to demonstrate that they have complied with their general obligations to provide sufficient accommodation and transit sites for the gipsy and traveller community.

(e) Common sense requires the court, when carrying out the proportionality exercise, to have careful regard to the cumulative effect of other injunctions granted against the gipsy and traveller community.

[105] In my view, borough-wide injunctions are inherently problematic. They give the gipsy and traveller community no room for manoeuvre. They are much

more likely to be refused by the court as a result (as happened here). The solution in *Wolverhampton* [2018] EWHC 3777, which identified particularly vulnerable sites but did not include all the sites owned by the council, seems to me to be a much more proportionate answer. I do not accept that this automatically means that the remaining sites will be the subject of unauthorised encampment, as Mr Kimblin suggested, but even if that happens, it is likely to be a better solution than a potentially discriminatory blanket ban.

[106] The same is true of the duration of the injunction. Again, in the *Wolverhampton* case, the injunction was limited to a period of one year after which there was a review. That again seems to me to be sensible. I consider that it is - without more - potentially fatal to any application for a local authority to seek a combination of a borough-wide injunction and a duration of a period as long as five years.

[107] Credible evidence of criminal conduct in the past, and/or of likely risks to health and safety, are important if a local authority wishes to obtain a wide injunction. In my view, the injunctions in the *Harlow* cases were explicable on the grounds of criminality and the grave risks to health and safety. Injunctions which are designed to prevent entry and encampment only, and without evidence of such matters, should be correspondingly more difficult to obtain.

[108] Whilst I do not accept the written submissions produced on behalf of the third intervener, to the general effect that this kind of injunction should never be granted, the following summary of the points noted above may be a useful guide:

(a) When injunction orders are sought against the gipsy and traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the gipsy and traveller community is to have effective protection under article 8 and the Equality Act 2010.

(b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.

(c) The submission that the gipsy and traveller community can "go elsewhere" or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action.

(d) There should be a proper engagement with the gipsy and traveller community and an assessment of the impact an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action.

(e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.

[109] Finally, it must be recognised that the cases referred to above make plain that the gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.

19. The underlined sections emphasise that, as the Article 8 rights of Gypsies and Travellers are engaged by Traveller Injunctions, the court must carefully consider the necessity for any order and the proportionality of the terms of the injunction that is sought by the local authority.

(3) *Canada Goose UK Retail Limited -v- Persons Unknown*

20. The third important decision bearing upon the limits of litigation against "Persons Unknown" is the Court of Appeal decision in ***Canada Goose***.

21. The claimants operated a retail store in central London selling clothing and other items made of animal fur and down. This had made it a target of protests by those opposed to the sale of fur and animal products. From its opening, the store had become a focus of demonstrations outside (and occasionally, inside) the premises. The Claimants obtained a without notice interim injunction against "Persons Unknown", who were the protesters, on various grounds including alleged harassment, trespass and/or nuisance. After a period of about a year, in which the proceedings were stayed, the Claimant applied for summary judgment against the defendants. At first instance ([2020] 1 WLR 417), the application for summary judgment was refused and the injunction was discharged. The Court found:

(1) the Claim Form had not been validly served on the "Persons Unknown" defendants: [138]. There had not been personal service on the "Persons Unknown" Defendants, and no order for alternative service had been made by the Court: [140];

(2) in any event, it was impossible to grant summary judgment against the class of "Persons Unknown" because it included within it both wrongdoers and people who had not committed any tort: [146]; and

(3) the grant of a final injunction would not bind newcomers, i.e. people who later fell within the definition of "Persons Unknown" by committing the prohibited acts but only after judgment had been granted: [157]-[159].

22. The claimants' appeal to the Court of Appeal was dismissed. As to service of the Claim Form on "Persons Unknown", the Court emphasised the procedural importance of proper service of the Claim Form being effective in bringing the proceedings to the attention of the defendants to the claim:

[45] … 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*** [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 r6.3 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 r 6.15, that:

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

23. In relation to the grant of interim injunctions against "Persons Unknown", and following the Court of Appeal decision in ***Ineos***, the Court accepted that, in principle, an interim *quia timet* injunction could be granted against newcomers, i.e. persons who had not committed any of the prohibited acts at the time when the injunction was granted: [72]. Following further consideration of ***Cuadrilla Bowland Ltd -v- Persons Unknown*** **[2020] 4 WLR 29**, and building upon ***Cameron***, the Court of Appeal identified the following principles which governed the grant of interim relief against "Persons Unknown": [82] ("the *Canada Goose* principles"):

> "(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..."

24. However, the Court held that injunctions granted by final order against "Persons Unknown" could bind only those who were parties to the proceedings at the date of the grant of the order, not newcomers:

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

[90] In Canada Goose's written skeleton argument for the appeal, it was submitted that ***Vastint Leeds BV -v- Persons Unknown*** **[2019] 4 WLR 2** (Marcus Smith J) is authority to the contrary. Leaving aside that ***Vastint*** is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in ***Ineos*** and the decision of the Supreme Court in ***Cameron***. Furthermore, there was no reference in ***Vastint*** to the confirmation in ***Attorney General -v- Times Newspapers (No.3)*** of the usual principle that a final injunction operates only between the parties to the proceedings.

[91] That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in ***Cameron***, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [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] 4 WLR 168** [132].

[92] In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose [counsel for Canada Goose] 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.

25. Finally, the Court of Appeal warned of the limits as to what could be achieved by civil litigation against "Persons Unknown" [93]:

"... 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."

C: The Cohort Claims

(1) Assembling the Cohort Claims and their features

26. Appendix 1 to this judgment contains a table setting out the 38 claims in which Traveller Injunctions are known to have been granted ("the Cohort Claims"). The table lists the claims and, in respect of each claim, identifies the claimants and defendants, provides key information about the history of the claim and the current status of the claim (including whether there is any subsisting injunction, interim or final).

27. The Cohort Claims were gathered together, to be managed by a single judge, in October 2020. From mid-2020, applications had been made in some of the Cohort Claims to extend and/or vary Traveller Injunctions that were coming to the end of the period for which they had been originally granted. Following a hearing in one of these claims – that brought by LB Enfield – in September 2020 ([2020] EWHC 2717 (QB) (see further [105]-[107] below), the issues raised suggested that there was a need for a review of the entire Cohort.

28. In consequence, on 16 October 2020, with the concurrence of the President of the Queen's Bench Division and Mr Justice Stewart, the Judge in charge of the Civil List in the Queen's Bench Division, an order was made in each of the Cohort Claims fixing a case management hearing in December 2020. Actions that had been commenced in District Registries or in the County Court were transferred to the Royal Courts of Justice. Basic information about each claim was collected by requiring completion of a questionnaire. The Order explained the Court's approach:

> "(A) The recent hearing in the ***Enfield*** case has led to the identification of issues that are likely to arise in other cases involving the grant of local authority wide injunctions to prohibit trespass on land granted against Persons Unknown who have typically, but not exclusively, been defined as Gypsies or Travellers ("Traveller Injunction"). The issues concern existing injunctions that have previously been granted (in most cases for several years) as well as applications for new or renewed injunctions of this type. The principles upon which such injunctions are granted have been subject to review in a series of cases: ***Cameron -v-Liverpool Victoria Insurance Co Ltd*** **[2019] 1 WLR 1471**; ***Boyd -v-Ineos Upstream Ltd*** **[2019] 4 WLR 100**; ***Bromley LBC -v-Persons Unknown*** **[2020] PTSR 1043**; ***Cuadrilla Bowland Ltd -v-Persons Unknown*** **[2020] 4 WLR 29**; and ***Canada Goose UK Retail Ltd -v-Persons Unknown*** **[2020] 1 WLR 2802**.
>
> (B) The Court has identified the [Cohort Claims] as claims in which Traveller Injunctions may have been granted in the past. The Court has held, in the ***Enfield*** case [32], that a local authority which has, in the past, obtained a Traveller Injunction is under a duty to restore the claim before the court if it becomes aware that there exist grounds upon which there is a realistic prospect that the injunction would be modified or discharged by the Court. This includes grounds that arise as a result of a change in the legal principles that apply. Any local authority not identified in [the Cohort Claims] which has been granted a Traveller Injunction should provide the details to the Clerk to Mr Justice Nicklin.

(C) It is likely that common issues will arise between the ***Enfield*** case and [the Cohort Claims] (and any other cases in which a Traveller Injunction has been granted). The Court wants to manage the resolution of any common issues in an effective and proportionate manner. The Order provides (a) for transfer of [the Cohort Claims] to the Queen's Bench Division of the High Court at the Royal Courts of Justice; (b) for completion of a Questionnaire to gather information about the [Cohort Claims]; and (c) a Case Management Hearing on 17 December 2020 which will enable the Court to identify the extent of common issues and determine the best way of resolving them.

(D) Prior to formulation of any common issues, the Court's first objective is to identify those local authorities with existing Traveller Injunctions who wish to maintain such injunctions (possibly with modification), and those who wish to discontinue their claims and/or discharge the current Traveller Injunction granted in their favour."

29. In the remaining part of this section of the judgment, I shall set out and describe common features typical in the Cohort Claims and the orders that have been sought and granted in them, under the broad headings:

(1) service of the Claim Form on "Persons Unknown";

(2) description of "Persons Unknown" in the Claim Form and CPR 8.2A;

(3) the bases of the civil claims;

(4) powers of arrest attached to injunction orders;

(5) use of the Interim Applications Court of the Queen's Bench Division; and

(6) failure to progress claims after the grant of an interim injunction.

30. I will also summarise the fate of three Cohort Claims which returned to Court during 2020 following an application by the relevant local authority to extend (sometimes with modifications) the Traveller Injunction that it had been originally granted. Consideration of these three claims – Harlow DC, LB Enfield and Canterbury CC – identified flaws in the approach and ultimately led to the formal gathering of the Cohort Claims for further investigation/management and the Case Management Hearing on 17 December 2020.

(2) Service of the Claim Form on Persons Unknown

31. Service of the Claim Form is the act by which the defendant is subjected to the court's jurisdiction in civil proceedings in England & Wales: ***Barton -v- Wright Hassall LLP*** **[2018] 1 WLR 1119** [8] *per* Lord Sumption. Whilst the Court may grant interim relief against a defendant before the Claim Form has been served (and, in cases of particular urgency, even before the Claim Form has been issued), that is an emergency jurisdiction which is "*both provisional and strictly conditional*": ***Cameron -v- Liverpool Victoria Insurance Co Ltd*** **[2019] 1 WLR 1471** [14] *per* Lord Sumption.

32. In relation to service of the Claim Form on "Persons Unknown", whilst there may be difficulties in effecting personal service of a Claim Form under CPR 6.5 on "Persons

Unknown", an identifiable but anonymous defendant can be served with the Claim Form, if necessary, by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the Claim Form: ***Cameron*** [15].

33. CPR 6.15 provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
>
> (3) An application for an order under this rule –
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice.
>
> (4) An order under this rule must specify –
>
> (a) the method or place of service;
>
> (b) the date on which the claim form is deemed served; and
>
> (c) the period for –
>
> (i) filing an acknowledgment of service;
>
> (ii) filing an admission; or
>
> (iii) filing a defence."

34. Reflecting the 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, an order for alternative service of the Claim Form can only be made where the Court is satisfied, on evidence, that the proposed method of alternative service "*can reasonably be expected to bring the proceedings to the attention of the defendant*": ***Cameron*** [21].

35. In none of the Cohort Claims was the Claim Form personally served upon "Persons Unknown" or an order made, exceptionally, dispensing with service of the Claim Form under CPR 6.16. The Cohort Claims can therefore be divided into three groups:

(1) claims in which no application or order was made for alternative service of the Claim Form pursuant to CPR 6.15;

(2) claims in which an order, purporting to authorise alternative service of the Claim Form on "Persons Unknown" has been made, but no application was made (or supported by evidence) and the order fails to comply with CPR 6.15(4); and

(3) claims in which, following an application by the relevant local authority, orders were made granting permission to serve the Claim Form upon "Persons Unknown" by alternative means.

36. In respect of the claims in the first category, the failure to serve the Claim Form on "Persons Unknown" meant, simply, that they had not been made defendants to the relevant claim. In respect of each claim in this category, the period for service of the Claim Form under CPR 7.5 had long since expired. As noted in ***LB Enfield -v- Persons Unknown*** **[2020] EWHC 2717 (QB)** [24], the consequence of failing to serve the Claim Form (or to obtain an order under CPR 6.15 for alternative service) is "*pretty stark*":

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

37. In total, 14 local authorities failed validly to serve the Claim Form or to obtain an order for alternative service; they were: LB Bromley (2nd Claimant); LB Croydon (3rd Claimant); RB Greenwich (5th Claimant); LB Merton (10th Claimant); LB Sutton (13th Claimant); LB Waltham Forest (14th Claimant); Canterbury CC (20th Claimant); Central Bedfordshire Council (21st Claimant); Elmbridge BC (22nd Claimant); Epsom & Ewell BC (23rd Claimant); Hertsmere BC (25th Claimant); Rugby BC (29th Claimant); Solihull MBC (32nd Claimant); and LB Enfield (36th Claimant). The injunctions granted in these claims have been discharged by the Court between October-December 2020 and most of the claims have also been dismissed (in most instances, as a result of an application made by the local authority itself to discharge the injunction).

38. In respect of the second category, purported orders for alternative service of the Claim Form were made in 11 claims, but the relevant order fails to comply with CPR 6.15(4) and, in most cases, there was no Application Notice (or evidence in support) seeking an order for alternative service of the Claim Form. They were: LB Ealing (4th Claimant); LB Hillingdon (7th Claimant); LB Hounslow (8th Claimant); RB Kingston-upon-Thames (9th Claimant); LB Richmond-upon-Thames (12th Claimant); LB Wandsworth (15th Claimant); Birmingham CC (18th Claimant); Boston BC and Lincolnshire CC (19th Claimants); Reigate and Banstead BC (27th Claimant); Runnymede BC (30th Claimant); and Buckinghamshire Council (formerly Wycombe DC) (37th Claimant). Since the case management of the Cohort Claims has commenced, some of these local authorities have issued Applications seeking relief under CPR 3.10 in respect of defects in the orders for alternative service. If necessary, those Applications will be resolved later as part of the continued management of the Cohort Claims. However, injunctions granted in the claims brought by RB Kingston-upon-Thames, LB Wandsworth, Birmingham CC, Runnymede BC and Buckinghamshire Council have been discharged (either as a result of an application made by the local authority itself or as a result of the relevant claimant failing to comply with an unless order) and the claim dismissed.

39. In total, since October 2020, the Court has discharged the injunctions in 19 cases, i.e. half the Cohort Claims. In these cases, there were fundamental failures properly to serve the Claim Form or to obtain valid orders for alternative service on Persons Unknown. I have not attempted to ascertain the total number of sites that were covered by the Traveller Injunctions in these 19 cases, but they easily reach into the thousands.

40. Even in the third category of case – where applications were made for orders for alternative service of the Claim Form on "Persons Unknown" – there are grounds for concern about whether, in light of the clear statements of principle from ***Cameron***, such orders were properly granted.

41. An example of the order, typically made in these claims following an application, is that made in the claim brought by LB Barking & Dagenham.

(1) The Application Notice, dated 9 March 2017, sought "*an order for alternative service as per attached draft order*".

(2) A witness statement in support of the application was provided by Adam Rulewski, dated 6 March 2017. In relation to the application for an order for alternative service against "Persons Unknown", Mr Rulewski stated:

> "The Claimants also seek an Order that the Claims and Application shall be deemed served on Persons Unknown by serving a copy of the Claim Form, Application Notice and Draft Order on all 140 sites identified in Schedule 2 of this Order by affixing them in a prominent place on the Land with a notice to Persons Unknown that a copy of the supporting evidence can be obtained from Barking Town Hall, Town Hall Square, 1 Clockhouse Avenue, Barking IG11 7LU and by contacting LBBD Legal Services on [telephone number given]."

(3) The application for an order for alternative service of the Claim Form on "Persons Unknown" was granted on 9 March 2017 – the same day the Claim Form was issued – in the following terms:

> "5. The claim forms and application shall be deemed served on Persons Unknown… pursuant to CPR Part 6.14, 6.15, 6.27 and 6.27 (sic) by serving a copy (as opposed to an original) of the claim form, application notice and draft order on all 140 sites identified in Schedule 2 of this Order by affixing them in a prominent place on the Land with a notice to Persons Unknown that a copy of the supporting evidence can be obtained from the Council offices [details given].
>
> 6. The Defendants shall acknowledge service of the claim form 21 days after the date of deemed service and file any written evidence in support of the Defence by the same date."

42. The order for alternative service in LB Barking & Dagenham's claim was technically defective; it did not state the date on which the Claim Form was deemed to be served on Persons Unknown (CPR 6.15(4)(b)). It was impossible, therefore, to identify the date for compliance under Paragraph 6. No doubt this was an oversight, but it is consistent with a theme that has emerged on investigation of the Cohort Claims: a lack of consideration of the fundamental question whether the proposed method of

alternative service of the Claim Form on "Persons Unknown" could be reasonably expected to bring the proceedings to the attention of those who it was sought to make defendants to the civil claim.

43. My impression is that, insofar as service of the Claim Form on Persons Unknown was considered at all in the Cohort Claims, it was done perfunctorily. Mr Rulewski's witness statement, for example, did not address why an order for alternative service of the Claim Form was justified or appropriate, or the basis on which the Court could be satisfied that the method of alternative service was likely to be an effective way of bringing the proceedings to the attention of the defendants. In fairness, Mr Rulewski prepared his witness statement, and the application for alternative service, before the Supreme Court's decision in ***Cameron***. He did not have the benefit of the decision's focus upon the need to demonstrate that the proposed method of alternative service could reasonably be expected to bring the proceedings to the attention of the "Persons Unknown" the local authority was attempting to make defendants to the claim.

44. Nevertheless, had Mr Rulewski asked himself, for example, *when* the Claim Form was likely to come to the attention of the "Persons Unknown" defendants, he might perhaps have identified the artificiality and unreality of the method he was proposing as being likely to bring the proceedings to the attention to anyone other than those presently in occupation at any of the injunction sites.

45. I recognise that the method of service he proposed reflected the well-established regime for possession claims against unknown trespassers (CPR 55.6). And there can be no real doubt that, in a claim against alleged trespassers in present occupation whose names are not known, displaying prominently the Claim Form (or copies of it), on or around the various sites in respect of which an injunction was to be sought, can usually be expected to bring the proceedings to the attention of the defendants. However, the whole point of Traveller Injunctions was to bind persons who turned up at the land only after the injunction had been granted. In respect of that category of defendant, posting copies of the Claim Form at the various sites was not likely to be an effective means of bringing the proceedings to their attention. To take an obvious example, displaying copies of the Claim Form at the Dagenham Road Car Park (or at any of the other sites covered by the injunction granted to LB Barking & Dagenham) was not likely to bring the proceedings to the attention of a family of Travellers in Rochdale. The first such a family was likely to discover about the proceedings, that had led to an injunction being granted against them, was when they subsequently pitched their caravan for an overnight stay in the Dagenham Road Car Park.

46. It may well be that the importance of this aspect of the decision in ***Cameron*** on claims against "Persons Unknown" has not been fully appreciated in the Cohort Claims. However, since the Supreme Court decision in ***Cameron*** the point has been authoritatively determined. In a claim against "Persons Unknown", the method of alternative service of the Claim Form that the Court permits must be one that can reasonably be expected to bring the proceedings to the notice of *all* of those who fall within the definition of "Persons Unknown". Without that safeguard, there is an obvious risk that the method of alternative service will not be effective in bringing the proceedings to a (perhaps significant) number of those in a broadly defined class of "Persons Unknown". By dint of the alternative service order, they would be deemed to have been served, when in fact they have not (a point that becomes important when the Court comes to consider granting final relief against "Persons Unknown"). Such an

outcome offends the fundamental principle of justice that each person who is made subject to the jurisdiction of the court had sufficient notice of the proceedings to enable him to be heard (see *Cameron* principles (1) and (4) (see [11] above)).

47. The unfortunate history of service of the Claim Form on "Persons Unknown" defendants (or lack of it) in the Cohort Claims demonstrates very clearly that the Court must adopt a vigilant and more rigorous process when considering applications under CPR 6.15 for alternative service of the Claim Form on "Persons Unknown". If the requirements of ***Cameron*** cannot be met, permission for alternative service should be refused. Such applications are typically, if not inevitably, made *ex parte*, so advocates presenting such applications will be under a duty to ensure that the Court is fully aware of all relevant authorities and any arguments that could be raised by the absent party. In practical terms, the advocate will be expected to demonstrate, by evidence filed in compliance with CPR 6.15(3)(a), how the proposed method of alternative service on the Person(s) Unknown can reasonably be expected to bring the proceedings to the attention of *all* of those who are sought to be made defendant(s). The greater and more ambitious the width of the definition of "Persons Unknown" in the Claim Form correspondingly the more difficult it is likely to be to satisfy the requirements for an order for alternative service.

48. Save in respect of the exceptional category of claims brought *contra mundum*, it is difficult to conceive of circumstances in which a Court would be prepared to grant an order dispensing with the requirement to serve the Claim Form upon "Persons Unknown" under CPR 6.16 (*Cameron* principle (5)). Consequently, if the Court refuses an order, under CPR 6.15, for alternative service of the Claim Form against "Persons Unknown", the jurisdiction of the Court cannot be established over the "Persons Unknown" defendants. Without having established jurisdiction, there will be no viable civil claim against them. With no civil claim, there can be no question of granting (or maintaining) interim injunctive relief against "Persons Unknown". (I deal below (see [167]-[173]) with the argument – based on ***South Cambridgeshire District Council -v- Gammell*** **[2006] 1 WLR 658** – that a person can become a defendant to proceedings when they commit the act prohibited by the injunction order).

(3) Description of "Persons Unknown" in the Claim Form and CPR 8.2A

49. Since the advent of the CPR, civil proceedings brought against "Persons Unknown" have always required that the description of the "Persons Unknown" defendants in the Claim Form be "*sufficiently certain as to identify both those who are included and those who are not*": ***Bloomsbury Publishing plc -v- News Group Newspapers Ltd*** **[2003] 1 WLR 1633** [19]-[21]; and "Persons Unknown" must be described "*by reference to... conduct which is alleged to be unlawful*" ***Canada Goose*** [82(2)] ("the Description Requirement"). In ***Birmingham City Council -v- Afsar*** **[2020] EWHC 864 (QB)**, Warby J held that the failure properly to describe "Persons Unknown" in the Claim Form was a "*fundamental defect*", adding, "*a person given notice of the proceedings, [cannot] fairly be expected to work their way through the body of a lengthy statement of case to work out whether they are a target of the claim*": [21(2)].

50. CPR Part 8.2A(1) and Practice Direction 8A impose further specific requirements in respect of certain categories of claim brought against "Persons Unknown". Paragraph 20 applies to claims and applications made under s.187B Town & County Planning Act

1990 (set out in Appendix 2 and discussed further in [61]-[63] below). The relevant sub-paragraphs provide:

"20.2 An injunction may be granted under [s.187B] against a person whose identity is unknown to the applicant.

20.3 In this paragraph, an injunction refers to an injunction under [s.187B] and 'the defendant' is the person against whom the injunction is sought.

20.4 In the claim form, the applicant must describe the defendant by reference to –

(1) a photograph;

(2) a thing belonging to or in the possession of the defendant; or

(3) any other evidence.

20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings.

(The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place).

20.6 The application must be accompanied by a witness statement. The witness statement must state –

(1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him;

(2) the steps taken by him to ascertain the defendant's identity;

(3) the means by which the defendant has been described in the claim form; and

(4) that the description is the best the applicant is able to provide.

20.7 When the court issues the claim form it will –

(1) fix a date for the hearing; and

(2) prepare a notice of the hearing date for each party.

20.8 The claim form must be served not less than 21 days before the hearing date.

20.9 Where the claimant serves the claim form, he must serve notice of the hearing date at the same time, unless the hearing date is specified in the claim form.

(CPR rules 3.1(2) (a) and (b) provide for the court to extend or shorten the time for compliance with any rule or practice direction, and to adjourn or bring forward a hearing)

20.10 The court may on the hearing date –

(1) proceed to hear the case and dispose of the claim; or

(2) give case management directions."

The requirements imposed by §§20.4-20.6 are of potential significance to the issues I have to decide (see further [63] below).

51. In the Cohort Claims there are repeated examples of claims brought against "Persons Unknown" which breach the Description Requirement. In Appendix 1, the column marked "Defendants" sets out how the "Persons Unknown" were described in the Claim Form (if at all). Where a description was given, few comply with the requirement that the "Persons Unknown" must be defined in the Claim Form by reference to conduct alleged to be unlawful (*Canada Goose* principle (2) – see [23] above). For example, several Claim Forms identify "Persons Unknown" as "*Persons Unknown occupying land*". Such a description would embrace every householder in England & Wales. In several Cohort Claims, there are also concerning examples of the description given of "Persons Unknown" in the injunction order being different from that in the Claim Form, without any amendment being sought to the description in the Claim Form. For example:

(1) In the claim brought by Basingstoke & Deane BC and Hampshire CC (16th Claimants), the Claim Form was issued against "Persons Unknown (owner and/or occupiers of land at various addresses set out in the attached Schedule)". The underlined words were added to the Claim Form by amendment. However, both the interim and final injunctions were directed simply at "Persons Unknown" (without any description).

(2) In the claim brought by Thurrock Council (34th Claimant), the Claim Form was issued against "Persons Unknown" (without description). The interim injunction was granted on 3 September 2019, "*pending the final injunction hearing*" against "*Persons Unknown forming unauthorised encampments within the borough of Thurrock*". There is no final injunction as no steps were taken to progress the claim to a final hearing following the grant of the interim injunction.

52. Finally, in respect of the Claim Forms in the Cohort Claims which did not name any individual defendant, and were therefore brought simply against "Persons Unknown", there is scant evidence of compliance with Practice Direction 8A, particularly §§20.4 to 20.6. This is so even though, excluding Walsall, every one of the Cohort Claimants based the claim (at least in part) upon s.187B.

(4) The bases of the civil claims against "Persons Unknown"

53. The local authorities have variously relied upon the following statutory powers/torts when applying for Traveller Injunctions:

(1) all claimants relied upon s.222 Local Government Act 1972 ("s.222") and s.187B Town and Country Planning Act 1990 ("s.187B");

(2) the 1st, 11th, 35th and 36th Claimants relied upon s.1 Anti-Social Behaviour, Crime and Policing Act 2014 ("s.1 ASBCPA") (albeit that relief was not granted under this section in the claim brought by the 36th Claimants – see [67] below);

(3) the 36th Claimant relied upon s.130 Highways Act 1980 ("s.130"); s.27 Police and Justice Act 2006; s.37 Supreme Court Act 1981 and trespass; and

(4) the 16th Claimant relies upon ss.61 and 77 Criminal Justice and Public Order Act 2014.

These statutory provisions are set out in Appendix 2 to this judgment.

54. Only actions for trespass or brought under s.1 ASBCPA constitute tortious causes of action capable of being tried between the claimants and any defendants. In Wolverhampton's claim, unusually for a Part 8 claim, Particulars of Claim were served which included a claim in trespass (see further [191]-[207] below).

(a) s.222 Local Government Act 1972

55. s.222 does not create any substantive cause of action. It simply confers standing upon local authorities to bring (or defend) legal proceedings, which, in respect of proceedings brought to enforce public rights, had previously vested only in the Attorney General: ***Birmingham City Council -v- Shafi*** **[2009] 1 WLR 1961** [22]-[24].

56. A local authority can apply for a civil injunction to restrain breaches of the criminal law: ***Stoke on Trent City Council -v- B&Q Retail Limited*** **[1984] AC 754**. In ***City of London Corporation -v- Bovis Construction Limited*** **[1992] 3 All ER 697**, a civil injunction had been granted to the local authority to restrain noise nuisance by the defendant. The local authority had issued 18 summonses against the defendant alleging breaches of s.60 Control of Pollution Act 1974. Bingham LJ set out the basis on which such jurisdiction was to be exercised. He noted that the jurisdiction to grant a civil injunction in support of the criminal law was "*exceptional and one of great delicacy to be exercised with great caution*" (714b, applying ***Gouriet -v- Union of Post Office Workers*** **[1978] AC 435, 481, 491, 500, 521**). He said that the "*guiding principles*" were (714g-j):

> "(1) … the jurisdiction is to be invoked and exercised exceptionally and with great caution: see [***Gouriet***];
>
> (2) … there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area: see the ***Stoke-on-Trent*** case at 767B, 776C, and ***Wychavon District Council -v- Midland Enterprises (Special Events) Ltd*** **[1987] 86 LGR 83, 87**;
>
> (3) … 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*** at page 89."

57. Upholding the grant of an injunction, Bingham LJ explained, by reference to the facts of the case (715c-e):

> "… The conduct which the local authority seek to restrain is conduct which would have been actionable (if not at the suit of the local authority) in the absence of any statute. Even if the conduct were not criminal, it would probably be unlawful. The contrast with the planning and Sunday trading cases is obvious. I see no reason for the court pedantically to insist on proof of deliberate and flagrant breaches of the criminal law when, as here, there is clear evidence of persistent and serious conduct which may well amount to contravention of the criminal law and which may, at this interlocutory stage, be regarded as showing a public and private nuisance. It is quite plain that the service of the notice and the threat of prosecution have proved quite ineffective to protect the residents.
>
> The local authority have issued 18 summonses but, even if convictions are obtained, the delay before the hearing will deprive the residents of Petticoat Square of any but (at best) minimal benefit. The local authority are charged with a power – and perhaps a corresponding duty – to protect their interests if their interests in the present case were left without protection. In my view the deputy judge was entitled to grant an injunction and was right to do so."

58. s.222 empowers local authorities to seek injunctive relief to restrain a public nuisance "*which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects*": ***Attorney-General -v- PYA Quarries Ltd*** **[1957] 2 QB 169, 184** *per* Romer LJ. Mr Bhose QC submitted that the case law demonstrates that s.222 provides a valuable and potentially powerful means by which a local authority can seek to ensure compliance with matters of public law, which all citizens have to obey for their mutual benefit. He referred to the judgment of Lawton LJ in the ***B&Q*** case in the Court of Appeal:

> "… [it is] in everyone's interest, and particularly so in urban areas, that a local authority should do what it can within its powers to establish and maintain an ambience of a law-abiding community; and what should be done for this purpose is for the local authority to decide." (emphasis added)

59. The underlined words are consistent with the principle that s.222 confers a status on the local authority to bring proceedings in its own name rather than granting any independent cause of action. Although not completely free from doubt, the balance of authority supports the view that, when bringing proceedings under s.222, the local authority must be able to establish a legal or equitable right in support of its claim and any application for an injunction (see discussion in §2-526(e)(5) *Encyclopaedia of Local Government Law*, Sweet & Maxwell). Whatever its limits, it is clear that s.222 does not provide a free-standing right to bring a claim simply on the grounds that the relief sought is "*expedient for the promotion or protection of the interests of the inhabitants of their area*": see ***Worcestershire County Council -v- Tongue*** **[2004] Ch 236** [30]-[32], [35] *per* Peter Gibson LJ.

60. Mr Bhose QC has pointed to the decision of Johnson J in ***London Borough of Hackney -v- Persons Unknown*** **[2020] EWHC 3049** as an example of an interim injunction granted to a local authority to restrain public nuisance by "Persons Unknown" under s.222.

(b) s.187B Town & Country Planning Act 1990

61. As s.187B(1) makes clear, the relevant cause of action in relation to any application for an injunction is an alleged breach of the duty to comply with planning controls in s.57(1), which provides that planning permission be obtained for the carrying out of any development of land as defined in s.55; ***South Buckinghamshire District Council -v- Porter*** **[2003] 2 AC 558** [11] *per* Lord Bingham.

62. s.187B itself does not, therefore, provide a cause of action. Rather, s.187B(1) provides *locus standi* for a local authority to apply for an injunction for actual or apprehended breach of planning controls required by s.57(1). s.187B(3) enables rules of Court to provide for injunctions to be granted against individuals the identity of whom is unknown.

63. In ***Cameron***, Lord Sumption referred to s.187B, and also to CPR 8.2A (see [50] above). He suggested that no such practice direction had been made. Whatever the position in ***Cameron***, insofar as concerns the Cohort Claims, Practice Direction 8A had been issued and, in paragraph 20, it set out requirements for various claims brought to obtain injunctions in respect of "*environmental harm or unlicensed activities*", including claims under s.187B: §20.1(1) (see [50] above). Importantly, §§20.4 to 20.6 of PD 8A clearly envisage that proceedings will be brought against, and the Claim Form served upon, *existing* known defendants, who can be described even if they cannot presently be named. The terms of PD 8A provide no support for a regime of granting injunctions against "Persons Unknown" under s.187B which will bind newcomers. Indeed, it would be impossible to comply with §20.4, in particular, in respect of a claim which sought to include newcomers in the definition of "Persons Unknown".

(c) s.1 Anti-Social Behaviour, Crime and Policing Act 2014

64. s.1 ASBCPA does create a cause of action - with an injunctive remedy - against persons engaging in anti-social behaviour as defined in s.2. The conditions of liability are set out in ss.1(2)-(3), including the standard of proof to be applied by the court. s.4 enables a Court to attach a power of arrest to an injunction if the conditions in s.4(1) are met (see further [79]-[81] below). s.5(1) provides that an application for an injunction under s.1 may be made only by specified bodies (which include a local authority: s.5(1)(a)). Applications can be made without notice being given to the respondent: s.6(1).

65. Rules of Court have been made under s.18 ASBCPA in CPR Part 65, Section VIII. CPR 65.43 provides (so far as material):

> "(1) An application for an injunction under … Part 1 of the 2014 Act is subject to the Part 8 procedure as modified by this rule and Practice Direction 65.
>
> (2) The application –
>
> (a) must be made by a claim form in accordance with Practice Direction 65;
>
> (b) may be made at any County Court hearing centre; and
>
> (c) must be supported by a witness statement which must be filed with the claim form

(2A) If the application –

(a) is on notice; and

(b) is made at a County Court hearing centre which does not serve the address where

(i) the defendant resides or carries on business; or

(ii) the claimant resides or carries on business,

the application will be issued by the County Court hearing centre where the application is made and sent to the hearing centre serving the address at (b)(i) or (ii), as appropriate…

(3) The claim form must state -

(a) the matters required by rule 8.2; and

(b) the terms of the injunctions applied for.

(4) An application under this rule may be made without notice and where such an application without notice is made –

(a1) the application may –

(i) be made at any County Court hearing centre;

(ii) be heard at the hearing centre where the application is made;

(iii) at any stage of the proceedings, be transferred by the court to-

(aa) the hearing centre which serves the address where the defendant resides or where the conduct complained of occurred; or

(bb) another hearing centre as the court considers appropriate;

(a) the witness statement in support of the application must state the reasons why notice has not been given; and

(b) the following rules do not apply –

(i) 8.3;

(ii) 8.4;

(iii) 8.5(2) to (6);

(iv) 8.6(1);

(v) 8.7; and

(vi) 8.8.

(5) In every application made on notice, the application notice must be served, together with a copy of the witness statement, by the claimant on the defendant personally.

(6) An application made on notice may be listed for hearing before the expiry of the time for the defendant to file acknowledgement of service under 8.3, and in such case –

(a) the claimant must serve the application notice and witness statement on the defendant not less than 2 days before the hearing; and

(b) the defendant may take part in the hearing whether or not the defendant has filed an acknowledgement of service."

66. Practice Direction 65, provides (so far as material)

"Issuing the Claim

1.1 (1) An application for an injunction under... Part 1 of the 2014 Act must be made by Form N16A and for the purposes of applying Practice Direction 8A to applications under ... Section VIII of Part 65, Form N16A shall be treated as the Part 8 claim form.

(2) An application on notice under [rule 65.43] will be issued by the County Court hearing centre where the claim is made but will then be sent to the County Court hearing centre which serves the address where the defendant resides or the conduct complained of occurred..."

Form N16A is the general form of application for an injunction. For present purposes, the form requires the full name of the person against whom the injunction is sought to be stated along with the names and addresses of all persons upon whom it is intended to serve the application. Applications under s.1 ASBCPA are not included in the actions which may be commenced under CPR Part 8 without naming a defendant: CPR Part 8.2A and Practice Direction 8A.

67. In the claim brought by Wolverhampton, Jefford J refused to grant an injunction on the basis of s.1 ASBCPA ([2018] EWHC 3777 (QB)). She considered that the s.1 envisaged the grant of an injunction to restrain anti-social behaviour by an identified individual, not "Persons Unknown": [2]. With respect, I agree with that conclusion. Part 1 of the Act (and the relevant provisions of the CPR) envisages a claim being made against an individual identified respondent and an injunction being used as part of targeted measures against anti-social behaviour committed by that respondent:

(1) s.1(1) provides a jurisdictional threshold: an injunction can only be granted against someone who is aged 10 or over.

(2) The court can grant an injunction under s.1 if two conditions are met:

a) s.1(2) requires the court to be satisfied on the balance of probabilities that "the respondent" has engaged in or threatens to engage in anti-social behaviour; and

b) s.1(3) requires that the court considers it is just and convenient to grant the injunction "*for the purpose of preventing the respondent from engaging in anti-social behaviour*"

Assessment of whether these conditions are met can only be done by the court focusing on the alleged conduct of the particular respondent and whether the terms of the injunction are likely to prevent the respondent from engaging in anti-social behaviour.

(3) Different courts have jurisdiction to make the injunction depending upon the age of the respondent. s.1(8) provides that the application for an injunction has to be made to a Youth Court if the respondent is under the age of 18 (and the appeal route is to the Crown Court in such cases: s.15), otherwise, in respect of those aged 18 and above the Act provides that the application is to be made to "*the High Court or the County Court*": s.1(8)(b). (Note, however, s.1(8)(b) is expressly made "*subject to any rules of court*" made under s.18(2). The relevant provisions of the CPR made under the section direct that the application must be made to the County Court.)

(4) s.14 imposes requirements to consult the local youth offending team about any application for an injunction that is made if the respondent is under the age of 18 when the application is made.

(5) s.1(4)(b) permits the court to impose positive requirements upon the respondent, but if such requirements are imposed, the injunction must specify who is to be responsible for supervising compliance with the requirement: s.3(1); and the court must have evidence about their suitability and enforceability: s.3(2). It is the duty of the person responsible for supervising compliance with the requirements imposed by the court to make the necessary arrangements in connection with the requirements and to promote the respondent's compliance with the relevant requirements. If the supervising person considers that the respondent has complied with (or failed to comply with) the relevant requirements, s/he must inform the person who applied for the injunction and the chief officer of police. A respondent subject to a requirement included in an injunction under s.1 is required to keep in touch with the supervising officer and notify that person of any change of address.

68. Whether or not a court could grant an injunction, under s.1 ASBCPA, against a person whose name was not known, but who could be identified, is a point that would require further argument. Whilst I can see force in the argument, for example, that it would be difficult to conduct any meaningful consultation with the local youth offending team if the respondent cannot be identified by name, it is not a point I need to determine. What, in my judgment, is clear is that the scope for wide-ranging "Persons Unknown" injunctions which bind newcomers (or are made *contra mundum*) under s.1 ASBCPA, particularly where they are targeting not individuals but particular forms of activity, are very difficult to justify as either being consistent with the structure of the Act or permitted under the CPR:

(1) The Act itself does not contain an express provision enabling injunctions under Part 1 of the Act to be granted against "Persons Unknown" or *contra mundum*. Furthermore, Part 4 of the same Act (ss.59-75) conveys powers upon local

authorities to tackle certain forms of anti-social behaviour by means of Public Spaces Protection Orders ("PSPOs"). I accept Mr Willers QC's submission, on behalf of the Interveners, that Part 4 of the Act enables the local authority to tackle general anti-social behaviour by making PSPOs. Part 1 contains measures to be targeted at individuals.

(2) Unlike the authorisation under CPR 8.2A and Practice Direction 8A §20 to commence proceedings under s.187B against "Persons Unknown", the CPR do not authorise proceedings to be brought against "Persons Unknown" under s.1 ASBCPA.

(3) Insofar as the local authority seeks an injunction under s.1 ASBCPA the terms of which are intended to bind newcomers, then I cannot presently see how the local authority could satisfy the requirement, ultimately, to give notice to the respondent(s) and personally serve a copy of the application notice and witness statement in support: CPR 65.43(5). Whilst both the Act and the CPR permit without notice applications, the relief that can be granted without notice is limited to an interim injunction: s.6. The claim could only be progressed to a final hearing by serving the application upon the respondent(s). As the N16A Application Notice is treated as the Claim Form (PD63 §1.1(1)), the principles governing service of the Claim Form would apply.

69. None of the local authorities has made oral submissions seeking to support the grant of Traveller Injunctions under s.1 ASBCPA. Ms Bolton and Mr Giffin QC represented the three local authorities who had been granted an injunction on grounds that included s.1 ASBCPA: LB Barking & Dagenham (1st Claimant) and LB Redbridge (11th Claimant). However, they did not advance any oral arguments seeking to support the grant of the injunctions on this basis.

70. I should perhaps here mention ***Sharif -v- Birmingham City Council* [2020] EWCA Civ 1488** (see further [177]-[180] below). It is clear from the Court of Appeal's decision that the local authority had not made its application for an injunction pursuant to s.1 ASBCPA, but under s.222 to restrain breaches of the criminal law. For present purposes, as the decision (a) did not concern an injunction granted under s.1 ASBCPA; and (b) specifically left undecided the ***Canada Goose*** point about civil injunctions granted against "Persons Unknown" and whether they can bind "newcomers", I do not consider that it assists the claimants in the Cohort Claims. Specifically, it does not assist on whether injunctions against "Persons Unknown" or *contra mundum* can be made under s.1 ASBCPA and it is not authority for the proposition that the Court can make civil *contra mundum* orders under s.222; the injunction was expressly granted against "Persons Unknown".

(d) s.130 Highways Act 1980

71. Only Wolverhampton has relied upon s.130 as a basis for the injunction it obtained, and Mr Anderson QC has not sought to argue that s.130 is an important underpinning of the injunction that was granted. I accept the submissions of the Interveners and Ms Wilkinson that s.130 does not itself create a cause of action. The relevant cause of action is an alleged public nuisance caused by the obstruction of the free passage of the public along the highway. Section 130 imposes a number of duties on highway authorities to assert and protect the right of the public to that unobstructed and

unhindered free passage along the highway and it gives them *locus standi* to bring or defend proceedings in performance of those duties, including applications for an injunction using its locus under s.222 in an appropriate case. Local authorities also have further powers under the Highways Act 1980 to deal with obstructions to the highway in ss.137ZA(4) and s.149.

72. In reality, however, an alleged public nuisance arising from an obstruction of the highway is an unpromising basis for a civil injunction against "Persons Unknown" (or *contra mundum* order), for the reasons explained by Longmore LJ in ***Ineos*** [40]:

> "... 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."

73. Mr Willers QC is right when he submitted that the Court would not grant an injunction *contra mundum* to prevent *all* encampments on a highway because it is impossible for the court to be satisfied, in advance, that *all* encampments would represent a public nuisance. It is one thing for a court to grant an injunction against a large encampment which currently is blocking traffic on a road (even assuming that the police have been unable to resolve the issue using their own powers), but it is another for the court prospectively to grant an injunction against the whole world prohibiting a single caravan stopping on the carriageway which does not impede the passage of other road users. An injunction that prohibits both, without discrimination, is wrong in principle, even before the Court makes an assessment, as it must, of the extent of the interference with the Article 8 rights of Gypsies and Travellers that the grant of such an injunction would represent and the proportionality and necessity for any such interference.

(e) ss.61 and 77-79 Criminal Justice and Public Order Act 1994

74. Section 61 provides that, where a senior police officer present at the scene reasonably believes (a) that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period; (b) that reasonable steps have been taken by or on behalf of the occupier to ask them to leave; and (c) that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or that those persons have between them six or more vehicles on the land, the officer may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land. A failure to comply with the direction of the police officer is an offence punishable with up to 3 months' imprisonment.

75. Section 61 therefore does not create a cause of action but instead gives the police power to direct trespassers on land to leave and to remove their property.

76. Section 77 provides a power for a local authority to direct unauthorised campers to leave the land; s.78 provides a power for local authorities to apply for orders from the magistrates' court for the removal of persons and their vehicles unlawfully on land; and

s.79 prescribes the requirements for service of directions and orders made under ss.77 and 78.

77. Basingstoke & Deane BC and Hampshire CC (16th Claimant) is the only remaining local authority that has purported to rely on these statutory provisions in support of its civil claim against "Persons Unknown". In the Claim Form in its action, the local authority stated: "*The Claimants seeks* (sic) *to restrain the repeated breaches of directions to leave the land, served pursuant to s.61 and 77 Criminal Justice and Public Order Act 1994.*" Ultimately, the injunction orders were stated to be made pursuant to s.222 and s.187B. None of the provisions in ss.61 and 77-79 of CJPOA creates a cause of action triable between the local authorities and the alleged defendants in respect of the actual and threatened trespasses in the present cases. The statutory provisions confer enforcement powers for local authorities. They do not contain or provide any *locus standi* to a local authority to seek injunctive relief.

(f) Trespass

78. Trespass is a common law tort consisting of any unjustifiable intrusion by one person upon land in the possession of another. It does not require proof of damage to be actionable. At common law, the local authority has *locus standi* to bring claims in trespass in respect of both land it owns in its own right and public spaces within its borough. Mr Bhose QC submits that where the Cohort Claims rely upon trespass as the cause of action, the local authority is bringing the claim on behalf of and for the benefit of the public to enforce their rights.

(5) Powers of arrest attached to injunction orders

79. In 23 Cohort Claims, the injunctions granted against "Persons Unknown" contained a power of arrest pursuant to s.27 Police and Justice Act 2006 and/or s.4 ASBCPA. These are unusual provisions that require clear and separate consideration and justification before being included in a civil injunction against identified defendants. Adding a power of arrest in an injunction against "Persons Unknown", where the definition of the defendants includes newcomers, presents real difficulties in satisfying the relevant statutory requirements and rules of court.

80. CPR 65.9 provides (so far as material):

> (1) An application under… section 27(3) of the 2006 Act for a power of arrest to be attached to any provision of an injunction must be made in the proceedings seeking the injunction by -
>
> (a) the claim form; or
>
> …
>
> (d) application under Part 23.
>
> (2) Every application must be supported by written evidence.
>
> (3) Every application made on notice must be served personally, together with a copy of the written evidence, by the local authority on the person against whom the injunction is sought not less than 2 days before the hearing.

81. It may be that there was evidence justifying the inclusion of a power of arrest against named individuals in injunctions granted in the Cohort Claims. However, it is difficult to see how a Court can be satisfied, on evidence, under s.27 Police and Justice Act 2006 and/or s.4 ASBCPA, that unidentified people, who have not yet even been present on the land, threaten conduct which consists of or includes the use or threatened use of violence, or that their actions present a significant risk of harm to others, sufficient to justify a power of arrest. There is also the issue of compliance with CPR 65.9(3). In the Cohort Claims, where a power of arrest was attached to the injunction order directed at "Persons Unknown", a person who simply parked his/her caravan overnight on land subject to the injunction was immediately liable to arrest. If the Court had simply granted an injunction against the hypothetical trespassing caravan owner in Dagenham Road Car Park (see [45] above), absent some very unusual feature in the evidence, the Court simply would not have had jurisdiction to attach a power of arrest as the conditions of s.27(3) and/or s.4(1) would not have been met.

82. I have found two instances in the Cohort Claims where the Court addressed specifically whether a power of arrest should be attached to an injunction against "Persons Unknown" in the Cohort cases are in the claims brought by LB Hillingdon (7th Claimant) and Rugby BC (29th Claimant).

LB Hillingdon

(1) In LB Hillingdon, Stewart J refused to attach a power of arrest to the interim injunction he granted on 29 March 2019 because the requirements of s.27(3) Police and Justice Act 2006 were not met.

Rugby Borough Council

(2) In Rugby BC, the Claim Form dated 22 August 2018, extraordinarily, was issued against six persons identified only by surname and a 7th Defendant "Persons Unknown", who were neither described nor identified (in breach of the Description Requirement – see [49] above). No order for alternative service of the Claim Form on "Persons Unknown" was sought or granted. An injunction, "*until further order*", was granted at the first hearing on 31 August 2018. A power of arrest was attached to the order under s.27 Police and Justice Act 2006. In a witness statement, dated 18 November 2020, the Legal Officer of Rugby BC, stated that she had represented the Council at the hearing at Nuneaton County Court on 31 August 2018. She had not prepared a skeleton argument, but she exhibited a copy of the "*advocacy notes*" she had prepared for the hearing. No judgment was given and no record or notes of the hearing are available. The advocacy notes indicate that the local authority relied upon the grant of an injunction to LB Bromley in similar terms. The notes make no reference to the power of arrest that was being sought, whether against the named defendants or "Persons Unknown", or the grounds upon which the council contended that such an order was justified by reference to the requirements of s.27(3).

(3) On 15 April 2020, the council applied to renew the power of arrest that had been granted under the original injunction order. On 3 June 2020, Deputy District Judge Leong at Nuneaton County Court refused the application, without a hearing. The Judge noted, succinctly:

> "The first 6 Defendants have not breached order since 2018/2019. In effect Rugby Borough Council are asking for an arrest power in relation to persons unknown (7th Defendant). That is not appropriate, nor are [the requirements] under s.27(3) Police and Justice Act 2006 met."

(4) The council did not renew the application to extend the power of arrest. As a result of a failure to comply with an unless order, dated 4 November 2020, the injunction order against "Persons Unknown" of 31 August 2018 was discharged. Upon further application by the council on 18 November 2020, the injunction granted against the named defendants in the order of 31 August 2018 was also discharged and the claim was dismissed.

(6) Use of the Interim Applications Court of the Queen's Bench Division ("Court 37")

83. Applications for interim injunctions are subject to the provisions of CPR Part 25 and Practice Direction 25A. The key procedural requirements are:

(1) the Application Notice must state the order sought and the date, time and place of the hearing: PD25A §2.1;

(2) subject to any order abridging time under CPR 23.7(4), the Application Notice and evidence in support must be served as soon as practicable after issue and in any event not less than three days before the court is due to hear the application: PD25A §2.2;

(3) except in cases where secrecy is essential, in any urgent application or application made without giving the required period of notice, the applicant should take steps to notify the respondent informally of the application: PD25A §4.3(3);

(4) the application must be supported by evidence and, where an application is made without notice to the respondent, the evidence must state why notice was not given: CPR 25.3(2), CPR 25.3(3), PD25A §§3.2 and 3.4;

(5) unless the court otherwise orders, any order for an injunction, made without notice to any other party, must contain a return date for a further hearing: PD25A §5.1(3); and

(6) an order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order: PD25A §5.4.

84. In a large number of claims (but not all of them), applications for interim injunctions were brought before the interim applications Judge of the Queen's Bench Division (or brought using equivalent procedures in District Registries or the County Court) ("Court 37"). Notwithstanding the procedural requirements I have identified, in most cases, no notice of the Application was given to the respondents, "Persons Unknown", whether by the placing of notice on the land in respect of which the injunction was sought or otherwise; the Claim Form was issued on the date on which the interim injunction application was made; and inevitably, the time the Court had to consider the application was very limited. Frequently, no skeleton argument was provided to the court.

85. In my judgment, the use of the urgent applications procedure, in Court 37, was almost always unjustified. Indeed, on 29 March 2019, Stewart J, the Judge in Charge of the Civil List of the Queen's Bench Division, told Counsel, who had applied for an injunction on an urgent basis in one of the Cohort Cases, that applications for this type of injunction should not be made in Court 37 unless there was "*real urgency*". Nevertheless, the same Counsel appeared, again in Court 37, on two further occasions seeking an interim injunction in Cohort Claims on 10 May 2019 and 12 June 2019. I am not presently satisfied that there was any real urgency that justified the applications being made in Court 37 on these subsequent occasions. The evidence in support of the application made on 12 June 2019 certainly does not demonstrate that there was any present unlawful activity or any credible immediate threat of any so as to justify making an application to Court 37. The transcript of the hearing on 10 May 2019 supports a similar conclusion.

(7) Failure to progress claims after the grant of an interim injunction

86. Another risk inherent in claims made against "Persons Unknown" is that, unless a defendant is identified (or comes forward), the claim can easily become dormant, if the claimant permits it to. Traveller Injunctions represent an interference with the Article 8 rights of members of the Gypsy and Traveller communities (for the reasons explained by the Court of Appeal in ***LB Bromley***). The wider the scope of the injunction, the greater the extent of the interference with the Article 8 rights. Any failure to prosecute a claim in which an interim injunction has been granted is a matter of serious concern.

87. It has been recognised, in other types of claim brought against "Persons Unknown", that a failure to progress a claim where an interim injunction has been granted can amount to an abuse of process.

88. Interim non-disclosure orders, granted in cases of alleged breach of confidence or misuse of private information, is another area in which proceedings are occasionally brought against "Persons Unknown", typically because the identity of the person threatening to disclose the information is not known to the claimant. An interim non-disclosure injunction directly and immediately interferes with the Article 10 right of the individuals(s) restrained, but it also has the potential to bind third parties who have knowledge of the order under the ***Spycatcher*** principle (see further discussion below in [184]-[185]), representing a further interference with the Article 10 rights of third parties.

89. It was recognised in several cases, in which an interim non-disclosure injunction had been granted, that there was potential for claims against "Persons Unknown" being allowed by claimants to become dormant when no defendant was identified or came forward. If that happened, the interim injunction became practically a permanent injunction restraining third parties by reason of the ***Spycatcher*** principle.

(1) In ***X -v- Persons Unknown*** **[2007] EMLR 10**, Eady J observed:

> [77] ... if a claimant is content to sit back and make no attempt at all to serve the defendant against whom an injunction has been obtained, with the order or the evidence on which it was based, then the tail will be wagging the dog. The ***Spycatcher*** doctrine has been acknowledged by the Court of Appeal and the House of Lords over

> the past 20 years because it is recognised that third parties should not knowingly frustrate orders of the court whether made *inter partes* or *contra mundum*: see, e.g. ***Attorney General -v- Punch Ltd*** **[2003] 1 AC 1046** [32]. The primary relief will usually have been obtained against a party who, it is anticipated, will otherwise infringe the claimant's rights. It is not desirable that this remedy should be sought as matter of formality, while depending primarily on the ancillary ***Spycatcher*** doctrine - salutary though it is.
>
> [78] Some effort should be made to trace and serve the primary wrongdoer. If appropriate, advantage can be taken of the provisions of [the CPR] for service by an alternative method (formerly "substituted service"). Otherwise, the litigation will go to sleep indefinitely, which is hardly consistent with the policy underlying the CPR, and what is supposed to be a temporary holding injunction becomes a substitute for a full and fair adjudication."

(2) In ***Terry (formerly LNS) -v- Persons Unknown*** **[2010] EMLR 16** [20], Tugendhat J summarised the unsatisfactory position where a claim had been brought against a person, who could not be identified by the claimant, who was threatening to disclose private information and photographs to a newspaper:

> "The overall likely effect of the order sought appeared to me to be as follows. The applicant was likely to notify a limited number of media third parties promptly. After the hearing that was done, as set out below. If it were not intended to do that, there would be no point in the court making the order (since it is admitted the respondent has not been identified). In my view, on the information now before me, the applicant is unlikely ever to serve the Claim Form on any respondent. Journalists do not normally reveal their sources and can rarely be obliged to do so: ***Financial Times Ltd -v- United Kingdom*** **[2010] EMLR 21**. As that case showed, even leak enquiries conducted with the resources of a major corporation, backed up by specialist investigators, commonly fail to identify the source of a leak. But that will not trouble the applicant. There is no provision for a return date. Since service on the respondent is unlikely, it follows that no trial is likely to be held. Unless a third party is prepared to take the risk in costs of applying to vary this order, this interim application is likely to be the only occasion on which the matter comes before the court. The real target of this application is the media third parties who are not respondents. The only third parties who will ever hear of the proceedings are those whom the applicant chooses to notify. According to the terms of the draft order, no one else will have any means of discovering that an order has been made at all. The third parties who will be notified will be told nothing by the applicant about the grounds for the claim, or any possible defence to it. If they want to know more, they will be at risk as to costs in making an application to the court. In short, the effect of the interim order sought is likely to be that of a permanent injunction (without any trial) binding upon any person to whom LNS chooses to give notice that the order exists."

90. The remedy to prevent actions becoming dormant in this way was to make directions that ensured the claimant progressed the claim. In ***Terry***, Tugendhat J noted that CPR PD 25A §5.1(3) required that, where an interim injunction had been granted without

notice to the defendant(s), the order must provide for a return date for a further hearing. That return date, the Judge noted, served two important functions in relation to claims brought against "Persons Unknown" the second of which was [136]:

> "... it [enables] the court to monitor the progress of any attempts to find a respondent and to serve him. As Eady J noted in ***X -v- Persons Unknown*** [78], it is not consistent with the CPR for litigation to be commenced and for the subsequent steps required of claimant to be deferred indefinitely to suit the interests of the claimant. CPR 1 provides that cases are to be dealt with expeditiously and fairly, and that the court has a duty to manage the case, including by fixing timetables and otherwise controlling the progress of the case, and giving directions to ensure that the trial of a case proceeds quickly and efficiently. If the Claim Form cannot be served expeditiously, then the action will be at risk of dismissal. Or a substitute defendant who can be served may be added by amendment."

91. In the ***Practice Guidance (Interim Non-Disclosure Orders)*** **[2012] 1 WLR 1003**, under a heading "*Active Case Management*", the Master of the Rolls gave further guidance:

> "Where an interim non-disclosure order... is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (***XJA -v- News Group Newspapers*** **[2010] EWHC 3174 (QB)** [13]; ***Gray -v- UVW*** **[2010] EWHC 2367 (QB)** [37]; ***Terry*** [134]-[136])."

92. In ***Kerner -v- WX*** **[2015] EWHC 178 (QB)**, as a condition of being granted an interim injunction to restrain harassment of her and her son by "Persons Unknown", the claimant was required to give an undertaking that she would use all reasonable endeavours to attempt to identify the "Persons Unknown". Reflecting the ***Practice Guidance***, Warby J also required the claimant to give an undertaking that, if she had been unable to identify the "Persons Unknown" within three months of grant of the injunction, she would apply to a Judge for directions as to the further conduct of the action. The Judge explained:

> [7] [The ***Practice Guidance***] relates to actions involving interim non-disclosure orders which affect the Convention right to freedom of expression. Active case management in accordance with this guidance is of particular importance in cases of that kind. The injunctions in this case do not include non-disclosure provisions. However, they do relate to the activities of individuals who are involved with the news media and some at least of the principles that apply in non-disclosure cases are applicable on that account. It is in any event inconsistent with modern litigation principles for the court to allow an interim orders to remain in place with the case otherwise "going to sleep".
>
> [8] Active case management in such actions is only practicable if the action is brought before the court to enable such management to take place. Unless

an order is made or an undertaking is given that ensures the case will be brought back, the risk exists that it will simply lie dormant.

[9] I express no view at this stage as to what might be appropriate means of disposing of this claim if the defendants or one of them cannot be traced and served. That issue can be addressed if and when the need arises. What would not be appropriate, however, is to leave an interim order in force in perpetuity.

93. A similar order to prevent the action simply becoming dormant following the grant of an interim injunction against Persons Unknown was made in ***LJY -v- Persons Unknown*** **[2018] EMLR 19**; and in ***GYH -v- Persons Unknown*** **[2017] EWHC 3360 (QB)**, Warby J again gave directions to ensure the action was properly progressed after the grant of an interim injunction:

[44] … A return date for the injunction application is provided for in the usual way. The draft order then provides that if the claimant is able to identify the defendant or a viable means of contacting him, "then she shall serve the claim form, this order and any other documents in these proceedings on the defendant as soon as reasonably practicable by email or text message". If she is unable to do this within 28 days, then "the filing of the Claim Form at Court on 1 December 2017 shall be deemed good service pursuant to CPR 6.15(2) and the claimant shall either (a) apply at the return date … for default judgment and/or final determination of the claim; or alternatively (b) discontinue the proceedings."

[45] The claimant will need to give an undertaking to (continue to) use her best endeavours to trace and serve the defendant: cf. ***Kerner -v- WX***. Subject to that, and provided that the return date is set not less than 7 days beyond the expiry of the 28-day period for service, this regime seems satisfactory."

94. The precise directions that are necessary to ensure the proper prosecution of the claim will depend on the circumstances of the case. The defendant(s) in ***GYH*** fell into Category 1 in Lord Sumption's analysis in ***Cameron*** (see [11(12)] above): anonymous defendants who are identifiable (and can be communicated with) but whose names are unknown. The defendant(s) in ***Kerner*** fell into Category 2: not only anonymous but could not, at that stage, even be identified.

95. As these cases demonstrate, albeit in a different area of law, directions can and should be made by the Court that ensure that, in claims brought against "Persons Unknown" in which interim injunctions are granted, the Court retains active supervision of the proceedings (see further [248] below). At the return date, the Court can investigate whether the claimant has established jurisdiction over any defendant by serving the Claim Form, which may include, where justified, by an order permitting a method of alternative service. If the claimant has failed to serve the Claim Form, any interim injunction is liable to be discharged and the claim dismissed (see further [46]-[48] above).

96. It is a striking feature of the Cohort Claims that in most cases in which an interim injunction was granted, no date was fixed for a further hearing (arguably in breach of PD25A §5.1(3)). In consequence, it was entirely up to the relevant local authority to take the initiative to move the claim forward. A significant number of claims have just ground to a halt after the interim injunction was granted. For example,

(1) in the claim brought by Rochdale MBC (28th Claimant), on 9 February 2018, an interim injunction was granted, without notice and "*until further order*", against absent defendants, including "Persons Unknown" (the interim injunction was subsequently discharged against two named defendants on 6 February 2019);

(2) in the claim brought by Nuneaton and Bedworth BC and Warwickshire CC (26th Claimants), on 19 March 2019, an interim injunction "*until further order*" was granted against absent defendants, including "Persons Unknown", expressly "*pending the final injunction hearing*"; and

(3) in the claim brought by Thurrock Council (34th Claimant), on 3 September 2019 an interim injunction was granted against absent defendants, including "Persons Unknown", again expressly "*pending the final injunction hearing*".

97. In all three of these claims, a power of arrest was attached to the injunction and no return date or date for the final hearing of the claim was provided. The relevant claimants took no further steps to progress the claims to a final hearing. Apart from the discharge application made by two named defendants in the Rochdale claim, the next development in each case was my order of 16 October 2020, assembling the Cohort Claims. It is necessarily a matter of conjecture how long it would have been before each of these local authorities would have taken any steps to progress the claim to a final hearing had it not been for the Court's intervention on 16 October 2020.

98. Overall, in a significant number of Cohort Claims the relevant local authority appears to have failed to progress the claim to a final hearing after having been granted an interim injunction. In addition to the three claims identified in [96] above, claims in which there appears, prima facie, to have been a failure properly to prosecute the claim after the grant of the interim injunction include: LB Havering (6th Claimant); LB Hillingdon (7th Claimant); LB Hounslow (8th Claimant); LB Richmond-upon-Thames (12th Claimant); Boston BC & Lincolnshire CC (19th Claimant); and Buckinghamshire Council (37th Claimant).

99. Periods of delay in prosecuting claims after the Court of Appeal handed down judgment in ***LB Bromley*** on 21 January 2020, and ***Canada Goose*** on 3 March 2020 are potentially more serious still. In combination, the effect of the decisions in ***Cameron***, ***LB Bromley*** and ***Canada Goose*** on the Traveller Injunctions obtained by local authorities was significant. It called into question the very basis on which many, if not the majority, of these injunctions had been granted and their terms. During March 2020, the First Intervener sent letters to most local authorities in the Cohort Claims specifically raising the appropriateness of the injunctions that had been granted in Cohort Claims in the light of the Court of Appeal decision in ***LB Bromley***. In the closing paragraphs of the letter, each local authority was asked to confirm that it would "*urgently reconsider the injunction [it had] in place*" and expressed the view that the injunction should be withdrawn. However, not a single local authority, which had been granted such an injunction, took steps that were effective in ensuring that the claims were listed for further hearing so that the Court could consider the impact of the ***LB Bromley*** and ***Canada Goose*** decisions. So far as the Court is aware, they continued to enforce the injunction that they had been granted. That was so despite the fact that several Cohort Claims, in which interim injunctions had been granted, had been adjourned *specifically*

on the ground that it was necessary to await the outcome of the Court of Appeal decision in ***LB Bromley*** before the claims could be progressed.

100. In fairness, I should record that some local authorities have filed evidence explaining that they were under considerable strain responding to the pandemic. LB Hillingdon has explained that it had obtained a hearing fixed for 7 May 2020, but this hearing was subsequently vacated, due to the pandemic, following a request by the local authority on 15 April 2020. LB Hounslow has explained that, whilst it has been considering the impact of ***LB Bromley***, it has permitted an encampment to remain for periods from 23 March to 31 May 2020 and then from 5 June to 18 August 2020, due to the pandemic.

101. Nevertheless, local authorities which had been granted interim Traveller Injunctions and failed to take steps promptly to restore the claims seem to me to be open to potential criticism for having failed to do so. In ***LB Enfield***, I held that a party who had (i) obtained an injunction against Persons Unknown *ex parte*, and (ii) become aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, was under a duty to restore the case within a reasonable period to the court for reconsideration: [2020] EWHC 2717 (QB) [32]. In the absence of any effective respondent who could take the initiative to seek the Court's reconsideration of whether, in the light of the decisions of ***LB Bromley*** and ***Canada Goose***, the injunction should be maintained in the terms in which it had been granted, or at all, injunctions potentially vulnerable to challenge on similar grounds continued in full force. The only reason that the Court has had an opportunity to reconsider any of these orders is because some local authorities, whose injunctions were approaching the end of the period for which they had been granted, made applications to the Court to "extend" them. Although I recognise that the pandemic has placed very unusual strains on the resources of local authorities, it did not, apparently, prevent several local authorities from applying to "extend" Traveller Injunctions that they had previously been granted.

(8) Particular Cohort Claims

(a) Harlow District Council and Essex County Council (24th Claimants)

102. As noted by the Court of Appeal in ***LB Bromley*** [10], the prototype of the "Persons Unknown" Traveller Injunction, targeting Gypsies and Travellers, was granted in 2015 to Harlow DC and Essex CC. An interim injunction was granted on 3 March 2015, followed by a final injunction on 16 December 2015. It was granted against 35 named defendants, but also against "Persons Unknown" (without any description of them). It was a borough-wide injunction in respect of Harlow DC.

103. On 26 May 2017, the two local authorities applied to "vary" the final injunction; they sought to extend the period of the injunction by a further three years and to add further named defendants to the claim. The application was granted on 14 June 2017. The judgment does not address the jurisdictional basis on which a "final injunction" could be "extended", or further defendants added to the claim, but a revised injunction was granted until 20 June 2020 and further named defendants were added to the claim.

104. On 8 June 2020, the local authorities made a further application to "extend" the "final injunction" for a further two years. The Application came before Tipples J on 10 July

2020. Perhaps understandably, the Judge questioned whether the Court had jurisdiction to extend a final injunction. The Claimants withdrew their application. In consequence, the local authority's injunction lapsed on 20 June 2020. No further similar claim has been issued, or Traveller Injunction sought, by Harlow DC and/or Essex CC.

(b) London Borough of Enfield (38th Claimant)

105. The London Borough of Enfield was granted a borough-wide interim injunction on 21 July 2017. The Claim Form was issued that same day simply naming the defendants as "Persons Unknown" (in breach of the Description Requirement – see [49] above). The injunction application was made to Court 37. A final injunction in similar terms was granted on 4 October 2017 for a period of three years. No respondent attended the hearings, and the orders were made without opposition. LB Enfield did not apply for, and was not granted, any order permitting service of the Claim Form by alternative means.

106. On 22 September 2020, little more than 10 days before the injunction was due to expire, LB Enfield issued an Application Notice seeking to amend the description of the defendants in the Claim Form and to extend the "final injunction" it had been granted. The application came before me, as the Judge in Court 37, on 29 September 2020. No notice had been given of the application to any defendants/respondents and there was no urgency (save that generated by delay on the local authority's part). Apart from the issue of whether the Court had any jurisdiction to amend the description of defendants or to extend an injunction that had been granted as a final order, more fundamentally it was apparent that LB Enfield had not served the Claim Form on any defendant and it had not obtained an order for alternative service under CPR 6.15. Confronted with these difficulties, Counsel for LB Enfield withdrew the application to amend the Claim Form and extend the injunction.

107. Nevertheless, on 30 September 2020, LB Enfield issued a further Application Notice seeking an order under CPR 6.15(2) retrospectively validating the steps LB Enfield had taken to bring the original Claim Form to the attention of the defendants. I refused that application on 2 October 2020: [2020] EWHC 2717 (QB). Separately, LB Enfield issued a fresh Part 8 Claim Form substantially seeking a final injunction in terms that they had sought as variation of the original injunction against two categories of "Persons Unknown", in summary to restrain unlawful encampments on land and fly-tipping. The council's application for an interim injunction against the latter category was also refused on 2 October 2020. The claim was adjourned, and directions given for a final hearing of the fresh Part 8 claim. Subsequently, on 11 January 2021, LB Enfield discontinued its second claim.

(c) Canterbury City Council (20th Claimant)

108. Canterbury CC had applied for, and was granted, an interim injunction, on 10 April 2019, to prevent encampment on any of 82 sites within the city. The application was made in Court 37. The Claim Form, naming the defendants as "Persons Unknown" (with no description in breach of the Description Requirement – see [49] above), was also issued on 10 April 2019. As noted in the judgment I gave in the claim on 30 October 2020 ([2020] EWHC 3153 (QB) [16]), there was no urgency (the Council had been contemplating making the application for at least three weeks), no notice was given to the respondents, the evidence in support contained no explanation why no notice of the

application had been given to the respondents (as required by CPR Part 25 APD §3.4), no skeleton argument was provided to the Court and no note of the hearing could be provided. The injunction order contained no provision regarding service of the Application Notice on the Defendants. As was later to prove important, the Council had also not applied for any Order permitting the Claim Form to be served by alternative means under CPR 6.15. The evidence in support of the injunction application did not address the issue of service of the Claim Form at all.

109. The matter returned to Court on 3 June 2019. The Council asked the Court to make a final order against "Persons Unknown" substantially in the terms of the interim injunction. A final injunction was granted, but only for 1 year, not the 3 years sought by the Council. The Council did not address the issue of service of the Claim Form and the 4-month period within which to serve it upon the defendants expired at midnight on 10 August 2019. No order for alternative service had been sought or made and no application had been made to extend the period within which to serve the Claim Form.

110. On 23 June 2020, Canterbury CC issued an Application Notice seeking to "*renew the order for injunction... which is due to expire, but on a narrower basis than previously for a period of two years*". The application initially came before the Court on 30 July 2020. Thornton J expressed concerns about several aspects of the application. She gave permission to amend the name of the defendants to comply with the requirement to identify "Persons Unknown" by reference to conduct which is alleged to be unlawful, but otherwise adjourned the application to be fixed in October 2020. The injunction was extended until that further hearing.

111. The hearing was fixed for 30 October 2020. Shortly before the hearing, Canterbury CC indicated that it wished to withdraw its application to renew/extend its injunction. Recognising that it had failed to serve the Claim Form on "Persons Unknown", or to obtain an order for alternative service, it proposed that the injunction order should be discharged, and its claim dismissed. I made the order that the claimant sought. The judgment identifies a series of failures in relation to the claim: [2020] EWHC 3153 (QB).

(9) Case Management Hearing: 17 December 2020 – Identification of the issues of principle to be determined

112. By the time of the Case Management Hearing on 17 December 2020, the remaining active local authorities had largely grouped themselves, and were represented, as they were at the hearing on 27-28 January 2021. Permission to intervene was granted to the three organisations that represent the interests of the Gypsy and Traveller communities. Largely by agreement, the following issues of principle were identified to be determined at the hearing on 27-28 January 2021:

    (1) Whether the Court has the power – either generally under CPR 3.1(7) or otherwise, or specifically having regard to the particular terms of the relevant order – to case manage the proceedings and/or to vary or discharge injunctions that have previously been granted by final order? ("The First Issue: Jurisdiction over Final Orders")

    (2) Whether the Court has jurisdiction, and/or whether it is correct in principle, generally or in any relevant category of claim, to grant a claimant local authority

final injunctive relief either against "Persons Unknown" who are not, by the date of the hearing of the application for a final injunction, persons whom the law regards as parties to the proceedings, and/or on a *contra mundum* basis? ("The Second Issue: Final Orders against Newcomers or *Contra Mundum* Orders")

(3) In the event that the Court finds that it does not have jurisdiction to grant a final injunction in the circumstances set out in (2) above, whether:

(a) it is possible to identify the Defendants in the category of persons unknown who were parties to the proceedings at the date the final order was granted and are bound by it; and

(b) insofar as the final injunction binds newcomers, it should be discharged.

("The Third Issue: Ascertaining the parties to the Final Order")

(4) If there is no jurisdiction to grant such final injunctive relief in all or any of the cases identified above, in what circumstances (if any) should the Court be prepared to grant interim injunctive relief against "Persons Unknown" Defendants in such a claim, in a form in which final relief would not be granted? ("The Fourth Issue: the Conundrum of Interim Relief")

The labelling of the issues is mine, following the hearing and reflecting the way the arguments developed.

113. At the request of the Court, the Attorney General instructed an advocate to the Court to make written and oral submissions on the issues to be decided by the Court. Sarah Wilkinson, who had appeared as advocate to the Court in the Court of Appeal in the ***Canada Goose*** case was counsel instructed by the Attorney General. I should record the Court's gratitude for the clarity of Ms Wilkinson's oral and written submissions, and indeed those of all Counsel instructed in the case. The issues to be determined at the 2-day hearing were complex and detailed. Time was allocated fairly and economically. I am extremely grateful for the cooperative way in which Counsel, their instructing solicitors and parties have approached this hearing and the necessary preparations for it.

D: An overview and summary of conclusions

114. Before embarking on consideration of the detailed submissions on each of the issues of principle, it is useful to have a summary of the position of each of the main groups and my conclusions (for the reasons explained in detail in the following paragraphs).

Issue 1: Jurisdiction over Final Orders

115. Ms Bolton's group of local authorities was the only group who argued that the Court has no jurisdiction to revisit the terms of the final injunctions that were granted to LB Barking & Dagenham (1st Claimant), LB Redbridge (11th Claimant), and Basingstoke & Deane BC and Hampshire CC (16th Claimants).

116. Apart from Walsall MBC and Sandwell MBC (35th Claimants) ("Walsall") and Wolverhampton CC (36th Claimant) ("Wolverhampton"), every other local authority

with a subsisting injunction has an interim injunction. It is common ground that, in respect of interim injunctions, the Court retains jurisdiction over both the claim and any injunction that has been granted.

117. The terms of the injunction orders made in Walsall and Wolverhampton are unusual in the Cohort Claims. Wolverhampton, uniquely in the remaining cases, has an order the terms of which are truly *contra mundum* (see further [191]-[207] below). Although Walsall's order has some characteristics that suggest it is a "final" injunction (albeit containing a permission to apply), Wolverhampton's injunction is not easy to categorise in terms of an "interim" or "final" order, as those terms are conventionally understood in *inter partes* civil litigation (see [207] below). Wolverhampton's order has, since it was originally granted, expressly provided for review hearings. There have been two such reviews. On each occasion the injunction has been continued. If *contra mundum* orders of this type and scope are permissible (a point that arises for determination under the Second Issue), then the Wolverhampton model avoids many of the pitfalls and difficulties – particularly proper identification and description of the "Persons Unknown" and service of the Claim Form – that have been encountered in the other Cohort Claims.

118. Contrary to Ms Bolton's arguments, it is an essential part of the submissions of both Walsall and Wolverhampton that, whether the orders are called "interim" or "final" and whether directed at "Persons Unknown" or *contra mundum*, the Court must retain jurisdiction over the injunction orders prohibiting trespass or breach of planning control. Both submit that, to be effective, the injunction orders must bind newcomers and they recognise that, if that is so, then the Court must retain jurisdiction over the terms of the order so as to be able to modify or discharge the injunction in the light of changing circumstances.

119. The Interveners contend that the Court does generally retain jurisdiction over the injunctions that have been granted as part of a "final order" but that, in any event, the Court need not resolve this issue because each of the injunction orders in the relevant claims contains specific express provisions which permit the terms of the injunction to be reconsidered by the Court, by expressly providing that the relevant order is to continue "*until further order*" and/or by inclusion of a paragraph granting permission to apply to vary or discharge the injunction to "*the Defendants or anyone notified of this order*".

120. I have rejected Ms Bolton's arguments and conclude that the Court does retain jurisdiction to consider the terms of the final injunctions in the claims brought by LB Barking & Dagenham, LB Redbridge, and Basingstoke & Deane BC and Hampshire CC. The Court has jurisdiction over these "final" injunctions because their terms (a) expressly provide for the continuing jurisdiction of the Court; and, in any event (b) apply to "newcomers" who were not parties to the proceedings when the relevant order was granted.

Issue 2: Final Orders against Newcomers or Contra Mundum Orders

121. This is the central issue. All the local authorities contend that, to be effective, injunctions to prohibit trespass and/or breach of planning control, must bind newcomers. They argue that injunctions of this type do not fall within the principle – from ***Attorney General -v- Times Newspapers Ltd (No.3)*** **[1992] 1 AC 191, 224**

("*Spycatcher*") and endorsed by the Court of Appeal in ***Canada Goose*** [89]-[90] – that a final injunction operates only between the parties to the proceedings. They contend that ***Canada Goose*** is limited to "protester" cases and that various statutory provisions permit local authorities, acting in the public interest and/or for the public good, to obtain injunctions that do bind newcomers. Reliance is placed, variously, upon s.222 Local Government Act 1972, s.187B Town & Country Planning Act 1990, s.1 Anti-social Behaviour, Crime and Policing Act 2014, s.130 Highways Act 1980 and ss.77-79 Criminal Justice and Public Order Act 1994.

122. As noted above, Wolverhampton goes further. It argues that injunctions against "Persons Unknown" are artificial. Local authorities wanting to restrain actual or threatened trespass or breach of planning control should be entitled to seek orders *contra mundum*.

123. The Interveners and Ms Wilkinson submit that Traveller Injunctions are subject to the principle that final orders bind the parties to the claim at the date of the order and *contra mundum* orders are available only in a very limited category of case which does not include the type of injunctions sought and obtained by the local authorities in the Cohort Claims.

124. I have rejected the local authorities' submissions. The Traveller Injunctions granted in the Cohort Claims:

(1) are subject to the principle – from ***Spycatcher*** and endorsed by the Court of Appeal in ***Canada Goose*** – that a final injunction operates only between the parties to the proceedings; and

(2) do not fall into the exceptional category of civil injunction that can be granted *contra mundum*.

Issue 3: Ascertaining the parties to the Final Order

125. If the answer to the second issue is that Traveller Injunctions made by final order bind only the parties at the date of the order, then the next issue is whether the relevant local authority can identify anyone in the category of "Persons Unknown" at the time the final order was granted. If it can, then the final injunction order binds each person who can be identified. If not, then the final injunction granted against "Persons Unknown" binds nobody. Some local authorities believe that they may be able to identify people who were parties to the proceedings falling within the definition of "Persons Unknown" at the date on which the final order was granted in their case.

Issue 4: The 'conundrum' of interim relief

126. This issue has, in fact, resolved itself as a result of consideration of, primarily, Issue 2.

E: Issue 1: Jurisdiction over Final Orders

(1) Submissions

127. Ms Bolton's argument is that a first instance Court has no (or very limited) jurisdiction to revisit or reconsider an injunction that has been granted by way of final order disposing of a claim.

(1) The general principle concerning injunctions granted by final orders are the same as for any final order, namely that "*[t]he interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist*": ***Roult -v- North West Strategic Health Authority*** **[2010] 1 WLR 487**.

(2) Once judgment has been given in a claim, the cause of action upon which it was based is merged in the judgment and its place is taken by the rights created by the judgment: ***Terry -v- BCS Corporate Acceptance Ltd*** **[2018] EWCA Civ 2422** [56]; ***Virgin Atlantic Airways Limited -v- Zodiac Seats UK Limited*** **[2014] AC 160** [17].

(3) A court of first instance cannot case manage a claim after final judgment, as there is no claim to manage: ***Terry*** [54].

(4) Even a material change in circumstances, or a misstatement of the facts, would not be sufficient to justify varying or revoking a final Order: ***Terry*** [75].

(5) Even if a final order contains a provision granting permission to apply, the judgment is no less final. Permission to apply does not permit a court to disturb, or case manage a final order, and only permits the Court to consider an application properly made by a party who has standing to make such an application, and only within the terms of the permission to apply.

(6) The court does not have the power generally to disturb a final order, save for the limited exceptions provided for under CPR 40.9, and to deal with any matters properly to be dealt with under a provision granting permission to apply.

128. Ms Bolton submits that, in cases where final orders have been made, the Court has no case management powers and, specifically, the Court cannot vary or discharge these orders pursuant to CPR 3.1(7).

(1) The power in CPR 3.1(7) does not extend to final orders: ***Roult*** [15]. To hold to the contrary would undermine the principle of finality.

(2) Further or alternatively, the power at CPR 3.1(7) does not extend to final injunction orders as such orders are not made pursuant to the CPR. The orders were made pursuant to s.37 Senior Courts Act 1981, s.187B and s.222 (and, in the case of the London Borough of Barking & Dagenham and the London Borough of Redbridge, s.1 ASBCPA). Accordingly, the power to revoke or vary under CPR 3.1(7) does not arise in relation to these orders. Any power to vary or discharge must be found elsewhere: ***DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH -v- Koshy*** **[2005] 1 WLR 2434** ("***Koshy***").

129. Ms Bolton argues that provision within an order for permission to apply does not prevent it from being a final order: ***Serious Organised Crime Agency -v- O'Docherty*** **[2013] EWCA Civ 518** [28], [82] and [83]). The scope of what may be considered by the court on any application to vary or discharge is limited by "*fundamental principles of the finality of court orders and the requirements of legal certainty*": ***O'Docherty*** [83].

130. A change of law does not permit reconsideration of an order under a permission to apply contained in a final order: ***O'Docherty*** [20] and [68]-[71]; ***Cadder -v- HM Advocate General for Scotland*** **[2010] UKSC 43**.

131. Finally, Ms Bolton contends that the permission to apply provisions contained in the final orders granted to LB Barking & Dagenham (1st Claimant), LB Redbridge (11th Claimant), and Basingstoke & Deane BC and Hampshire CC (16th Claimants) do not give the Court power unilaterally to disturb these final orders. An application must be made by a party who is directly affected by the Order and no such application has been made: ***O'Docherty*** [83].

132. Ms Wilkinson addressed this point last in her written submissions. She did so because she contended, I consider correctly, a proper understanding of the jurisdiction of the Court to reconsider injunctions granted against "Persons Unknown" does engage wider considerations of the nature of the relief that the Court has granted.

133. Ms Wilkinson agreed, broadly, with Ms Bolton's submission that a permission to apply provision in a final order does not permit a party to reargue the merits. She disagreed with the submission that a change of law cannot be relied upon as a change of circumstances that might justify a reconsideration under a permission to apply. She referred to §24-050 in *Gee on Commercial Injunctions* (7th edition), which contains the following summary:

> "... When a final injunction is granted following adjudication of the substantive claim the defendant who seeks discharge or variation of that injunction cannot be allowed to reopen the underlying merits and to reargue the case for the injunction on the merits, unless there has been some special element, such as misleading the court to procure the injunction, or abuse of the process in procuring the injunction, or a material unforeseen change in circumstances, or that there has been a material change in the law (***Advent Capital Plc -v- Ellinas Imports-Exports*** **[2005] 2 Lloyd's Rep 607** [63]-[74]). The remedy otherwise is by appeal. The words "liberty to apply" inserted into a final injunction do not permit a rearguing of the merits or an application based on matters which were foreseeable at the time the injunction was granted (***Co-operative Insurance Society Ltd -v- Argyll Stores Holdings Ltd*** **[1998] AC 1, 18A-C** *per* Lord Hoffmann.) Their ambit is a matter of interpretation of the order and depends upon the wording of the final order and the circumstances which existed at the time the order was made. Where it is desired to reserve the power to vary an injunction by references to certain foreseeable matters which might arise subsequently, clear wording should be inserted reserving this power. CPR r.3.1(7) provides that a power under the Rules to make an order includes a power to vary or revoke an order. However this does not detract from the general principle that the merits of a case are to be adjudicated upon once and once only, and that relitigation of those merits once adjudicated upon finally, is not permitted (***Thevarajah -v- Riordan*** **[2016] 1 WLR 76**)

134. Finally, Ms Wilkinson submitted that ***Koshy*** was not authority for the broad proposition, advanced by Ms Bolton, that CPR 3.1(7) cannot be a source of jurisdiction for the Court to reconsider the terms of an injunction granted by way of final order. The reason why reliance could not be placed on CPR 3.1(7) in ***Koshy*** was because the original order had been made under the Rules of the Supreme Court, rather than the Civil Procedure Rules. Ms Wilkinson argued that all injunctions are made under

s.37 Supreme Court Act 1981 (or other express statutory provisions), but they were nevertheless made under CPR 40.

(2) Decision

135. Ms Bolton's submissions represent the orthodox position where a final judgment is granted in conventional civil litigation between identifiable parties. The requirements of finality in litigation underpin the principles that she has identified. The analysis begins to break down once the attempt is made to apply these principles to litigation where the defendants are "Persons Unknown". It remains conceptually sound if applied to "Persons Unknown" where the defendants are identifiable at the point at which judgment is granted; they are defendants to the claim and bound by the order. Their rights to apply to vary or discharge the order will probably be as limited as the rights that would have been available to a named defendant.

136. However, it is legally unsound to attempt to impose concepts of "finality" against "Persons Unknown" who are newcomers and who only later discover that they fall within the definition of "Persons Unknown" and after judgment has been granted. It is quite obvious that the permission to apply provisions in the orders granted to LB Barking & Dagenham, LB Redbridge, and Basingstoke & Deane BC and Hampshire CC were included precisely because it was recognised that it would be fundamentally unjust not to afford to such newcomers the opportunity to ask the Court to reconsider the terms of the order. A simple review of the terms of these three orders demonstrates how inappropriate and unfair it would be to apply any notion of "finality" so as to oust the jurisdiction of the Court to reconsider the terms of the injunction.

137. The operative parts of the injunction order in the three cases were in the same terms (even with similar same spelling and grammar errors). In respect of the relevant "Land", "Persons Unknown" were prohibited from:

> "(1) Setting up an encampment on any Land identified on the attached map and list of sites without written permission from the local planning authority, or planning permission granted by the planning inspector.
>
> (2) ... entering and/or occupying any part of the Land identified on the attached map and list of sites for residential purposes (temporary or otherwise) including the occupation of caravans/mobile homes, storage of vehicles, caravans and residential paraphernalia
>
> (3) ... bringing onto the Land or stationing on the Land any caravans/mobile homes other than when driving through the London Borough of Barking and Dagenham or in compliance with the parking orders regulating the use of car parts (sic) or with express permission from the owners of the Land.
>
> (4) deposit (sic) or cause to be deposited, controlled waste in or on the Land unless a waste management license (sic) or environmental permit is in force and the deposit is in accordance with the license (sic) or permit."

138. The orders in the claims brought by LB Barking & Dagenham and Basingstoke & Deane BC and Hampshire CC were directed at "Persons Unknown". In the claim brought by LB Barking & Dagenham, in the Claim Form, the "Persons Unknown" were defined as "*Persons Unknown being members of the traveller community who have*

unlawfully encamped within the borough of Barking and Dagenham" (emphasis added), i.e. those who had *in the past* set up encampments. In the LB Redbridge claim, the 70th Defendants "Persons Unknown" were described in the injunction order as "*Persons Unknown forming unauthorised encampments within the London Borough of Redbridge*" (the Claim Form had defined "Persons Unknown" as "*Persons Unknown forming or intending to form unauthorised encampments in the London Borough of Redbridge*"), by contrast people who *in the future* would set up encampments. The orders in the cases of LB Redbridge and Basingstoke & Deane BC and Hampshire CC even contained, exceptionally, a power of arrest, requiring the arresting officer to bring any person found to be in breach of the order before the Court within 24 hours of his/her arrest.

139. No doubt recognising that the injunction order was intended to bind people who had had no notice of the proceedings, each order contained an express permission to apply in the following terms:

> "The Defendants may each of them (or anyone notified of this Order) apply to the Court on 72 hours written notice to the Court and the Claimant to vary or discharge this Order (or so much of as if (sic) it affects that person)."

140. The three orders share the following common features:

(1) The geographical areas made subject of each injunction were wide-ranging and practically borough-wide. For members of the Gypsy and Traveller community (but not limited to them), the injunctions represented a total ban on stationing a caravan or other vehicle on the defined Land for any period. If a person, with knowledge of the injunction, stayed overnight in a caravan at one of the locations, without permission, s/he was liable to be in contempt of court even if the stay caused no damage or other inconvenience. For the two orders that included power of arrest, it also rendered the individual liable to arrest.

(2) The orders granted to LB Barking & Dagenham and Basingstoke & Deane BC and Hampshire CC, were granted against "Persons Unknown" without any description of them. Even at the time these orders were granted, this form of injunction was not in accordance with the Description Requirement (see [49] above). For this reason, at least, an injunction would not now be granted against "Persons Unknown" in the terms that they were granted to LB Barking & Dagenham and Basingstoke & Deane BC and Hampshire CC. The lack of description of "Persons Unknown", coupled with the width of the terms of the injunction, also meant that, for all practical purposes, the relevant injunction was made *contra mundum*. There is no way of identifying (other than the named defendants) who was a defendant at the grant of the final order, but (as was the clear intention) it certainly applied to newcomers once they had notice of its terms.

(3) All three injunctions were intended to bind newcomers. Even in the case of LB Redbridge, where there was some attempt to describe the "Persons Unknown" defendants, the injunction was not limited to those who had, by 23 November 2018, formed an unauthorised encampment on the relevant land.

(4) Despite being "final orders" all three injunctions contained express permission to apply, and two were expressly made subject to "further order" of the Court.

141. In my judgment, the inclusion of such a permission to apply in a final order is an implicit recognition that the relevant proceedings were not likely to have been brought to the attention of all of those who fell within the definition of the Persons Unknown defendants. The permission to apply was a necessary – but belated – safeguard to prevent unfairness to such unnotified defendants. As Mr Anderson QC submitted, between the relevant claimant and the newcomers, there could be no *res judicata*. That is clearly correct. For such newcomers, an application to the Court to vary or discharge the injunction order would not be an attempt at re-litigation; for them it would be the first opportunity to be heard and to ask the Court to consider their own circumstances.

142. But the implications go further. The express recognition by the claimant, and the Court, that there existed a group of unidentified defendants who were never made aware of the proceedings and, in respect of whom fairness required a permission to apply be provided, calls into question whether the order for alternative service was correctly granted in the first place; and, with it, the whole foundation of the jurisdiction over the defendants for the reasons explained in ***Cameron***. This is just one of the problems when an order sought against "Persons Unknown" seeks to capture newcomers.

143. To an extent, the debate about the particular provisions granting permission to apply in these three cases is something of a distraction. Even had such provisions not been included in the final injunction orders, it is tolerably clear that such newcomers, not having been parties to the litigation at the time when the order was granted, would have been able to apply to the Court to vary or discharge the injunction, as it affected them, under CPR 40.9. Ms Wilkinson is correct to submit that the exercise by the Court of any jurisdiction to set aside or vary an injunction granted by final order is, in cases against "Persons Unknown", dependent upon the nature of the judgment that the Court has actually granted.

144. I can deal with Ms Bolton's final point – that the Court can act only in response to an application to vary/discharge – relatively shortly. During her submissions, I pressed Ms Bolton as to how far her argument went. I posited the example of a group of 1,000 individuals who fell within the category of persons unknown, but who were newcomers in the sense that they had not set up an encampment on any of the parts of the land covered by the injunction until after the grant of the final order. Assuming for the purposes of this argument that the final injunction bound them as newcomers, Ms Bolton's submission was that, as the order was "final", the Court could do nothing about the injunction of its own initiative. The Court could only act in response to an application to vary or discharge made by one or more of the 1,000 newcomers. Further, even if one newcomer's application to discharge the order were successful, the Court could only discharge the injunction in respect of the single person who had made the application; the injunction would continue to bind the other 999.

145. The case of ***O'Docherty*** provides no support for this stark submission of judicial impotence. It is authority for the proposition that, in conventional *inter partes* litigation, a permission to apply in a final order does not permit an application to be made to vary or discharge an order based upon a subsequent change in interpretation of the law. This principle is premised on the recognition that, following an *inter partes* determination

on the merits, the court has made its decision and granted an order in consequence. A party cannot have a second bite at the cherry (at least at first instance) under the guise of a permission to apply. Newcomers to the litigation brought by LB Barking & Dagenham, LB Redbridge, and Basingstoke & Deane BC and Hampshire CC, by exercising the right given to them under the permission to apply, would be having their first cherry bite. It is simply impossible to apply concepts of "merger" of cause of action upon judgment in circumstances when the claim is brought against a class of "Persons Unknown" only some of whom (if any) are even capable of being identified at the point at which judgment is entered.

146. In my judgment, it is a fundamental requirement of justice that, where an injunction has been granted by the Court, whether interim or final, that has the potential to bind people who have not had the opportunity to be heard before the order was granted, the Court must retain jurisdiction to set aside or vary that order, whether on application by the person affected or, if necessary, on its own initiative. I reject Ms Bolton's jurisdictional argument that, once a Court has granted an injunction by final order, the Court cannot exercise the power granted under CPR 3.1(7). In the case of final orders, there are, for good reason, well-established and significant limits on the Court's use of CPR 3.1(7) to revisit orders (reflecting and respecting the principle of finality to litigation), but the jurisdiction is not extinguished by a final order. The authority of ***Roult*** does not support Ms Bolton's submission. On the contrary, it recognises the continuing role of CPR 3.1(7) in instances where there are "*continuing orders which may call for revocation or variation as they continue*": [15] *per* Hughes LJ.

147. I prefer, and accept, Ms Wilkinson's submission that final orders are granted by the Court under CPR Part 40 and, consequently, CPR 3.1(7) continues to apply. By the same token, the Court retains jurisdiction to act of its own initiative to vary or discharge a "final order" under CPR 3.3. Taking the example of the group of 1,000 newcomers, the Court can act to vary or discharge the injunction made against the whole group of 1,000 whether in response to an application by one member of the group, or even of its own motion. The Court will not stand idly by and allow an injunction to be enforced (*a fortiori*, with the power of arrest) against persons who had no opportunity to be heard when the injunction was granted in circumstances where the Court is satisfied that the injunction should be varied or discharged.

148. Of course, the issue of whether the Court would need to have a jurisdiction to vary or discharge an injunction made by final order that binds newcomers leads on to the next issue for determination: whether final orders can bind newcomers.

F: Issue 2: Final orders against Newcomers or *contra mundum* orders

149. This is the central issue that arises in the Cohort Claims. Can a court grant an injunction, by way of final order against "Persons Unknown", the effect of which is to bind people who were not parties to the litigation at the date on which the order was granted (the so-called "newcomers")? Although a final injunction has been granted only in a minority of the Cohort Claims (see [115] above), those local authorities that have been granted interim injunctions recognise that, if a final injunction against "Persons Unknown" does not bind newcomers, these injunctions will not achieve what the local authorities hoped they would. If the Court rules that final orders cannot bind non-parties, then I need to consider whether a *contra mundum* injunction order, like

that granted in the Wolverhampton case, can properly be granted. If so, that may potentially achieve what the "Persons Unknown" injunctions could not.

(1) Do final injunctions in the Cohort Claims bind newcomers?

150. The immediate issue that confronts the local authorities is the Court of Appeal's decision in ***Canada Goose*** [89]-[90] which established that a final injunction against "Persons Unknown" binds only those who are parties to the proceedings at the date of the grant of the final order, not newcomers (see [24] above).

(a) Submissions

151. Ms Bolton and Mr Bhose QC argue that the principle from ***Canada Goose*** does not apply to the type of litigation brought by the local authorities in the Cohort Claims. They submit that the claims are brought by the local authorities pursuant to statutory powers conferred by s.222 and s.187B. These sections confer powers upon a local authority to bring legal proceedings, and to seek injunctive relief, to restrain actual or threatened wrongs. The claims brought in the Cohort Claims were brought not to vindicate civil wrongs committed (or threatened) against the local authority itself as a private entity but against the wrongs to the public by unauthorised encampments on land.

152. Ms Bolton argued that, in respect of s.187B:

(1) an injunction pursuant to section 187B is capable of binding newcomers: ***South Cambridgeshire DC -v- Gammell*** [29], [31], [33]; ***Cameron*** [9] and [15];

(2) service of a Claim Form and order on a newcomer served with a statutory injunction is capable of being sufficient where it is placed in a prominent position on the land that is to be caught by the injunction: ***Mid Bedfordshire DC -v- Brown*** **[2005] 1 WLR 1460** [25]-[28]; ***Gammell*** at [29], [33]; ***Cameron*** [9], [15];

(3) the newcomer will become a party to the proceedings when they do an act which brings them within the definition of defendants in the particular case: ***Mid Bedfordshire -v- Brown*** [25]-[28]; ***Gammell*** [33];

(4) the newcomer will be in breach of an injunction where they act in breach of the terms of the Order, with knowledge of the order, before seeking to set it aside: ***Mid Bedfordshire*** [25]-[28]; ***Gammell*** [33]; and

(5) the order itself should indicate the correct way in which to challenge the injunction, by containing an express provision giving the newcomer permission to apply: ***Gammell*** [25].

153. Ms Bolton, Mr Bhose QC and Mr Giffin QC submitted that the decision of the Court of Appeal in ***Canada Goose*** that a final injunction binds only the parties at the date of judgment is either (a) limited to protester cases, and does not extend to Traveller Injunctions obtained by local authorities in exercise of their statutory powers; or (b) *obiter dicta* and should be distinguished or not followed.

154. Mr Bhose QC advanced four arguments as to why ***Canada Goose*** should be distinguished:

(1) ***Canada Goose*** was a protest case in which Articles 10 and 11 were engaged. At the start of its judgment, the Court framed the appeal as concerning "*the way in which, and the extent to which, civil proceedings for injunctive relief against 'persons unknown' can be used to restrict public protests*" [1]. The procedural guidelines it gave in relation to interim relief were said to be applicable in "*protester cases like the present one*" [82]. Then, when the Court was considering final relief in [89] it qualified what was said by referring to "*protestor case against "persons unknown"*" and to "*protestor actions*", before noting that the appellant's "*problem*" was that it was seeking to invoke the court's civil jurisdiction as a means of controlling "*ongoing public demonstrations*" [93]. Had the Court intended [89]-[95] to have any broader effect than in "protest" cases, it would not have framed its judgment in these terms, in particular the phrases of limitation in [89].

(2) Second, like ***Ineos*** and ***Caudrilla***, it was a case where a private claimant was seeking to protect its own commercial interests against interference with its private law rights against newcomers. Here, by contrast, the claims are brought by public authorities for the public good and the Court of Appeal heard no argument as to whether different principles apply in claims such as these. Mr Bhose QC accepts that the Court did hold ([91]) that, in ***Birmingham CC -v- Afsar*** [132], Warby J was correct to "*take the same line*" as had been taken in ***Canada Goose*** at first instance. ***Afsar*** was a case brought by a local authority, seeking to restrain a protest outside a school, in which reliance was placed, *inter alia*, on s.222 and s.130. However, Mr Bhose QC argues it is not clear from Warby J's judgment what argument was advanced on the point. The Judge said (having referred to the reasoning in ***Canada Goose*** as "*persuasive*") that it seemed to him, "*subject to any further argument*", that a final injunction could not be made against newcomers. In addition, there is no consideration in Warby J's judgment as to whether the principles for the grant of final relief are different in claims brought in reliance on those statutory provisions. In these circumstances it cannot be said that the arguments made by the Claimant in the instant claim are closed-off by the Court of Appeal's short-form treatment of ***Afsar***.

(3) There is nothing in the judgment to call into question, or qualify, the Court of Appeal's judgment the previous month in ***LB Bromley***. In that case, the only judgment was given by Coulson LJ who was then part of the constitution which delivered the judgment of the court in ***Canada Goose***. ***LB Bromley*** was similar to the Cohort Claims in that injunctive relief was sought on a *quia timet* basis to restrain the unauthorised occupation and/or deposit of waste on land owned and managed by the local authority. The judge granted final injunctions in respect of fly-tipping and waste against "persons unknown", i.e. newcomers ([2019] EWHC 1675 (QB)). However, none of the "Persons Unknown" attended. London and Gypsy Travellers intervened, by counsel, but it was no part of their argument that final injunctions should not be granted to restrain this form of behaviour [16]. Nor was any argument addressed to whether a final injunction could be granted because of the *in personam* principle. The appeal in

LB Bromley was by the local authority against the refusal to grant final injunctions relating to residential encampment. There was no respondent's notice against the injunctions that had been granted. It is right to note that Coulson LJ did refer to the *in personam* principle [33], although ***Cameron*** was not referred to. Nevertheless, Coulson LJ did not go on to say that final injunctions cannot in fact be granted against newcomers. Mr Bhose QC argues that Coulson LJ's comments in [34] suggest that he considered they could be, and he rejected Liberty's submission that injunctions of this type should *never* be granted: [108]. Had the Court in ***Canada Goose*** meant [89] to apply also to claims such as those made by LB Bromley, and in which it had offered guidance just the previous month, it would have explained this. It did not.

(4) Fourth, it is clear from ***Sharif***, that the Court of Appeal does not regard ***Canada Goose*** as necessarily applying to injunctions under s.222. No issue was taken by the appellant in relation to the newcomer point. If ***Canada Goose*** at [89] has universal application in claims for injunctions against newcomers, the court in ***Sharif*** would have been bound so to hold.

Alternatively, Mr Bhose QC (and Mr Anderson QC for Wolverhampton) reserved the argument that, on this point, ***Canada Goose*** was wrongly decided.

155. Mr Giffin QC developed an argument that if a final injunction binds only the parties to the claim at the date of the order, then it leads to many unsatisfactory consequences. He submitted that, if this principle were correct, then its application and effect had apparently been overlooked by the Courts in ***Meier***, ***Cameron*** and ***LB Bromley*** and he pointed to the apparent endorsement of the availability of such injunctions by Lord Sumption in ***Cameron*** [15] and Coulson LJ in ***LB Bromley*** [34]. He also referred to my observations in the ***LB Enfield*** case ([2020] EWHC 2717 (QB)), when I refused to grant an interim injunction to restrain fly-tipping by "Persons Unknown":

> [41] The difficulty is this: even if I were to grant an interim injunction in terms that were proportionate and targeted at the type of fly tipping that I have described, there would be no real prospect of serving the injunction order. No-one is presently occupying any of the land and carrying out fly-tipping on it. The Claimant seeks orders for alternative service of the Claim Form and any injunction. But, even assuming that such orders were made, the court would shortly thereafter move to consider what final relief should be granted. In a typical Persons Unknown claim like this, no Acknowledgement of Service is filed and there is no attendance by, or representation of, any defendant at the final hearing. In this case, for example, the Interim Order was granted on 21 July 2017 and the Final Order at a hearing on 4 October 2017, i.e. less than three months between initial and final hearings.
>
> [42] The point can be demonstrated in this way. Assume that the Court were to make a final order in the terms sought by the Claimant against Persons Unknown. It would not provide any real protection to the Claimant because, in all probability, the Claimant would not be able to demonstrate whether any individual person had become a defendant to the claim. If no one can be identified as a defendant, the final order binds no-one. ***Canada Goose*** establishes that final injunctions against "Persons Unknown" do not bind newcomers. The consequence is that a hypothetical fly tipper who turned up at any of the ninety-six sites in respect of which the Court had made the final

order would not actually be restrained by the injunction: s/he is not bound as an original defendant to the claim and s/he is not bound as a newcomer.

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

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

156. Mr Giffin QC's simple submission is that a programme of rolling interim injunctions – required because a final injunction would be practically worthless – would be anomalous and absurd. On the facts of Walsall's own case, some 14 caravans and their occupiers came onto the specified sites in breach of the interim injunction and before the final injunction was granted. Those occupiers (although still not known by name) were party to the proceedings and therefore "identifiable" before the date of the final order. If the effect of ***Canada Goose*** is that a final injunction could be granted against those 14 or so persons as "Persons Unknown", but not against anyone else, there is no logical reason why the final injunction should not bind those who come onto the land after the order is made. The quality of their wrongdoing is no different and the impact on the claimant is no different; yet, Mr Giffin QC submits, the legal result is said to be radically different.

157. He argues that the position of the "newcomers" is safeguarded by their having permission to apply. What is the problem, he asks, about the newcomers being bound by the injunction if they choose not to take advantage of the permission to apply? Maintaining such a sharp distinction between those who do the prohibited act – and therefore become a defendant to the claim – before or after the date of the final order will serve as a perverse incentive to claimants not to use their best efforts to bring cases to trial speedily. He suggests that, if final orders bind only the parties to the proceedings, the result will be that local authorities will adopt the expedient of immediately applying for a further interim injunction as soon as a final order is granted. If that were not permitted, then he argues that "*the whole* **Bloomsbury Publishing** *and* **Ineos** *jurisdiction would in effect have disappeared, save in a small proportion of unusual cases*". Alternatively, local authorities will adopt the procedure that was utilised prior to ***Bloomsbury Publishing*** of identifying one defendant and then seeking an order under CPR 19.6 making him/her a representative defendant for a wider class.

158. Ms Wilkinson submitted that the answer to Issue 2 is that, whilst the court does have the power to grant orders against "Persons Unknown", it is wrong in principle to grant

final injunctions that bind newcomers and that there is no justification in the present cases for extending the exceptional *contra mundum* jurisdiction to such orders.

159. She argued that some of the conceptual difficulties arise because the local authorities' submissions tend to treat a final injunction as a freestanding remedy flowing from the court's undoubted power to prohibit an apprehended breach of a right, rather than as a remedy granted as a result of the determination of rights between the parties, as ***Cameron*** and ***Canada Goose*** made clear.

160. Ms Wilkinson drew the Court's attention to one further way in which a final Traveller Injunction might bind non-parties: a claim against a representative defendant under CPR 19.6. That rule enables the court to permit a claim to be maintained against a defendant as a representative of a group of others who have the "*same interest in a claim*". Representative actions do offer an important safeguard. CPR 19.6(4)(b) only permits an order to be enforced against a person who is not a party to the claim with the permission of the Court. I do not consider, however, that a representative claim is a viable option by which to obtain a Traveller Injunction. The class of person that the local authorities are seeking to target is so large that it would be impossible to suggest that each member of the class had the same interest in the claim (even applying a liberal approach to what amounts to the "same interest"). The circumstances of different members of the Gypsy and Traveller communities would vary significantly, and although members of these communities are the principal target of the Traveller Injunctions, they are not the only ones who would be bound by its terms. None of the local authority claimants in the Cohort Claims has sought to bring a claim against a representative defendant. Mr Giffin QC in his submissions noted that HHJ Pelling QC rejected the representative defendant option in ***Cuadrilla -v- Persons Unknown*** **(unreported QB, 11 July 2018)**.

(b) Decision

161. The Court undoubtedly has *the power* to grant an injunction that binds non-parties to proceedings. For the High Court, that jurisdiction comes from s.37 Senior Courts Act 1981: ***South Carolina Insurance Co -v- Assurantiue Maatschappij 'De Zeven Provincien' NV*** **[1987] AC 24, 39-40** *per* Lord Brandon and **44** *per* Lord Goff; ***Mercedes Benz -v- Leiduck*** **[1996] AC 284, 308** *per* Lord Nicholls; ***Broadmoor Special Hospital Authority -v- Robinson*** **[2000] QB 775** [20]-[21] *per* Lord Woolf; ***In re BBC*** **[2010] 1 AC 145** [57] *per* Lord Brown. The power extends, exceptionally, to making *contra mundum* injunction orders: ***Venables -v- News Group Newspapers Ltd*** **[2001] Fam 430.**

162. As to the circumstances in which the Court will exercise this power to grant relief by way of injunction, Ms Wikinson has, in my judgment, identified the correct starting point: recognition of the fundamental difference between interim and final injunctions.

(1) Interim injunctions were described by Lord Diplock in ***Siskina (Owners of cargo lately laden on board) -v- Distos Compania Naviera SA (The Siskina)*** **[1979] AC 210, 256** as intended to protect the *status quo* pending a final determination of the merits of the claim:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing

> cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction to the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

(2) *Snell's Equity* (34th edition) (at §18-02) describes a final injunction in these terms:

> "A perpetual (or final) injunction can only be granted after the court has been able to adjudicate upon the matter. A perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because it will necessarily operate forever. For instance, a perpetual injunction may be granted so as to continue only during the currency of a lease. By contrast an interlocutory (or interim) injunction is granted before the trial of an action; its object is to keep matters in *status quo* until the question at issue between the parties can be determined." (emphasis added)

163. When the Court grants a final injunction, it is (or is part of) the *remedy* to which the Court considers the claimant has demonstrated an entitlement, in respect of those against whom judgment is granted ("the Trial Defendants"), based upon a cause of action or other entitlement following either a trial on the merits or other judgment in his/her favour (for example default or summary judgment). An interim injunction is a provisional protective measure, usually granted at an early stage in the proceedings pending resolution of the claim.

164. In appropriate cases, an interim injunction can be granted before the issue of a Claim Form. However, the emergency jurisdiction to grant such orders is provisional and strictly conditional: ***Cameron*** [14]. It is provisional, in the sense that it is an interim order designed to protect the *status quo*, and conditional because the claimant must, thereafter, serve the Claim Form on the defendant in order to establish the Court's jurisdiction to determine the claimant's claim against the defendant. If a claimant fails to serve the Claim Form on the defendant, jurisdiction will not have been established and any interim injunction will be refused or is liable to be discharged (see [46]-[48] above).

165. The defendants to a civil claim, against whom an interim injunction has been granted, may not, ultimately, be persons against whom a final injunction is granted as a Trial Defendant. The claimant may fail to establish liability in respect of a particular defendant, or, in respect of those against whom liability is established, the court may refuse to grant an injunction as part of the final relief. Before final judgment, the defendants to the claim may also fluctuate; defendants may be added or removed.

166. These principles also apply equally to proceedings which are brought against (or include) "Persons Unknown". The Claim Form must be served on "Persons Unknown". Ordinarily, that will require an order for alternative service under CPR 6.15. If the claimant cannot obtain an order for alternative service – because no method can be devised that can reasonably be expected to bring the proceedings to the attention of all of those identified as the "Persons Unknown" – and the Court does not

dispense with service of the Claim Form – then the Court's jurisdiction cannot be established over the "Persons Unknown". In that event, there will be no viable civil claim and there will be no question of any injunction being granted, whether interim or final.

167. It is now well-established that the Court can grant an interim injunction against "Persons Unknown" which will bind all of those who fall within the description of the "Persons Unknown" in the interim injunction order. That may include people who only fall within the definition of Persons Unknown as a result of doing some act after the grant of the interim injunction: ***Cameron*** [15]; ***Ineos*** [30]; ***Canada Goose*** [66]. The key decision underpinning this principle is ***South Cambridgeshire District Council -v- Gammell*** **[2006] 1 WLR 658**. It is upon this authority that Ms Bolton advanced her submission (see [152(3)] above) that the newcomer becomes a party to the underlying proceedings when they do an act which brings them within the definition of the defendants to the claim ("the *Gammell* principle").

168. At the interim injunction stage, there is no conceptual difficulty with the *Gammell* principle. At that point, the Court has not determined the liability of the Trial Defendants or made any final order against them. ***Gammell*** was a case of breach of an interim injunction. The local authority had brought a claim, pursuant to s.187B, against some 18 individuals but also against "Persons Unknown" who were described in the Claim Form (as amended) as:

> "Persons unknown (being persons other than [the named defendants]) causing or permitting hardcore to be deposited and/or to station caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans on land to be occupied at Victoria View, Smithy Fen, Cottenham, Cambridge"

169. At first instance, the Judge refused to grant an interim injunction against "Persons Unknown" on the grounds that he lacked jurisdiction to do so. His decision was reversed by the Court of Appeal ([2004] EWCA Civ 1280) and, on 17 September 2004, the Court of Appeal granted an interim injunction in the following terms:

> "Persons unknown [other than the named defendants] causing or permitting hardcore to be deposited other than for agricultural purposes on land known as plots 1-11, Victoria View... caravans, mobile homes or other forms of residential accommodation to be stationed other than for agricultural purposes on the said land; or existing caravans, mobile homes or other forms of residential accommodation on the said land to be occupied other than for agricultural purposes."

170. Subsequently, on 20 April 2005, an individual, "KG", moved on to plot 10 with her caravan. The terms of the interim injunction were communicated to KG on 21 April 2005 and so, from that point, she was in breach of the interim injunction. At first instance, KG was found guilty of contempt of court. The Court of Appeal dismissed her appeal ([2006] 1 WLR 658), finding [32]:

> "...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."

171. KG became a defendant to the proceedings, whilst they were still at an interim stage, because she did an act – stationing her caravan on plot 10 – which placed her in the definition of "Persons Unknown" in the interim injunction order. By so doing, she became an individual who fell within the description of defendants to the claim. She was also identified by name, but the result would have been the same had "KG" not been identifiable by name, but by photograph. Critically, however, she was capable of being identified as having become someone who, by her actions, had come within the definition of "Persons Unknown" in the interim injunction. Had a final injunction subsequently been granted in the ***Gammell*** case, then KG would have been bound by it because she was, by that point, identifiable as a party to the claim.

172. As has been recognised in subsequent authorities, there can be no objection to the operation of the *Gammell* principle at the interim stage. Providing the Court's jurisdiction has been established over a defendant by service of the Claim Form (whether a named defendant or a "Person Unknown" in respect of whom service of the Claim Form can be effected by an alternative service order), then there is jurisdiction to grant an interim injunction in terms which will apply not only to those who have already carried out the allegedly wrongful acts but also newcomers who may commit the wrongful acts in the future. Similarly, at the interim stage, there is no objection, in principle, to adding further defendants to the claim, even if that is done in the dynamic way endorsed by the *Gammell* principle.

173. However, ***Gammell*** is not authority for the proposition that a person can become a defendant to proceedings, after a final injunction is granted, by doing an act which brings him within the definition of "Persons Unknown" in that order if s/he was not a party when the final injunction was granted. ***Mid Bedfordshire -v- Brown*** adds nothing to ***Gammell*** on this point.

174. To have jurisdiction over the Trial Defendants, the Claim Form has to have been served on the Trial Defendants (whether personally or pursuant to an order for alternative service). An order made by way of final judgment results either from default on the part of a properly served defendant, or of the court's adjudication of the merits of the claimant's claim against the Trial Defendants (whether by way of summary judgment or judgment after trial). If at the date of the judgment, there remain Trial Defendants that the claimant still cannot *name*, relief granted against these "Persons Unknown" nevertheless requires them to be *identified*. It is fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim. A Court cannot, at a trial, adjudicate whether a claimant has established an entitlement to a remedy against a defendant unless it is possible to identify who that defendant is and whether the claimant has demonstrated, by evidence, that s/he has committed some act that entitles the claimant to relief (see ***Canada Goose*** at first instance [146], [155]-[162]). Fundamentally, a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently *become* one. As the Court of Appeal noted in ***Canada Goose*** [92]:

> "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."

175. I reject the submissions that Traveller Injunctions are not subject to these fundamental rules of civil litigation or that the principle from ***Canada Goose*** is limited only to 'protester' cases, or cases involving private litigation. The principles enunciated by the

Court of Appeal in ***Canada Goose*** (drawn from the Supreme Court decision in ***Cameron***) are of universal application to civil litigation in this jurisdiction. Local authorities, bringing litigation for the public good, may be afforded certain privileges, for example that, generally, they are excused from the requirement to give a cross-undertaking in damages when seeking an interim injunction, but otherwise they are subject to the same rules that apply to all litigants who pursue civil claims.

176. Nothing in s.222, s.187B, or s.1 ASBCPA (or any of the authorities) suggests that Parliament has granted to local authorities, exceptionally, the ability to obtain final injunctions in civil proceedings against "Persons Unknown" which apply to and bind newcomers. Given that, in my judgment, the granting of such a power would represent a radical (and unprecedented) departure from the principles of civil litigation in this jurisdiction, one would have expected to see such a power granted by express words. There is no hint of such a power in the legislation. On the contrary, as already noted, s.222 does not provide any cause of action (see [55] above); the procedural rules that apply to s.187B positively appear to rule out commencing proceedings against "Persons Unknown" who cannot be identified by the means required in Practice Direction §20.4, still less obtaining final relief against newcomers (see [63] above); and my analysis of s.1 ASBCPA had led me to conclude that it cannot be used as a basis for a "Persons Unknown" injunction and specifically not one made by way of final order (see [67]-[68] above). Warby J was correct to apply the *Canada Goose* principles when refusing a final order against "Persons Unknown" in ***Afsar***, and this authority supports the conclusion that the argument that local authorities are in some privileged position to obtain final orders that bind newcomers must be rejected.

177. I also reject Mr Bhose QC's submissions as to the effect of ***Sharif -v- Birmingham City Council*** **[2020] EWCA Civ 1488**. In that case, the local authority had obtained an injunction against "Persons Unknown", on 3 October 2016, to prohibit 'street cruising' throughout its local authority area for a period of three years (subsequently, on 22 October 2019, the injunction was extended until 1 October 2022). "Street-cruising" was defined in a schedule to the order and is set out in [3] of the Court of Appeal decision. The key facts of the case are as follows:

(1) On 27 September 2018, the council served an Application Notice on Mr Sharif seeking his committal for contempt of court. It was alleged that he had breached the terms of the injunction by participating in a 'street cruise' in the prohibited area and had caused danger to other road users by dangerously racing his vehicle against another. He had been arrested and had applied to discharge the injunction.

(2) On 24 May 2019, the application to discharge was refused. Mr Sharif appealed. In summary, he argued that where Parliament has provided a remedy and procedure in the form of PSPOs to combat anti-social behaviour, the Court should give effect to Parliament's intention and injunctive relief should be granted only in very rare circumstances. In support of this argument he relied, principally, on ***Birmingham City Council -v- Shafi*** **[2009] 1 WLR 1961**.

178. In the final paragraph of his judgment, Bean LJ said this, under the heading "*The grant of injunction against 'Persons Unknown'*":

> [44] No point was taken in the court below about whether the original grant of the injunction against persons unknown and the provision for service by advertisements and prominent local notices was open to challenge. Since the order was first made, this question has been considered (though not in relation to an injunction of the same type) in this court in ***Ineos*** and ***Canada Goose***. It may have to be considered again in any future case about injunction to restrain anti-social behaviour by persons unknown. I simply record that we were told by [counsel for the local authority] that the "persons unknown" issue was the reason why Birmingham did not apply for an anti-social behaviour injunction under s.1 of the 2014 Act.

179. As noted, the local authority had not made its application an injunction pursuant to s.1 ASBCPA, but under s.222 to restrain breaches of the criminal law. The appeal was argued on the ground that the Court should not make an injunction in the terms granted where the local authority could have applied for a PSPO; an argument that was rightly rejected on the basis of previous authorities including ***Birmingham City Council -v- James*** **[2014] 1 WLR 23.**

180. The short point in answer to Mr Bhose QC's submissions on ***Sharif*** is that the appeal did not consider the point about whether final injunctions granted against "Persons Unknown" can bind newcomers; indeed, the Court specifically left open the point for decision in later cases. Likewise, insofar as any support can be found in ***LB Bromley*** for the contention that Traveller Injunction granted by final order can bind newcomers, the simple point is the Court of Appeal was not in that case considering the point that I have to decide.

181. ***LB Hackney -v- Persons Unknown*** **[2020] EWHC 3049** was an application for an interim injunction in which Johnson J was satisfied the *Canada Goose* principles were met. It will remain to be seen whether the local authority claimant in that case will, by the time of the final hearing of the claim, have identified (by name or other description) any individuals who are defendants to the claim at the point at which the Court comes to consider what, if any, final relief should be granted.

182. The submissions of Mr Bhose QC indirectly, and those of Mr Anderson QC (and probably Mr Giffin QC) directly, sought a form of remedy that is not *in personam* but *in rem*; the ability to bring a claim and seek relief not against particular individuals, but to prohibit certain conduct generally (whoever engages in it). However, the authorities make clear that civil litigation in this jurisdiction is (with the particular exception of a narrow category of *contra mundum* orders) limited to the former: ***Iveson -v- Harris*** **(1802) 7 Ves. Jun. 251, 256–7** *per* Lord Eldon: ***Spycatcher*** 224A-B, *per* Lord Oliver; ***Attorney General -v- Newspaper Publishing plc*** **[1988] Ch 333, 369**, *per* Sir John Donaldson MR; ***Environment Secretary -v- Meier*** **[2009] 1 WLR 2780** [6] *per* Lord Rodger; ***Cameron*** [14] *per* Lord Sumption; ***Canada Goose*** [89] *per* Coulson LJ. The latter is a form of quasi-legislation, not litigation (see the discussion in Berryman, *Recent developments in the Law of Equitable Remedies: What Canada can do for you* (2002) 33 VUWLR 51, 61 and further [230] below).

183. In civil proceedings, the Court's processes are limited to considering the evidence and submissions of the parties (and anyone likely to be affected by the grant of an injunction). That adversarial process has certain inherent weaknesses, particularly so where, as the Cohort Claims demonstrate, litigation against "Persons Unknown" is

likely to be wholly one-sided and not adversarial at all. In ***LB Bromley***, Coulson LJ explained:

> [31] It is, however, appropriate to add something about procedural fairness, because that has arisen starkly in this and the other cases involving the gipsy and traveller community.
>
> [32] Article 6 of the Convention provides: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
>
> [33] This is reflective of a principle of English law that civil litigation is adversarial: "English civil courts act *in personam*. They adjudicate disputes between the parties to an action and make orders against those parties only." (***Attorney General -v- Newspaper Publishing plc*** **[1988] Ch 333, 369C** *per* Sir John Donaldson MR.) This allows disputes to be decided fairly: a defendant is served with a claim, obtains disclosure of the evidence against them, and can substantially present their case before the court (***Jacobson -v- Frachon*** **(1927) 138 LT 386, 393** *per* Atkins LJ). This allows arguments to be fully tested.
>
> [34] The principle that the court should hear both sides of the argument is therefore an elementary rule of procedural fairness. This has the consequence that a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they are not there to put their side of the case."

184. Although certain interim injunctions, granted in civil claims, can effectively prohibit certain conduct by non-parties, who have notice of its terms, under the ***Spycatcher*** principle, the fundamental principle remains that injunction orders do not bind third parties. Lord Nicholls explained in ***Attorney General -v- Punch Ltd*** **[2003] 1 AC 1046** [4]:

> "... It is a contempt of court by a third party, with the intention of impeding or prejudicing the administration of justice by the court in an action between two other parties, himself to do the acts which the injunction restrains the defendant in that action from committing if the acts done have some significant and adverse affect on the administration of justice in that action: see Lord Brandon of Oakbrook in ***Spycatcher*** 203D, 206G-H, and, for the latter part, Lord Bingham of Cornhill CJ in ***Attorney General -v- Newspaper Publishing plc*** **[1997] 1 WLR 926, 936.** Lord Phillips MR **[2001] QB 1028** [87] neatly identified the rationale of this form of contempt:
>
> > 'The contempt is committed not because the third party is in breach of the order – the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted.'

185. The paradigm example of an interim injunction to which the ***Spycatcher*** principle applies is an interim non-disclosure order to prohibit publication of certain information. In ***Spycatcher*** itself, Lord Brandon (206A-C) identified an interim injunction to prohibit trespass as one that did *not* engage the principle. An interim injunction to

prohibit trespass on A's land by B would not prohibit trespass on the same by C, even if s/he had knowledge of the terms of the injunction that had been granted against B.

186. I reject Mr Giffin QC's arguments based on absurdity or perverse incentives. The concerns I expressed in the *ex-tempore* judgment in ***LB Enfield*** (see [155] above) do not, with the benefit of further consideration and on proper analysis, actually arise. Application of the *Canada Goose* principles will not lead to, or permit, a "rolling programme" of interim injunctions.

(1) First, on a proper application of the guidance from ***Ineos*** and ***Canada Goose***, a court would not grant an interim injunction against "Persons Unknown" unless it is satisfied that there exist people who, even if they cannot be named, are capable of being identified and served with the proceedings, if necessary, by an order for alternative service such as can reasonably be expected to bring the proceedings to their attention: ***Canada Goose*** [82(1)].

(2) Second, if a claimant is not able to serve the Claim Form upon the "Persons Unknown" defendants by a means of alternative service that the Court is satisfied can reasonably be expected to bring the proceedings to their attention, there will be no civil claim in which to grant or maintain an injunction. The claimant will simply not have established jurisdiction over the "Persons Unknown": see [46]-[48] and [164]-[166] above.

(3) Third, an interim injunction will only be granted against "Persons Unknown" if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief: ***Canada Goose*** [82(3)]. If the evidence in support of an interim injunction application only demonstrated a general risk that there might, at some point, be an unauthorised encampment on land by some unspecified person, the court would simply refuse the injunction. If the evidence does disclose a real and imminent threat of a tort being committed to justify a *quia timet* interim injunction against "Persons Unknown", the claimant will then have the period between then and the final hearing to identify the "Persons Unknown" defendants. Any final order, if granted, will bind only those identified parties as defendants.

187. In my judgment, once a final injunction is seen as a remedy flowing from the final determination of rights between the claimant and the Trial Defendants, rather than a remedy between the claimant and anyone who might ever infringe that right in the future, the importance of identification of the Trial Defendants becomes much clearer. As identified above, the final injunction in the cases brought by LB Barking & Dagenham (1st Claimant) and Basingstoke & Deane BC and Hampshire CC (16th Claimants) was sought and granted against "Persons Unknown" without further description. That is tantamount to a remedy *contra mundum*, was justified by evidence of actions of only a minority, to protect a right that has been, and is only likely to be, infringed by a few. More importantly, an order against "Persons Unknown", without further description, makes it impossible to identify the Trial Defendant(s); to assess, on the evidence, whether they have committed (or threatened) any wrongdoing justifying the grant of any remedy; or even for the Court to know whether they have been served with the Claim Form and thus brought within the jurisdiction of the Court.

188. Whilst, as recognised both in ***Cameron*** and ***Canada Goose***, there is a legitimate role for interim injunctions against "Persons Unknown", such remedies are conditional and are granted to protect the *status quo* pending determination of the parties' rights at a trial: ***Canada Goose*** [92].

189. In cases where a claimant wishes to bring a claim against defendants who are (or include) "Persons Unknown", then an interim injunction can be granted where the evidence demonstrates actual or threatened commission of a tort or other civil wrong by the "Persons Unknown". In the period between grant of any interim injunction and subsequent trial, the claimant must identify either by name or other method the persons against whom s/he seeks a final judgment. If a judgment is granted against the defendants, it will be against the defendants who can be named or identified by description even if some of them may be, at the date of the judgment, anonymous. They have to be identified sufficiently to enable the Court to consider whether the claimant is entitled to any remedy against them by way of final order. Consistent with the analysis in ***Cameron***, however, the final judgment cannot be granted against Category 2 defendants: defendants who are not only anonymous, but cannot be identified.

(2) Can the Court grant a Traveller Injunction *contra mundum*?

190. In the light of my decision that Traveller Injunctions are subject to the principle that a final injunction only binds the parties to the action at the date of the order, I must consider whether the Court can grant similar relief, not against "Persons Unknown" but *contra mundum*.

(a) The injunction granted to Wolverhampton CC

191. As already noted (see [117] above), in the Cohort Claims, Wolverhampton (36th Claimant) has been granted what, on its face, is a *contra mundum* injunction order. I should set out some of the history of this claim and the orders that have been made.

192. The Claim form was issued on 29 June 2018. Under Defendant, the Claim Form simply stated, "Persons Unknown". Under "details of claim", the council stated the following:

> "1. By this claim, the Claimant seeks to restrain unauthorised encampments from being set up by Persons Unknown on 60 sites in Wolverhampton which have been identified as being vulnerable to such encampments.
>
> 2. The Claimant seeks the following relief:
>
> (i) an injunction order;
>
> (ii) a power of arrest;
>
> (iii) declaratory relief;
>
> (iv) further or other relief;
>
> (v) costs.

3. The claim is brought pursuant to the following statutory provisions:

   (i) Section 222 of the Local Government Act 1972;

   (ii) Section 130 of the Highways Act 1972;

   (iii) Section 187B of the Town and Country Planning Act 1990

   (iv) Section 1 and 4 of the Anti-social Behaviour, Crime and Policing Act 2014;

   (v) Section 37 of the Senior Courts Act 1981; and/or

   (vi) Section 27 of the Police and Justice Act 2006

4. The Claimant has taken steps to ascertain the Defendant's (sic) identity but has been unable to obtain sufficient details to enable them to name individual defendants for the reasons set out in paragraph 37 of the Witness Statement of Shaun Walker dated 31 May 2018. The claim is therefore brought against Persons Unknown.

5. For the purposes of this claim, the Defendant is described as: "any person who enters and/or attempts to enter onto land in Wolverhampton for the purpose of setting up an unauthorised encampment and/or occupies and/or attempts to occupy any such land as part of an unauthorised encampment whether temporary or otherwise…"

193. Although issued under Part 8, Wolverhampton filed Particulars of Claim dated 28 June 2018. In it, particulars were given of alleged unauthorised encampments which had been set up by "Persons Unknown" since 2015; and incidents of anti-social behaviour alleged to have been committed by "Persons Unknown". The Particulars of Claim contained details of the alleged impact of the activities complained of on business, community, Wolverhampton CC and West Midlands Police. Under a heading, "*risk of displacement*", the council stated:

> "When an encampment is moved on, this frequently has the effect of displacing the problem as another encampment is set up elsewhere in Wolverhampton, whilst the Claimant is left to clear up the previous site and take steps to deal with the new one. The Claimant therefore becomes involved in an expensive game of 'cat and mouse' as the travellers simply move to a new site when they are evicted from their original site. The Claimant has also experienced displacement from other local authority areas, some of whom have been granted an injunction in relation to unauthorised encampments."

194. In support of the claim for an injunction, the Particulars of Claim averred:

> "Unless restrained… there is a significant likelihood that Persons Unknown will continue setting up unauthorised encampments in Wolverhampton.
>
> …
>
> For the reasons particularised above, the Claimant respectfully invites the Court to find that it is just and convenient and to exercise its discretion under section 37(1)

> of the Senior Courts Act 1981 to grant an injunction in the terms of the draft injunction which accompanies the application, or alternatively in such terms as the Court thinks fit
>
> The Claimant further invites the Court to attach a power of arrest to the injunction pursuant to section 27 of the Police and Justice Act 2006 and/or section 4 of the Anti-social Behaviour, Crime and Policing Act 2014 as the anti-social conduct has involved the use or threat of violence and/or poses a significant risk of harm to other persons." (emphasis added)

195. In respect of "Persons Unknown", the council stated:

> "The Claimant has attempted to ascertain the identity of the individuals who have trespassed upon land in order to set up unauthorised encampments but the Claimant has been unable to obtain sufficient details to enable them to name the individual defendants. Officers of the Claimant seek to obtain details when an unauthorised encampment occurs, but the people who are present are very reluctant to disclose their true identity.
>
> The Claimant has no way of ascertaining whether any details which are given are true or false as it is generally the intention of those present to frustrate the process so that they can remain on the land for as long as possible. When details are provided, this is frequently preceded by an individual asking an earlier caravan what name they gave. The Claimant can have no confidence that the details given are correct. There is further the risk of mistaken identity if a name were to be relied upon which is inaccurate. In any event, no address is provided due to their nomadic way of life. In the circumstances, it has been necessary to seek the injunction against Persons Unknown".

196. Also on 28 June 2018, Wolverhampton issued an Application Notice seeking an order for alternative service of the Claim Form pursuant to CPR 6.15. An order under CPR 6.15 was made on 6 July 2018, permitting service of the Claim Form on "Persons Unknown" by (a) making available on the Council's website ("the Website Page") copies of the Notice of Hearing, Part 8 Claim Form, Particulars of Claim, Injunction Application and draft injunction order and power of arrest; (b) posting on Twitter and Facebook a link to the website page with the documents; (c) issuing a press release to the Council's standard media contacts; (d) placing an editorial in the Wolverhampton edition of the *Express and Star* newspaper; (e) uploading a video to YouTube and the Council's website providing details of the application; and (f) posting the Notice of Hearing and a document outlining the nature of the application for the injunction with a link to the Website Page.

197. It is not necessary to consider whether this order for alternative service could reasonably be expected to bring the proceedings to the attention of those whom it was sought to make defendants to the claim. However, it is clear, from the documents filed by Wolverhampton in support of their claim and application, that there was a fundamental underlying tension or contradiction between the historic acts of "Persons Unknown", who were identifiable even if they could not be named, relied upon to support the claim, and the terms of the injunction, which were directed prospectively at anyone who in the future might set up an encampment in Wolverhampton (i.e. newcomers). The term "Persons Unknown" therefore covered two very distinct groups: historic wrongdoers and newcomers. Outside the area of "Persons Unknown" injunctions the inadequacy of

proof of historic wrongdoing by A as a justification for a *quia timet* injunction against B would be immediately apparent. Further, whatever might be said about the likelihood of the alternative service methods utilised by the council bringing the proceedings to the attention of the historic wrongdoers (in respect of acts alleged to have taken place up to 3 years previously), there could be no reasonable expectation that they would bring the proceedings to the attention of all of the newcomers (for the reasons explained in [45] above).

198. The claim came before Jefford J on 2 October 2018. Ms Caney, who represented Wolverhampton at the hearing, had provided a skeleton argument. A transcript of the hearing has been obtained. There was no attendance by or representation of the Defendants. The claim was presented, both in the skeleton argument and in the submissions to the Court, as a conventional *inter partes* claim against "Persons Unknown", not as a *contra mundum* injunction. The skeleton argument referred specifically to ***Bloomsbury Publishing*** and several of the Cohort Claims in which "Persons Unknown" injunctions had by that stage been granted. There was no reference to or consideration of ***Venables*** or any other *contra mundum* authorities. Reference was made to the service of the Claim Form by alternative means and the failure by the defendants to file an acknowledgement of service. Yet, the injunction that the council was asking the Court to make, and which was ultimately granted, was in terms a *contra mundum* injunction; "*IT IS FORBIDDEN for anyone...*" to set up encampments at the 60 sites. It is also plain from Jefford J's judgment ([2]) that she understood that she was exercising the jurisdiction to grant an injunction against "Persons Unknown", not making an order *contra mundum*.

199. Ms Caney's skeleton argument did refer to Practice Direction 8A §20. She submitted that the Practice Direction confirmed "*that an injunction may be granted under s.187B Town & Country Planning Act 1990 against a person whose identity is unknown to the Claimant*". However, Ms Caney did not deal, either in her skeleton argument or at the hearing, with §§20.4 to 20.6 of the Practice Direction (set out in [50] above). Had she done so, the fact that the claim was being brought against two distinct categories of "Persons Unknown" – historic wrongdoers and newcomers – would likely have become apparent. On the basis of the *pleaded* claim against historic wrongdoers, there was every reason to believe that the council *could* have complied with PD 8A §20.4 by describing the historic wrongdoers, for example by a photograph or other evidence (see further [204] below). The pleaded claim explained reasons why the Council could not provide the names of the historic wrongdoers (or lacked confidence in the accuracy of any names that it had been given). That did not explain why the simple expedient of photographing the alleged wrongdoers was not practicable as a method of identifying those who were sought to be made defendants to the claim. Crucially, had attention been paid to PD 8A §20.5, focus would have been drawn to the need to describe the "Persons Unknown" defendants "*sufficiently clearly to enable the defendant to be served with the proceedings*". As the definition of "Person Unknown" in Paragraph 5 of the Claim Form and in the injunction was directed exclusively at newcomers, there were very real obstacles to the council being able to satisfy the requirements of the Practice Direction.

200. The injunction was granted for a period of 3 years (with a power of arrest under s.27 Police and Criminal Justice Act 2006), "*unless before then it is revoked or varied by further order of the Court*", but the Judge directed that a review hearing should take

place after a year. The injunction was granted pursuant to s.187B and s.130, but not s.1 ASBCPA (see [2] of the judgment). A point that particularly concerned the Judge was the absence of any transit site provision by Wolverhampton. As the Judge noted in argument, one potential consequence of the grant of a Traveller Injunction to a local authority was the risk that it substantially removed the impetus to provide a transit site. She therefore expressly provided that, before the review hearing, the council was to provide a witness statement setting out the progress with regard to the proposed transit site.

201. The first review hearing took place on 5 December 2019. The Council applied to vary the injunction to remove four sites and to add three new sites, but otherwise sought the continuation of the injunction in the terms in which it had originally been granted. Ms Caney again represented the council at the review hearing and provided a skeleton argument. Evidence was filed by the Council. In summary, although work had been carried out to try and establish a transit site, none had been provided. The Court was told that "*a development plan [to provide one] is in place to move forward as quickly as possible*" and that the Claimant "*remains committed and resolutely determined to establishing a suitable transit site*".

202. By order of 5 December 2019, the injunction was amended as sought by the council and extended (with the same power of arrest) until 5 December 2021, "*unless before then it is revoked or varied by further order of the court*", with a further review hearing to take place in July 2020.

203. The second review hearing took place on 20 July 2020. Ms Caney represented the council and provided a skeleton argument. On this occasion, although no defendants attended or were represented, the Court did receive written submissions from Chris Johnson, of the Community Law Partnership on behalf of the National Federation of Gypsy Liaison Groups (the Third Intervener in these proceedings). The transit site had still not opened. Planning permission had been granted for the site, but it was limited to 13 caravans and available only to Travellers who had been evicted from unauthorised encampments within the administrative area of Wolverhampton. Ms Caney's skeleton addressed the Court of Appeal decision in ***LB Bromley***.

204. In his submissions, Mr Johnson argued that Wolverhampton could not demonstrate compliance with all of the requirements of ***LB Bromley***. Mr Johnson noted that the Court of Appeal in ***LB Bromley*** had considered ([39(b)]) that the "*positive evidence*" in respect of the planned transit site had had a "*major impact*" on Jefford J's original decision to grant the injunction. Further, the Council's evidence in support of the original application for the injunction had suggested that the injunction was part of a "*dual strategy*", the other part of which was provision of a transit site, which had still not materialised. In relation to the action against "Persons Unknown" Mr Johnson submitted:

> "It is not clear why the Travellers against whom allegations of nuisance and anti-social behaviour are made cannot be identified (e.g. by use of vehicle registration details) and named in the proceedings. There are a large number of photographs in the original Trial Bundle which show fly-tipping and depositing of waste. Whilst we accept that there is evidence of such criminality linked to some unauthorised encampments, we would point out that it is well known that others may take advantage of the existence of unauthorised encampment by fly-tipping near the

encampment on the basis that the occupants of the encampment will get the blame."

205. Finally, Mr Johnson referred in his written submissions to ***Canada Goose*** in support of his argument that the injunction obtained by Wolverhampton, even if justifiable, could only bind those who were parties to the proceedings (i.e. those who were encamped on the relevant land at the date of the final order).

206. Martin Spencer J continued the injunction order. Whilst he expressed concern about the planning conditions attached to the transit site, which meant that it offered no practical solution to the issues faced by the Gypsy and Traveller communities, he was satisfied that there were other transit sites available in the West Midlands and that the injunction was in accordance with the "*letter and spirit*" of the decision in ***LB Bromley***. The Judge did not deal with ***Canada Goose*** in his judgment (although, during argument, he stated the Wolverhampton claim and ***Canada Goose*** "*are not equivalent*") and no point was raised about the *contra mundum* issue.

207. There was some discussion, at the hearing before me, as to whether Wolverhampton's injunction is an interim or final order. In his skeleton argument, Mr Anderson QC suggested that the order of 2 October 2018 was a final order. The Interveners submitted likewise. Ms Wilkinson expressed doubt as to this because there had been no interim injunction, but that is not necessarily determinative. A final injunction can be granted in a claim even if no interim injunction has been granted. On this point, and applying the principles set out in [161] above, my conclusion is that Wolverhampton's injunction is a final order. The order was not granted to protect the *status quo* pending a final determination. It was granted ostensibly following a determination of Wolverhampton's claim. It was not a perpetual injunction - it was granted for 3 years – and the court required a review. Certainly, Martin Spencer J regarded Jefford J as having determined the claim (see [2020] EWHC 2280 (QB) [20]) and no further reviews have been ordered. No final hearing has been listed. As matters stand, therefore, unless varied or discharged by the court in the meantime, Wolverhampton has a subsisting *contra mundum* injunction (with power of arrest) made by final order until 5 December 2021 prohibiting any encampment at the 60 or so sites identified in the 5 December 2019 order.

(b) Submissions

208. Mr Anderson QC, on behalf of Wolverhampton, has argued that the *contra mundum* order granted to his client is a pragmatic, sensible and effective solution to the problem of unlawful encampments. He submits that the court has jurisdiction to grant a *contra mundum* Traveller Injunctions and that such an injunction was justified in Wolverhampton's case.

209. Mr Anderson QC accepted that, when Wolverhampton's claim was commenced, there was no ongoing trespass, and the council did not seek any remedy in respect of past acts of trespass. The claim was brought *quia timet*; to protect against the threat of wrongdoing. He argues that the situation confronted by Wolverhampton was quintessentially one justifying injunctive relief. Mr Anderson QC relies on the evidence filed in the proceedings to demonstrate that prior to the grant of the injunction, the inhabitants of Wolverhampton were suffering from escalating unauthorised encampments, up to 39 incidents by 2 October 2018. The land affected included

highways, public open spaces, playing fields, business parks, industrial estates, public and private car parks and development land. There were instances where damage was caused to gain access to the land. The immediate impact was to inhibit the use of the areas by those who were otherwise entitled to use and enjoy the land. He submitted that the evidence demonstrated anti-social behaviour regularly associated with encampments, comprising abuse, noise, nuisance, threats of violence and intimidation. The absence of toilet facilities caused a public health nuisance. Encampments on the highway caused risks to the safety of the public and waste was regularly left behind, resulting in substantial clean-up costs. The total cost to Wolverhampton of dealing with the encampments in 2016 and 2017 (and excluding costs to the police service) was estimated to be £250,000. Mr Anderson QC defended the grant of the injunction and warned that the Court "*should be highly reluctant to deny the people of Wolverhampton its protection*".

210. Mr Anderson QC argued that the Courts have always had the power to grant injunctions *contra mundum* in appropriate cases: ***Venables***; ***OPQ -v- BJM*** **[2011] EWHC 1059**. The modern foundation of the jurisdiction is s.37 Senior Courts Act 1981. Mr Anderson QC recognises that the Court of Appeal in ***Canada Goose*** stated [89]:

> "... There are some very limited circumstances, such as in ***Venables -v- News Group Newspapers Ltd*** **[2001] Fam 430**, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category..."

211. He contends, however, that it is wrong to suggest that there is any "*usual principle*" that *contra mundum* orders are not granted. He suggests that the injunction orders granted in all the Cohort Claims are, in fact, *contra mundum* orders, albeit he concedes that "*not all of the 38 were granted for adequate reason and with adequate safeguards, and some have been discharged already*". He nevertheless submits, stirringly:

> "... those which were granted for adequate reason and with adequate safeguards should not be thrown out for imagined legal incompetence which has the effect of extracting the teeth from several statutory provisions."

212. Wolverhampton accepts that it is a fundamental principle of natural justice, that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard: ***Cameron*** [17]. And, on a practical level, the absence of a defendant can make the entire judicial process, which is supposed to be adversarial, one-sided: injunctions are more likely to be granted in the absence of a defendant and, in such absence, there is no prospect of an appeal.

213. Nevertheless, Mr Anderson QC argues that the principle – that both sides must be heard – should not be a bar to an injunction against persons defined by reference to their future conduct, and who therefore do not exist at the time at which the order is made. There are some cases where the claimant cannot obtain justice if such persons cannot be sued: ***Ineos*** [29]. He submits that the absence of a defendant is not a conceptual problem. ***Ineos*** and ***Canada Goose*** show that there is no difficulty in a person being bound by an injunction without having been personally served with the Claim Form nor with the application for an injunction nor even with the injunction itself. In the Wolverhampton case, no one was personally served with the Claim Form but that does not matter so long as fair notice was devised, which, he submits, it was.

214. Mr Anderson QC referred to Baroness Hale's observation in ***Meier*** [25]:

> "... 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?"

215. He argues that the Court of Appeal in ***LB Bromley***, expressly referred to Wolverhampton's case and approved the approach taken by Jefford J (see [39(b)], [70], [105] and [106]). In particular, Coulson LJ observed (at [70]) that the approach of identifying specific sites, coupled with the proposal for a transit site, was *"in accordance with the ECtHR authorities"* detailed at [44]-[48] of his judgment. He further observed ([105]) that the solution of identifying particularly vulnerable sites in Wolverhampton was a more proportionate answer to a borough-wide order. The provision for a review after 12 months was also considered sensible ([106]). These "*important safety valves*" were, he submits, absent in ***LB Bromley***.

216. Mr Anderson QC argues that, in Wolverhampton's case, Jefford J was correct to grant *contra mundum* relief because it was a reasonable and proportionate way of protecting the inhabitants of Wolverhampton against the situation described in her judgment: [3]-[8].

217. Although not an order that was granted, in terms, to any of her clients, Ms Bolton also supports Mr Anderson QC's contention that the Court can grant *contra mundum* orders under s.222 "*where there is evidence of a widespread impact on the Article 8 rights of the inhabitants of [the local authority]'s area*". Environmental harm and harm to the well-being of the inhabitants of a local area is capable of infringing Article 8 rights: ***Lopez Ostra -v- Spain* (1995) 20 EHRR 277**; as can harm to mental and physical health: ***OPQ -v- BJM*** [19]; ***X (formerly Bell) -v- O'Brien* [2003] EMLR 37** [22].

218. Mr Bhose QC similarly argues that the court has jurisdiction under s.37 Senior Courts Act 1981 to grant final relief on a *contra mundum* basis: ***Ambrosiadou -v- Coward* [2013] EWHC 58 (QB)** [13]; extending particularly to cases where local authorities are proceeding to restrain breaches of the criminal law, the commission of public nuisance, or to uphold public rights and privileges over land owned by them.

219. Mr Giffin QC also argues that the Court has jurisdiction to grant *contra mundum* injunctions. True *contra mundum* orders undoubtedly infringe the principle of natural justice that a person should not be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard: ***Cameron*** [17]. Consequently, Mr Giffin QC submitted – on the basis of ***Venables*** [98]-[100] – *contra mundum* orders were limited to cases in which justice cannot be achieved, or fundamental rights (including in particular Convention rights) cannot be protected, in any other way.

220. Mr Willers QC on behalf of the Interveners submits that the court has jurisdiction to grant *contra mundum* injunction orders: ***Venables***. Whatever its origins, the modern basis of statutory jurisdiction is s.6 Human Rights Act 1998: ***RXG -v- Ministry of Justice* [2020] QB 703** [24]. However, the claimants in the Cohort Claims cannot

invoke this jurisdiction because they cannot meet the criteria. A *contra mundum* Traveller Injunction is almost by definition disproportionate; it does not discriminate between a large encampment causing massive disruption, damage and nuisance, and a single caravan peacefully parked overnight in a local authority car park. Where, as recognised in ***LB Bromley***, the Article 8 rights of the Gypsy and Traveller communities are affected by the grant of such Traveller injunctions, the Court has to consider the necessity for and proportionality of the interference that a Traveller Injunction represents.

221. On the point of whether the local authorities can demonstrate that it is necessary for the Court to grant *contra mundum* injunctions, Mr Willers QC relied upon guidance published in March 2015: "*Dealing with illegal and unauthorised encampments*". This Guidance noted that it was "*primarily aimed at public authorities*", and identified what were described as "*extensive powers*" available to local authorities, including: stop notices (and temporary stop notices), under ss.171E and 183 Town & Country Planning Act 1990; licensing controls of caravan sites under the Caravan Sites and Control of Development Act 1960; possession orders (including interim possession orders, where available) against trespassers under CPR Part 55; local byelaws made under s.235 Local Government Act 1972 (including the ability to attach powers of seizure and retention of property in connection with any breach of a byelaw under s.150(2) Police Reform and Social Responsibility Act 2011); directions pursuant to s.77 Criminal Justice and Public Order Act 1994 (see further [76] below); various provisions of the Highways Act 1980 to deal with obstructions of this highway causing a nuisance; planning contravention notices under s.171C Town & Country Planning Act 1990; and enforcement notices under s.172 Town & Country Planning Act 1990. The guide also identified powers that the police could exercise to tackle unauthorised encampments.

222. Insofar as reliance was placed on the permission to apply provisions that were included in the Wolverhampton injunction (and generally), Mr Willers QC submitted that this did not make up for the disproportionate impact of the injunction order. He argued that it was fanciful to suggest that a family of Travellers who arrived at a location to find that an injunction is in place prohibiting them from stopping there would lodge an application to the High Court asking for the injunction to be varied.

223. In agreement with the Interveners' submissions, Ms Wilkinson contended that the *Venables* jurisdiction to grant *contra mundum* orders was to give effect to the positive obligation placed upon the Court to take steps to give effect to Convention rights; principally Articles 2, 3 and 8. Ms Wilkinson noted that none of the claimants in the claims before the Court had indicated in their Claim Forms that any issue under the Human Rights Act 1998 arises. She submitted that this was plainly not tenable. At the very least, the Article 8 and 14 rights of Gypsies and Travellers are engaged. Ms Bolton's clients, she noted, appeared to acknowledge only the Article 8 rights of the inhabitants of the relevant local authority area.

(c) Decision

224. In my judgment, in civil proceedings, s.37 Senior Courts Act 1981 confers jurisdiction on the Court to grant *contra mundum* injunction orders: ***In re BBC* [2010] 1 AC 145** [57]. However, the circumstances in which the Court will exercise this jurisdiction are very limited, and are practically restricted to cases where the *contra mundum* order is the only way to protect an engaged Convention right and where a refusal to grant the

injunction would put the Court in breach of s.6 Human Rights Act 1998: ***In re S* [2005] 2 AC 593** [23]; ***OPQ -v- BJM*** [18]; ***RXG*** [24]. This self-denying limit on the grant of *contra mundum* orders recognises and gives effect to a fundamental principle of justice, explained by the Court of Appeal in ***Canada Goose*** [89]:

> "... that a final injunction operates only between the parties to the proceedings: ***Attorney General -v- Times Newspapers Ltd (No.3)* [1992] 1 AC 191, 224**. That is consistent with the fundamental principle in ***Cameron*** [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."

225. As the Divisional Court noted in ***RXG*** [33], the "*Venables* jurisdiction" to grant *contra mundum* injunctions had been exercised on only three further occasions after ***Venables***. Since the decision in ***RXG***, (and excluding the orders made in the Cohort Claims) I am aware of one further claim in which a court has granted a *contra mundum* injunction: ***D & F -v- Persons Unknown* [2021] EWHC 157 (QB)**. The Court of Appeal in ***Canada Goose*** correctly described the circumstances in which *contra mundum* orders are granted as "*very limited*" [89].

226. The submissions made by Counsel for the local authorities urging development of the law to fashion a civil remedy to the problem of unauthorised encampments on land are superficially attractive and powerfully argued. Rightly, they give pause for thought. Mr Anderson QC refers to Baroness Hale's call to action, "*ubi ius, ibi remedium*" (see [214] above) to encourage the Court to expand the reach of the civil law. However, in the very passage he cited, there is the following important check: "*provided that there is proper procedural protection for those against whom the remedy may be granted*" (see to similar effect also Baroness Hale's observations in [40] quoted in [14]).

227. Mr Willers QC countered that there are clear limits to how creative the Court can be in pursuit of a remedy for a wrong. One of those limits is the position where a party's rights are infringed by an unidentifiable wrongdoer. That is precisely what happened in ***Cameron***. There was no dispute that Ms Cameron had been injured by the negligence of another, but because she could not identify that other, the Court could not assist her. It made no difference that this deprived her of a remedy. Mr Willers QC argued that this neatly demonstrates the limits to the maxim quoted by Baroness Hale. He argues that it was responding to this siren call that led the majority in the Court of Appeal in ***Cameron*** into error: finding jurisdiction when there was none (see [7] *per* Lord Sumption).

228. Mr Willers QC, in his submissions, also encapsulated the danger of not respecting the proper limits to civil litigation:

> "The civil courts determine disputes between parties. They uphold rights but they do so within the context of *inter partes* disputes. The Court's role as arbiter – rather than inquisitor – is why the system is adversarial... The proceedings brought by these Claimants are of a qualitatively different nature to the *inter partes* arguments the Court is designed to decide. These proceedings are not, and are not intended by the Claimants to be, a determination of a dispute. Rather, they are intended to confer on the Claimants a new power enabling them to police public disorder using the Court's enforcement mechanisms. This is not an appropriate use of civil litigation. The purpose of the Court's enforcement powers is to give effect to its

> own judgments. They are not designed as a general control on wide-ranging anti-social behaviour over large geographical areas. Moreover, it puts the Court – whose role is to determine disputes – in an invidious position, because it makes a process which is designed to be adversarial inherently one-sided. This is contrary to the principles outlined by Lord Sumption in ***Cameron*** [17]".

229. Broadly, I accept that submission subject to the following point. As recognised by the Court of Appeal in ***Canada Goose*** and ***Ineos*** the Court does have a legitimate role, at an interim injunction stage, and in an appropriate case, in granting civil injunctions against "Persons Unknown" which may have the effect of temporarily subjecting "newcomers" to the Court's jurisdiction and coercive orders, and even to restrain otherwise lawful activity. However, the Court will only grant such interim remedies where the claimant demonstrates that they are necessary and there is "*no other proportionate means of protecting the claimant's rights*": ***Canada Goose*** [82(5)]. An interim injunction in those terms is a temporary measure and must be time limited: [82(7)]. The claimant must identify defendants to the claim and then advance the proceedings to a final hearing at which the Court will determine the dispute between the parties. An interim injunction that, as an unavoidable consequence, places restrictions upon strangers to the litigation and/or limits lawful activity can be tolerated only for as long as is strictly necessary to progress the claim to a final hearing; *a fortiori* if the injunction interferes with Convention rights. As the Court of Appeal explained in ***Canada Goose*** [92]:

> "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."

230. 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. Parliament has required that local authorities seeking PSPOs must carry out consultation before making/extending/varying a PSPO: s.72(3) ASBCPA. Leaving aside the constitutional objections based on separation of powers, the Court has no way of carrying out any sort of consultation as part of determining a civil claim for an injunction. As the Court of Appeal noted in ***Canada Goose*** [93], "*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".

231. Respecting those boundaries, the grant of *contra mundum* injunctions is strictly limited to circumstances where the Court is compelled to act. The cases in which *contra mundum* orders have been granted demonstrate that they are instances where, having considered the evidence, the Court is left with only one option: to grant the injunction. The fundamental principle that persons to be restrained by an order of the court made in civil proceedings must be served with proceedings and given an opportunity to be heard, in this exceptional category of case, has to yield to more important considerations. The clearest examples are cases in which the Court was satisfied, on evidence, that if the injunction were not granted there would be a real and immediate risk of serious physical harm or death. At that point, Articles 2 and/or 3 of the Convention are engaged, and there is no question of that risk being balanced against any other Convention rights (for example Article 10): ***RXG*** [35(v)]. In other cases – like ***RXG*** itself – the evidence, whilst not demonstrating a threat at a level engaging Articles 2 and/or 3, establishes that, without an injunction, there will be a serious interference with the applicant's Article 8 right. As Article 8 is a qualified right, the Court would have to resolve any conflict with other engaged Convention rights using the now well-established parallel analysis: ***Re S*** [17]:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two 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 must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

232. When considering whether to grant a *contra mundum* order in these exceptional cases, the Court will always strive, so far as circumstances permit, to enable representations to be made and considered before an order is made. Typically, they also include provisions to enable the orders to be reconsidered. But, unlike other civil proceedings, there is no requirement for there to be a defendant to the proceedings; the order is sought and, if the claim is successful, granted *contra mundum*.

233. Can the local authorities demonstrate that Traveller Injunctions fall into the exceptional category where the court is compelled to act by way of *contra mundum* injunction? In my judgment, the answer is plainly no. There is no doubt that Traveller Injunctions engage the Article 8 rights of Gypsies and Travellers: ***LB Bromley*** (see [15] above). Insofar as the remaining local authorities in the Cohort Claims, now raise an argument that the relief sought also engages the Article 8 rights of denizens of its area, then the Court would be required to perform the required parallel analysis when considering whether to grant an injunction and, if so, in what terms. The Court's task in doing so was explained by Sir Mark Potter P in ***A Local Authority -v- W*** **[2006] 1 FLR 1** [53]:

> "… The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific

rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out..."

234. The submissions made by the remaining local authorities in support of Traveller Injunctions might be thought to be paradigmatic examples of "*rival generalities*". Indeed, the whole structure of "Persons Unknown" litigation, and *a fortiori* claims for injunctions *contra mundum*, because there is no focus on individuals, means that Court can only carry out any assessment based on rival generalities. Worse, it is an assessment that risks a significant element of in-built prejudice. On the basis of evidence of the worst examples of historic wrongdoing by some, unidentified persons, the Court is asked to impose an injunction to restrain future conduct of unidentified (and unlimited) newcomers, including those who were not guilty of any of the acts of wrongdoing relied upon to support the injunction application. If the Court cannot identify the individuals who will be restrained by the injunction, it cannot begin to assess the particular circumstances of each person to be restrained, whether an injunction is necessary in that person's case and whether the terms of the injunction are proportionate (see ***LB Bromley*** [104]). It is difficult to see how the claimant would begin to demonstrate the required evidence of "*irreparable harm*" if it cannot identify the persons who it claimed would cause it (see [13(3)] above). Put shortly, it is impossible to carry out the required parallel analysis of and intense focus upon the engaged rights. In ***LB Bromley*** the Court of Appeal expressed concern that closing down unlawful encampments on land and moving on Gypsies and Travellers must be regarded as a last resort: [101]. Prospectively making a *contra mundum* injunction prohibiting all encampments is arguably worse.

235. Members of the Gypsy and Traveller communities are generally entitled to have the proportionality of measures affecting their Article 8 rights considered by an independent tribunal (see [15(10)-(11)] above). I do not consider that the availability of a permission to apply to challenge a final injunction order after it has been granted (particularly where the likelihood of it being exercised is illusory, for the reasons articulated by Mr Willers QC ([222] above)) is an adequate substitute for proper consideration of the proportionality of the order before it is granted. Whatever a court might exceptionally be prepared to grant, on an emergency basis by way of interim injunction, it could not countenance granting an injunction in such broad terms by way of final *contra mundum* order.

236. To illustrate this, I would return to the hypothetical example of the Traveller family pitching their caravan overnight at the Dagenham Road Car Park (see [45] above). If LB Barking & Dagenham applied for an injunction against the Traveller family to require them to vacate the site, the Court would be able to carry out a meaningful parallel analysis of engaged rights. It could assess the necessity for, and proportionality, of an injunction, for example, by considering the circumstances of the Traveller family, the evidence of availability of other sites where the caravan could be pitched, the impact of any injunction on the Article 8 rights of the Traveller family, any evidence that the family had previously caused damage or engaged in anti-social or other criminal behaviour, any evidence of adverse impact or harm that would be caused by the family staying overnight in the car park and any Article 8 rights of nearby residents. Perhaps most importantly, in the adversarial process, the Traveller family would have the opportunity to make submissions to the Court as to whether an order should be made and, if so, in what terms. The result of that analysis could well lead to the refusal of an injunction, or to the Traveller family being given a period of time before they were

required to move on. In reality, and consistent with the guidance issued to local authorities (see [16] and [221] above), a short-lived "encampment", that was not likely to cause damage or nuisance, would be unlikely to lead to an application for an injunction in the first place. However, if a *contra mundum* injunction had already been granted, the Traveller family would discover, on arrival at Dagenham Road Car Park, that the Court has already pre-judged their circumstances and granted an injunction (with a power of arrest attached) prohibiting them from pitching up even for a single night.

237. It cannot be argued by the local authorities that a *contra mundum* order is the only way in which they can tackle the problem of unauthorised encampments that cause the sort of damage and harm upon which Wolverhampton relied. As noted (see [221] above), local authorities already possess what have been described as "*extensive powers*" to tackle unauthorised encampments and the harm associated with them. In some of the evidence filed by the local authorities in the Cohort Claims, complaints are made that some of these remedies are not as effective (and/or are more expensive) than civil injunctions. This evidence falls a very long way short of demonstrating that *contra mundum* civil injunctions are the only way of preventing the harm caused by unauthorised encampments: ***LB Bromley*** [109]. For the reasons already mentioned, civil injunctions may have a role to play in tackling unauthorised encampments, but, as targeted measures, where justified by evidence, against actual wrongdoers (or those who present a real and imminent threat of wrongdoing), in proceedings in which those to be made subject to the Court's jurisdiction have an opportunity to be heard.

238. In my judgment, for the reasons I have given, Traveller Injunctions granted in the Cohort Claims do not fall into the exceptional category that permits the Court to grant a *contra mundum* injunction.

G: Issue 3 – Ascertaining the parties to the Final Order

(1) Submissions

239. In summary, the parties made the following submissions on this issue:

(1) Mr Bhose QC has not advanced any submissions on this issue as he represents local authorities that have only interim injunctions.

(2) Mr Giffin QC, for Walsall, has indicated that his local authority would be able to identify a limited number of people who have become defendants to the proceedings prior to the grant of the final order in its claim on 21 October 2016. Otherwise, he accepts that (if Issue 2 is decided as I have done) the injunction order should be discharged against "newcomers".

(3) Mr Anderson QC limited his submissions to Issue 2.

(4) Ms Bolton stated that the local authorities that she represents who were granted final orders (LB Barking & Dagenham (1st Claimant), LB Redbridge (11th Claimant), and Basingstoke & Deane BC and Hampshire CC (16th Claimants)) may be able to identify individuals who were parties to the proceedings before the date of the final order. Ms Bolton makes the fair point, which is borne out by the practice demonstrated in the claims brought by her

local authorities, that her clients did undertake significant work to identify as many defendants by name as they were able before the claim was issued: 64 named defendants in LB Barking & Dagenham's claim; 100 named defendants in LB Redbridge's claim; and 115 named defendants in Basingstoke & Deane BC and Hampshire CC's claim. The three local authorities had not ascertained, at the date of the hearing before me, whether they would be able to demonstrate that there were any further persons under the definition of "Persons Unknown" who had by the date of the relevant final order become defendants to the claim. Ms Bolton suggested that the three local authorities affected should be given time to consider their position on this issue.

(5) Mr Willers QC submitted for the Interveners that insofar as any final order made in the Cohort Claims binds or purports to bind newcomers then it should be discharged.

(6) Ms Wilkinson submitted that the Court of Appeal in ***Canada Goose*** had given guidance as to what steps should be taken following the grant of an interim injunction against "Persons Unknown" to identify the persons who are (or are to be made) parties to the action before the grant of any final order.

(2) Decision

240. In my judgment, Ms Wilkinson has correctly identified that the Court, in ***Canada Goose***, has not only established the principle that final injunctions bind only the parties to the proceedings, including in claims brought against "Persons Unknown" but also given guidance as to the steps to be taken between the grant of any interim injunction and the final resolution of the claim at trial or earlier determination. During that period, the claimant must take steps to identify each of the wrongdoers in the category of "Persons Unknown", either by name or other description that enables his/her identification: see ***Canada Goose*** [91]-[92]. These principles were followed by Warby J in ***Birmingham City Council -v- Afsar*** **[2020] EWHC 864 (QB)** [22].

241. It is a relatively straightforward exercise, now, to apply these principles to the Cohort Claims in which final orders have been granted against "Persons Unknown". The injunctions will be discharged against newcomers. I will give the affected local authorities a limited period to identify, if they can, any individuals whom they contend were parties to the proceedings under the relevant definition of "Persons Unknown" (if the definition of "Persons Unknown" complies with the Description Requirement) at the time that the final order was granted. In fairness to those people, and in order to achieve certainty, it seems to me that any such individuals that are bound by the final injunction by this route should, where practicable, be specifically advised of this fact. This will enable them to decide whether they wish to challenge the injunction order made against them.

H: Issue 4 – The 'conundrum' of interim relief

242. This issue arose in the context of the second claim brought by LB Enfield, which, before the claim was discontinued, was a point that had troubled me when LB Enfield had applied for interim relief against "fly-tippers" (see [2020] EWHC 2717 (QB) [41]-[44] quoted in [155] above).

243. The resolution of Issue 2 has led me to conclude that, on analysis, there is no 'conundrum'. The answer is contained in the Court of Appeal's decision in ***Canada Goose*** [92] and a proper application of the *Canada Goose* principle and the principles relating to orders for alternative service of the Claim Form. If these are followed, there is no real likelihood of any 'rolling programme' of applications for interim injunctions, for the reasons I have explained (see [186] above).

J: Consequences and Next steps

244. In respect of the remaining Cohort Claims, subject to further submissions at a hearing to be fixed, the following orders appear to be consequent on the judgment:

(1) subject to (2), injunction orders against "Persons Unknown" in the claims brought by (a) LB Barking & Dagenham; (b) LB Redbridge; (c) Basingstoke & Deane BC and Hampshire CC; (d) Walsall MBC; and (e) Wolverhampton CC will be discharged;

(2) I will grant (a) LB Barking & Dagenham; (b) LB Redbridge; (c) Basingstoke & Deane BC and Hampshire CC; and (d) Walsall MBC a short period in which to identify, if they can, any defendants in the category of "Persons Unknown" who can be demonstrated to have been a defendant to the proceedings prior to the grant of the final order in the relevant claim; and

(3) in the remaining Cohort Claims, where interim injunctions have been granted, the relevant local authority will have 7 days from the date of this judgment to consider whether they wish to proceed with or discontinue their claim against "Persons Unknown". If they opt to proceed, I will give directions that will lead to the prompt identification of the "Persons Unknown" defendants and bring these claims speedily to a final hearing. As I have noted (see [96]-[101] above), many of the Cohort Claims have not been prosecuted with due expedition towards a final hearing. As an interim injunction currently remains in force in these claims, there must be no further delay.

245. I am also minded to discharge any power of arrest that has been granted in the remaining interim injunctions against "Persons Unknown". The parties have not had an opportunity to make submissions on this point. They will be able to do so at the hearing which will be fixed to consider consequential orders.

246. As set out in more detail above, my overall consideration of the Cohort Claims has led me to conclude that there are grounds to suspect that, in a significant number of applications for interim injunctions, there were material and serious breaches of the procedural requirements and the procedures of the Court (and Court 37 in particular) have been abused. As I have already noted, a significant number of the Cohort Claims were allowed to go to sleep following the grant of an interim injunction, and no local authority, which had been granted a Traveller Injunction, returned the claims to Court for reconsideration following the decisions of ***LB Bromley*** and ***Canada Goose***. This judgment is not the place to go into these matters further, but I will ensure, so far as possible, that they will be properly investigated.

247. Looking to the future, the experience in the Cohort Claims demonstrates that the Court needs to adopt measures to ensure that "Persons Unknown" injunctions (and powers of

arrest) are only granted in appropriate cases and are subject to proper safeguards. In her written submissions, Ms Wilkinson submitted that the Court could adopt procedures, similar to those that have been adopted in cases where non-disclosure injunctions have been sought (see [88]-[94] above), to ensure that cases are properly case managed, not allowed to become dormant and that active steps are taken by the claimant to name (or at least to identify) the defendants who are within the category of "Persons Unknown" and against whom a final remedy is sought.

248. Based on the procedure that is now established for claims for interim non-disclosure orders, and reflecting the existing authorities, I consider that claims against "Persons Unknown" should be subject to the following safeguards:

(1) The "Persons Unknown" must be described in the Claim Form (or other originating process) (a) with sufficient certainty to identify those who are defendants to the claim and those who are not; and (b) by reference to conduct which is alleged to be unlawful: see [49] above.

(2) Where they apply, the Claim Form must comply with the requirements of CPR 8.2A(1) and Practice Direction 8A.

(3) The "Persons Unknown" defendants identified in the Claim Form are, by definition, people who have not been identified at the time of commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. "Persons Unknown", against whom relief is sought, must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary, by alternative service of the Claim Form: *Canada Goose* principle (1).

(4) Any application for permission to serve the Claim Form on "Persons Unknown" must comply with CPR 6.15(3) and the claimant must demonstrate, by evidence, that the proposed method of alternative service is such as can reasonably be expected to bring the proceedings to the attention to all of those in the category of "Persons Unknown" sought to be made defendants to the proceedings: *Cameron* principle (4); and any order under CPR 6.15 must comply with CPR 6.15(4).

(5) Applications for interim injunctions against "Persons Unknown" must comply with the requirements of Practice Direction 25A (see [83] above) and, unless justified by urgency, must be fixed for hearing and a skeleton argument provided.

(6) At the hearing of an application for an interim injunction against "Persons Unknown" the applicant should be expected to explain why it has not been possible to name individual defendants to the claim in the Claim Form and why proceedings need to be pursued against "Persons Unknown".

(7) An interim injunction will only be granted *quia timet* if the applicant demonstrates, by evidence, that there is a sufficiently real and imminent risk of a tort being committed by the respondents: *Canada Goose* principle (3).

(8) If an interim injunction is granted:

a) the claimant should provide an undertaking to the Court to use its best endeavours to identify the "Persons Unknown" whether by name or other identifying information (e.g. photograph) and serve them personally with the Claim Form;

b) the terms of the injunction must comply with *Canada Goose* principles (5) to (7);

c) the Court must be satisfied that the inclusion of any power of arrest is justified by evidence demonstrating that the relevant statutory test is met; and

d) the Court in its order should fix a date on which the Court will consider the claim and injunction application further ("the Further Hearing"). What period is allowed before the Further Hearing is fixed will depend on the particular circumstances, but I would suggest it should not be more than 1 month from the date of the interim order, and in many cases a shorter period would be appropriate.

(9) At the Further Hearing, the claimant should provide evidence of the efforts to identify the "Persons Unknown" and make any application to amend the Claim Form to add named defendants. The Court should give directions requiring the claimant, with a defined period:

a) if the "Persons Unknown" have not been identified sufficiently that they fall with Category 1 "Persons Unknown", to apply to discharge the interim injunction against "Persons Unknown" and discontinue the claim under CPR 38.2(2)(a);

b) otherwise, as against the Category 1 "Persons Unknown" defendants to apply for (i) default judgment; or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim,

and, in default of compliance, that the claim be struck out and the interim injunction against "Persons Unknown" discharged.

(10) Assuming that the claimant has demonstrated an entitlement to relief against a party to the claim, in respect of any final order that is granted against "Persons Unknown" (whether by default judgment, summary judgment or after a final hearing), unless falling in the exceptional category where a *contra mundum* order is justified, the order:

a) can only be made against parties to the proceedings: those named defendants, or those who fall into Category 1 of "Persons Unknown", who have been served with the Claim Form;

b) must clearly identify by description the Category 1 "Persons Unknown" defendants that are bound by the order; and

c) must not be drafted in terms that would capture newcomers, i.e. persons who are not parties when the order is granted: ***Canada Goose*** [91]-[92].

Appendix 1: List of Actions

	Claimant(s) & Claim No. and Current Status	Defendants (as described in Claim Form)	Key History of the Claim:
1.	**LB Barking and Dagenham** QB-2017-006899 (HQ17X00849) **Current status:** Final injunction in force against Persons Unknown until further order	(1) Tommy Stokes (2)-(64) other named Defendants (65) Persons Unknown being members of the traveller community who have unlawfully encamped within the borough of Barking and Dagenham	Claim Form issued on 10 March 2017. Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 10 March 2017. Interim injunction granted on 29 March 2017 Final injunction granted on 30 October 2017 "until further order" against 23 named defendants and "Persons Unknown". The final injunction contains a permission to apply to the Defendants or "anyone notified of this Order" to vary or discharge on 72 hours' written notice.
2.	**LB Bromley** QB-2018-003485 (HQ18X02920) **Current status**: Claim dismissed and injunction(s) discharged.	Persons Unknown	Interim injunction (without notice) granted on 15 August 2018 against "Persons Unknown Occupying Land and/or Depositing Waste". Claim Form issued on 15 August 2018 not served during its period of validity. No order for alternative service of Claim Form. Final injunction granted on 24 May 2019 against "Persons Unknown Depositing Waste or Fly-Tipping" until 15 May 2022. 21 January 2020: Court of Appeal dismisses Claimant's appeal against Order of 24 May 2019 ([2020] PTSR 1043) On application by the Claimant, injunction discharged and action dismissed on 9 November 2020.
3.	**LB Croydon** QB-2018-003395 (HQ18X03041) **Current status:** Claim dismissed and injunction(s) discharged.	Persons Unknown	Interim injunction (without notice) granted on 18 July 2018 against "Persons Unknown Occupying Land and/or Depositing Waste" with power of arrest. Claim Form issued on 24 August 2018 not served during its period of validity. No order for alternative service of Claim Form. Final injunction granted on 17 October 2018 until 16 October 2021 On application by the Claimant, injunction discharged and action dismissed on 10 November 2020.

4.	**LB Ealing** QB-2019-001696 **Current status:** Interim injunction in force against Persons Unknown.	(1) Persons Unknown occupying land (2) Persons Unknown depositing waste or fly-tipping	Interim injunction (without notice) granted on 10 May 2019 with power of arrest. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued 10 May 2019. 15 July 2019: Claim adjourned pending decision of the Court of Appeal in LB Bromley case.
5.	**RB Greenwich** QB-2018-003037 (HQ18X04086) **Current status:** Claim dismissed and injunction(s) discharged.	Persons Unknown	Interim injunction (without notice) granted on 19 December 2017. Claim Form issued on 19 December 2017 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 19 March 2018 until 18 March 2021. On application by the Claimant, injunction discharged and action dismissed on 13 November 2020.
6.	**LB Havering** QB-2019-002737 **Current status:** Interim injunction in force against Persons Unknown	(1) William Stokes (2)-(105) other named Defendants (106) Persons Unknown	Claim form issued on 31 July 2019. Order for alternative service by affixing copy of the Claim Form at each site, dated 31 July 2019. Interim injunction granted on 11 September 2019 "pending the final injunction hearing" with power of arrest.
7.	**LB Hillingdon** QB-2019-001138 **Current status:** Interim injunction in force against Persons Unknown	(1) Persons Unknown occupying land (2) Persons Unknown depositing waste or fly-tipping on land	Interim injunction (without notice) granted on 29 March 2019. Power of arrest refused by Stewart J. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 29 March 2019.

			Order of 17 June 2019 adjourned the final hearing of the claim until the decision of the Court of Appeal in LB Bromley.
8.	**LB Hounslow** QB-2019-002113 **Current status:** Interim injunction in force against Persons Unknown	(1) Persons Unknown occupying land (2) Persons Unknown depositing waste or fly-tipping on land	Interim injunction (without notice) granted on 12 June 2019 with power of arrest. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 12 June 2019 Order of 3 October 2019 adjourned the final hearing of the claim until the decision of the Court of Appeal in LB Bromley.
9.	**RB Kingston-upon-Thames** QB-2019-000150 **Current status:** Claim dismissed and injunction(s) discharged.	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste or flytipping on land	Interim injunction (without notice) granted on 15 January 2019 with power of arrest. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 15 Jan 2019. Final injunction granted on 15 April 2019 until 14 April 2022. On application by the Claimant, injunction discharged and action dismissed on 10 November 2020.
10.	**LB Merton** QB-2018-000452 **Current status:** Claim dismissed and injunction(s) discharged.	(1) Persons Unknown occupying land (2) Persons Unknown depositing waste on land	Interim injunction (without notice) granted on 12 December 2018 with power of arrest. Claim Form issued on 12 December 2018 not served during its period of validity. No order for alternative service of Claim Form. Final injunction granted on 13 March 2019 until 13 March 2022.

			On application by the Claimant, injunction discharged and action dismissed on 10 November 2020.
11.	**LB Redbridge** QB-2018-003983 (HQ18X01522) **Current status:** Final injunction in force against Persons Unknown until 21 November 2021	(1) Martin Stokes (2)-(100) other named Defendants (101) Persons Unknown forming or intending to form unauthorised encampments in the London Borough of Redbridge	Claim Form issued on 26 April 2018. Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 26 April 2018. Interim injunction granted against 70 named Defendants and Persons Unknown on 4 June 2018 with power of arrest. Final injunction granted on 12 November 2018 until 21 November 2021 against 69 named Defendants and Persons Unknown. The final injunction contains a permission to apply to the Defendants "and anyone notified of this Order" to vary or discharge on 72 hours' written notice.
12.	**LB Richmond-upon-Thames** QB-2019-000777 **Current status:** Interim injunction in force against Persons Unknown	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste or flytipping on land	Interim injunction (without notice) granted on 6 March 2019. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 6 March 2019. Order of 10 May 2019 adjourned the final hearing of the claim until the decision of the Court of Appeal in LB Bromley.
13.	**LB Sutton** QB-2018-003487 (HQ18X02913) **Current status:** Claim dismissed and injunction(s) discharged.	Persons Unknown occupying land and/or depositing waste on land	Interim injunction (without notice) granted on 14 August 2018 and continued on 24 August 2018. Both contain powers of arrest. Claim Form issued on 14 August 2018 not served during its period of validity. No order for alternative service of Claim Form. Final injunction granted on 7 November 2018 until 7 November 2021 with power of arrest. On application by the Claimant, injunction discharged and action dismissed on 10 November 2020.

14.	**LB Waltham Forest** QB-2017-005691 (HQ17X03769) **Current status:** Claim dismissed and injunction(s) discharged.	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste or flytipping on the land	Interim injunction (without notice) granted on 16 October 2017. Claim Form issued on 16 October 2017 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 23 February 2018 against "Persons Unknown Occupying the Land (as defined in the Order)" until 12 January 2021. On application by the Claimant, injunction discharged and action dismissed on 11 November 2020.
15.	**LB Wandsworth** QB-2019-000778 **Current status:** Interim injunction discharged and claim struck out.	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste or flytipping on the land	Interim injunction (without notice) granted on 6 March 2019. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 6 March 2019. Order of 2 June 2020 discharged the interim injunction order and adjourned the claim generally with permission to restore. If no request to restore the claim was made by 25 November 2020, the Claim to be stuck out. No request to restore was received and so claim struck out.
16.	**(1) Basingstoke and Deane Borough Council** **(2) Hampshire County Council** QB-2018-003748 (HQ18X02304) **Current status:** Final injunction in force against Persons Unknown until 3 April 2024 or further order	(1) Henry Loveridge (2)-(115) other named Defendants (116) Persons Unknown (owner and/or occupiers of land at various addresses set out in the attached Schedule)	Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 28 June 2018. Claim Form issued 2 July 2018. Interim injunction granted on 30 July 2018 with power of arrest. Final injunction granted on 26 April 2019 "until 3 April 2024 or further order" against 115 named defendants and "Persons Unknown" with power of arrest. The final injunction contains a permission to apply to the Defendants or "anyone notified of this Order" to vary or discharge on 72 hours' written notice.

17.	**(1) Basildon Borough Council** **(2) Essex County Council** QB-2017-005724 (HQ17X03732) **Current status:** Interim injunction discharged and claim discontinued.	(1) Dennis Ainey (2)-(45) other named Defendants (46) Persons Unknown	Order for alternative service on persons unknown by affixing copy of the Claim Form at each site, 9 October 2017. Claim Form issued 12 October 2017. Interim injunction granted on 6 November 2017. On application by the Claimant, interim injunction discharged on 18 November 2020 and Claimant given permission to discontinue claim. Claim discontinued on 4 December 2020.
18.	**Birmingham City Council** QB-2020-003833 (formerly Birmingham District Registry D90BM148-149) **Current status:** Final injunction discharged.	Persons Unknown	Claim Form issued on 5 July 2017. Final injunction (without notice) granted on 5 July 2017 with power of arrest. Order extended time for service of the Claim Form to 14 July 2019. Order dated 27 September 2017 varying the final injunction. Order dated 3 July 2019 extending and varying the final injunction and extending the period to serve the Claim Form to 1 July 2021. On application by the Claimant, the final injunction discharged on 1 December 2020.
19.	**(1) Boston Borough Council** **(2) Lincolnshire County Council** QB-2020-003835 (formerly Birmingham District Registry E90BM073) **Current status:** Interim injunction discharged and claim dismissed.	Persons Unknown	Interim injunction (without notice) granted on 3 April 2019. The order contains purported order for alternative service of the Claim Form by affixing Claim Form at each site, but no Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). The claim was "adjourned generally with liberty to restore". Claim Form issued on 3 April 2019. On application by the claimants, the interim injunction discharged and claim dismissed on 13 November 2020.
20.	**Canterbury City Council** QB-2019-001304 **Current status:** Final injunction discharged and claim dismissed.	Persons Unknown	Interim injunction (without notice) granted on 10 April 2019 against "Persons Unknown occupying land". Claim Form issued on 10 April 2019 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 3 June 2019 against "Persons Unknown Occupying

			the sites listed in this Order" until 3 June 2020. Application by the Claimant to extend the final injunction withdrawn on 28 October 2020. Interim and final injunction orders discharged and claim dismissed on 30 October 2020: [2020] EWHC 3153 (QB)
21.	**Central Bedfordshire** QB-2020-003858 (formerly Bedford District Registry E01LU344) **Current status:** Final injunction lapsed on 5 October 2020 and no application made to extend or renew.	(1) Levi Parker (2)-(22) other named Defendants (23) Persons Unknown entering or remaining without planning consent on those parcels of land coloured in Schedule 2 of the draft order.	Unclear when the Claim Form was issued, but not served during its period of validity. No order for alternative service of the Claim Form. Final Injunction (without notice) granted against Persons Unknown with power of arrest from 5 October 2018 until 5 October 2020.
22.	**Elmbridge Borough Council** QB-2018-003423 (HQ18X02948) **Current status:** Final injunction discharged and claim dismissed.	Persons Unknown occupying land and/or depositing waste on land	Interim injunction (without notice) granted on 16 August 2018 with power of arrest. Claim Form issued on 16 August 2018 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 8 November 2018 until 8 November 2021 with power of arrest. On application by the claimant, final injunction discharged and claim dismissed on 11 November 2020.
23.	**Epsom and Ewell Borough Council** QB-2018-000383 **Current status:** Final injunction discharged and claim dismissed.	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste on land	Interim injunction (without notice) granted on 7 December 2018 with power of arrest. Claim Form issued on 7 December 2018 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 20 May 2019 against "(1) Persons Unknown occupying the land as part of an encampment of ten (10) vehicles or more (2) Persons Unknown depositing waste and fly-tipping on the land (as defined in the Order" until 15 May 2022 with power of arrest. On application by the claimant, final injunction discharged and claim dismissed on 10 November 2020.

24.	**(1) Harlow District Council** **(2) Essex County Council** QB-2015-002380 (HQ15X00825) **Current status:** Injunction lapsed on 14 June 2020 and application to extend final injunction withdrawn on 10 July 2020.	(1) Michael Stokes (2)-(53) other named Defendants (54) Persons Unknown	Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 20 February 2015. Interim injunction granted on 3 March 2015. Final injunction granted on 16 December 2015 against 35 named defendants and Persons Unknown until 15 June 2017. Order of 14 June 2017 extending the final injunction until 14 June 2020. Application by the Claimant, issued on 8 June 2020 to extend further the final injunction, withdrawn on 10 July 2020 at a hearing before Tipples J.
25.	**Hertsmere Borough Council** QB-2018-000333 **Current status:** Final injunction discharged and claim dismissed.	Persons Unknown occupying land and/or depositing waste on land	Interim injunction (without notice) granted on 5 December 2018 with power of arrest. Claim Form issued on 5 December 2018 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 17 January 2019 against (1) Persons Unknown occupying land (2) Persons Unknown depositing waste on land until 17 January 2022 with power of arrest. On application by the claimant, final injunction discharged and claim dismissed on 13 November 2020.
26.	**(1) Nuneaton and Bedworth Borough Council** **(2) Warwickshire County Council** QB-2019-000616 **Current status:** Interim injunction in force against Persons Unknown	(1) Thomas Corcoran (2)-(53) other named Defendants (54) Persons Unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth	Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 22 February 2019. Claim Form issued 22 February 2019. Interim injunction granted on 19 March 2019 with power of arrest. No steps taken by the Claimant to bring the claim to a final hearing.
27.	**Reigate and Banstead Borough Council** QB-2019-002297 **Current status:** Interim injunction in force against Persons Unknown	(1) Persons Unknown possessing or occupying land (2) Persons Unknown depositing waste or fly-tipping on land	Interim injunction (without notice) granted on 25 June 2019 with power of arrest. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking

			order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued on 25 June 2019. Order of 25 November 2019 adjourned the final hearing of the claim until the decision of the Court of Appeal in LB Bromley.
28.	**Rochdale Metropolitan Borough Council** QB-2017-005202 (HQ17X04668) **Current status:** Interim injunction in force against Persons Unknown	(1) Shane Heron (2)-(89) other named Defendants (90) Persons Unknown (being members of the travelling community who have unlawfully encamped within the borough of Rochdale)	Claim form issued 21 December 2017. Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 22 December 2017. Interim injunction granted on 9 February 2018 with power of arrest. No steps taken by the Claimant to bring the claim to a final hearing.
29.	**Rugby Borough Council** QB-2020-003852 (formerly Nuneaton County Court E00NU379) **Current status:** Final injunction discharged and claim dismissed.	(1) McDonough (surname only) (2)-(6) other Defendants identified by surname only (7) Persons Unknown	Claim Form issued 22 August 2018 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction (without notice) granted on 31 August 2018 against Persons Unknown "until further order" with power of arrest. Application to renew power of arrest refused on 4 June 2020. As a result of the Claimant's failure to comply with an unless Order dated 4 November 2020, the injunction order against Persons Unknown was discharged on 13 November 2020. On application by the Claimant, injunction order against the First to Sixth Defendants discharged and claim dismissed on 20 November 2020.
30.	**Runnymede Borough Council** QB-2017-006165 (HQ17X02485) **Current status:** Final injunction against Persons Unknown discharged.	(1) Callum Wooding (2)-(23) other named Defendants (24) Persons Unknown (Occupiers of land at Thorpe Green Open Space, Egham, Surrey, TW20 8QL and other areas of land within Runnymede Borough Council)	Interim injunction (without notice) granted on 14 July 2019 against "Persons Unknown (occupiers of land at Thorpe Green open space, Egham, Surrey TW20 8QL and other areas of land within Runnymede Borough Council as identified in the Schedules to this Order and shown on the plan attached to this Order)". The order contains purported order for alternative service of the Claim Form by affixing Claim Form at each site, but no Application Notice was issued seeking order for alternative service of Claim

			Form and the order does not comply with CPR 6.15(4). Claim Form issued 14 July 2017. Final injunction granted on 22 September 2017 against "Persons Unknown (Occupiers of Land as defined within this Order as identified in the Schedules to this order and shown on the plan attached to this Order)". Order contains no end date, but provides permission to apply to vary/discharge. On application by the claimant, final injunction against Persons Unknown discharged on 9 December 2020.
31.	**Sandwell Metropolitan Borough Council** QB-2020-003841 (formerly Birmingham District Registry D90BM116) **Current status:** Injunction against Persons Unknown discharged.	(1) John Cassidy (2)-(14) other named Defendants (15) Persons Unknown	Claim Form issued 26 May 2017. Order for alternative service dated 26 May 2017 deeming service of the Claim Form on "Persons Unknown" after it has been served on the First Defendant. Injunction (without notice) granted against Persons Unknown on 6 June 2017 until 6 June 2018 (unclear whether interim or final). Further injunction granted on 5 June 2018 against Persons Unknown until 6 June 2023 with power of arrest. On application by the claimant, injunction against Persons Unknown discharged on 27 November 2020.
32.	**Solihull Metropolitan Borough Council** QB-2020-003848 (formerly Birmingham District Registry E90BM026) **Current status:** Injunction against Persons Unknown discharged.	(1) John Cassidy (2)-(14) other named Defendants (15) Persons Unknown	Claim Form issued 5 February 2018. No order for alternative service of the Claim Form upon Persons Unknown. Injunction (without notice) granted against Persons Unknown on 13 March 2018 until 13 March 2021 (unclear whether interim or final). As a result of the Claimant's failure to comply with an unless Order dated 6 November 2020, the injunction order against Persons Unknown was discharged on 20 November 2020.
33.	**Test Valley Borough Council** QB-2020-002112 **Current status:** Interim injunction in force against Persons Unknown	(1) Albert Bowers (2)-(89) other named Defendants (90) Persons Unknown forming unauthorised encampments within the borough of Test Valley	Claim Form issued 18 June 2020. Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 18 June 2020. Interim injunction granted on 28 July 2020 with power of arrest.
34.	**Thurrock Council**	(1) Martin Stokes	Claim Form issued 31 July 2019

	QB-2019-002738 **Current status:** Interim injunction in force against Persons Unknown	(2)-(107) other named Defendants (108) Persons Unknown	Order for alternative service on persons unknown, by affixing copy of the Claim Form at each site, dated 31 July 2019. Interim injunction granted on 3 September 2019 with power of arrest. No steps taken by the Claimant to bring the claim to a final hearing.
35.	**Walsall Metropolitan Borough Council** QB-2020-003850 (formerly Walsall County Court C00WJ967) **Current status:** Final injunction in force against Persons Unknown	(1) Brenda Bridges (2)-(18) other named Defendants (19) Persons Unknown	No separate Claim Form issued. The Claimant states that the claim was brought using the modified Part 8 procedure provided by CPR Part 65.43 for applications for injunctions under Anti-Social Behaviour, Crime and Policing Act 2014 (see judgment [65]-[66]). Interim injunction (without notice) granted on 23 September 2016. The order of 23 September 2016 includes: "service of the proceedings may be effected by displaying the notice of application together with the written evidence on the land edged red on the map annexed to this order". If this is an order for alternative service, then it does not comply with CPR 6.15(4). Final injunction granted on 21 October 2016 until "further order of the Court."
36.	**Wolverhampton City Council** QB-2020-003838 (formerly Birmingham District Registry E90BM139) **Current status:** Contra mundum injunction in force prohibiting encampments within the boundaries of 59 sites	Persons Unknown	Claim Form issued 29 June 2018. Order for alternative service on persons unknown, by various methods and affixing a notice of hearing of the Claimant's Application for an injunction and directions how to inspect documents. Injunction granted on 2 October 2018 ([2018] EWHC 3777 (QB)). The injunction is contra mundum, but in places refers to "the Defendants". It contains a power of arrest. The judgment considers the principles governing injunctions against "persons unknown" (see [2]) but does not address whether the Court has the jurisdiction to grant a contra mundum order. The order provided for a review hearing to take place on the first available date after 1 October 2019. Further injunction order granted on 5 December 2019, again contra mundum and with power of arrest. The order provided for a further review hearing to take place on 20 July 2020.

			Hearing on 20 July 2020 which led to an order of 29 July 2020 continuing the injunction ([2020] EWHC 2280 (QB)).
37.	**Buckinghamshire Council (formerly) Wycombe District Council** QB-2019-002783 **Current status:** Interim injunction discharged and claim dismissed.	(1) Persons Unknown occupying land (2) Persons Unknown depositing waste or fly-tipping on land	Interim injunction (without notice) granted on 2 August 2019 with power of arrest. The order contains purported order for alternative service of the Claim Form by affixing at each site a copy of the injunction Order and a notice that the Part 8 Claim Form could be obtained from the Claimant's offices. No Application Notice was issued seeking order for alternative service of Claim Form and the order does not comply with CPR 6.15(4). Claim Form issued 2 August 2019. Order of 10 December 2019 adjourning the final hearing of the claim until the determination of the appeal in LB Bromley. On application by the Claimant, interim injunction discharged and claim dismissed on 12 November 2020.
38.	**LB Enfield** QB-2017-006080 (HQ17X02619) (1st Claim) QB-2020-003471 (2nd Claim) **Current status:** No injunction in force against persons unknown. 2nd Claim discontinued on 11 January 2021.	1st Claim: Persons Unknown 2nd Claim: (1) Persons Unknown who enter and/or occupy any of the locations listed in this order ("the locations") for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphanelia (sic) (2) Persons Unknown who enter and/or occupy any of the locations listed in this order ("the locations") for the purposes of fly-tipping or discarding waste including entering with caravans, mobile homes, pick-up trucks, vans or lorries and any associated vehicles	1st Claim: Interim injunction (without notice) granted on 21 July 2017. Claim Form issued on 21 July 2017 not served during its period of validity. No order for alternative service of the Claim Form. Final injunction granted on 4 October 2017 until 3 October 2020. Application by the Claimant to extend final injunction and to amend the Claim Form withdrawn on 28 September 2020. Application by the Claimant for an order for alternative service of the Claim for under CPR 6.15(2) (validation of steps already taken) refused on 2 October 2020: [2020] EWHC 2717 (QB). 2nd Claim: Claim Form issued 5 October 2020. Interim injunction application against second Defendant refused on 2 October 2020. Hearing of Part 8 Claim fixed for 27-28 January 2021. Notice of Discontinuance filed on 11 January 2021.

Appendix 2: Statutory provisions (in chronological order)

Local Government Act 1972:

222. Power of local authorities to prosecute or defend legal proceedings.

(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.

Highways Act 1980:

130. Protection of public rights

(1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.

(2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.

(3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—

(a) the highways for which they are the highway authority, and

(b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.

(4) Without prejudice to the foregoing provisions of this section, it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste comprised in a highway for which they are the highway authority.

(5) Without prejudice to their powers under section 222 of the Local Government Act 1972, a council may, in the performance of their functions under the foregoing provisions of this section, institute legal proceedings in their own name, defend any legal proceedings and generally take such steps as they deem expedient.

(6) If the council of a parish or community or, in the case of a parish or community which does not have a separate parish or community council, the parish meeting or a community meeting, represent to a local highway authority—

(a) that a highway as to which the local highway authority have the duty imposed by subsection (3) above has been unlawfully stopped up or obstructed, or

(b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority, it is the duty of the local highway authority, unless satisfied that the representations are incorrect, to take proper proceedings accordingly and they may do so in their own name.

(7) Proceedings or steps taken by a council in relation to an alleged right of way are not to be treated as unauthorised by reason only that the alleged right is found not to exist.

...

137. Penalty for wilful obstruction.

(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 a fine not exceeding level 3 on the standard scale.

137ZA. Power to order offender to remove obstruction.

(1) Where a person is convicted of an offence under section 137 above in respect of the obstruction of a highway and it appears to the court that—

(a) the obstruction is continuing, and

(b) it is in that person's power to remove the cause of the obstruction,

the court may, in addition to or instead of imposing any punishment, order him to take, within such reasonable period as may be fixed by the order, such steps as may be specified in the order for removing the cause of the obstruction.

(2) The time fixed by an order under subsection (1) above may be extended or further extended by order of the court on an application made before the end of the time as originally fixed or as extended under this subsection, as the case may be.

(3) If a person fails without reasonable excuse to comply with an order under subsection (1) above, he is guilty of an offence and liable to a fine not exceeding level 5 on the standard scale; and if the offence is continued after conviction he is guilty of a further offence and liable to a fine not exceeding one-twentieth of the greater of £5,000 or level 4 on the standard scale for each day on which the offence is so continued.

(4) Where, after a person is convicted of an offence under subsection (3) above, the highway authority for the highway concerned exercise any power to remove the cause of the obstruction, they may recover from that person the amount of any expenses reasonably incurred by them in, or in connection with, doing so.

(5) A person against whom an order is made under subsection (1) above is not liable under section 137 above in respect of the obstruction concerned—

(a) during the period fixed under that subsection or any extension under subsection (2) above, or

(b) during any period fixed under section 311(1) below by a court before whom he is convicted of an offence under subsection (3) above in respect of the order.

...

149. Removal of things so deposited on highways as to be a nuisance etc.

(1) If any thing is so deposited on a highway as to constitute a nuisance, the highway authority for the highway may by notice require the person who deposited it there to remove it forthwith and if he fails to comply with the notice the authority may make a complaint to a magistrates' court for a removal and disposal order under this section.

(2) If the highway authority for any highway have reasonable grounds for considering—

(a) that any thing unlawfully deposited on the highway constitutes a danger (including a danger caused by obstructing the view) to users of the highway, and

(b) that the thing in question ought to be removed without the delay involved in giving notice or obtaining a removal and disposal order from a magistrates' court under this section,

the authority may remove the thing forthwith.

(3) The highway authority by whom a thing is removed in pursuance of subsection (2) above may either—

(a) recover from the person by whom it was deposited on the highway, or from any person claiming to be entitled to it, any expenses reasonably incurred by the authority in removing it, or

(b) make a complaint to a magistrates' court for a disposal order under this section.

(4) A magistrates' court may, on a complaint made under this section, make an order authorising the complainant authority—

(a) either to remove the thing in question and dispose of it or, as the case may be, to dispose of the thing in question, and

(b) after payment out of any proceeds arising from the disposal of the expenses incurred in the removal and disposal, to apply the balance, if any, of the proceeds to the maintenance of highways maintainable at the public expense by them.

(5) If the thing in question is not of sufficient value to defray the expenses of removing it, the complainant authority may recover from the person who deposited it on the highway the expenses, or the balance of the expenses, reasonably incurred by them in removing it.

(6) A magistrates' court composed of a single justice may hear a complaint under this section.

Town & Country Planning Act 1990:

187B. Injunctions restraining breaches of planning control

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

(2) On an application under subsection (1), the court may grant such 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.

Criminal Justice and Public Order Act 1994

61. Power to remove trespassers on land.

(1) If the senior police officer present at the scene reasonably believes that two or more persons are trespassing on land and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and—

(a) that any of those persons has caused damage to the land or to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his, or

(b) that those persons have between them six or more vehicles on the land,

he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land.

(2) Where the persons in question are reasonably believed by the senior police officer to be persons who were not originally trespassers but have become trespassers on the land, the officer must reasonably believe that the other conditions specified in subsection (1) are satisfied after those persons became trespassers before he can exercise the power conferred by that subsection.

(3) A direction under subsection (1) above, if not communicated to the persons referred to in subsection (1) by the police officer giving the direction, may be communicated to them by any constable at the scene.

(4) If a person knowing that a direction under subsection (1) above has been given which applies to him—

(a) fails to leave the land as soon as reasonably practicable, or

(b) having left again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

...

(6) In proceedings for an offence under this section it is a defence for the accused to show—

(a) that he was not trespassing on the land, or

(b) that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser.

(7) In its application in England and Wales to common land this section has effect as if in the preceding subsections of it—

(a) references to trespassing or trespassers were references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights; and

(b) references to "the occupier" included the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner.

(8) Subsection (7) above does not—

(a) require action by more than one occupier; or

(b) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier.

(9) In this section—

"common land" means—

(a) land registered as common land in a register of common land kept under Part 1 of the Commons Act 2006; and

(b) land to which Part 1 of that Act does not apply and which is subject to rights of common as defined in that Act;

"commoner" means a person with rights of common as defined in section 22 of the Commons Registration Act 1965;

"land" does not include—

(a) buildings other than—

(i) agricultural buildings within the meaning of, in England and Wales, paragraphs 3 to 8 of Schedule 5 to the Local Government Finance Act 1988... or

(ii) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

(b) land forming part of—

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

"the local authority", in relation to common land, means any local authority which has powers in relation to the land under section 9 of the Commons Registration Act 1965;

"occupier" (and in subsection (8) "the other occupier") means—

(a) in England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him…

"property", in relation to damage to property on land, means—

(a) in England and Wales, property within the meaning of section 10(1) of the Criminal Damage Act 1971…

and "damage" includes the deposit of any substance capable of polluting the land;

"trespass" means, in the application of this section—

(a) in England and Wales, subject to the extensions effected by subsection (7) above, trespass as against the occupier of the land…

"trespassing" and "trespasser" shall be construed accordingly;

"vehicle" includes—

(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and

(b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960;

and a person may be regarded for the purposes of this section as having a purpose of residing in a place notwithstanding that he has a home elsewhere.

77. Power of local authority to direct unauthorised campers to leave land

(1) If it appears to a local authority that persons are for the time being residing in a vehicle or vehicles within that authority's area -

(a) on any land forming part of a highway;

(b) on any other unoccupied land; or

(c) on any occupied land without the consent of the occupier,

the authority may give a direction that those persons and any others with them are to leave the land and remove the vehicle or vehicles and any other property they have with them on the land.

(2) Notice of a direction under subsection (1) must be served on the persons to whom the direction applies, but it shall be sufficient for this purpose for the direction to specify the land and (except where the direction applies to only one person) to be addressed to all occupants of the vehicles on the land, without naming them.

(3) If a person knowing that a direction under subsection (1) above has been given which applies to him -

(a) fails, as soon as practicable, to leave the land or remove from the land any vehicle or other property which is the subject of the direction, or

(b) having removed any such vehicle or property again enters the land with a vehicle within the period of three months beginning with the day on which the direction was given,

he commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) A direction under subsection (1) operates to require persons who re-enter the land within the said period with vehicles or other property to leave and remove the vehicles or other property as it operates in relation to the persons and vehicles or other property on the land when the direction was given.

78. Orders for removal of persons and their vehicles unlawfully on land

(1) A magistrates' court may, on a complaint made by a local authority, if satisfied that persons and vehicles in which they are residing are present on land within that authority's area in contravention of a direction given under section 77, make an order requiring the removal of any vehicle or other property which is so present on the land and any person residing in it.

(2) An order under this section may authorise the local authority to take such steps as are reasonably necessary to ensure that the order is complied with and, in particular, may authorise the authority, by its officers and servants—

(a) to enter upon the land specified in the order; and

(b) to take, in relation to any vehicle or property to be removed in pursuance of the order, such steps for securing entry and rendering it suitable for removal as may be so specified.

(3) The local authority shall not enter upon any occupied land unless they have given to the owner and occupier at least 24 hours notice of their intention to do so, or unless after reasonable inquiries they are unable to ascertain their names and addresses.

(4) A person who wilfully obstructs any person in the exercise of any power conferred on him by an order under this section commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) Where a complaint is made under this section, a summons issued by the court requiring the person or persons to whom it is directed to appear before the court to answer to the complaint may be directed—

(a) to the occupant of a particular vehicle on the land in question; or

(b) to all occupants of vehicles on the land in question, without naming him or them.

(6) Section 55(2) of the Magistrates' Courts Act 1980 (warrant for arrest of defendant failing to appear) does not apply to proceedings on a complaint made under this section.

(7) Section 77(6) of this Act applies also for the interpretation of this section.

79. Provisions as to directions under s.77 and orders under s.78.

(1) The following provisions apply in relation to the service of notice of a direction under section 77 and of a summons under section 78, referred to in those provisions as a "relevant document".

(2) Where it is impracticable to serve a relevant document on a person named in it, the document shall be treated as duly served on him if a copy of it is fixed in a prominent place to the vehicle concerned; and where a relevant document is directed to the unnamed occupants of vehicles, it shall be treated as duly served on those occupants if a copy of it is fixed in a prominent place to every vehicle on the land in question at the time when service is thus effected.

(3) A local authority shall take such steps as may be reasonably practicable to secure that a copy of any relevant document is displayed on the land in question (otherwise than by being fixed to a vehicle) in a manner designed to ensure that it is likely to be seen by any person camping on the land.

(4) Notice of any relevant document shall be given by the local authority to the owner of the land in question and to any occupier of that land unless, after reasonable inquiries, the authority is unable to ascertain the name and address of the owner or occupier; and the owner of any such land and any occupier of such land shall be entitled to appear and to be heard in the proceedings.

(5) Section 77(6) applies also for the interpretation of this section.

Police and Justice Act 2006:

27.Injunctions in local authority proceedings: power of arrest and remand

(1) This section applies to proceedings in which a local authority is a party by virtue of section 222 of the Local Government Act 1972 (c. 70) (power of local authority to bring, defend or appear in proceedings for the promotion or protection of the interests of inhabitants of their area).

(2) If the court grants an injunction which prohibits conduct which is capable of causing nuisance or annoyance to a person it may, if subsection (3) applies, attach a power of arrest to any provision of the injunction.

(3) This subsection applies if the local authority applies to the court to attach the power of arrest and the court thinks that either—

(a) the conduct mentioned in subsection (2) consists of or includes the use or threatened use of violence, or

(b) there is a significant risk of harm to the person mentioned in that subsection.

(4) Where a power of arrest is attached to any provision of an injunction under subsection (2), a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of that provision.

(5) After making an arrest under subsection (4) the constable must as soon as is reasonably practicable inform the local authority.

(6) Where a person is arrested under subsection (4)—

(a) he shall be brought before the court within the period of 24 hours beginning at the time of his arrest, and

(b) if the matter is not then disposed of forthwith, the court may remand him.

(7) For the purposes of subsection (6), when calculating the period of 24 hours referred to in paragraph (a) of that subsection, no account shall be taken of Christmas Day, Good Friday or any Sunday.

(8) Schedule 10 applies in relation to the power to remand under subsection (6).

(9) If the court has reason to consider that a medical report will be required, the power to remand a person under subsection (6) may be exercised for the purpose of enabling a medical examination and report to be made.

(10) If such a power is so exercised the adjournment shall not be in force—

(a) for more than three weeks at a time in a case where the court remands the accused person in custody, or

(b) for more than four weeks at a time in any other case.

(11) If there is reason to suspect that a person who has been arrested under subsection (4) is suffering from mental disorder within the meaning of the Mental Health Act

1983 the court shall have the same power to make an order under section 35 of that Act (remand for report on accused's mental condition) as the Crown Court has under that section in the case of an accused person within the meaning of that section.

(12) For the purposes of this section—

(a) "harm" includes serious ill-treatment or abuse (whether physical or not);

(b) "local authority" has the same meaning as in section 222 of the Local Government Act 1972 (c. 70);

(c) "the court" means the High Court or the county court and includes—

(i) in relation to the High Court, a judge of that court, and

(ii) in relation to the county court, a judge of that court.

Anti-Social Behaviour, Crime and Policing Act 2014:

1. Power to grant injunctions

(1) A court may grant an injunction under this section against a person aged 10 or over ("the respondent") if two conditions are met.

(2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.

(3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.

(4) An injunction under this section may for the purpose of preventing the respondent from engaging in anti-social behaviour—

(a) prohibit the respondent from doing anything described in the injunction;

(b) require the respondent to do anything described in the injunction.

(5) Prohibitions and requirements in an injunction under this section must, so far as practicable, be such as to avoid—

(a) any interference with the times, if any, at which the respondent normally works or attends school or any other educational establishment;

(b) any conflict with the requirements of any other court order or injunction to which the respondent may be subject.

(6) An injunction under this section must—

(a) specify the period for which it has effect, or

(b) state that it has effect until further order.

In the case of an injunction granted before the respondent has reached the age of 18, a period must be specified and it must be no more than 12 months.

(7) An injunction under this section may specify periods for which particular prohibitions or requirements have effect.

(8) An application for an injunction under this section must be made to—

(a) a youth court, in the case of a respondent aged under 18;

(b) the High Court or the county court, in any other case.

Paragraph (b) is subject to any rules of court made under section 18(2).

2. Meaning of "anti-social behaviour"

(1) In this Part "anti-social behaviour" means—

(a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person,

(b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or

(c) conduct capable of causing housing-related nuisance or annoyance to any person.

(2) Subsection (1)(b) applies only where the injunction under section 1 is applied for by—

(a) a housing provider,

(b) a local authority, or

(c) a chief officer of police.

(3) In subsection (1)(c) "housing-related" means directly or indirectly relating to the housing management functions of—

(a) a housing provider, or

(b) a local authority.

(4) For the purposes of subsection (3) the housing management functions of a housing provider or a local authority include—

(a) functions conferred by or under an enactment;

(b) the powers and duties of the housing provider or local authority as the holder of an estate or interest in housing accommodation.

3. Requirements included in injunctions

(1) An injunction under section 1 that includes a requirement must specify the person who is to be responsible for supervising compliance with the requirement.

The person may be an individual or an organisation.

(2) Before including a requirement, the court must receive evidence about its suitability and enforceability from—

(a) the individual to be specified under subsection (1), if an individual is to be specified;

(b) an individual representing the organisation to be specified under subsection (1), if an organisation is to be specified.

(3) Before including two or more requirements, the court must consider their compatibility with each other.

(4) It is the duty of a person specified under subsection (1)—

(a) to make any necessary arrangements in connection with the requirements for which the person has responsibility (the "relevant requirements");

(b) to promote the respondent's compliance with the relevant requirements;

(c) if the person considers that the respondent—

(i) has complied with all the relevant requirements, or

(ii) has failed to comply with a relevant requirement,

to inform the person who applied for the injunction and the appropriate chief officer of police.

(5) In subsection (4)(c) "the appropriate chief officer of police" means—

(a) the chief officer of police for the police area in which it appears to the person specified under subsection (1) that the respondent lives, or

(b) if it appears to that person that the respondent lives in more than one police area, whichever of the relevant chief officers of police that person thinks it most appropriate to inform.

(6) A respondent subject to a requirement included in an injunction under section 1 must—

(a) keep in touch with the person specified under subsection (1) in relation to that requirement, in accordance with any instructions given by that person from time to time;

(b) notify the person of any change of address.

These obligations have effect as requirements of the injunction.

4. Power of arrest

(1) A court granting an injunction under section 1 may attach a power of arrest to a prohibition or requirement of the injunction if the court thinks that—

(a) the anti-social behaviour in which the respondent has engaged or threatens to engage consists of or includes the use or threatened use of violence against other persons, or

(b) there is a significant risk of harm to other persons from the respondent.

"Requirement" here does not include one that has the effect of requiring the respondent to participate in particular activities.

(2) If the court attaches a power of arrest, the injunction may specify a period for which the power is to have effect which is shorter than that of the prohibition or requirement to which it relates.

5. Applications for injunctions

(1) An injunction under section 1 may be granted only on the application of—

(a) a local authority,

(b) a housing provider,

(c) the chief officer of police for a police area,

(d) the chief constable of the British Transport Police Force,

(e) Transport for London,

(ea) Transport for Greater Manchester,

(f) the Environment Agency,

(g) the Natural Resources Body for Wales,

(h) the Secretary of State exercising security management functions, or a Special Health Authority exercising security management functions on the direction of the Secretary of State, or

(i) the Welsh Ministers exercising security management functions, or a person or body exercising security management functions on the direction of the Welsh Ministers or under arrangements made between the Welsh Ministers and that person or body.

(2) In subsection (1) "security management functions" means—

(a) the Secretary of State's security management functions within the meaning given by section 195(3) of the National Health Service Act 2006;

(b) the functions of the Welsh Ministers corresponding to those functions.

(3) A housing provider may make an application only if the application concerns anti-social behaviour that directly or indirectly relates to or affects its housing management functions.

(4) For the purposes of subsection (3) the housing management functions of a housing provider include—

(a) functions conferred by or under an enactment;

(b) the powers and duties of the housing provider as the holder of an estate or interest in housing accommodation.

(5) The Secretary of State may by order—

(a) amend this section;

(b) amend section 20 in relation to expressions used in this section.

6. Applications without notice

(1) An application for an injunction under section 1 may be made without notice being given to the respondent.

(2) If an application is made without notice the court must either—

(a) adjourn the proceedings and grant an interim injunction (see section 7), or

(b) adjourn the proceedings without granting an interim injunction, or

(c) dismiss the application.

7. Interim injunctions

(1) This section applies where the court adjourns the hearing of an application (whether made with notice or without) for an injunction under section 1.

(2) The court may grant an injunction under that section lasting until the final hearing of the application or until further order (an "interim injunction") if the court thinks it just to do so.

(3) An interim injunction made at a hearing of which the respondent was not given notice may not have the effect of requiring the respondent to participate in particular activities.

(4) Subject to that, the court has the same powers (including powers under section 4) whether or not the injunction is an interim injunction.

...

14. Requirements to consult etc

(1) A person applying for an injunction under section 1 must before doing so—

(a) consult the local youth offending team about the application, if the respondent will be aged under 18 when the application is made;

(b) inform any other body or individual the applicant thinks appropriate of the application.

This subsection does not apply to a without-notice application.

(2) Where the court adjourns a without-notice application, before the date of the first on-notice hearing the applicant must—

(a) consult the local youth offending team about the application, if the respondent will be aged under 18 on that date;

(b) inform any other body or individual the applicant thinks appropriate of the application.

(3) A person applying for variation or discharge of an injunction under section 1 granted on that person's application must before doing so—

(a) consult the local youth offending team about the application for variation or discharge, if the respondent will be aged under 18 when that application is made;

(b) inform any other body or individual the applicant thinks appropriate of that application.

(4) In this section—

"local youth offending team" means—

(a) the youth offending team in whose area it appears to the applicant that the respondent lives, or

(b) if it appears to the applicant that the respondent lives in more than one such area, whichever one or more of the relevant youth offending teams the applicant thinks it appropriate to consult;

"on-notice hearing" means a hearing of which notice has been given to the applicant and the respondent in accordance with rules of court;

"without-notice application" means an application made without notice under section 6.

...

18. Rules of court

(1) Rules of court may provide that an appeal from a decision of the High Court, the county court or a youth court—

(a) to dismiss an application for an injunction under section 1 made without notice being given to the respondent, or

(b) to refuse to grant an interim injunction when adjourning proceedings following such an application,

may be made without notice being given to the respondent.

(2) Rules of court may provide for a youth court to give permission for an application for an injunction under section 1 against a person aged 18 or over to be made to the youth court if—

(a) an application to the youth court has been made, or is to be made, for an injunction under that section against a person aged under 18, and

(b) the youth court thinks that it would be in the interests of justice for the applications to be heard together.

(3) In relation to a respondent attaining the age of 18 after proceedings under this Part have begun, rules of court may—

(a) provide for the transfer of the proceedings from the youth court to the High Court or the county court;

(b) prescribe circumstances in which the proceedings may or must remain in the youth court.

19. Guidance

(1) The Secretary of State may issue guidance to persons entitled to apply for injunctions under section 1 (see section 5) about the exercise of their functions under this Part.

(2) The Secretary of State may revise any guidance issued under this section.

(3) The Secretary of State must arrange for any guidance issued or revised under this section to be published.

20. Interpretation etc

(1) In this Part—

"anti-social behaviour" has the meaning given by section 2;

"harm" includes serious ill-treatment or abuse, whether physical or not;

"housing accommodation" includes—

(a) flats, lodging-houses and hostels;

(b) any yard, garden, outhouses and appurtenances belonging to the accommodation or usually enjoyed with it;

(c) any common areas used in connection with the accommodation;

"housing provider" means—

(a) a housing trust, within the meaning given by section 2 of the Housing Associations Act 1985, that is a charity;

(b) a housing action trust established under section 62 of the Housing Act 1988;

(c) in relation to England, a non-profit private registered provider of social housing;

(d) in relation to Wales, a Welsh body registered as a social landlord under section 3 of the Housing Act 1996;

(e) any body (other than a local authority or a body within paragraphs (a) to (d)) that is a landlord under a secure tenancy within the meaning given by section 79 of the Housing Act 1985;

"local authority" means—

(a) in relation to England, a district council, a county council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly;

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

"respondent" has the meaning given by section 1(1).

(2) A person's age is treated for the purposes of this Part as being that which it appears to the court to be after considering any available evidence.

...

Public Spaces Protection Orders

59. Power to make orders

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

(2) The first condition is that—

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

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

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

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

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

(c) justifies the restrictions imposed by the notice.

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

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

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

(c) does both of those things.

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

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

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

(6) A prohibition or requirement may be framed—

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

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

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

(7) A public spaces protection order must—

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

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

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

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

60. Duration of orders

(1) A public spaces protection order may not have effect for a period of more than 3 years, unless extended under this section.

(2) Before the time when a public spaces protection order is due to expire, the local authority that made the order may extend the period for which it has effect if satisfied on reasonable grounds that doing so is necessary to prevent—

(a) occurrence or recurrence after that time of the activities identified in the order, or

(b) an increase in the frequency or seriousness of those activities after that time.

(3) An extension under this section—

(a) may not be for a period of more than 3 years;

(b) must be published in accordance with regulations made by the Secretary of State.

(4) A public spaces protection order may be extended under this section more than once.

61. Variation and discharge of orders

(1) Where a public spaces protection order is in force, the local authority that made the order may vary it—

(a) by increasing or reducing the restricted area;

(b) by altering or removing a prohibition or requirement included in the order, or adding a new one.

(2) A local authority may make a variation under subsection (1)(a) that results in the order applying to an area to which it did not previously apply only if the conditions in section 59(2) and (3) are met as regards activities in that area.

(3) A local authority may make a variation under subsection (1)(b) that makes a prohibition or requirement more extensive, or adds a new one, only if the prohibitions and requirements imposed by the order as varied are ones that section 59(5) allows to be imposed.

(4) A public spaces protection order may be discharged by the local authority that made it.

(5) Where an order is varied, the order as varied must be published in accordance with regulations made by the Secretary of State.

(6) Where an order is discharged, a notice identifying the order and stating the date when it ceases to have effect must be published in accordance with regulations made by the Secretary of State.

62. Premises etc to which alcohol prohibition does not apply

(1) A prohibition in a public spaces protection order on consuming alcohol does not apply to—

(a) premises (other than council-operated licensed premises) authorised by a premises licence to be used for the supply of alcohol;

(b) premises authorised by a club premises certificate to be used by the club for the supply of alcohol;

(c) a place within the curtilage of premises within paragraph (a) or (b);

(d) premises which by virtue of Part 5 of the Licensing Act 2003 may at the relevant time be used for the supply of alcohol or which, by virtue of that Part, could have been so used within the 30 minutes before that time;

(e) a place where facilities or activities relating to the sale or consumption of alcohol are at the relevant time permitted by virtue of a permission granted under section 115E of the Highways Act 1980 (highway-related uses).

(2) A prohibition in a public spaces protection order on consuming alcohol does not apply to council-operated licensed premises—

(a) when the premises are being used for the supply of alcohol, or

(b) within 30 minutes after the end of a period during which the premises have been used for the supply of alcohol.

(3) In this section—

"club premises certificate" has the meaning given by section 60 of the Licensing Act 2003;

"premises licence" has the meaning given by section 11 of that Act;

"supply of alcohol" has the meaning given by section 14 of that Act.

(4) For the purposes of this section, premises are "council-operated licensed premises" if they are authorised by a premises licence to be used for the supply of alcohol and—

(a) the licence is held by a local authority in whose area the premises (or part of the premises) are situated, or

(b) the licence is held by another person but the premises are occupied by a local authority or are managed by or on behalf of a local authority.

63. Consumption of alcohol in breach of prohibition in order

(1) This section applies where a constable or an authorised person reasonably believes that a person (P)—

(a) is or has been consuming alcohol in breach of a prohibition in a public spaces protection order, or

(b) intends to consume alcohol in circumstances in which doing so would be a breach of such a prohibition.

In this section "authorised person" means a person authorised for the purposes of this section by the local authority that made the public spaces protection order (or authorised by virtue of section 69(1)).

(2) The constable or authorised person may require P—

(a) not to consume, in breach of the order, alcohol or anything which the constable or authorised person reasonably believes to be alcohol;

(b) to surrender anything in P's possession which is, or which the constable or authorised person reasonably believes to be, alcohol or a container for alcohol.

(3) A constable or an authorised person who imposes a requirement under subsection (2) must tell P that failing without reasonable excuse to comply with the requirement is an offence.

(4) A requirement imposed by an authorised person under subsection (2) is not valid if the person—

(a) is asked by P to show evidence of his or her authorisation, and

(b) fails to do so.

(5) A constable or an authorised person may dispose of anything surrendered under subsection (2)(b) in whatever way he or she thinks appropriate.

(6) A person who fails without reasonable excuse to comply with a requirement imposed on him or her under subsection (2) commits an offence and is liable on summary conviction to a fine not exceeding level 2 on the standard scale.

64. Orders restricting public right of way over highway

(1) A local authority may not make a public spaces protection order that restricts the public right of way over a highway without considering—

(a) the likely effect of making the order on the occupiers of premises adjoining or adjacent to the highway;

(b) the likely effect of making the order on other persons in the locality;

(c) in a case where the highway constitutes a through route, the availability of a reasonably convenient alternative route.

(2) Before making such an order a local authority must—

(a) notify potentially affected persons of the proposed order,

(b) inform those persons how they can see a copy of the proposed order,

(c) notify those persons of the period within which they may make representations about the proposed order, and

(d) consider any representations made.

In this subsection "potentially affected persons" means occupiers of premises adjacent to or adjoining the highway, and any other persons in the locality who are likely to be affected by the proposed order.

(3) Before a local authority makes a public spaces protection order restricting the public right of way over a highway that is also within the area of another local authority, it must consult that other authority if it thinks it appropriate to do so.

(4) A public spaces protection order may not restrict the public right of way over a highway for the occupiers of premises adjoining or adjacent to the highway.

(5) A public spaces protection order may not restrict the public right of way over a highway that is the only or principal means of access to a dwelling.

(6) In relation to a highway that is the only or principal means of access to premises used for business or recreational purposes, a public spaces protection order may not restrict the public right of way over the highway during periods when the premises are normally used for those purposes.

(7) A public spaces protection order that restricts the public right of way over a highway may authorise the installation, operation and maintenance of a barrier or barriers for enforcing the restriction.

(8) A local authority may install, operate and maintain barriers authorised under subsection (7).

(9) A highway over which the public right of way is restricted by a public spaces protection order does not cease to be regarded as a highway by reason of the restriction (or by reason of any barrier authorised under subsection (7)).

(10) In this section—

"dwelling" means a building or part of a building occupied, or intended to be occupied, as a separate dwelling;

"highway" has the meaning given by section 328 of the Highways Act 1980.

65.Categories of highway over which public right of way may not be restricted

(1) A public spaces protection order may not restrict the public right of way over a highway that is—

(a) a special road;

(b) a trunk road;

(c) a classified or principal road;

(d) a strategic road;

(e) a highway in England of a description prescribed by regulations made by the Secretary of State;

(f) a highway in Wales of a description prescribed by regulations made by the Welsh Ministers.

(2) In this section—

"classified road", "special road" and "trunk road" have the meaning given by section 329(1) of the Highways Act 1980;

"highway" has the meaning given by section 328 of that Act;

"principal road" has the meaning given by section 12 of that Act (and see section 13 of that Act);

"strategic road" has the meaning given by section 60(4) of the Traffic Management Act 2004.

66.Challenging the validity of orders

(1) An interested person may apply to the High Court to question the validity of—

(a) a public spaces protection order, or

(b) a variation of a public spaces protection order.

"Interested person" means an individual who lives in the restricted area or who regularly works in or visits that area.

(2) The grounds on which an application under this section may be made are—

(a) that the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied);

(b) that a requirement under this Chapter was not complied with in relation to the order or variation.

(3) An application under this section must be made within the period of 6 weeks beginning with the date on which the order or variation is made.

(4) On an application under this section the High Court may by order suspend the operation of the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied), until the final determination of the proceedings.

(5) If on an application under this section the High Court is satisfied that—

(a) the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied), or

(b) the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement under this Chapter,

the Court may quash the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied).

(6) A public spaces protection order, or any of the prohibitions or requirements imposed by the order (or by the order as varied), may be suspended under subsection (4) or quashed under subsection (5)—

(a) generally, or

(b) so far as necessary for the protection of the interests of the applicant.

(7) An interested person may not challenge the validity of a public spaces protection order, or of a variation of a public spaces protection order, in any legal proceedings (either before or after it is made) except—

(a) under this section, or

(b) under subsection (3) of section 67 (where the interested person is charged with an offence under that section).

67. Offence of failing to comply with order

(1) It is an offence for a person without reasonable excuse—

(a) to do anything that the person is prohibited from doing by a public spaces protection order, or

(b) to fail to comply with a requirement to which the person is subject under a public spaces protection order.

(2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(3) A person does not commit an offence under this section by failing to comply with a prohibition or requirement that the local authority did not have power to include in the public spaces protection order.

(4) Consuming alcohol in breach of a public spaces protection order is not an offence under this section (but see section 63).

68. Fixed penalty notices

(1) A constable or an authorised person may issue a fixed penalty notice to anyone he or she has reason to believe has committed an offence under section 63 or 67 in relation to a public spaces protection order.

(2) A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to a local authority specified in the notice.

(3) The local authority specified under subsection (2) must be the one that made the public spaces protection order.

(4) Where a person is issued with a notice under this section in respect of an offence—

(a) no proceedings may be taken for the offence before the end of the period of 14 days following the date of the notice;

(b) the person may not be convicted of the offence if the person pays the fixed penalty before the end of that period.

(5) A fixed penalty notice must—

(a) give reasonably detailed particulars of the circumstances alleged to constitute the offence;

(b) state the period during which (because of subsection (4)(a)) proceedings will not be taken for the offence;

(c) specify the amount of the fixed penalty;

(d) state the name and address of the person to whom the fixed penalty may be paid;

(e) specify permissible methods of payment.

(6) An amount specified under subsection (5)(c) must not be more than £100.

(7) A fixed penalty notice may specify two amounts under subsection (5)(c) and specify that, if the lower of those amounts is paid within a specified period (of less than 14 days), that is the amount of the fixed penalty.

(8) Whatever other method may be specified under subsection (5)(e), payment of a fixed penalty may be made by pre-paying and posting to the person whose name is stated under subsection (5)(d), at the stated address, a letter containing the amount of the penalty (in cash or otherwise).

(9) Where a letter is sent as mentioned in subsection (8), payment is regarded as having been made at the time at which that letter would be delivered in the ordinary course of post.

(10) In any proceedings, a certificate that—

(a) purports to be signed by or on behalf of the chief finance officer of the local authority concerned, and

(b) states that payment of a fixed penalty was, or was not, received by the dated specified in the certificate,

is evidence of the facts stated.

(11) In this section—

"authorised person" means a person authorised for the purposes of this section by the local authority that made the order (or authorised by virtue of section 69(2));

"chief finance officer", in relation to a local authority, means the person with responsibility for the authority's financial affairs.

...

70. Byelaws

A byelaw that prohibits, by the creation of an offence, an activity regulated by a public spaces protection order is of no effect in relation to the restricted area during the currency of the order.

...

72. Convention rights, consultation, publicity and notification

(1) A local authority, in deciding—

(a) whether to make a public spaces protection order (under section 59) and if so what it should include,

(b) whether to extend the period for which a public spaces protection order has effect (under section 60) and if so for how long,

(c) whether to vary a public spaces protection order (under section 61) and if so how, or

(d) whether to discharge a public spaces protection order (under section 61),

must have particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 of the Convention.

(2) In subsection (1) "Convention" has the meaning given by section 21(1) of the Human Rights Act 1998.

(3) A local authority must carry out the necessary consultation and the necessary publicity, and the necessary notification (if any), before—

(a) making a public spaces protection order,

(b) extending the period for which a public spaces protection order has effect, or

(c) varying or discharging a public spaces protection order.

(4) In subsection (3)—

"the necessary consultation" means consulting with—

(a) the chief officer of police, and the local policing body, for the police area that includes the restricted area;

(b) whatever community representatives the local authority thinks it appropriate to consult;

(c) the owner or occupier of land within the restricted area;

"the necessary publicity" means—

(a) in the case of a proposed order or variation, publishing the text of it;

(b) in the case of a proposed extension or discharge, publicising the proposal;

"the necessary notification" means notifying the following authorities of the proposed order, extension, variation or discharge—

(a) the parish council or community council (if any) for the area that includes the restricted area;

(b) in the case of a public spaces protection order made or to be made by a district council in England, the county council (if any) for the area that includes the restricted area.

(5) The requirement to consult with the owner or occupier of land within the restricted area—

(a) does not apply to land that is owned and occupied by the local authority;

(b) applies only if, or to the extent that, it is reasonably practicable to consult the owner or occupier of the land.

(6) In the case of a person or body designated under section 71, the necessary consultation also includes consultation with the local authority which (ignoring subsection (2) of that section) is the authority for the area that includes the restricted area.

(7) In relation to a variation of a public spaces protection order that would increase the restricted area, the restricted area for the purposes of this section is the increased area.

73. Guidance

(1) The Secretary of State may issue—

(a) guidance to local authorities about the exercise of their functions under this Chapter and those of persons authorised by local authorities under section 63 or 68;

(b) guidance to chief officers of police about the exercise, by officers under their direction or control, of those officers' functions under this Part.

(2) The Secretary of State may revise any guidance issued under this section.

(3) The Secretary of State must arrange for any guidance issued or revised under this section to be published.

74. Interpretation of Chapter 2

(1) In this Chapter—

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

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

"local authority" means—

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

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

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

"restricted area" has the meaning given by section 59(4).

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

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

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

whether or not for all persons and at all times.

reason that I was in favour of allowing the appeal and granting the injunction in the terms proposed.

Appeal allowed with costs.
Injunction granted.

Solicitors: Lovell White Durrant; Stephenson Harwood.

[Reported by SHIRANIKHA HERBERT, Barrister]

[HOUSE OF LORDS]

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

AND

JONES (MARGARET) AND ANOTHER . . . . APPELLANTS

1998 Oct. 20, 21; 1999 March 4

Lord Irvine of Lairg L.C., Lord Slynn of Hadley, Lord Hope of Craighead, Lord Clyde and Lord Hutton

Crime—Public order—Trespassory assembly—Order in force prohibiting trespassory assemblies—Peaceful, non-obstructive assembly on highway—Extent of public's rights of access to highway—Whether assembly trespassory—Public Order Act 1986 (c. 64), ss. 14A, 14B(2) (as inserted by Criminal Justice and Public Order Act 1994 (c. 33), s. 70)

The defendants took part in a peaceful, non-obstructive assembly on a highway in respect of which there was in force an order under section 14A of the Public Order Act 1986,[1] as inserted by section 70 of the Criminal Justice and Public Order Act 1994, prohibiting the holding of trespassory assemblies. They were convicted before justices of taking part in a trespassory assembly knowing it to be prohibited, contrary to section 14B(2) of the Act of 1986, as inserted. On appeal, the Crown Court held that there was no case for them to answer on the basis that the holding of a peaceful, non-obstructive assembly was part of the public's limited rights of access to the highway and so was not prohibited by the order. The Divisional Court allowed an appeal by the Director of Public Prosecutions.

On appeal by the defendants:—

Held, allowing the appeal (Lord Slynn of Hadley and Lord Hope of Craighead dissenting), that (*per* Lord Irvine of Lairg L.C.) the public highway was a public place that the public

[1] Public Order Act 1986, s. 14A, as inserted: see post, p. 252A–E.
S. 14B(2), as inserted: see post, p. 252E.

might enjoy for any reasonable purpose, provided that the activity in question did not amount to a public or private nuisance and did not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway; that (*per* Lord Clyde) a peaceful assembly for a reasonable period that did not unreasonably obstruct the highway was not necessarily unlawful, nor did it necessarily constitute a trespassory assembly within sections 14A and 14B(2) of the Act of 1986, the matter being essentially one to be judged in the light of the particular facts; that (*per* Lord Hutton) the right of public assembly could, in certain circumstances, be exercised on the highway provided that it caused no obstruction to persons passing along the highway and that the tribunal of fact found that it had been a reasonable user; and that, in the circumstances, the Crown Court had been entitled to allow the defendants' appeals (post, pp. 254G–255A, F–G, 257D–G, 279C–F, 281B–F, G–H, 288D–E, 291A–B, 292H–293B, 294A).

Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A. and *Hickman v. Maisey* [1900] 1 Q.B. 752, C.A. considered.

Decision of the Divisional Court of the Queen's Bench Division [1998] Q.B. 563; [1997] 2 W.L.R. 578; [1997] 2 All E.R. 119 reversed.

The following cases are referred to in their Lordships' opinions:

Aldred v. Miller, 1924 J.C. 117

Atholl (Duke of) v. Torrie (1850) 12 D. 691; (1852) 1 Macq. 65, H.L.(Sc.)

Attorney-General v. Antrobus [1905] 2 Ch. 188

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

C. (A Minor) v. Director of Public Prosecutions [1996] A.C. 1; [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43, H.L.(E.)

Committee for the Commonwealth of Canada v. Canada (1991) 77 D.L.R. (4th) 385

Derbyshire County Council v. Times Newspapers Ltd. [1992] Q.B. 770; [1992] 3 W.L.R. 28; [1992] 3 All E.R. 65, C.A.

Ellenborough Park, In re [1956] Ch. 131; [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667, C.A.

Fielden v. Cox (1906) 22 T.L.R. 411

Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A.

Hickman v. Maisey [1900] 1 Q.B. 752, C.A.

Hirst v. Chief Constable of West Yorkshire (1986) 85 Cr.App.R. 143, D.C.

Hubbard v. Pitt [1976] Q.B. 142; [1975] 3 W.L.R. 201; [1975] 3 All E.R. 1, C.A.

Lewis, Ex parte (1888) 21 Q.B.D. 191, D.C.

Liddle v. Yorkshire (North Riding) County Council [1934] 2 K.B. 101, C.A.

Llandudno Urban District Council v. Woods [1899] 2 Ch. 705

Lowdens v. Keaveney [1903] 2 I.R. 82

M'Ara v. Magistrates of Edinburgh, 1913 S.C. 1059

Macpherson v. Scottish Rights of Way and Recreation Society Ltd. (1888) 13 App.Cas. 744, H.L.(Sc.)

Mann v. Brodie (1885) 10 App.Cas. 378, H.L.(Sc.)

Nagy v. Weston [1965] 1 W.L.R. 280; [1965] 1 All E.R. 78, D.C.

Randall v. Tarrant [1955] 1 W.L.R. 255; [1955] 1 All E.R. 600, C.A.

Reg. v. Graham (1888) 16 Cox C.C. 420

Reg. v. Pratt (1855) 4 E. & B. 860

Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 S.C.(H.L.) 30, H.L.(Sc.)

The following additional cases were cited in argument:

Anderson v. United Kingdom [1998] E.H.R.L.R. 218
Burden v. Rigler [1911] 1 K.B. 337, D.C.
Chappell v. United Kingdom (1987) 10 E.H.R.R. 510
Christians against Racism and Fascism v. United Kingdom (1980) 21 D. & R. 138
Cooper v. Metropolitan Police Commissioner (1985) 82 Cr.App.R. 238, D.C.
De Morgan v. Metropolitan Board of Works (1880) 5 Q.B.D. 155, D.C.
Dovaston v. Payne (1795) 2 H.Bl. 527
Ferguson (L.L.) Ltd. v. O'Gorman [1937] I.R. 620
Greek Case, The (1969) 12 Yearbook of the European Convention on Human Rights
Homer v. Cadman (1886) 16 Cox C.C. 51, D.C.
Plattform "Ärzte für das Leben" v. Austria (1988) 13 E.H.R.R. 204
Rassemblement jurassien v. Switzerland (1979) 17 D. & R. 93
Reg. v. Clark (No. 2) [1964] 2 Q.B. 315; [1963] 3 W.L.R. 1067; [1963] 3 All E.R. 884, C.C.A.
Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245
Wheeler v. Leicester City Council [1985] A.C. 1054; [1985] 2 All E.R. 151, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

This was an appeal by the defendants, Margaret Jones and Richard Lloyd, by leave of the House of Lords (Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde) given on 14 January 1988 from the judgment of the Divisional Court of the Queen's Bench Division (McCowan L.J. and Collins J.) on 23 January 1997 allowing an appeal by the Director of Public Prosecutions by case stated from the decision of the Crown Court at Salisbury (Judge MacLaren Webster Q.C. and justices). The Crown Court on 4 January 1996 had allowed appeals by the defendants against their convictions by Salisbury justices on 3 October 1995 of offences of trespassory assembly contrary to section 14B(2) of the Public Order Act 1986, as inserted by section 70 of the Criminal Justice and Public Order Act 1994.

The point of law of general public importance certified by the Divisional Court was: "Where there is in force an order made under section 14A(2) [of the Act of 1986, as inserted], and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's right of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

The facts are stated in their Lordships' opinions.

Edward Fitzgerald Q.C., Keir Starmer and *Anthony Hudson* for the defendants. The public's right of access in the context of the criminal offence of trespassory assembly is not exceeded if the use of the highway is a reasonable use of the highway. A peaceful, non-obstructive assembly is a reasonable use of the highway.

The definition of "limited" in section 14A(9) of the Act of 1986 is merely illustrative of the type of circumstances in which the public's right of access to land is not absolute. It does not restrict or cut down the public's pre-existing common law right of access. The extent of the public's

A right of access is therefore left untouched by section 14A and is found in the common law. That limited right is not necessarily exceeded by a peaceful, non-obstructive assembly. It is to be inferred from the wording of section 14A(1)(*a*), including the reference to "conduct," that an assembly can be held on the public highway that does not of itself exceed the limits of the public's right of access to the highway. Parliament intended courts B to consider the conduct of the assembly and whether its conduct was reasonable. If the law were otherwise, much reasonable conduct would amount to a trespass and therefore would be made unlawful by an order under section 14A. It is both inappropriate and contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) for the freedom to carry out such activities to be dependent on the forbearance of the relevant authorities. It is C inappropriate for such a fundamental civil liberty to be subject to potentially arbitrary enforcement.

The early trespass cases (*Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 and *Hickman v. Maisey* [1900] 1 Q.B. 752) established that the public's right of access extended beyond that of the right to pass and repass and recognised that the breadth of that right would be subject to further D extensions as society developed. The more recent obstruction cases, applying the test in a modern setting and in the context of a criminal offence, show that the test includes consideration of whether the use in question is a "reasonable user" of the highway. Lord Esher M.R.'s formulation of the public's right of access in *Harrison v. Duke of Rutland*, at pp. 146–147 necessarily requires a consideration of what is "reasonable" and necessarily recognises that the answer will change as society does. His E judgment is to be preferred to those of Lopes and Kay L.JJ. as the authoritative statement of the law in 1893, since it was the leading judgment and was cited with approval in *Hickman v. Maisey*. The "reasonable extensions" recognised as necessary by the Court of Appeal in *Hickman v. Maisey* in 1900 are found in the subsequent cases on obstruction. *Burden v. Rigler* [1911] 1 K.B. 337 demonstrates that in F determining whether a public meeting held on a highway is unlawful it is necessary to look at the circumstances of the assembly. McCowan L.J. and Collins J. erred in relying upon *Ex parte Lewis* (1888) 21 Q.B.D. 191 in support of their conclusion that no right of peaceful, non-obstructive assembly on the highway exists in English law. *Ex parte Lewis* is of little assistance because (a) the ratio of the decision concerned the jurisdiction G of the Divisional Court to review the decisions of magistrates to refuse to issue summonses; (b) the comments about the public's right of access were obiter; (c) those comments were essentially concerned with the right on the part of the public to occupy Trafalgar Square for the purposes of holding public meetings; (d) Trafalgar Square was completely regulated by Act of Parliament; and (e) any other comments about the public's right of access to the highway are ambiguous and/or not inconsistent with a development H of that right, as demonstrated by *Harrison v. Duke of Rutland* and *Hickman v. Maisey*. *Reg. v. Graham* (1888) 16 Cox.C.C. 420 fails to take account of the concept of reasonable user. [Reference was also made to Review of Public Order Law (1985) (Cmnd. 9510).]

The test of "reasonable user" applied in the obstruction cases is of particular relevance as, like the offence of trespassory assembly, it involves the adoption and application of the civil test of the public's right of access in relation to a criminal offence. To the extent that the definition of the public's right of access found in the obstruction cases differs from the civil law test of trespass, the former is the applicable test when considering the criminal offence of trespassory assembly. The obstruction cases, e.g., *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143, establish that a person whose use of a highway is reasonable has a lawful excuse even if he is a demonstrator. The right to demonstrate peacefully on the public highway has received judicial recognition in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175, 177D–G, 178E–H; *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 151–152 and Lord Scarman's statement in his report on The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38, para. 6. Concepts based on the protection of private rights of ownership must be modified when dealing with a publicly owned highway, the public ownership of which engages the state's duty to protect and foster the right to peaceful demonstration. [Reference was made to *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 393–394; *Lowdens v. Keaveney* [1903] 2 I.R. 82, 86–87, 89–91; *Cooper v. Metropolitan Police Commissioner* (1985) 82 Cr.App.R. 238, 242 and section 137 of the Highways Act of 1980.

Rights, although not "positive" in the sense that they are enshrined in statute, nonetheless exist in the sense that under English law it is recognised that citizens are entitled to act unless their conduct is restricted by law: see *Wheeler v. Leicester City Council* [1985] A.C. 1054, 1065C and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 178. Individuals have freedom, and therefore a right, to engage in activity on the highway so long as it does not constitute a civil wrong or a criminal offence in other words, so long as it does not transgress that which is reasonable and usual. Collins J. [1998] Q.B. 563, 571 erred in rejecting the approach of the Crown Court on the ground that the public's right of access, "must mean a right given by law." It is a misconceived approach in the context of English law, to look for a positive right of freedom of assembly. It is necessary to start from the premise that the public has right of access, including potentially to assemble, except to the extent that that right is restricted by law. The law restricts the right of access to the extent that it does not amount to passage or repassage and reasonable and usual user. If, in a particular set of circumstances, an assembly constitutes reasonable and usual usage, the public has a right to so assemble. The magistrates will take account of that is usual. Collins J.'s analysis at pp. 571–572, that "a right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it" is, in the present context, also misconceived. The public does have a right of access to public highways. The argument is over the extent of that right. The public's right of access is a right to engage in activity on the highway that is reasonable and usual. If such activity is neither a trespass nor a criminal offence it cannot be stopped unless and until the limits of reasonableness are exceeded. [Reference was made to articles 10 and 11 of

A the European Convention for the Protection of Human Rights and Fundmental Freedoms (1953) (Cmd. 8969).] The judgment of the Divisional Court creates a fundamental divergence between English laws and the Convention. The highway should be regarded as a public place or open space where all activities may reasonably go on. The test of reasonableness will be the same in all cases, but the fact that the land in question is private rather than public property may be a factor to be taken into B account. [Reference was made to *Dicey, Introduction to the Study of the Law of the Constitution,* 10th ed. (1965), pp. 270–272 and *Aldred. v. Miller,* 1924 J.C. 117, 120.]

Collins J. erred in distinguishing *Hirst v. Chief Constable of West Yorkshire* as he did, at p. 573D: see the commentary of Professor Sir John Smith on the decision of the Divisional Court [1997] Crim.L.R. 599, 600. C Moreover, the judgment of Glidewell L.J. in *Hirst v. Chief Constable of West Yorkshire,* at p. 150, makes it clear that lawful excuse is not limited as suggested by Collins J. "in terms of offending" in the context of the criminal offence of obstruction. The effect of the Divisional Court's judgment is to create an unfortunate dichotomy whereby peaceful non-obstructive assembly is deemed a reasonable user of the highway and therefore lawful when obstruction charges are preferred but unreasonable D user of the highway and therefore unlawful when trespassory assembly charges are preferred.

Starmer following. The European Convention for the Protection of Human Rights and Fundamental Freedoms is relevant in two respects: (a) as an aid to statutory interpretation; (b) as a yardstick against which to resolve any uncertainty in the common law or to guide its development: E see *Derbyshire County Council v. Times Newspaper Ltd.* [1992] Q.B. 770.

The obligation on a contracting party to the Convention under article 1 to "secure" to its citizens the right to freedom of peaceful assembly under article 11 and to provide an "effective remedy" in cases of arguable violation (article 13) requires domestic law to recognise a "right" to peaceful assembly; a mere practice of tolerance or non-interference (even if established on the facts) is not enough, being ineffective and F illusory. The analysis of article 11(1) by Collins J. is wrong. The wording of article 11 suggests a positive right of peaceful assembly and limits restrictions on that right: see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93. In keeping with the constant jurisprudence of the European Court of Justice and the Commission of Human Rights, any restrictions on the right of peaceful assembly should be narrowly construed. An G unfettered discretion on the part of a local authority or private landlord to restrict the public's right of peaceful assembly is wholly inconsistent with the requirements of article 11(2). For the proper approach to restrictions such as those under article 11(2), see *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245. An unfettered discretion to restrict the public's right of peaceful assembly is not prescribed by law because the H circumstances in which it can be exercised are arbitrary, nor will any restriction necessarily pursue a legitimate aim, and the pre-conditions of necessity will not be met. [Reference was made to *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283 and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.]

The wording of article 11 has to be read with article 1 (the obligation to secure Convention rights) and article 13 (the obligation to provide an effective remedy for arguable violations). For proper approach to article 13, see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 209–210, paras. 25, 28–34. If the Director of Public Prosecutions were right in his assertion that the right of peaceful assembly under article 11 is "secured" in the United Kingdom through tolerance or non-interference, article 11 read in conjunction with article 13 would be rendered meaningless. The narrow view advocated by him is wholly inconsistent with the approach of the European Court of Human Rights to positive obligations arising under article 11. This approach is consistent with the "principle of effectiveness" developed by the court and the Commission. The conclusion should be that section 14A of the Act of 1986 and/or the common law of civil trespass to the highway can be reconciled with the Convention only if the right to peaceful assembly is recognised wthin the public's right of access to the highway. If this is right, recourse to article 11(2) is unnecessary. [Reference was made to The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights, pp. 170–171, paras. 392–394.]

The right to peaceful assembly under article 11 of the Convention includes a right to assemble on the highway: *Rassemblement jurassien v. Switzerland*, p. 17 D. & R. 93, pp. 118–119, para. 3, *Plattform* and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.

Unless the order in issue in this case is construed narrowly so as to exclude the assembly in issue, it cannot be justified as "necessary in a democratic society" under article 11(2) of the Convention: *Christians against Racism and Fascism v. United Kingdom* (1980) 21 D. & R. 138, 149–150. No issue under article 11(1) arose there because (i) the effect of an order under section 3(3) of the Public Order Act 1936, now section 13(1) of the Act of 1986, was to ban *all* public processions, with one or two exceptions, not just those taking place in prohibited circumstances, and (ii) a right to process has always been recognised. The pre-conditions to making an order under section 3(3) of the Act of 1936 were much stricter than those under section 14A of the Act of 1986. The House of Lords should draw on the Commission's comments about the narrow circumspection of the order in question and, by analogy, construe the order in question in these proceedings so as to ring-fence and thereby preserve the applicants' right of peaceful assembly under article 11 of the Convention. The principle of proportionality derived from paragraph (2) of articles 10 and 11 requires section 14A of the Act of 1986 to be construed so as to ensure, if possible, that an order made under that section does not infringe the rights guaranteed under paragraph (1) of articles 10 and 11.

Chappell v. United Kingdom (1987) 10 E.H.R.R. 510 does not advance the issue for determination. It concerned rights of access to Stonehenge itself and was not dealing with article 11 rights on the highway.

The "margin of appreciation," being a principle of international law applicable on the international plane, is irrelevant to the determination of the present issues: see *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights* (1995) pp. 12–15. In any event, as *Christians*

A *against Racism and Fascism v. United Kingdom* shows, the Strasbourg bodies apply a fairly strict test even when the margin of appreciation is in play.

Victor Temple Q.C. and *Michael Butt* for the Director of Public Prosecutions. The question whether an assembly on the highway is a trespassory assembly is to be determined only by reference to the common law relating to rights of access to the highway and the principles of B trespass. This is a consequence of the clear language of section 14A(9) of the Act of 1986. It is clear from the definition of "limited" in section 14A(9) that, where the land in question is a highway or road, to which there is only a limited right of access for the public, use of the land in excess of the right is intended to fall within the "prohibited circumstances" of section 14A(5)(*b*). It is also clear that the draftsman has C singled out highways as being the starting-point of any test, so that all that one has to do is to look at the public right of access to the highway. Since the authorities are all one way in showing that this is limited to passing and trepassing for the purposes of legitimate travel and purposes incidental thereto, section 14A(9) is not opening the floodgates to general use of the highway. [Reference was also made to section 328 and 329 of the Highways Act 1980.]

D The limits of the public's rights of access to the highway have been established by a very long line of clear and settled authority: see *Halsbury's Laws of England,* 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110; *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146–147, 152, 154, 155–156; *Dovaston v. Payne* (1795) 2 H.Bl. 527; *Reg. v. Pratt* (1855) 4 E. & B. 860; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705; *Hickman v.* E *Maisey* [1900] 1 Q.B. 752; *Fielden v. Cox* (1906) 22 T.L.R. 411 and *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101. Any extension to the right to pass and repass must always be consistent with the paramount principle that the right of the public is that of passage.

If the applicants are correct and the public's right of access is based on reasonableness, that would, being contrary to a long line of authority, constitute a fundamental and radical extension to the common law, which F is not a matter for the judiciary: see *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1.

Use of the highway for purposes other than passing and repassing, etc., is prima facie trespass. In particular, there is no right to use the highway for static meetings, assemblies, protests or demonstrations, peaceful or otherwise. Such activities, while commonly taking place on the highway G without hindrance or objection, are nevertheless acts of trespass if they are not licensed or permitted. The Salvation Army holding a service on the highway do, strictly speaking, commit a trespassory offence. The order in this case was made for good reason, anticipating trouble. Where no order is made, as would be the case with the Salvation Army, charitable collections, tourists and so on, the fact that there is, strictly speaking, an offence does not in practice give rise to problems, tolerance and common H sense inevitably prevailing. However, it is still necessary to have the power to remove even prima facie peaceful groups, because otherwise the position could arise where the first 20 were joined by another 20, and so on, and they became violent or, in the case of Stonehenge, make an excursion over

the perimeter fence. [Reference was made to *Dovaston v. Payne*, 2 H.Bl. 527, 530; *Reg. v. Pratt*, 4 E.&B. 860, 868–869; *Harrison v. Duke of Rutland*, [1893] 1 Q.B. 142, 152–153; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, 709; *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756, 757–758 and *Fielden v. Cox*.]

Certain activities incidental to passage and repassage on the public highway may be considered necessary, usual and reasonable for the purpose of exercising the right. Such activities will not be trespass if they do not go further than use of the highway *as a highway* and are not inconsistent with the paramount idea that the right of the public is a right of passage: see *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146, 147, 156; *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, 757–758 and *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259–260. An activity which is "lawful" in itself is not prevented thereby from being a trespass on the highway: see *Reg. v. Pratt*, 4 E.&B. 860 and *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146. There is no authority for the proposition that a static assembly, meeting or demonstration on the public highway is to be considered a use incidental to the right of passage and repassage. Such use is wholly inconsistent with the dedication of a public highway, and must therefore prima facie be a trespass on the highway: see *De Morgan v. Metropolitan Board of Works* (1880) 5 Q.B.D. 155, 157; *Homer v. Cadman* (1886) 16 Cox C.C. 51, 54; *Ex parte, Lewis* (1888) 21 Q.B.D. 191, 197 and *Reg. v. Graham* (1888) 16 Cox C.C. 420 and compare *L. L. Ferguson Ltd. v. O'Gorman* [1937] I.R. 620, 644, 648. Attempts to demonstrate the existence of a common law right to hold assemblies on the highway (see the argument advanced in *Burden v. Rigler* [1911] 1 K.B. 337) are misconceived. In that case a political meeting held on the highway in the course of an election was at least tacitly licensed by the urban authority and could not therefore have been a trespass against it. No evidence of obstruction or nuisance had been called. The justices were held to have been wrong in finding that all meetings on the highway were unlawful for the purposes of the Public Meeting Act 1908, but it is plain that the judgment of Lord Alverstone C.J. was concerned with the question of the statute and the matter of obstruction. It has nothing to say about trespass and does not establish any general principle that the only meetings on a highway that are unlawful are those that cause a material obstruction.

In principle, where a highway vests in the highway authority by virtue of section 263 of the Act of 1980, there appears to be nothing to prevent it from seeking and obtaining relief for acts of trespass on it. Indeed, both at common law and now by statute it has not only the right but the duty to remove obstruction interfering with free passage along the highway and assert and protect the rights of the public to the use and enjoyment of it: see section 130 of the Act of 1980. In practice, however, throughout the 20th century acts amounting to civil trespass on the highway have been dealt with by way of the criminal offence of obstruction under successive Highway Acts, or by way of prosecutions for public nuisance. For the first time (apart from the offence of burglary), section 14A of the Act of 1986 brings consideration of the civil wrong of trespass into the criminal domain.

Nothing in the obstruction and nuisance cases, or other authority, suggests that the defence of "reasonable use" is relevant where trespass is the issue, as in the context of trespassory assembly. The fact that the defendant is or may be a civil trespasser is immaterial in deciding the lawfulness or otherwise of his activity for the purposes of the criminal offence of obstruction: *Lowdens v. Keaveney* [1903] 2 I.R. 82 and *Nagy v. Weston* [1965] 1 W.L.R. 280. Essentially the same test is to be applied in cases of public nuisance: see *Reg. v. Clark (No. 2)* [1964] 2 Q.B. 315. These cases establish a defence that excuses liability for specific criminal offences. They do not establish rights that did not exist before. They neither establish nor propose that activities on the highway that may be reasonable in the context of obstruction and nuisance cannot thereby be trespass. "Lawful excuse" in a crimnal case is not the same as a positive right in civil law: There is no suggestion in *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 or *any* of the obstruction cases that the concept of "reasonable use" has been borrowed from the civil law of trespass, still less does section 137 of the Act of 1980 deem any particular activity to be a reasonable or unreasonable use of the highway. "Reasonable user" has never been a defence to a civil accusation of trespass. It follows that there is nothing inconsistent in an activity being "reasonable" for the purposes of section 137 and yet remaining a civil wrong in trespass for the purpose of founding an offence under section 14B of the Act of 1986. In such circumstances, the court is saying no more than that it shall not attract a criminal sanction. Further, to say that the public's *rights* of access to the highway are now determined simply by what is reasonable and usual is an unjustified extension of the principle in the obstruction and nuisance cases and ignores the clear line of authority in the trespass cases. If an activity is to avoid being a trespass on the highway, it must be incidental to the right of passage and repassage and must not trangress the usual and reasonable mode of using the highway *as a highway*, or otherwise have the consent of the owner of the surface. The concept of trespass on highways has laid dormant for most of the century. That concept, firmly established in the common law, is now the foundation of section 14A of the Act of 1986. There can be no warrant for grafting on to it the body of case law that has grown up around obstruction and nuisance.

Recourse to the European Convention to assist in interpretation is neither necessary nor permissible where, as here, English law is settled and unambiguous. It is neither uncertain, nor developing, nor incomplete. Nor is the United Kingdom yet in the position where the courts must resolve conflicts between the Convention and national law: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 812E. Any discussion about rights in English law must take into account the difference between countries whose written constitutions *confer* clearly defined rights on citizens, and countries such as the United Kingdom without written constitutions where rights are only really definable in terms of the extent to which they are restricted or abrogated. Rights such as freedom of peaceful assembly are "secured" in the United Kingdom for the purposes of article 1 of the Convention through toleration, or non-interference. No general assessment as to whether such rights are secured in accordance with article 1 can be made without reference to tradition and practical

experience. Freedom of assembly inevitably raises a number of problems, especially where public meetings are involved. These pose threats to public order through the disruption of communications, the prospect of confrontation with the police and the danger of violence with rivals, the latter claiming their own freedom to demonstrate. The European Commission of Human Rights and the European Court of Human Rights have confirmed that in these particular circumstances there are positive duties on a state to protect those exercising their right of freedom of peaceful assembly from violent disturbance by counter-demonstrators.: see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 210, para. 32. In none of the cases brought against the United Kingdom under article 11 has it been argued that the relevant freedoms do not exist in the United Kingdom, and the only questions have been whether there has been a restriction on the freedoms and, if so, whether it has been justified under article 11(2). Each case has been decided against the complaint on the basis either that there has been no interference with the freedoms or that, if there has, it was justified under article 11(2) (the so-called state's "margin of appreciation"): *Chappell v. United Kingdom*, 10 E.H.R.R. 510 and *Anderson v. United Kingdom* [1998] 2 E.H.R.L.R. 218.

In England, the state and the courts recognise and give practical effect to a "right" of peaceful assembly. Peaceful, non-obstructive demonstrations on the highway are in fact permitted. In 1985 the Government declined to extend to static assemblies the power to ban that was provided in respect of processions and marches: see Review of Public Order Law (1985) (Cmnd. 9510), p. 2, para. 1.7, p. 31–32, para. 5.3. In 1994, however, the Criminal Justice and Public Order Act 1994 provided a limited such power by the insertion of section 14A into the Act of 1986. The power provided in section 14A to prohibit trespassory assemblies represents an encroachment, albeit limited, on the right to freedom of assembly. This right has never been absolute and has always been subject to the requirement of good order. By 1994, however, events had largely overtaken the 1985 decision. These included various attempts to defy the exclusion of the public from the Stones at Stonehenge and led to successive annual outbreaks of violence and disorder: see *Chappell v. United Kingdom* and section 19 of the Ancient Monuments and Archaeological Areas Act 1979, as amended by section 33 of and Schedule 4, paragraph 45 to The National Heritage Act 1983.

In any event, such interference with the freedom of peaceful assembly as is caused by a section 14A(2) order is justified under article 11(2) of the Convention. The conditions required to be met before an order under section 14A(1) will issue are entirely compatible with article 11(2): see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93, 120. [Reference was also made to section 14A(6) of the Act of 1986.]

It is to be observed that, while English law recognises and gives effect to a *right* of peaceful assembly as such, there is no legal *right* to exercise that freedom on the public highway, although commonly that is where assemblies/demonstrations/protests do in fact take place without objection or hindrance.

Fitzgerald Q.C. in reply. As to "judicial legislation," the concept of reasonable user is nothing new but is simply rationalising the law and two conflicting lines of authority. There is no reason why the common law cannot develop it; indeed, Parliament has expressly left the development of these matters to the courts.

There must be some objective evidence to justify an inference that persons may behave unreasonably. If the assembly is not peaceful and non-obstructive and there is evidence that the persons involved are a group of conspirators, that right render the user unreasonable.

Article 11(1) of the Convention guarantees a right of peaceful assembly on the highway. That right can only be restricted in pursuit of a legitimate aim under article 11(2), e.g, for the prevention of disorder or crime, and where restriction is "necessary," i.e., is proportionate to the legitimate aim pursued. If the public's rights of access to a highway include all such uses as are reasonable but not inconsistent with the rights of others to passage, e.g., peaceful assembly, article 11 is complied with in full. If they exclude a right of peaceful assembly, article 11 is not complied with. There is no content to the right given by article 11(1) if the argument for the Director of Public Prosecutions is correct.

Their Lordships took time for consideration.

4 March 1998. LORD IRVINE OF LAIRG L.C. My Lords, this appeal raises an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?

On 1 June 1995 at about 6.40 p.m. Police Inspector Mackie counted 21 people on the roadside verge of the southern side of the A344, adjacent to the perimeter fence of the monument at Stonehenge. Some were bearing banners with the legends, "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." He concluded that they constituted a "trespassory assembly" and told them so. When asked to move off, many did, but some, including the defendants, Mr. Lloyd and Dr. Jones, were determined to remain and put their rights to the test. They were arrested for taking part in a "trespassory assembly" and convicted by the Salisbury justices on 3 October 1995. Their appeals to the Salisbury Crown Court, however, succeeded. The court held that neither of the defendants, nor any member of their group, was "being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

About an hour before, a different group of people had scaled the fence of the monument and entered it. They had been successfully escorted away by police officers without any violence or arrests; but there were no grounds for apprehension that any of the group of which Mr. Lloyd and Dr. Jones were members proposed an incursion into the area of the monument.

An appeal by way of case stated to the Divisional Court [1998] Q.B. 563 followed. It was assumed for the purposes of that appeal (*per* McCowan L.J., at p. 568C) that (a) the grass verge constituted part of the

public highway; and (b) the group was peaceful, did not create an obstruction and did not constitute or cause a public nuisance.

The defendants had been charged with "trespassory assembly" under section 14B(2) of the Public Order Act 1986 (as inserted by section 70 of the Criminal Justice and Public Order Act 1994). Section 14A(1) (as inserted) of the Act of 1986 permits a chief officer of police to apply, in certain circumstances, to the local council for an order prohibiting for a specified period "trespassory assemblies" within a specified area. An order of that kind may be obtained only in respect of land "to which the public has no right of access or only a limited right of access;" had been obtained in this case; and covered the area in which the defendants, with others, had assembled.

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in prohibited circumstances, that is to say, without the permission of the occupier of the land or *so as to exceed* the limits of any permission of his or *the limits of the public's right of access.*" (Emphasis added.)

Section 14A(5) thus indicates that a "trespassory assembly" must be "trespassory" in the sense that it must involve the commission of the tort of trespass by those taking part, either by entering land to which they have no right of access, or by exceeding a limited right of access to land.

Section 14A(9) provides, inter alia:

> "In this section ... 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) . . ."

The offence with which the defendants were charged is set out in section 14B(2): "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The Divisional Court reinstated the defendants' convictions. It held that a peaceful assembly on the public highway exceeds the limits of the public's right of access (within the meaning of section 14A(5)). The "particular purpose" mentioned in the definition of "limited" in section 14A(9) was held not to include the use of the highway for peaceful assembly.

The central issue in the case thus turns on two interrelated questions: (i) what are the "limits" of the public's right of access to the public highway at common law? and (ii) what is the "particular purpose" for which the public has a right to use the public highway?

The basis of the Divisional Court's decision

The reasoning underlying the Divisional Court's judgments is not altogether clear. McCowan L.J. stated, at p. 570:

> "counsel for the defendants ... argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to

A have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public."

In my judgment that reasoning is circular. There is no suggestion in B the Act of 1986 that the making of any order under section 14A(1) *in itself* defines the limits on the public's right of access to the highway. Rather, the conditions under which it is appropriate to make an order, and the conditions for the breach of such an order, are defined by reference to the *existing* limits upon the public's right of access. In other words, section 14A presupposes limited rights of access; it does not purport to impose such limits.

C Collins J. concluded, at pp. 571–572, that, at common law, an assembly on the highway, however peaceable, exceeds the limits of the public's right of access. This is the conclusion which lies at the heart of the Divisional Court's decision.

In addition, Collins J. rejected the defendants' argument that article 11(1) of the European Convention for the Protection of Human D Rights and Fundamental Freedoms (1953) (Cmd. 8969) requires that there is a *right* of assembly on the public highway (albeit a right which may be subject to restrictions under article 11(2)), as opposed merely to a toleration of assemblies. Collins J. concluded, at p. 574, that the common law conforms with the Convention right of assembly because "The reality is that peaceful and non-obstructive assemblies on the highway are normally permitted."

E Thus in broad terms the basis of the Divisional Court's decision is the proposition that the public's right of access to the public highway is limited to the right to pass and repass, and to do anything incidental or ancillary to that right. Peaceful assembly is not incidental to the right to pass and repass. Thus peaceful assembly exceeds the limits of the public's right of access and so is conduct which fulfils the actus reus of the offence of F "trespassory assembly."

The position at common law

The Divisional Court's decision is founded principally on three authorities. In *Ex parte Lewis* (1888) 21 Q.B.D. 191 the Divisional Court held obiter that there was no public right to occupy Trafalgar Square for the purpose of holding public meetings. However, Wills J., giving the G judgment of the court, had in mind, at p. 197, an assembly "to the detriment of others having equal rights ... in its nature irreconcilable with the right of free passage ..." Such an assembly would probably also amount to a public nuisance, and, today, involve the commission of the offence of obstruction of the public highway contrary to section 137(1) of the Highways Act 1980. Such an assembly would probably also amount to H unreasonable user of the highway. It by no means follows that this same reasoning should apply to a peaceful assembly which causes no obstruction nor any public nuisance.

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the plaintiff had used the public highway, which crossed the defendant's land, for the sole and

deliberate purpose of disrupting grouse-shooting upon the defendant's land, and was forcibly restrained by the defendant's servants from doing so. The plaintiff sued the defendant for assault; and the defendant pleaded justification on the basis that the plaintiff had been trespassing upon the highway. Lord Esher M.R. held, at p. 146:

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, *or for any reasonable or usual mode of using the highway as a highway*, I think he was a trespasser." (Emphasis added.)

Plainly Lord Esher M.R. contemplated that there may be "reasonable or usual" uses of the highway beyond passing and repassing. He continued, at pp. 146–147:

> "Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

Lopes L.J., by contrast, stated the law in more rigid terms, at p. 154:

> "if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil ..."

Similarly, Kay L.J. stated, at p. 158:

> "the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

The rigid approach of Lopes and Kay L.JJ. would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.

The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a

trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway.

The third authority relied upon by the Divisional Court is the decision of the Court of Appeal in *Hickman v. Maisey* [1900] 1 Q.B. 752. In that case, the defendant, a racing tout, had used a public highway crossing the plaintiff's property for the purpose of observing racehorses being trained on the plaintiff's land. A. L. Smith L.J. expressly followed the approach of Lord Esher M.R. in *Harrison v. Duke of Rutland.* Applying that reasoning, he accepted, at p. 756, that a man resting at the side of the road, or taking a sketch from the highway, would not be a trespasser. The defendant's activities, however, fell outside "an ordinary and reasonable user of the highway" and so amounted to a trespass. Collins L.J. similarly approved Lord Esher M.R.'s approach, noting, at pp. 757–758, that:

> "in modern times a reasonable extension has been given to the use of the highway as such ... The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

Romer L.J. was to similar effect, at p. 759.

I do not, therefore, accept that, to be lawful, activities on the highway must fall within a rubric "incidental or ancillary to" the exercise of the right of passage. The meaning of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland*, at pp. 146–147, is clear: it is not that a person may use the highway only for passage and repassage and acts incidental or ancillary thereto; it is that any "reasonable and usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's right of passage. I understand Collins L.J.'s acceptance in *Hickman v. Maisey*, at pp. 757–758, of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* in that sense.

To commence from a premise, that the right of passage is the only right which members of the public are entitled to exercise on a highway, is circular: the very question in this appeal is whether the public's right is confined to the right of passage. I conclude that the judgments of Lord Esher M.R. and Collins L.J. are authority for the proposition that 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.

Nor can I attribute any hard core of meaning to a test which would limit lawful use of the highway to what is incidental or ancillary to the right of passage. In truth very little activity could accurately be described as "ancillary" to passing along the highway: perhaps stopping to tie one's shoe lace, consulting a street-map, or pausing to catch one's breath. But I do not think that such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book, would qualify. These

examples illustrate that to limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The law should not make unlawful what is commonplace and well accepted.

Nor do I accept that the broader modern test which I favour materially realigns the interests of the general public and landowners. It is no more than an exposition of the test Lord Esher M.R. proposed in 1892. It would not permit unreasonable use of the highway, nor use which was obstructive. It would not, therefore, afford carte blanche to squatters or other uninvited visitors. Their activities would almost certainly be unreasonable or obstructive or both. Moreover the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance.

Nor do I accept that the "reasonable user" test is tantamount to the assertion of a right to remain, which right can be acquired by express grant, but not by user or dedication. That recognition, however, is in no way inconsistent with the "reasonable user" test. If the right to use the highway extends to reasonable user not inconsistent with the public's right of passage, then the law does recognise (and has at least since Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 recognised) that the right to use the highway, goes beyond the minimal right to pass and repass. That user may in fact extend, to a limited extent, to roaming about on the highway, or remaining on the highway. But that is not of the essence of the right. That is no more than the scope which the right might in certain circumstances have, but always depending on the facts of the particular case. On a narrow footpath, for example, the right to use the highway would be highly unlikely to extend to a right to remain, since that would almost inevitably be inconsistent with the public's primary right to pass and repass.

A highway may be created either by way of the common law doctrine of dedication and acceptance, or by some statutory provision. Dedication presupposes an intention by the owner of the soil to dedicate the right of passage to the public. Whilst the intention may be expressed, it is more often to be inferred; but the requirement of an inference of an intention to dedicate does not, in my judgment, advance the question of the extent of the public's right of user of the highway. The dedication is for the public's use of the land as a highway and the question remains: what is the proper extent of the public's use of the highway? Given that intention to dedicate is usually inferred, it would be a legal fiction to assert that actual intention was confined to the right to pass and repass and activities incidental or ancillary to that right. There is no room in the judgment of Collins L.J. in *Hickman v. Maisey* [1900] 1 Q.B. 752, 757–758 for the fiction of an immutable, subjective original intention. Neither highway users nor the courts are in any position to ascertain what the landowner's original intentions may have been, years or even centuries after the event. In many cases, where the intention to dedicate is merely inferred from the fact of user as of right, there will not even have been a subjective intention. Nor would it be sensible to hold that the extent of the public's right of user

A should differ from highway to highway, as necessarily it would if actual subjective intention were the test. It is time to recognise that the so-called intention of the landowner is no more than a legal fiction imputed to the landowner by the court.

It would have been possible for the common law to have imposed tight constraints on the public's right of user of the highway in one of two ways. First, it could have held that the right was no wider than the bare B minimum required for the use of the highway as such: a test of necessity. Or, secondly, it could have been held that the right was static, so that a user which could not have been in contemplation as reasonable and usual at the time of dedication could never become a lawful user in changing social circumstances. I have already demonstrated that the former has been rejected. Nor could the latter be sustained. I doubt whether, when a C highway was first dedicated in, say, the early 19th century, a landowner would have contemplated the traversal at very high speed of the land dedicated by vehicles powered by internal combustion engines. The fact is that the common law permits vehicles to be driven at high speed on the highway because that is a reasonable user in modern conditions: it would be a fiction to attribute that to an actual intention at the time of dedication.

D I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.

E Since the law confers this public right, I deprecate any attempt artificially to restrict its scope. It must be for the magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass. In particular, there can be no principled basis for limiting the scope of the right by reference to the subjective intentions of the persons assembling. Once the right to assemble within F the limitations I have defined is accepted, it is self-evident that it cannot be excluded by an intention to exercise it. Provided an assembly is reasonable and non-obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature. To draw a distinction on the basis of anterior intention is in substance to G reintroduce an incidentality requirement. For the reasons I have given, that requirement, properly applied, would make unlawful commonplace activities which are well accepted. Equally, to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and degree for the court of trial.

H Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the subsoil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined

are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways.

Finally, I regard the conclusion at which I have arrived as desirable, because it promotes the harmonious development of two separate but related chapters in the common law. It is neither desirable in theory nor acceptable in practice for commonplace activities on the public highway not to count as breaches of the criminal law of wilful obstruction of the highway, yet to count as trespasses (even if intrinsically unlikely to be acted against in the civil law), and therefore form the basis for a finding of trespassory assembly for the purposes of the Act of 1986. A system of law sanctioning these discordant outcomes would not command respect.

Wilful obstruction of the highway

By section 137 of the Act of 1980: "(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 ..." The relevant case law was extensively considered by the Divisional Court in *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143.

The appeal was by animal rights supporters, who had been demonstrating against the use of animal fur both outside and in the doorway of a furrier's shop. They handed out leaflets, held banners and attracted groups of passers-by who blocked the street. The issue whether they were guilty of the statutory offence was held (*per* Glidewell L.J., at pp. 150–151) to turn on three questions: (i) was there an obstruction (with "any stopping on the highway," unless de minimis, counting as an obstruction)? (ii) was the obstruction deliberate? and (iii) was the obstruction without lawful excuse?

The latter question, if the obstruction was not unlawful in itself (as in the case of unlawful picketing), was "to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway." Glidewell L.J. instanced, at p. 150:

> "what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? ... It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates . . ."

In so holding Glidewell L.J. applied the reasoning of the Divisional Court in *Nagy v. Weston* [1965] 1 W.L.R. 280, where the activity in question, the sale of hot dogs in the street, "could not ... be said to be incidental to the right to pass and repass along the street." The question was one of fact: "whether the activity was or was not reasonable."

I find it satisfactory that there is a symmetry in the law between the

A activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway.

Article 11 of the European Convention

If, contrary to my judgment, the common law of trespass is not as clear as I have held it to be, then at least it is uncertain and developing, so
B that regard should be had to the Convention for the Protection of Human Rights and Fundamental Freedoms in resolving the uncertainty and in determining how it should develop: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, *per* Balcombe L.J., at p. 812B–C, and Butler-Sloss L.J., at p. 830A–B; and see *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283, *per* Lord Goff of
C Chieveley. Article 11 confers a "right to freedom of peaceful assembly" and then entitles the state to impose restrictions on that right. The effect of the Divisional Court's decision in this case would be that any peaceful assembly on the public highway, no matter how minor or harmless, would involve the commission of the tort of trespass.

Its conclusion is that all peaceful assemblies on the highway are tortious, whilst seeking to justify that state of affairs by observing that
D peaceful assemblies are in practice usually tolerated. In my judgment it is none to the point that restrictions on the exercise of the right of freedom of assembly may under article 11 be justified where necessary for the protection of the rights and freedoms of others. If the Divisional Court were correct, and an assembly on the public highway always trespassory, then there is not even a prima facie right to assembly on the public highway in our law. Unless the common law recognises that assembly on
E the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied. Of course the right may be subject to restrictions (for example, the requirements that user of the highway for purposes of assembly must be reasonable and non-obstructive, and must not contravene the criminal law of wilful obstruction of the highway). But in my judgment our law will not comply with the Convention unless its *starting-point* is
F that assembly on the highway will not necessarily be unlawful. I reject an approach which entails that such an assembly will always be tortious and therefore unlawful. The fact that the letter of the law may not in practice always be invoked is irrelevant: mere toleration does not secure a fundamental right. Thus, if necessary, I would invoke article 11 to clarify or develop the common law in the terms which I have held it to be; but for the reasons I have given I do not find it necessary to do so. I would
G therefore allow the appeal.

LORD SLYNN OF HADLEY. My Lords, in section 14A of the Public Order Act 1986 (inserted by section 70 of the Criminal Justice and Public Order Act 1994) Parliament gave a new power of control to local councils and to the police to deal with assemblies of 20 or more persons on land
H to which the public had a limited right of access or no right of access.

A chief officer of police who reasonably believes that such an assembly is intended to be held and that it is likely to be held without the permission of the occupier of the land, or to conduct itself in such a way as to exceed the public's limited right of access, and to cause significant damage to land

or buildings of historical or archaeological importance, may apply to the council of the district for an order "prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified:" section 14A(1). It is thus necessary to show that the land is such that the public has no or only a limited right of access, and

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to *use for a particular purpose (as in the case of a highway or road)*:" section 14A(9) (emphasis added).

With the consent of the Secretary of State the council may then make an order prohibiting such assemblies for a period not exceeding four days and in respect of an area not exceeding five miles from a specified centre. When such an order is made: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence:" section 14B(2) (as inserted).

This new offence is thus subject to important conditions being satisfied before prosecutions can be brought—the reasonable belief of the chief officer of police as to the matters specified, the consent of the Secretary of State and the decision of the council to make such an order, but it is plain that Parliament in 1994 was intending to give additional powers to councils and to the police to disperse trespassory assemblies over and above any other remedies (often slower and less effective) which might be available where people trespassed, committed nuisance or were violent.

On 22 May 1995 Salisbury District Council made an order prohibiting the holding of trespassory assemblies within a four-mile radius of Stonehenge for a period from 29 May to 1 June 1995 inclusive.

It is agreed that on 1 June 1995 a group of people were on the grass verge of the A344 road. The group was not fixed or static; people came and went. At about 6.45 p.m. the present defendants were on the verge in a group said by the police to have numbered 21 persons. A police inspector formed the view that this group constituted a prohibited trespassory assembly and they were told to move on. Some apparently did. The two defendants refused and were subsequently charged with the offence under section 14B(2) of the Act. They were convicted by the Salisbury justices but on appeal the Crown Court ruled that there was no case to answer and allowed the appeal.

The Crown Court found that the group, including the defendants, were not "destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway." The court further concluded that the group's use of the highway was a "reasonable user" and that the conduct of the defendants and the group as a whole did not exceed the public's right of access to the highway.

The Divisional Court on appeal allowed the appeal and ruled that a peaceful assembly of 20 or more persons on the highway which does not obstruct the highway is still a trespassory assembly for the purposes of section 14B(2). The sole question on the appeal to your Lordships is thus whether the public has the right of access to the highway in order to assemble there when it does not at the time obstruct the highway and when those present are not violent and are not threatening a breach of the peace.

A It cannot, of course, be said that the public has no right of access to the highway; it is not suggested that the public's right of access is absolute. The question is what are the limits to the right (not, it should be noted, the practice) of the public to use or be on the highway. For this purpose it is not necessary to distinguish between "highway" and "road" since the definition of "limited" includes both, though no issue has been raised that the place where the defendants were was not a highway. I assume that it B was and that as such the public had some right of access to it.

It is necessary to remember when considering this case that both at common law and by the Highways Act 1980 the public have an analogous right of way over bridleways and footpaths. It is not, however, necessary in this case to consider the case of a private road or other place where the permission of the occupier is needed and where additional factors may C need to be taken into account, but the arguments here have implications in principle for both.

It is hardly surprising that the public's rights of access to and use of the highway have been considered on previous occasions by the courts though in different contexts. As I see it the essential feature of the public's right was explained in the judgment of Lopes L.J., with whom in substance Kay L.J. agreed, in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142. D Lopes L.J. said, at p. 152: "The interest of the public in a highway consists solely in the right of passage . . ." He quotes, at p. 153, Crompton J. in *Reg. v. Pratt* (1855) 4 E. & B. 860, 868–869 who said:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser." E

Lopes L.J. added: "I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public." He said, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that F in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil G as he had previously to any easement being acquired by the public."

Thus the core right is to pass and to repass although I do not think that Lopes L.J. would have said that uses incidental to passing and repassing—stopping to adjust a bridle or to repair a carriage wheel—would have constituted a trespass. Lord Esher M.R. was more specific. He said, at p. 146:

H

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser."

He added, at pp. 146–147, that if the language of Erle J. and Crompton J. were construed too largely the effect might be to interfere

> "with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

It does not seem to me that his words "any reasonable or usual mode of using the highway as a highway" or "a reasonable and usual mode of using a highway *as such*" (emphasis added) were intended to include acts done by people who were not in the ordinary sense of the term "passing and repassing along the highway." This is how A. L. Smith L.J. appears to have read Lord Esher M.R. in his judgment in *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756. He then said: "I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a *slight* extension of the rule as previously stated ..." (Emphasis added.) He accepted that for a man to stop to rest or to take a sketch in the highway would not be considered an act of trespass but he continued:

> ". . . I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

Collins L.J. said, at pp. 757–758:

> "The question must in the last resort be whether what the defendant did after he got upon the highway comes within the ordinary and reasonable use of the highway *as a highway,* that is, for the purpose for which it is dedicated to the public. Now primarily the purpose for which the highway is dedicated is that of passage, as is shown by the case of *Dovaston v. Payne* (1795) 2 H.Bl. 527; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage." (Emphasis added.)

A It seems to me that Collins L.J. is saying no more than that developments which were incidental to the right of passage might be accepted as falling within the public's right of limited access to the highway.

That ruling as to the law had already been reflected in two cases involving specifically the holding of public meetings in Trafalgar Square. Thus in *Reg. v. Graham* (1888) 16 Cox C.C. 420, 429–430 Charles J., rejecting the claim that there was a right of public meeting in Trafalgar B Square or any other thoroughfare, said:

> "So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them for the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and C repassing . . ."

Similarly, in *Ex parte Lewis,* 21 Q.B.D. 191, 197, Wills J. said that a public right of passage is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

D It was reflected subsequently in *Randall v. Tarrant* [1955] 1 W.L.R. 255 where Sir Raymond Evershed M.R. said, at p. 259:

> "The rights of members of the public to use the highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time E to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

and in *Clerk & Lindsell on Torts,* 17th ed. (1995), p. 861, para. 17-41:

F > "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The right of assembly, of demonstration, is of great importance but in G English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored.

These cases, in limiting or linking rights of user by the public of the highway to passage or repassage, in themselves exclude a right to stay on the highway other than for purposes connected with such passage, but they are to be read with cases of wider application which reject the possibility of a right of staying on or wandering over land being acquired by user or H prescription. See, for example, *Attorney-General v. Antrobus* [1905] 2 Ch. 188, where a claim of a right for the public to visit Stonehenge acquired by user was rejected, and in *In re Ellenborough Park* [1956] Ch. 131 where a claim that the public had acquired a right to wander in a pleasure park

was asserted. In the latter case, Sir Raymond Evershed M.R. said, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

On existing authority, I consider that the law is clear. The right is restricted to passage and reasonable incidental uses associated with passage.

It seemed to be suggested or at least implicit in argument that demonstrations and assemblies are a new development of the late 20th century and cannot have been in the mind of judges when they defined the law in the 19th century and even as late as Sir Raymond Evershed M.R.'s judgment to which I have referred. This is plainly wrong as the two Trafalgar Square cases (and 19th century descriptions of contemporary conditions) show, even though the extent, nature, size and object of such demonstrations and assemblies have changed. I am willing to assume that more people are now more conscious of the importance of assembly and demonstration than they were in previous centuries, but I do not see that this in itself is enough to justify changing the nature and scope of the public's right to use the highway. That it cannot in itself justify as of right assemblies or demonstrations on private land is obvious. The defendants' argument in effect involves giving to members of the public the right to wander over or to stay on land for such a period and in such numbers as they choose so long as they are peaceable, not obstructive, and not committing a nuisance. It is a contention which goes far beyond anything which can be described as incidental or ancillary to the use of a highway as such for the purposes of passage; nor does such an extensive use in my view constitute a reasonable, normal or usual use of the highway as a highway. If the defendants' claim is right, it seems to me to follow that other uses of the highway than assembly would be permitted—squatting, putting up a tent, selling and buying food or drinks—so long as they did not amount to an obstruction or a nuisance. To get over the fence from adjoining land (as could have happened here) and to sit or stand on the highway, including the verge, in order to demonstrate does not seem to me to be a normal or usual use of the highway as such and has nothing to do with passing and repassing.

The fact that the purpose of the demonstration or assembly is one which most or many people would approve does not change what is otherwise a trespass into a legal right. Nor does the fact that an assembly is peaceful or unlikely to result in violence, or that it is not causing an obstruction at the particular time when the police intervene, in itself change what is otherwise a trespass into a legal right of access.

It is objected that very often people on the highway singly or in groups take part in activities which go beyond passage and repassage and are not stopped. That is no doubt so, but reasonable tolerance does not create a new right to use the highway and indeed may make it unnecessary to create such a right which in its wider definition goes far beyond what is justified or needed. It may well be in the situation with which your

Lordships are concerned that, but for section 14 of the Act of 1986, nothing would have been done to a peaceful non-obstructive group like the one in which the defendants took part. But Parliament in 1994 has enabled action to be taken over and above existing remedies to deal with trespass on the highway, or on land for entry on which the landowner's permission is required, to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do so. I do not consider that disapproval of this near statutory power justifies a change in the law by the courts as to the public's rights over the highway, which is what at times seemed to be one of the bases of the defendants' arguments.

Reference was made to cases such as *Lowdens v. Keaveney* [1903] 2 I.R. 82; *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 (under section 137(1) of the Act of 1980); *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hubbard v. Pitt* [1976] Q.B. 142, which concern wilful obstruction of the passage along a highway without reasonable excuse. That is a different question from the one raised in the present case and I do not consider that the passages relied on from those judgments directly assist in answering it.

Reference was also made to the European Convention for the Protection of Human Rights and Fundamental Freedoms, not, of course, as in itself governing the legal position in the United Kingdom, but as indicating what our law should now be. It is desirable to look at the Convention for guidance even at the present time, but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is: see *per* Butler-Sloss L.J. in *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830. In any event, I am not satisfied that the existing law on highways is necessarily in conflict with article 11 of the Convention providing for a right of assembly, or of article 10 relating to freedom of expression. Both provide for exceptions to the rights created. I accept that it is arguable that a restriction on assembly even on the highway may interfere with the right of assembly in some situations, as the decisions of the European Court of Human Rights, which have been referred to, show, but I am not satisfied that there was here such a violation either by the law relating to access to the highway as it stands, or in its application to the facts of this case, which should compel us to change the law as I believe it to be.

It follows in my view that the Crown Court deciding essentially that what happened was a reasonable use of the highway erred in law and that the Divisional Court was right in the result to reverse their decision. The justices who heard the case through were entitled to find that there had been a trespassory assembly.

The question certified in essence asks whether the lack of obstruction prevents an assembly of 20 or more persons on the highway from being a trespassory assembly. I would answer that in the negative. Put in the way in which the question is framed, i.e. whether such an assembly where there is no obstruction does exceed the public right of access to the highway so as to constitute a trespassory assembly contrary to section 14A of the Act of 1986, I would answer in the affirmative.

I would accordingly dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, the point which is at issue in this appeal arises out of an incident which took place on 1 June 1995 on the grass verge of the A344 road beside the perimeter fence of the monument at Stonehenge. It relates to the extent of the use which members of the public are entitled to make of a highway in the exercise of the public's right of access to it. The question is whether members of the public who join together to form a peaceful, non-obstructive assembly upon the highway, their purpose being not to pass along the road but to remain in the place where they have gathered for such time as they choose to remain there, are acting in such a way as to exceed their public right of access to the highway.

On 22 May 1995 Salisbury District Council made an order under section 14A(2) of the Public Order Act 1986, as inserted by the Criminal Justice and Public Order Act 1994, prohibiting the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining Stonehenge from 2359 hours on Sunday, 28 May 1995 until 2359 hours on Thursday, 1 June 1995. At about 6.40 p.m. on 1 June 1995 the defendants had gathered with others on the grass verge of the perimeter fence to the west of the Heelstone. They were spread out along the verge, which was about five feet wide, over a distance of about 10 to 15 yards. The conduct of the group was entirely peaceful. No obstruction was being caused to anybody who wished to use the highway. No member of the group was on the roadway, and nobody was abusive, offensive or violent to the police or anybody else in any way. There had been some movement, as people joined the group and others left it during the afternoon and those who were on the verge moved around. But the group was in the nature of an assembly, not a procession. Its members were not pausing for conversation, rest or refreshment while passing along the highway. They had taken up a position upon it in a place where they proposed to stay for the time being. It can be assumed that they did so because they believed they had a right to be there.

A police officer who was at the scene formed the view, after counting its members, that this was an assembly of 20 or more persons and that it was a trespassory assembly which had been prohibited by the order made under section 14A. He informed those present of the terms of the order and at about 6.45 p.m. he instructed them to move on. Most of those who were present complied with this instruction. But the defendants refused to do so, and just after 7 p.m. they were arrested on the ground that they were committing an offence under section 14B of the Act by taking part in an assembly which they knew was prohibited by an order under section 14A. They were tried before the Salisbury magistrates and convicted of an offence under section 14B(2). They appealed against their convictions to the Salisbury Crown Court, which allowed their appeals on the ground that the group's user of the highway was a reasonable one which did not exceed the public's right of access. This decision was reversed when the case came before a Divisional Court of the Queen's Bench Division [1998] Q.B. 563 on the ground that the public's right of access to the highway was limited to a right of passage and that an assembly, although peaceful and non-obstructive, could not be said to be on the highway in the exercise of that right. McCowan L.J. rejected, at p. 570, the suggestion that the

holding of an assembly of 21 persons was incidental to the right of passage and repassage. Collins L.J. said, at p. 571H, that the holding of a meeting, demonstration or vigil on the highway, however peaceable, has nothing to do with the right of passage.

The case has obvious implications for the relationship between the criminal law and the right of peaceful assembly under article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as it arises out of a prosecution brought under the Act of 1986. But the problem which it has raised seems to me to depend for its answer upon an application of the principles which are to be found in the law of real property and landownership. This is because of the words which section 70 of the Act of 1994 has used to define what it describes as a trespassory assembly. Section 14A(5), which it has inserted into Part II of the Act of 1986, states:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

"Assembly" for this purpose means an assembly of 20 or more persons, and "land" means land in the open air: see subsection (9). The word "limited" is defined by subsection (9) in these terms:

> " 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

This section may be contrasted with section 14 of the Act of 1986 which deals with the imposition of conditions on public assemblies. Section 16 defines "public assembly" as "an assembly of 20 or more persons in a public place which is wholly or partly open to the air." It defines "public place" for this purpose as meaning any highway and any place to which the public or any section of it has access, on payment or otherwise, as of right or by virtue of express or implied permission. The technique which section 14 uses to enable the police to control assemblies of this kind is that of enabling the police to impose conditions on the place where it may be held, its numbers and its duration. A person who knowingly fails to comply with any of these conditions commits an offence. The assumption is that, so long as the conditions are complied with, a public assembly in a public place is lawful and that the police have no power to require its members to disperse.

The technique which section 14A uses is entirely different. It brings into the arena of the criminal law the rights, if any, which the public have as against the occupier of the land in private law. It does so by enabling the police to take action against those taking part in an assembly if the occupier of the land would be entitled to treat the assembly as trespassing on his land. But the police may exercise their powers independently of the occupier, whose knowledge of or consent to the action which they are

taking is not required. It is sufficient that an order under section 14A is in force for the time being and that the assembly is within the area to which it applies.

In this situation it is necessary first to identify the extent of the public's right of access to a highway before looking more broadly at the human rights issues which this case has raised. Mr. Fitzgerald for the defendants accepted that the public's right of access was a limited one, and he did not suggest that there was any relevant distinction in this regard between a "road" and a "highway." The definition of "limited" in section 14A(9) uses both expressions. At common law the expression "highway" includes all ways to which the public have access, from footpaths and bridleways to carriageways. It may therefore be said to include a "road," and in particular a road such as the A344 the solum of which is vested in the statutory highway authority.

The most important point to note about these expressions is their generality. The certified question refers to "*the public* highway" (emphasis added). The use of the definite article and the addition of the adjective "public" suggest that a distinction can be drawn between those highways which are public and those which are not. But section 14A(9) refers simply to "a highway." In doing so it follows the wording used in other statutes to which I shall refer later. It also follows the common law, which uses the word "highway" to describe a place to which the public have access in order to exercise the public right. All highways are in that sense "public." The only distinction which might relevantly be drawn is that the land over which a highway passes is not always vested in a public authority. But it has not been suggested that the right of access is different according to the public or private character of the landowner. The conclusions which I would draw from this are that the addition of the word "public" is tautologous, and that anything which we may say about the limits of the public right of access to a highway must be taken, in law, to apply to each and every highway.

The next point is that no question arises in this case as to the limits of any permission given by the occupier. But it is worth noting that section 14A(5), by treating an assembly which exceeds the limits of such permission as a trespassory assembly, is relying for its application on a matter which the law would normally be content to leave to the discretion of the occupier. The same may also be said of cases where the assembly is held on land to which the public have a right of access which is limited. The law would normally be content to leave it to the occupier to intervene if any members of the public were acting in a way which exceeded the limits of the public right. Although the right to complain that there is a trespass has been taken out of the hands of the occupier and placed at the disposal of the police by section 14A, the extent of these limits must nevertheless be found in the relationship in private law between the public and the occupier.

It may be convenient to begin an examination of this subject with some general statements. A highway is a way over which there is a public right of way. A public right of way is similar to but not in all respects the same as an easement of way. The right is exercisable by anyone whether he owns land or not, whereas an easement is a right exercisable by the owner of

land for the time being by virtue of his estate in the land of which he is the dominant proprietor. There are other differences. But a public right of way closely resembles an easement of way in regard to the nature of the user from which its creation may be inferred and the nature of the use which may be made of it. *Halsbury's Laws of England*, 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110, states that it is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper use of it as such. In the same volume, p. 9, para. 1, it is stated that a highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. In *Megarry & Wade, The Law of Real Property,* 5th ed. (1984), p. 844 it is stated:

> "The land over which a public right of way exists is known as a highway; and although most highways have been made up into roads, and most easements of way exist over footpaths, the presence or absence of a made road has nothing to do with the distinction. There may be a highway over a footpath, while a well made road may be subject only to an easement of way, or may exist only for the landowner's benefit and be subject to no easement at all."

In *Clerk & Lindsell on Torts*, 17th ed., p. 861, para. 17-41 the current state of the law as to the question of use is summarised in these terms:

> "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The law of Scotland, which is relevant to this case as section 14A applies also to Scotland (section 42(2)), is the same on the question as to the use which may be made of the public right. In *Rankine, The Law of Land-ownership in Scotland*, 4th ed. (1909), p. 325 it is stated that the definition of a highway in English law as "a right of passage in general to all the King's subjects" applies also to Scotland. At p. 327 it is observed that "the public right of passage, called a highway" is regarded as a limitation or restriction on the landowner's use of his property. In *Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd.*, 1976 S.C.(H.L.) 30, 125 Lord Wilberforce said: "A public right of way on highways is established by use over the land of a proprietor . . ."

But it is worth nothing that there are some important differences between the law of Scotland and the law of England as to the constitution of the right. I think that it is right to mention this, because Scots law does not regard the assertion that actual intention is confined to the right to pass and repass and to activities incidental or ancillary to that right as a legal fiction. This is regarded in Scotland as a matter of fact which requires to be established by the evidence. The differences between the laws of the two countries on this matter were discussed in *Mann v. Brodie* (1885) 10 App.Cas. 378. Lord Blackburn observed, at p. 385, that any reference to the law of England in that case, which was to be governed by the law

of Scotland, was apt to mislead unless the difference of the law of the two countries was borne in mind. He pointed out, at p. 386, that, although in both countries a right of public way may be acquired by prescription, it was in England never practically necessary to rely on prescription to establish a public way. It was enough that there was evidence on which those who had to find the fact might find that there was a dedication by the owner whoever he was. Lord Watson said, at pp. 390–391, that the constitution of such a right according to the law of Scotland does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. There are many examples in the Scottish authorities of cases where the parties have joined issue on the question whether the evidence of user was sufficient to establish this fact: e.g. *Duke of Atholl v. Torrie* (1850) 12 D. 328, affirmed (1852) 1 Macq. 65; *Macpherson v. Scottish Rights of Way and Recreation Society Ltd.* (1888) 13 App.Cas. 744. As *Rankine*, pp. 329–330, puts it: "The books are rich in illustrations of this matter, for no actions have been more obstinately fought out than cases of right of way."

The statutes which make provision as regards highways in England and Wales and as regards roads in Scotland follow the approach of the common law as to the nature of the public right of access. Section 328(1) of the Highways Act 1980 provides that in that Act, except where the context otherwise requires, "highway" means the whole or part of a highway other than a ferry or waterway. Section 329(1) defines "bridleway," "carriageway," "footpath" and "footway" respectively as meaning a way over which the public have a right of way on horseback, for the passage of vehicles or on foot only, as the case may be. As the term "highway" is not itself defined, it is necessary to apply the common law meaning of the word as a way over which members of the public have a right to pass and repass. Section 151(1) of the Roads (Scotland) Act 1984 is more explicit on this point. It defines "road" as meaning any way over which there is a public right of passage by whatever means. From this it follows that it is not possible to draw any relevant distinction as regards the nature of the public right of access between a highway which passes over land which is in private ownership and a highway which is vested in the statutory highway or roads authority.

It seems that at one time the extent of the right of passage was stated more narrowly than appears from the current textbooks. In *Ex parte Lewis*, 21 Q.B.D. 191 it was held that there was no right in the public to occupy Trafalgar Square for the purpose of holding public meetings there. Wills J. said, at p. 197:

> "The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.' A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."

In *Reg. v. Graham,* 16 Cox C.C. 420, 429–430 Charles J. addressed the jury in these terms:

> "I have anxiously considered the observations of Mr. Asquith" —counsel for the defendant Graham—"and I can find no warrant for telling you that there is a right of public meeting either in Trafalgar Square or any other public thoroughfare. So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and repassing; and, if you come to regard Trafalgar Square as a place of public resort simply, it seems to me it would be very analogous to the case of public thoroughfares . . ."

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 152 Lopes L.J. said that the interest of the public in a highway consisted solely in the right of passage. He went on to say, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of a highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

Kay L.J., at p. 158, was to the same effect. He said that the right of the public upon a highway is that of passing and repassing over the land the soil of which may be owned by a private person, and that using the land for any other purpose lawful or unlawful was a trespass.

I note in passing that he also made the point that, for trespass, the purpose need not be unlawful in itself, it being enough that it should be a user of the soil for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it. These observations seem to me to be directly in point in the present case. On this approach it would not matter in the least whether the assembly was or was not a peaceful one or whether or not it was causing an obstruction to anyone. The motives or behaviour of those who constitute the assembly are irrelevant to the question whether there is a trespass. The mere fact that it was a use of the soil for a purpose other than that of passing or repassing along the highway would be enough to make it a trespassory assembly.

But the strict approach indicated by the earlier authorities was departed from by Lord Esher M.R. in the same case. He observed, at p. 146, that, if the proposition that the use of the highway for any purpose, lawful or unlawful, other than that of passing or repassing was a trespass were to be construed too largely, the effect might be to interfere with the universal usage as regards highways in a way which would derogate from the

reasonable exercise of the rights of the public. He went on to give this explanation, at pp. 146–147:

> "Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway *as such*. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." (Emphasis added.)

In *Hickman v. Maisey* [1900] 1 Q.B. 752, 755 A. L. Smith L.J. said that he agreed with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, although he thought that it was a slight extension of the rule as previously stated which showed that the right of the public was merely to pass and repass along the highway. He gave, at p. 756, as examples of acts which no reasonable person would regard as trespassing, that of a man who sat down by the road for a time to rest himself or who took a sketch from the highway—of which the modern equivalent might be the tourist who pauses to take a photograph. But it is important to notice that the distinction which he drew was between acts which were an ordinary and reasonable use of the highway as such, which were permissible, and acts which were not within that description, which were not. Collins L.J. put the matter in this way, at pp. 757–758:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. This is in effect what Lord Esher M.R. said in *Harrison v. Duke of Rutland*."

While therefore Lord Esher M.R. may be said to have extended the previous statements of the law, the extension which he was willing to accept did not depart from the essential principle. The test of what is ordinary and reasonable is not to be applied in the abstract, as one may legitimately do in order to discover whether the activity is in itself lawful. It has to be applied in the context of the exercise of the right of passage, which is the only right which members of the public are entitled to exercise when "using the highway *as a highway*" (emphasis added): see his words at p. 146. So the question remains whether what is being done is an ordinary and reasonable thing for a person to do while using the highway as such in the exercise of that right.

Some of the cases indicate a disinclination on the part of the judges to favour resort to the courts for a remedy in cases where the trespass was so trivial or technical that no reasonable person would have objected to it: *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, where the

objection was to a clergyman holding services and delivering addresses on the seashore; *Fielden v. Cox* (1906) 22 T.L.R. 411, where the defendants had set up appliances on the highway for the purpose of catching moths. But the fact that some activities on the highway are or ought to be tolerated does not mean that they are being done there in the exercise of the public's right of access to it. It is the extent of the right of access, not the question whether the activity in question ought to be tolerated, which is in issue in the present case. For the purposes of section 14A(5) the question is not whether the assembly is of a kind which a reasonable occupier of the land would tolerate, but whether it exceeds the limits of any permission of his or the limits of the public's right of access.

We were referred to a number of later authorities, but these seem to me to be illustrations of the application of the law as settled by these previous cases and not to indicate that the law is in need of any further extension or relaxation as to the test to be applied. For example, in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. said:

> "The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

These observations are consistent with the opinion which the Lord President (Lord Dunedin) expressed in *M'Ara v. Magistrates of Edinburgh*, 1913 S.C. 1059. The question in that case was whether the magistrates were entitled to issue a proclamation ordering that "persons shall not assemble or congregate or hold meetings" in certain streets of the city unless they had been licensed to do so. It was held that they had no power to do so either under the Act of 1606, c. 17, for staying unlawful conventions or at common law. As the Lord President explained, at pp. 1074–1075, they had power by means of the police to move the people on if they were causing an obstruction or their conduct was such as to be likely to amount to a breach of the peace. What they could not do without statutory authority was to create an offence and impose penalties. (It should be noted that the Lord President was referring here to the magistrates not as judges—not as a tribunal of fact of that kind—but as members of the town council, with the power at common law by means of the police—and by proclamation, if necessary—of moving on people who were causing an obstruction. The Lord President said, as to the limits of the public right of access, at p. 1073:

> "As regards the common law, I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets."

He went on to say that, although the streets are for passage and that passage is paramount to everything else, this does not necessarily mean

that anyone is doing an illegal act if he is not at the moment passing along—the whole question being one of degree. As for the right of free speech, he said that it undoubtedly exists but that: "the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised." I think therefore that the law as stated by Lord Esher M.R. in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 can be taken to be the law as it must be applied between members of the public who seek to exercise the public's right of way on a highway and the occupier of the land which has been dedicated to that right. The question is one of degree. But the principle which must be applied is that the highway is for passage, and such other uses as may be made of it as of right must be capable of being recognised as a reasonable and usual mode of using the highway as such.

This brings me to the wider questions which were raised in the course of the argument. Mr. Fitzgerald's submission was that the assembly in this case was a reasonable use of the highway because it was an entirely peaceful one and because it was not obstructing anybody. His argument was that this was a reasonable use of the highway, not because it was incidental or accessory to the activity of passing and repassing along it, but because as a purpose and end in itself it was reasonable. He said that the test which had been stated by Lord Esher M.R. was capable of development to bring it into line with what society in the late 20th century would consider to be reasonable. In order to strike a fair balance between the rights to freedom of expression and of assembly and the rights of those who wished to pass and repass on the highway, an assembly which was causing an obstruction could not be considered to be reasonable. But an assembly which was not obstructive and was otherwise lawful was a reasonable and usual use of the highway simply because the activity was in itself a reasonable one. So it should not be regarded as a trespassory assembly within the meaning of section 14A.

I do not think that this broad argument can be reconciled with Lord Esher M.R.'s statement of the law or with principle. In my opinion the distinction between the use of a highway for passage and its use as a place of assembly as an end in itself is a fundamental one, although the question is ultimately one of fact. The purpose of those who are said to have formed an assembly may be to remain in the place where they have gathered for a short time only before continuing to pass along the road, in which case it may be inferred that they are making reasonable use of the highway as a highway. Or it may be that their purpose to remain there indefinitely, in which case the only inference which can be drawn is that they are using the highway as a place of assembly. This point that the right is to pass or repass, not to remain, is perhaps best illustrated by using the language which Farwell J. adopted in *Attorney-General v. Antrobus* [1905] 2 Ch. 188 when he was asking himself whether the public could acquire by user the right to visit a public monument.

In that case also, as it happens, Stonehenge was the subject of the controversy—although in rather different circumstances, as the monument was then in private ownership. The owner of the land had enclosed the monument by fencing on the view that this was necessary for its protection. The Attorney-General wished to remove the fencing in order to keep the

A place open so that the public could visit it. The action failed, because there could be no public right of way to the monument acquired by mere user or by the fact that the public had been in the habit of visiting it. Farwell J. said, at p. 198, that the jus spatiandi—the right to walk about or to promenade—was not known to our law as a possible subject matter of prescription. He said, at p. 206, that the public had no jus spatiandi or manendi—the right to stay or remain—within the circle. In *In re Ellenborough Park* [1956] Ch. 131, in which it was held that the jus spatiandi, in regard to a right to use a pleasure park, could be acquired by grant as an easement, Sir Raymond Evershed M.R. observed, at p. 163, that Farwell J.'s rejection of it may have been derived in part from its similar rejection by the law of Rome, and that there was no other judicial authority for adopting the Roman view in this respect into English law. But as to the matter of public right he went on to say, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

Although the use of these Latin words may seem out of date in present circumstances, they serve nevertheless as a valuable reminder of the place which the right to assemble must occupy in the context of the law relating to real property. Easements and public rights to land which are acquired by user or by dedication are limited rights, as against the occupier or owner of the land which is affected by them. They are granted or acquired for a particular purpose only, and they are not to be confused with the use of the land for other purposes. Thus a right of way or passage is entirely different from a right to walk about or a right to remain in one place. The law recognises that a right of way or passage may be acquired by user or by dedication. But it takes a different view of the right to walk about or to remain in one place. These are not rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at all they can be acquired only by express grant. So they cannot be included among the rights of access which the public can enjoy as of right without the consent of the landowner.

The assembly which was said by the police to have formed on this occasion was undoubtedly a peaceful and non-obstructive one and, as it was on the grass verge of a road which was vested in the statutory highway authority, it may reasonably be said to have been doing no harm to anybody. But the consequences of accepting that anyone who was behaving in this way was exercising the public's right of access to the highway—was doing so as of right and not by mere tolerance—would have implications far beyond the facts of this case. It would affect the position of every private owner of land throughout the country over which there is a public right of way, irrespective of whether this is a made-up road or a footpath or bridleway. The right of assembly which Mr. Fitzgerald was seeking to establish was what would be described in the terms of property law as a right to remain. I wish to stress that the purpose for which the defendants were seeking to remain where they had gathered is not material in this

context. Any member of the public may use a highway for passage in the exercise of the public right whatever his reason may be for doing so. In the same way, if such a thing as a public right to assemble and remain in one place on the highway were to be recognised, the purpose of those who wished to exercise it would be immaterial. If it was an unlawful purpose it could be stopped on that ground. But if it was lawful there would be nothing to prevent those who wished to exercise it from remaining where they were for however long they wished, whatever their number and whatever their purpose might be in doing so.

It is not difficult to see that to admit a right in the public in whatever numbers to remain indefinitely in one place on a highway for the purpose of exercising the freedom of the right to assemble could give rise to substantial problems for landowners in their attempts to deal with the activities of demonstrators, squatters and other uninvited visitors. It would amount to a considerable extension of the rights of the public as against those of both public and private landowners which would be difficult for the courts to control by reference to any relevant principle. The margin between what is and what is not a nuisance is an imprecise one, as to which he who wishes to put a stop to it may be in difficulty in obtaining an immediate remedy. The test of reasonable use of the highway as such is consistent with the rule that the public's right of way is essentially a right of passage. It is also consistent with the law as to the kind of user which must be shown in order to show that a public right of way has been constituted over the land of the proprietor. The proposition that the public are entitled to do anything on the highway which amounts in itself to a reasonable user may seem at first sight to be an attractive one. But it seems to me to be tantamount to saying that members of the public are entitled to assemble, occupy and remain anywhere upon a highway in whatever numbers as long as they wish for any reasonable purpose so long as they do not obstruct it. I do not think that there is any basis in the authorities for such a fundamental rearrangement of the respective rights of the public and of those of public and private landowners.

Mr. Fitzgerald said that, whatever the difficulties might be in regard to the holding of assemblies on footpaths and bridleways over the property of private landowners, there was no good reason why the same view should be applied to highways which were vested in the statutory highway authority. He said that, as highways which are used as roads by the public are now almost all in public ownership and as section 14A had brought the whole issue of trespass into the realm of public law, there should now be a coherent system of public law to deal with assembly cases. His argument was that the approach which the criminal law had taken in obstruction cases showed that the concept of reasonable user was capable of providing the required symmetry.

I do not need to go into a detailed analysis of the obstruction cases. We were referred to *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, in which the question was considered in the context of the offence which is created by section 137(1) of the Act of 1980 where a person without lawful authority or reasonable excuse in any way wilfully obstructs the free passage along a highway. In that context it is necessary to consider whether what was done was in itself reasonable, striking a

balance between the right to free speech and to demonstrate on the one hand and the need for peace and good order on the other: *per* Otton L.J., at p. 151.

Mr. Fitzgerald said that the common law was capable of development within the concept of reasonable user in order to rationalise what he accepted were two conflicting lines of authority. But I do not think that section 14A requires us to attempt such an exercise. On the contrary, the intention of Parliament as disclosed by the language of that section was to rely upon the existing state of the law relating to trespass as between members of the public and the occupiers of land to which members of the public have no right of access or only a limited right of access. Like it or not, this approach makes the lack of symmetry of which Mr. Fitzgerald complains inevitable. The private law upon which section 14A depends for its application is concerned to regulate the rights of the owners and occupiers of land in regard to the use of their land by the public. Public law, which is concerned with the relationship between the state and its citizens, depends upon entirely different concepts. Furthermore it is a striking feature of the present case that the question whether the law relating to the public's right of access should be rationalised in order to give the public greater freedom in the exercise of that right is being discussed in a case to which no landowner is a party. It seems to me to be contrary to elementary concepts of justice that the rights of landowners as against the public in relation to access to their land should be diminished by a decision of your Lordships' House when nobody who is in a position to defend their interest has yet been heard.

We were invited to have regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms both as an aid to statutory interpretation and as a yardstick against which to resolve any uncertainty in the common law or to guide its development. I do not think that there is any need to have resort to the Convention as an aid to statutory interpretation, as there is no ambiguity in the statutory provisions which are relevant to this case. Nor do I think that there is any uncertainty as to the test which must be applied under the common law relating to the use which the public may make of a highway in the exercise of the public's right of access. In *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283G, Lord Goff of Chieveley said that he conceived it to be his duty, when he was free to do so, to interpret the law in accordance with the obligations of the Crown under the treaty. Adopting this approach, in *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830B–C Butler-Sloss L.J. said that, where there was an ambiguity in the law or the law was otherwise unclear or so far undeclared by an appellate court, the English court was not only entitled but obliged to consider the implications of the Convention. For the defendants it was contended that the law is unclear because the inconsistency between the private law relating to trespass and the criminal law relating to obstruction in public places had still to be reconciled. For the reasons which I have already given I do not accept that there is such an inconsistency.

In any event it seems to me that there are clear indications in the Convention that restrictions on the exercise of fundamental rights and freedoms such as the freedom of assembly under article 11(1) of the

Convention may be justified where this is necessary for the protection of the rights and freedoms of others. This is stated in terms in article 11(2). Article 1 of the First Protocol states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The precise effect of these provisions in regard to the right of a landowner to exclude trespassers from his property was not explored in the course of the hearing before us. But I do not think that it would be right to regard the Convention as providing unqualified support to the argument that the public's right of access should be enlarged so as to enable the public to exercise what article 11(1) of the Convention describes as "the right to freedom of peaceful assembly" wherever there is a public right of access to a highway. Such an enlargement would be bound to result in loss of the protection of the owners of land which the existing state of the law gives to them. In that sense and to that extent it could be said that they were being deprived of their right to the quiet enjoyment of their possessions contrary to article 1 of the First Protocol.

It seems to me therefore that what I can best describe as the horizontal effect of the defendants' argument as to the Convention in regard to the private rights of landowners gives rise to questions of considerable difficulty. I am not persuaded that the balance which is struck in private law between the rights of the public and those of landowners is in need of adjustment in order to enable members of the public to exercise their freedom of assembly. In practice members of the public are allowed to assemble in public places as they wish without objection or hindrance so long as they do not obstruct others and are peaceful. As Lord Goff of Chieveley said in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283F, everybody is free to do anything in this country, subject only to the provisions of the law. The law of trespass exists to protect the interests of landowners where such assemblies exceed the limits which they are willing to tolerate. Such provisions as exist in public law, as in the case of section 14A, may be justified on the ground that they have been carefully drafted having regard to the need to protect the public from arbitrary action on the part of the police while at the same time enabling the police to intervene to prevent disorder or crime. I do not think that the Convention requires us to attempt to reform the private law relating to trespass on which section 14A relies in order to mitigate the effects of its application to trespassory assemblies which are held in breach of an order obtained under that section.

For these reasons I would answer the certified question in the affirmative and dismiss the appeal.

LORD CLYDE. My Lords, the defendants were convicted of having taken part in an assembly which they knew was prohibited under section 14 of the Public Order Act 1986. The question is whether the assembly was a prohibited one. Section 14A(5) explains what is meant by a prohibited, or a "trespassory," assembly. The relevant words for the purposes of the present case are that the assembly "(*a*) is held on land to which the public has ... only a limited right of access, and (*b*) takes place in the prohibited circumstances ..."

There is no doubt but that the assembly in the present case took place on a highway and that a highway is land to which the public had a limited right of access. So one has next to consider the prohibited circumstances. Those circumstances are defined in section 14A(5)(*b*). The critical qualification here claimed is that the assembly so took place "as to exceed ... the limits of the public's right of access." So the question comes to be what is the extent of the public's right of access. That is a quite general question which will apply universally, whether an individual member of the public or a group of people is involved. It will also be applicable to any other kind of public road, subject to any particular limitations which may restrict the use of such a road, whenever or however imposed.

The Act gives a little further explanation. Section 14A(9) defines "limited" in relation to a right of access by the public to land as meaning that "their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions." So one has to consider what was the particular purpose for which Parliament considered the use of a highway was restricted.

The fundamental purpose for which roads have always been accepted to be used is the purpose of travel, that is to say, passing and repassing along it. But it has also been recognised that the use comprises more than the mere movement of persons or vehicles along the highway. The right to use a highway includes the doing of certain other things subsidiary to the user for passage. It is within the scope of the right that the traveller may stop for a while at some point along the way. If he wishes to refresh himself, or if there is some particular object which he wishes to view from that point, or if there is some particular association with the place which he wishes to keep alive, his presence on the road for that purpose is within the scope of the acceptable user of the road. The view was expressed by A. L. Smith L.J., in *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, that if a man took a sketch from the highway no reasonable person would treat that as an act of trespass. So, as it seems to me, the particular purpose for which a highway may be used within the scope of the public's right of access includes a variety of activities, whether or not involving movement, which are consistent with what people reasonably and customarily do on a highway. In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146 Lord Esher M.R. defined trespass in terms of a person being on the highway "not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway . . ." But what is reasonable or usual may develop and change from one period of history to another. That was recognised by Collins L.J. where in *Hickman v. Maisey* he said, at pp. 757–758:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

On the other hand the purpose for which the road is used must be for ordinary and lawful uses of a roadway and not for some ulterior purpose for which the road was not intended to be used. Thus in *Hickman v. Maisey* it was held to be a trespass for someone to use the road as a vantage point for observing the performance of racehorses undergoing trial. To use the language of Collins L.J., that was a use of the highway "in a manner which is altogether outside the purpose for which it was dedicated ..." So also in the earlier case of *Harrison v. Duke of Rutland* it was held to be a trespass for a person to use the road for the purpose of disrupting the adjoining landowner's enjoyment of his sporting rights.

But it must immediately be noticed that the public's right is fenced with limitations affecting both the extent and the nature of the user. So far as the extent is concerned the user may not extend beyond the physical limits of the highway. That may often include the verges. It may also include a lay-by. Moreover, the law does not recognise any jus spatiendi which would entitle a member of the public simply to wander about the road, far less beyond its limits, at will. Further, the public have no jus manendi on a highway, so that any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there.

So far as the manner of the exercise of the right is concerned, any use of the highway must not be so conducted as to interfere unreasonably with the lawful use by other members of the public for passage along it. The fundamental element in the right is the use of the highway for undisturbed travel. Certain forms of behaviour may of course constitute criminal actings in themselves, such as a breach of the peace. But the necessity also is that travel by the public should not be obstructed. The use of the highway for passage is reflected in all the limitations, whether on extent, purpose or manner. While the right to use the highway comprises activities within those limits, those activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with that use even if they are not strictly ancillary to it. As was pointed out in *M'Ara v. Magistrates of Edinburgh*, 1913 S.C. 1059 and in *Aldred v. Miller*, 1924 J.C. 117 the use of a public street for free unrestricted passage is the most important of all the public uses to which public streets are legally dedicated. No issue regarding the nature of the user arises in the present case. It appears that everyone was behaving with courtesy and civility and restraint. Moreover there was no obstruction at all to any traffic.

In the generality there is no doubt but that there is a public right of assembly. But there are restrictions on the exercise of that right in the public interest. There are limitations at common law and there are express limitations laid down in article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. I would not be prepared to affirm as a matter of generality that there is a right of assembly at any place on a highway at any time and in any event I am not persuaded that the present case has to be decided by reference to public rights of assembly. If a group of people stand in the street to sing hymns or Christmas carols they are in my view using the street within the legitimate scope of the public right of access to it, provided of course that they do so for a

reasonable period and without any unreasonable obstruction to traffic. If there are shops in the street and people gather to stand and view a shop window, or form a queue to enter the shop, that is within the normal and reasonable use which is matter of public right. A road may properly be used for the purposes of a procession. It would still be a perfectly proper use of the road if the procession was intended to serve some particular purpose, such as commemorating some particular event or achievement. And if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so. All such activities seem to me to be subsidiary to the use for passage. So I have no difficulty in holding that in principle a gathering of people at the side of a highway within the limits of the restraints which I have noted may be within the scope of the public's right of access to the highway.

In my view the argument for the defendants, and indeed the reasoning of the Crown Court, went further than it needed to go in suggesting that any reasonable use of the highway, provided that it was peaceful and not obstructive, was lawful, and so a matter of public right. Such an approach opens a door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway. I do not consider that by using the language which it used Parliament intended to include some distinct right in addition to the right to use the road for the purpose of passage.

I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway.

The only point which has caused me some hesitation in the circumstances of the present case is the evident determination by the two defendants to remain where they were. That does seem to look as if they were intending to go beyond their right and to stay longer than would constitute a reasonable period. But I find it far from clear that there was an assembly of 20 or more persons who were so determined and in light of the fluidity in the composition of the grouping and in the consistency of its component individuals I consider that the Crown Court reached the correct conclusion.

I do not find it possible to return any general answer to the certified question. The matter is essentially one to be judged in light of the particular facts of the case. But I am prepared to hold that a peaceful assembly which does not obstruct the highway does not necessarily constitute a trespassory assembly so as to constitute the circumstances for an offence where an order under section 14A(2) is in force. I would allow the appeal.

LORD HUTTON. My Lords, on 1 June 1995 a number of people were present in the vicinity of Stonehenge. There were tourists and sightseers, and there were also a number of people who were present because it was the tenth anniversary of a disturbance known as "the Battle of the Beanfield" when the police had had to eject persons who had tried to enter the site of Stonehenge.

About 6.45 p.m. on 1 June the two defendants together with about 19 other persons, constituting a group of more than 20 persons, were on the grass verge between the perimeter fence of Stonehenge and the metal surface of the roadway of the A344. Some of the group were carrying banners with the words "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." The grass verge was about 4 feet 6 inches to 5 feet wide and the group, which was not static but fluid, was moving around on the verge and was spread out over 10 to 15 yards. It is not in dispute that the grass verge is to be considered as part of the public highway.

In 1994 Parliament amended the Public Order Act 1986 by section 70 of the Criminal Justice and Public Order Act 1994 which inserted section 14A and section 14B after section 14. The effect of section 14A in relation to the circumstances of the present case can be broadly stated as follows: where a chief officer of police reasonably believes that an assembly of 20 or more persons is intended to be held in any district at a place on land to which the public has only a limited right of access, and that the assembly is likely to conduct itself in such a way as to exceed the limits of the public's right of access and may result in serious disruption to the life of the community or in significant damage to a monument of historical, architectural, archaeological or scientific importance on the land, he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or in part of it. On receiving such an application a council in England, with the consent of the Secretary of State, may make such an order.

On 22 May 1995 Salisbury District Council made an order pursuant to section 14A that the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining the monument at Stonehenge were prohibited for four days commencing at 23.59 hours on 28 May 1995 and terminating at 23.59 hours on 1 June 1995.

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

Section 14A(9) provides:

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

Section 14B(2) provides: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The two defendants were charged with an offence under section 14B(2). They were tried before the Salisbury justices and on 3 October 1995 they were each convicted of that offence. They appealed against their convictions to the Salisbury Crown Court and their appeals were heard by Judge MacLaren Webster Q.C. and two justices on 3 and 4 January 1996. At the close of the prosecution case the defendants submitted that there was no case to answer and the Crown Court accepted this submission and allowed the appeals in a fully reasoned judgment setting out its findings and conclusions. The Director of Public Prosecutions appealed by case stated to a Divisional Court of the Queen's Bench Division, constituted by McCowan L.J. and Collins J., which allowed the Director's appeal and ordered that the case be remitted to the Salisbury Crown Court to be reheard by a differently constituted bench.

In its judgment the Crown Court set out its findings of fact. These included:

> "At no time was either appellant or, for that matter any other person in the group of people in the area extending 10 to 15 yards westward from the Heelstone abusive, obstructive or in any way offensive or violent to the police or anyone else. None of those to whom Inspector Mackie addressed himself was in the roadway—the A344 itself, they were not obstructing the freedom of movement of others on the verge nor were they causing a public nuisance ... I pause to remind us that we have found that the assembly of 20 or more people was merely that. It was a presence. It was not, let alone any member of it, let alone either of the appellants, other than present. Neither as a group nor as individuals were any of those 20, and in particular, of course, the defendants (whom it must always be remembered we have to consider individually as distinct both from the group and each other) being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

Therefore the issue which arose for determination before the Crown Court and the Divisional Court was whether the entirely peaceful assembly which did not obstruct passage along the highway constituted a trespassory assembly because it was taking place "so as to exceed the limits of ... the public's right of access" to the highway, the A344.

The conclusion of the Crown Court was stated as:

> "we find that everything that was done by the appellants was done peaceably and in good order. Although Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142 was dealing with an interlocutory injunction and Otton J. in *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 with obstruction (which, let it be recalled, did not occur in the instant case), we too are of the view that the passage cited from Lord Denning, at pp. 178–179, is, to adopt and adapt the words of Otton J., at p. 152, of importance when considering whether appellants (behaving as we find, on the evidence thus far, these

appellants to have been behaving), have committed a criminal offence of knowingly taking part in a *prohibited* assembly. What the order prohibited was a trespassory assembly. We accept Mr. Butt's contention [for the prosecution] that a trespassory assembly is one where the public's right of access to land has been exceeded. We do not in the light of our conclusion on that aspect have to consider whether the appellants knew they were taking part in a prohibited assembly. Their user of the highway was a reasonable user. Accordingly, for the reasons we have sought to explain we have unanimously reached the conclusion that the evidence is not such that properly directed we could properly convict of that offence. Accordingly there is no case for the appellants to answer and their appeals must be allowed."

In the case stated to the Divisional Court two questions were stated for its opinion:

"(i) Where there is in force an order under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A? (ii) In order to prove an offence under section 14B(2), is it necessary for the prosecution to prove that each of the 20 or more persons present is exceeding the limits of the public's right of access or merely that 20 or more persons were present and that some of them were exceeding the limits of the public's right of access?"

The Divisional Court answered the first question in the affirmative. In his judgment in the Divisional Court [1998] Q.B. 563, 570 McCowan L.J. stated:

"In the present case counsel for the defendants, Mr. Starmer, argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public. I would accordingly answer the first question posed by the Crown Court for this court in the affirmative. Counsel for the defendants also argued before us that a right to passage and repassage must include anything incidental thereto. I would accept that, but it leaves the question of what is incidental to passage or repassage. Passing the time of day with an acquaintance whom one happens to meet on the highway might well qualify, but I would reject the suggestion that the holding of an assembly of 21 persons possibly could, any more than I would accept counsel's suggestion, by way of analogy, that a photographer on a public highway adjacent to the Queen's land taking photographs from the highway of members of the Royal Family on that land would only be doing something which was incidental to his right of passage or repassage on that highway."

Collins J. stated, at pp. 571–572:

> "The holding of a meeting, a demonstration or a vigil on the highway, however peaceable, has nothing to do with the right of passage. Such activities may, if they do not cause an obstruction, be tolerated, but there is no legal right to pursue them. A right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it."

He said, at p. 573:

> "The existence of a lawful excuse for doing something does not necessarily establish a legal right to do it. In the context of the criminal offence of obstruction, lawful excuse is naturally seen in terms of offending and not in terms of civil trespass."

It was agreed before the Divisional Court that the second question should be answered in the negative, in the sense that the prosecution need prove no more than that the assembly consisted of 20 or more persons and that the particular person accused was taking part in that assembly knowing it to be prohibited by an order under section 14A.

The point of law of general public importance stated for the opinion of this House is the same as that contained in the first question stated for the opinion of the Divisional Court:

> "Where there is in force an order made under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

My Lords, I consider that in the light of the well known authorities cited to the House the present state of the law is correctly stated in the following passage in *Halsbury's Laws of England,* 4th ed. reissue, vol. 21, pp. 77–78, para. 110:

> "The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for those purposes and not with a legitimate object, and as against the owner of the soil he is to be treated as a trespasser."

However I consider that there are indications in the authorities that the public's right to use the highway may be extended and that the important issue before your Lordships' House is whether that right should be extended so that the public has a right in some circumstances to hold a peaceful assembly on the public highway provided that it does not obstruct the use of the highway.

To consider this issue I must first turn to the principal authorities which establish the principle stated in *Halsbury's Laws of England.* In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 it was held that the plaintiff was a trespasser when, on the occasion of a grouse drive upon a moor

owned by the Duke of Rutland, the plaintiff went upon a highway which crossed it, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the guns. Lopes L.J. stated, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

In his judgment, having considered the authorities, Kay L.J. stated, at p. 158:

> "According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it."

In *Hickman v. Maisey* [1900] 1 Q.B. 752 the defendant, who published information as to the performances of racehorses in training, walked backwards and forwards on a portion of the highway over the plaintiff's land about 15 yards in length for a period of about an hour and a half, watching and taking notes of the trials of racehorses on the plaintiff's land. The Court of Appeal following the decision in *Harrison v. Duke of Rutland* upheld a verdict that the defendant was a trespasser.

In *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, 125–127 Slesser L.J. stated the right of the public to use the highway in the terms employed by Lopes L.J. in *Harrison v. Duke of Rutland*, at p. 154, and in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. stated:

> "it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

Therefore, as I have stated, the issue which arises in the present appeal is whether the right of the public to use the highway, as stated by Lopes L.J. in *Harrison v. Duke of Rutland,* should be extended and should include the right to hold a peaceful public assembly on a highway, such as the A344, which causes no obstruction to persons passing along the highway and which the Crown Court found to be a reasonable user of the highway.

In my opinion your Lordships' House should so hold for three main reason which are as follows. First, the common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern and I consider that the common law should now recognise that this right, which is one of the fundamental rights of citizens in a democracy, is unduly restricted unless it can be exercised in some circumstances on the public highway. Secondly, the law as to trespass on the highway should be in conformity with the law relating to proceedings for wilful obstruction of the highway under section 137 of the Highways Act 1980 that a peaceful assembly on the highway may be a reasonable use of the highway. Thirdly, there is a recognition in the authorities that it may be appropriate that the public's right to use the highway should be extended, in the words of Collins L.J. in *Hickman v. Maisey*, at p. 758:

> "in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

I now turn to state these reasons more fully.

The common law right of public assembly is unduly restricted unless it can be exercised in some circumstances on the public highway

In *Hubbard v. Pitt* [1976] Q.B. 142, 178–179 Lord Denning M.R. stated:

> "Finally, the real grievance of the plaintiffs is about the placards and leaflets. To restrain these by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in *Bonnard v. Perryman* [1891] 2 Ch. 269, and repeatedly applied ever since. That case spoke of the right of free speech. Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of Common Council of London affirmed 'the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.' Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited: see *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308. I stress the need for peace and good order. Only too often violence may break out: and then it should be firmly handled and severely punished. But so long as good order is maintained, the right to demonstrate must be preserved. In his recent inquiry on the Red Lion Square disorders, Scarman L.J. was asked to

recommend that 'a positive right to demonstrate should be enacted.' He said that it was unnecessary: 'The right, of course, exists, subject only to limits required by the need for good order and the passage of traffic:' The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38. In the recent report on Contempt of Court (1974) (Cmnd. 5794), the committee considered the campaign of the 'Sunday Times' about thalidomide and said that the issues were 'a legitimate matter for public comment:' p. 28, line 7. It recognised that it was important to maintain the 'freedom of protest on issues of public concern:' p. 100, line 5. It is time for the courts to recognise this too. They should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right of free speech; provided that everything is done peaceably and in good order."

In *Hubbard v. Pitt* the issue before the Court of Appeal was whether the judge in the High Court was right to grant an interlocutory injunction. Lord Denning M.R. dissented on this issue from the other members of the court, Stamp and Orr L.JJ., but they did not express an opinion on the right of public assembly.

In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 151–152 Otton J. cited the above passage from the judgment of Lord Denning M.R. in *Hubbard v. Pitt* and said:

"The courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other."

If, as in my opinion it does, the common law recognises the right of public assembly, I consider that the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens, because otherwise the value of the right is greatly diminished. The principles of law in Canada governing the right of public assembly are different to those in England, in part because the Canadian Charter of Rights and Freedoms gives an express right of freedom of expression, but I consider that the reasoning in the following passage in the judgment of Lamer C.J.C. in the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 394 should also apply to the common law right of public assembly:

"the freedom of expression cannot be exercised in a vacuum ... it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression."

Conformity between the law of trespass to the highway and the law relating to wilful obstruction of the highway

Section 137(1) of the Highways Act 1980 provides: "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 ..."

In *Hirst v. Chief Constable of West Yorkshire* the defendants were members of a group of animal rights' supporters which stood on the public street in the vicinity of a furrier's shop offering leaflets to pedestrians and holding banners. They were charged with an offence contrary to section 137(1). They were convicted by the justices and their appeals to the Crown Court were dismissed. They then appealed by case stated to the Divisional Court. Both in the Crown Court and in the Divisional Court the submission of the prosecutor was, 85 Cr.App.R. 143, 146:

> "that unless the presence of the defendants upon the highway was for the purpose of its lawful use (i.e. passing and repassing over and along it) or some purpose incidental to that lawful use then their presence on the highway constituted an obstruction. [The prosecutor] further contended that the question of 'reasonableness' did not fall to be decided if the court was satisfied that the presence of the defendants upon the highway was not for the purpose of its lawful use or some purpose incidental to it."

The Crown Court stated its conclusion as follows:

> "We considered ourselves bound by the decision in *Waite v. Taylor* (1985) 149 J.P. 551. We found that to stand in the highway offering and distributing leaflets or holding a banner was not incidental to its lawful user, and accordingly that each of the defendants had wilfully obstructed the highway contrary to section 137 of the Highways Act 1980. We therefore dismissed the appeals."

The Divisional Court allowed the appeals and quashed the convictions. In his judgment Glidewell L.J., at pp. 147–148, cited the judgment of Lord Parker C.J. in *Nagy v. Weston* [1965] 1 W.L.R. 280, 284 in which Lord Parker C.J. said:

> "It is undoubtedly true—[counsel for the defendant] is quite right—that there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

Glidewell L.J. also cited the judgment of Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175 where a group of persons picketed the plaintiffs' offices by standing on the public footpath in front of the premises holding placards and distributing leaflets and Lord Denning M.R., after quoting the passage from the judgment of Lord Parker C.J. in *Nagy v. Weston* which Glidewell L.J. quoted, continued:

> "In the present case the police evidently thought there was no breach of this law. The presence of these half a dozen people on Saturday morning for three hours was not an unreasonable use of the highway. They did not interfere with the free passage of people to and fro. Of course, if there had been any fear of a breach of the peace, the police could have interfered: see *Duncan v. Jones* [1936] 1 K.B. 218. *But there was nothing of that kind.*"

Glidewell L.J. then stated, at p. 150: A

> "In *Nagy v. Weston* itself, the activity being carried on, that is to say the sale of hot dogs in the street, could not in my view be said to be incidental to the right to pass and repass along the street. Clearly, the Divisional Court took the view that it was open to the magistrates to consider, as a question of fact, whether the activity was or was not reasonable. On the facts the magistrates had concluded that it was B unreasonable (an unreasonable obstruction) but if they had concluded that it was reasonable then it is equally clear that in the view of the Divisional Court the offence would not have been made out. That is the way Tudor Evans J. approached the matter in the recent decision of *Cooper v. Metropolitan Police Commissioner* (1986) 82 Cr.App.R. 238, 242 and I respectfully agree with him. As counsel pointed out to us in argument, if that is not right, there are a variety of activities C which quite commonly go on in the street which may well be the subject of prosecution under section 137. For instance, what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the D distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? In my judgment that is a question that arises. It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates, in my view ... Some activities which commonly go on in the street are E covered by statute, for instance, the holding of markets or street trading, and thus they are lawful activities because they are lawfully permitted within the meaning of the section. That is lawful authority. But many are not and the question thus is (to follow Lord Parker's dictum): have the prosecution proved in such cases that the defendant was obstructing the highway without lawful excuse? That question is F to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway."

In his judgment Otton J. referred to the balance between the right to demonstrate and the need for peace and good order and stated, at p. 152:

> "On the analysis of the law, given by Glidewell L.J. and his suggested approach with which I totally agree, I consider this balance G would be properly struck and that the 'freedom of protest on issues of public concern' would be given the recognition it deserves."

The importance of this decision, which in my opinion was correct, was that, in deciding whether there was a lawful excuse for a technical obstruction of the highway, the Divisional Court rejected the test applied H by the Crown Court, which was that a use of the highway which was not incidental to passing along it could not give rise to a lawful excuse, and applied the test whether the use of the highway (even though not incidental to passage) was reasonable or not.

In my opinion the law would be left in an unsatisfactory state if your Lordships' House held that in this case the peaceful assembly on the highway, which caused no actual obstruction to persons passing along the highway, constituted a criminal trespass under section 14B of the Act of 1986 because the assembly was not incidental to passage along the highway, whilst the law recognised, as held in *Hirst v. Chief Constable of West Yorkshire*, that such an assembly may be a reasonable use of the highway and in consequence there is a lawful excuse under section 137 of the Act of 1980 in respect of a charge of wilfully obstructing the free passage along a highway.

The extension of the public's right to use the highway

In the judgments in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the words of Crompton J. in *Reg. v. Pratt*, 4 E. & B. 860, 868–869 were quoted:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

In *Pratt's* case Erle J., at pp. 867–868, made a similar statement. But in *Harrison v. Duke of Rutland* Lord Esher M.R. stated the principle in less restrictive terms, at pp. 146–147:

> "Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of Erle J., and of Crompton J., in *Reg. v. Pratt*, were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

In their judgments in *Hickman v. Maisey* [1900] 1 Q.B. 752 A. L. Smith and Collins L.JJ. accepted that the right of the public to pass and repass on the highway was subject to some degree of extension. A. L. Smith L.J. stated, at pp. 755–756:

> "Many authorities, of which the well known case of *Dovaston v. Payne*, 2 H.Bl. 527 is one, show that prima facie the right of the public is merely to pass and repass along the highway; but I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a slight extension of the rule as previously stated, namely,

that, though highways are dedicated prima facie for the purpose of passage, 'things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such;' and, 'if a person on a highway does not transgress such reasonable and usual mode of using it,' he will not be a trespasser; but, if he does 'acts other than the reasonable and ordinary user of a highway as such' he will be a trespasser. For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, to take a case suggested during the argument, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass. But I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

And Collins L.J. stated, at pp. 757–758:

"Now primarily the purpose for which a highway is dedicated is that of passage, as is shown by *Dovaston v. Payne*; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

It can be contended that these passages in the judgments of Lord Esher M.R. and A. L. Smith and Collins L.JJ. only contemplate an extension of the rights of the public provided that the highway is used "as such," and that the extended use must be connected with using the highway for passing and repassing. But I consider that the passages are open to a broader construction and that they do not exclude a reasonable use of the highway beyond passing and repassing, provided always that the use is not inconsistent with the paramount purpose of a highway, which is for the use of the public to pass and repass. Therefore for your Lordships' House to uphold the defendants' argument would not constitute a reversal of a well established principle but rather would be an extension of the law in a way foreshadowed by earlier judgments. In *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1 this House was considering whether a long established rule of the criminal law should be set aside and I consider that the approach stated by Lord Lowry, at p. 28B–D, is not applicable to the present case.

Therefore, for the reasons which I have given, I am of opinion that the holding of a public assembly on a highway can constitute a reasonable

A user of the highway and accordingly will not constitute a trespass and I would allow the appeal. But I desire to emphasise that my opinion that this appeal should be allowed is based on the finding of the Crown Court that the assembly in which the defendants took part on this particular highway, the A344, at this particular time, constituted a reasonable use of the highway. I would not hold that a peaceful and non-obstructive public assembly on a highway is always a reasonable user and is therefore not a B trespass.

It is for the tribunal of fact to decide whether the user was reasonable. In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 150 Glidewell L.J. makes it clear that a reasonable activity in the street may become unreasonable by reason of the space occupied or the duration of time for which it goes on, "but it is a matter on the facts for the C magistrates, in my view."

If members of the public took part in an assembly on a highway but the highway was, for example, a small, quiet country road or was a bridleway or a footpath, and the assembly interfered with the landowner's enjoyment of the land across which the highway ran or which it bordered, I think it would be open to the justices to hold that, notwithstanding the importance of the democratic right to hold a public assembly, nevertheless D in the particular circumstances of the case the assembly was an unreasonable user of the highway and therefore constituted a trespass.

In conclusion I refer to one further matter. In setting out the facts the judgment of the Crown Court states:

> "At 5.45 p.m. [Inspector Mackie] and other officers saw a sizeable group (he said by that he meant one he estimated at about 20 people) E scale the fence of the monument and enter it. The officers also saw that group escorted out again either by police or security officers without any arrests or violence."

And:

> "Of course the basis of Inspector Mackie's undisputedly reasonable and sensibly intended intervention was to prevent any such thing as F an incursion into the monument such as had occurred an hour earlier in which there was no evidence that the appellants were involved."

I thought for a time in the course of the argument that the decision of the Crown Court might be erroneous because it appears that Inspector Mackie thought that the assembly of which the defendants were a part was about to commit an act of trespass by entering the monument, as had G happened an hour earlier. I consider that there is an argument of some force that a reasonable user of the highway by an assembly may become an unreasonable user so that the non-trespassory assembly becomes a trespassory assembly if it appears that members of the assembly are about to commit unlawful acts. However, this point did not arise in the questions stated for the opinion of the Divisional Court and was not argued before the Divisional Court, and the point does not arise on the question stated H for the opinion of your Lordships' House. Therefore it would not be right to decide the appeal on this point. Accordingly I express no concluded opinion on the point or on the circumstances in which a non-trespassory assembly may become a trespassory assembly.

For the reasons which I have given I would allow the appeal and would answer the certified question before your Lordships' House as follows. "No, if the tribunal of fact finds that the assembly was a reasonable user of the highway."

Appeal allowed. Order of Crown Court restored.
Costs of first appellant to be paid out of central funds in accordance with section 16 of the Prosecution of Offences Act 1985.

Solicitors: Philip Leach, Legal Department, Liberty; Douglas & Partners, Bristol; Crown Prosecution Service, London Branch 2, Central Casework.

M. G.

[PRIVY COUNCIL]

GILBERT AHNEE AND OTHERS . . . . . APPELLANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

[APPEAL FROM THE SUPREME COURT OF MAURITIUS]

1999 Jan. 25, 26; March 17

Lord Steyn, Lord Jauncey of Tullichettle, Lord Hoffmann, Sir Iain Glidewell and Sir Andrew Leggatt

Mauritius—Supreme Court—Jurisdiction—Contempt of court—Newspaper article publicly scandalising court—Whether power to commit for contempt of court—Whether power contravening individual's constitutional rights—Whether constitutional meaning of "law" including common law—Ingredients of offence of scandalising court—Courts Ordinance 1945 (No. 5 of 1945), s. 15—Constitution of Mauritius (Laws of Mauritius, 1981 rev., vol. 1, p. 9), ss. 5(1), 10(1)(4), 12(1)(2)(b), 76(1)[1]*—Courts Act (Laws of Mauritius, 1996 rev., vol. 2), s. 15*[2]

[1] Constitution of Mauritius 1968, s. 5(1): see post, p. 301D.
S. 10: "(1) Where any person is charged with a criminal offence . . . the case shall be afforded a fair hearing . . . (4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . ."
S. 12(1)(2): see post, p. 301E–F.
S. 76(1): see post, p. 301G.
[2] Courts Act, s. 15: see post, p. 301B–C.
S. 15, as amended: see post, p. 302B–C.

Supreme Court

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25

Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC

Human rights — Freedom of expression and assembly — Interference with — Defendants charged with obstructing highway during demonstration against arms fair — Whether defendants lawfully exercising Convention rights so as to have "lawful . . . excuse" — Whether interference with defendants' Convention rights proportionate — Proper approach to proportionality by appellate court on appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], 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 middle of the approach road to the conference centre and attaching themselves to two lock boxes with pipes sticking out from either side, making it difficult for police to remove them from the highway. 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 section 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. 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 section 111 of the Magistrates' Courts Act 1980[3]. The Divisional Court of the Queen's Bench Division allowed the appeal, holding that the district judge's assessment of proportionality had been wrong. The defendants appealed. 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.

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with the protesters' rights was proportionate for the purposes of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that, rather, there had to be an assessment of the facts in each individual case to determine whether the interference was "necessary in a democratic society" for the purposes of articles 10(2) and 11(2); that, therefore, deliberate physically obstructive conduct by protesters was capable of being something for which there was a "lawful . . . excuse" for the purposes of section 137(1) of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users was more than de minimis and

[1] Highways Act 1980, s 137: see post, para 8.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 14.
Art 11: see post, para 15.
[3] Magistrates' Courts Act 1980, s 111(1): see post, para 36.

A prevented them, or was capable of preventing them, from passing along the highway; and that whether or not the protesters had a lawful excuse would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether the protesters' convictions for offences under section 137(1) were justified restrictions on their Convention rights or (per Lord Hodge DPSC and Lord Sales JSC) whether the police response in seeking to remove the obstruction involved the exercise of their powers in a proportionate manner (post, paras 63–70, 94, 99, 121, 154).

B (2) (Lord Hodge DPSC and Lord Sales JSC dissenting) that, on an appeal by way of case stated under section 111 of the Magistrates' Courts Act 1980, the test to be applied by the appellate court to an assessment of the decision of the trial court in respect of a defence of lawful excuse under section 137 of the Highways Act 1980 when Convention rights were engaged was the same as that applicable generally to appeals on questions of law in a case stated, namely that an appeal would be allowed where there was an error of law material to the decision reached which was C apparent on the face of the case stated or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found; that, in accordance with that test, where the defence of lawful excuse depended upon an assessment of proportionality, an appeal would lie if there had been an error or flaw in the court's reasoning on the face of the case stated which undermined the cogency of its conclusion on proportionality; that such assessment fell to be made on the basis of the primary and secondary findings set out D in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached; and that, therefore, the Divisional Court in the present case had applied an incorrect test by asking itself whether the district judge's assessment of proportionality had been wrong (post, paras 42–45, 49–54, 99, 106–108).

Edwards v Bairstow [1956] AC 14, HL(E) and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, SC(E) considered.

E (3) (Lord Hodge DPSC and Lord Sales JSC dissenting in part, but agreeing in allowing the appeal) that there had been no error or flaw in the district judge's reasoning on the face of the case stated such as as to undermine the cogency of his conclusion on proportionality; that, in particular, he had not erred in considering as relevant factors the facts that the defendants' actions (a) had been entirely peaceful, (b) had not given rise either directly or indirectly to any form of disorder, (c) had not involved the commission of any other criminal offence, (d) had been aimed only at F obstructing vehicles headed to the arms fair, (e) had related to a matter of general concern, namely the legitimacy of the arms fair, (f) had been limited in duration, (g) had not given rise to any complaint by anyone other than the police and (h) had stemmed from the defendants' long-standing commitment to opposing the arms trade; and that, accordingly, the convictions should be set aside and the dismissal of the charges against the defendants restored (post, paras 71–78, 80–88, 99, 109–113, 115–118).

G *Nagy v Weston* [1965] 1 WLR 280, DC and *City of London Corpn v Samede* [2012] PTSR 1624, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 reversed.

The following cases are referred to in the judgments:

H *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bracegirdle v Oxley [1947] KB 349; [1947] 1 All ER 126, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7; [2017] NI 301, SC(NI)
D'Souza v Director of Public Prosecutions [1992] 1 WLR 1073; [1992] 4 All ER 545; 96 Cr App R 278, HL(E)
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Garry v Crown Prosecution Service [2019] EWHC 636 (Admin); [2019] 1 WLR 3630; [2019] 2 Cr App R 4, DC
Google LLC v Oracle America Inc (2021) 141 S Ct 1183
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
H v Director of Public Prosecutions [2007] EWHC 2192 (Admin), DC
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lashmankin v Russia (Application No 57818/09) (unreported) 7 February 2017, ECtHR
Love v Government of the United States of America [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Molnár v Hungary (Application No 10346/05) (unreported) 7 October 2008, ECtHR
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
New Windsor Corpn v Mellor [1974] 1 WLR 1504; [1974] 2 All ER 510
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Oladimeji v Director of Public Prosecutions [2006] EWHC 1199 (Admin)
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, HL(E)
Primov v Russia (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest Heath District Council [1998] Env LR 9, CA
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)

A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin); 170 JP 453
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Z) v Hackney London Borough Council [2019] EWCA Civ 1099; [2019] PTSR 2272, CA; [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
C *Smith and Grady v United Kingdom* (Application Nos 33985/96, 33986/96) (1999) 29 EHRR 493, ECtHR
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205, ECtHR (GC)

No additional cases were cited in argument.

D **APPEAL** from the Divisional Court of the Queen's Bench Division

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court, acquitted the defendants, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstructing the highway, contrary to section 137 of the Highways Act 1980. By a case stated that was served on the defendants on
E 20 March 2018, the prosecution appealed. By a judgment dated 22 January 2019 the Divisional Court of the Queen's Bench Division (Singh LJ and Farbey J) [2019] EWHC 71 (Admin); [2020] QB 253 allowed the appeal.

With permission of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted on 3 December 2019, the defendants appealed.

F The issues in the appeal, as stated in the parties' agreed statement of facts and issues, were: (1) What was the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights were engaged in a criminal matter? (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate
G obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

The facts are stated in the judgment of Lord Hamblen and Lord Stephens JJSC, post, paras 1–6.

H *Henry Blaxland QC*, *Blinne Ní Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

As far back as 1965 the courts explained "lawful authority or excuse" as encompassing the concept of "reasonableness": see *Nagy v Weston* [1965] 1 WLR 280. In respect of the offence of obstruction of the highway contrary to section 137 of the Highways Act 1980, reasonableness is a question of

fact to be assessed having regard to all the prevailing circumstances, including the duration of the obstruction, its location and purpose and whether it did in fact cause an actual, as opposed to a potential, obstruction. A defendant will not be guilty of deliberately obstructing the highway unless it is proved that such obstruction was not reasonable.

Even before the coming into force of the Human Rights Act 1998, it was possible for protesters engaged in an obstructive protest on the highway to argue successfully that they were exercising a lawful right to protest and therefore had a "lawful" right to protest.

The Convention rights which are in issue in this appeal are the rights contained in article 10 (concerning the right to freedom of expression) and article 11 (concerning the right to freedom of peaceful assembly) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those two articles and the parallel rights and obligations arising under common law must be considered when assessing the reasonableness of any obstruction of the highway and the proportionality of any interference with a right to protest.

The assessment of whether an obstruction of the highway was reasonable in the context of articles 10 and 11 is inevitably a fact-sensitive one that will depend on factors including the extent to which the continuation of the protest would breach domestic law, the importance to protesters of the precise protest location, the duration of the protest, and the extent of the actual interference caused to the rights of others: see *City of London Corpn v Samede* [2012] PTSR 1624.

The actions of the defendants in the present case were no more than symbolic. They could not have prevented arms being delivered to the arms fair, nor could they have prevented the arms fair taking place. Their protest was aimed at raising awareness of their cause. There was no evidence led by the prosecution that the protest caused disruption to traffic, or to the venue where the arms fair was being held, or to other people. It was entirely speculative whether there was obstructive conduct on the part of the protesters. There was evidence of potential interference but not of actual interference. There was no material which showed to the criminal standard that traffic was disrupted.

[Reference was made to *Kudrevičius v Lithuania* (2015) 62 EHRR 34.]

Even deliberate interference with the activities of others can fall within the protection of article 11. It must be shown by the prosecution that there was interference with the rights of others. Article 11 must be construed in a way which does not limit free speech and peaceful assembly. The defendants' intention was to cause some disruption but it did not take them outside article 11.

The trial judge's decision was impeccable and contained no legal error. The Divisional Court failed to accord due weight to the trial judge's findings, contrary to the need for appellate caution in relation to both findings of fact and value judgments. The Divisional Court substituted its own view of the evidence for that of the trial judge despite the fact it had not seen the live evidence and the video footage of the protest which was the material on which the trial judge had assessed the nature of the protest and the disruption it caused.

Where a statutory defence such as that arising under section 137 of the Highways Act 1980 encompasses the engagement of one or more

A Convention rights, the assessment of whether the prosecution has disproved that a defendant's use of the highway was reasonable constitutes an evaluative assessment within the province of the tribunal of fact. Therefore the approach to be taken by an appellate court is not simply to consider whether in its view the conclusion of the court below was "wrong", but rather whether that conclusion was reached either as a result of an identifiable flaw in the court's logic or reasoning or whether it was a B conclusion which no properly directed tribunal could have reached. The Divisional Court fell into error in determining otherwise.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The Divisional Court did not conclude as a matter of law that, in a prosecution under section 137 of the Highways Act 1980, findings of fact of C a complete obstruction of the highway for a significant period of time can never constitute a "lawful . . . excuse" for wilful obstruction within the meaning of section 137(1) of the Highways Act 1980. The Divisional Court held that those facts were "highly relevant" and "highly significant" to the assessment of proportionality in this case and concluded that the trial judge had given insufficient consideration to them in striking a fair balance D between the defendants' Convention rights and the rights and interests of others.

The essential facts can be ascertained from the case stated. It was clear that there was a deliberate or "wilful" obstruction of the highway which was planned rather than spontaneous. Its specific purpose was disruption of the traffic to the venue at which the arms fair was being held. It was aimed at a particular type of traffic which was delivering material to the arms fair. E The disruption lasted 90 minutes, which was a period of some length in the circumstances. The defendants used apparatus which was hard to disassemble in order to lock themselves together. They refused to unlock themselves and it can be inferred that they knew there would be a delay in removing them from the highway because police removal experts and specialist cutting equipment were needed. The reality was that the F defendants knew they would remain on the road until the police were able, with difficulty, to remove them.

In essence the primary facts were not in issue. But whether the facts as found did or may have constituted a lawful excuse called for a value judgment by the trial judge: see *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin). The tribunal of fact was dealing with the balancing act.

G The decision depended on the proportionality between the offence and the defendants' Convention rights. The Divisional Court concluded that the trial judge had erred in its assessment of proportionality and had not struck the fair balance necessary in that assessment.

On an appeal by way of case stated the High Court has a very wide discretion: see section 28A of the Senior Courts Act 1981. In the fact-specific circumstances of this case, the Divisional Court's review did accord due H weight to the assessment made by the trial judge, and correctly concluded that it was wrong.

Blaxland QC replied.

The court took time for consideration.

25 June 2021. The following judgments were handed down.

LORD HAMBLEN and LORD STEPHENS JJSC

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the "five-stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

4 The appellants were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable".

5 The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2018, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted permission to appeal.

A 7 The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?

B (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

C 8 Section 137 of the 1980 Act provides:

> "137 *Penalty for wilful obstruction*
>
> "(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 a fine not exceeding level 3 on the standard scale."

D 9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

> "there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

E

10 In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ("the HRA") needs to be read in the light of the HRA.

F 11 Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

12 Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (section 6(3)(a)), as are the police.

G 13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
>
> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

H

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."

15 Article 11 ECHR materially provides:

"1. Everyone has the right to freedom of peaceful assembly . . .

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

16 In the present case the Divisional Court explained how section 137(1) of the 1980 Act can be interpreted compatibly with the rights in articles 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows:

"62. The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

"(2) If so, is there an interference by a public authority with that right?

"(3) If there is an interference, is it 'prescribed by law'?

"(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

"(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

"64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

"(2) Is there a rational connection between the means chosen and the aim in view?

"(3) Are there less restrictive alternative means available to achieve that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

A "65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry."

17 Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of* B *London Corpn v Samede* [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul's Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras 39–41:

"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 C 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 D 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 E 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 F 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 G 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 H Strasbourg court said in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, 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."

3. The case stated

18 The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

19 All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

"All . . . defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route."

20 The district judge identified the issue for decision at para 37 of the case stated, as being:

"whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway."

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

"(a) The actions were entirely peaceful—they were the very epitome of a peaceful protests [sic].

"(b) The defendants' actions did not give rise either directly or indirectly to any form of disorder.

"(c) The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

A "(d) The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair . . . I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether 'non-DSEI traffic' was or was not in fact obstructed since the authorities cited above appeared to envisage 'reasonable' obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration . . .

"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the long-standing commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble."

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

H "The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

4. The decision of the Divisional Court

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see eg per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)."

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103:

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the

A assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law."

26 Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong "because (i) he took into account certain considerations which were irrelevant; B and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes" (para 129).

27 Of the factors listed at paras 38(a) to (h) of the case stated as cited in para 21 above, the Divisional Court considered those set out at paras 38(a), C (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of "limited duration". The Divisional Court considered that to be a "significant period of time". Its core criticism was of para 38(d), in relation to which it stated as follows at para 112:

D "At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of E proportionality. This is not a case where, as commonly occurs, *some part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said F (depending on the facts) that a 'fair balance' is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*." (Emphasis added.)

G 28 The Divisional Court explained at para 117 that the "fundamental reason" why it considered the district judge's assessment of proportionality to be wrong was that:

"there was no 'fair balance' struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the H highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows:

> "the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them."

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows:

> "Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do."

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse" defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows:

> "On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse . . . : *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse."

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in

which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it—see, for example, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) at [40] (Auld LJ) (article 10 ECHR); *Hammond v Director of Public Prosecutions* (2004) 168 JP 601, para 33 (May LJ) (articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

34 *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on

questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an "adventure . . . in the nature of trade". The commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law . . . the true and only reasonable conclusion contradicts the determination."

38 This approach has been followed for other case stated appeal procedures—see, for example, *New Windsor Corpn v Mellor* [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 the question arose as to the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at pp 752–753:

> "My Lords, in *Edwards v Bairstow* [1956] AC 14, 36, Lord Radcliffe made it plain that the court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

A 39 The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

B 40 In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] KB 349, 353:

C "It is said that this court is bound by the findings of fact set out in the cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived . . . if magistrates come to a decision to D which no reasonable bench of magistrates, applying their minds to proper considerations, and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it."

In *R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest* E *Heath District Council* [1998] Env LR 9, 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

"It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley*. But it is not perverse, even if it may be mistaken, to prefer the F evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court."

41 In *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way G of case stated in criminal proceedings concerning whether the appellant, who had absconded from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was "unlawfully at large and whom [the police constables were] pursuing" under section 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as "a question of fact" but one which "must be answered within the relevant H legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

"I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the

constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

In re B

42 In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under section 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

43 *In re B* [2013] 1 WLR 1911 was a family law case and involved the appellate test under CPR r 52.11(3) that an appeal will be allowed where the decision of the lower court is "wrong", whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* [2018] 1 WLR 2889 but that too involves a wide right of appeal "on a question of law or fact" (sections 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if "the district judge ought to have decided a question before him differently" and "had he decided it as he ought to have done, he would have been required to discharge the appellant"—see sections 27(3) and 104(3). In argument, reliance was also placed on the application of *In re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a magistrates' court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review—see, for example, *R (P) v Liverpool City Magistrates' Court* (2006) 170 JP 453, para 5.

44 It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

45 A prosecution under section 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful authority or excuse. Some cases stated in relation to section 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

46 Whilst we do not consider that *In re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *In re B* has been

A developed in later cases. In *In re B* at para 88 Lord Neuberger PSC stated as follows:

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on
B the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

C 47 This approach was qualified by the Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. In that case Lord Carnwath JSC (with whom the other justices agreed) said at para 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to
D point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.
E However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge
F below was wrong . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not
G make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the factors which the court considers to be relevant to that assessment are likely
H to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the

face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not "any relevant evidence".

50 In his judgment Lord Sales JSC sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

51 As Lady Arden JSC's analysis at para 101 of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

52 Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *In re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

53 In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

54 For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under section 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *In re B*, where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

A *6. Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?*

The second certified question

B 55 As the Divisional Court explained, (see para 28 above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time". That fundamental reason led the Divisional C Court to certify the second question which the parties agreed as being in the terms set out in para 7(2) above ("the second certified question"). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of D preventing users, from passing along the highway. In those circumstances, the interference with the protesters' article 10 and article 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to section 137 of the 1980 Act.

56 On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of E constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's F order directing convictions should be set aside and that this court should issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

57 The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) G and 11(2): see paras 14–15 above. 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 *Kudrevičius 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 H 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. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest,

which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales JSC (see for instance para 120, 153 and 154) who considers that the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden JSC at para 94 that "the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not" (emphasis added).

58 As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

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.

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

61 In this case both articles 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under article 10 or article 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the court. In *Kudrevčius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis

pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

Deliberate obstruction with more than a de minimis impact

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevičius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those

separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

65 The case of *Hashman and Harrup v United Kingdom* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their article 10 rights. At para 28 the ECtHR noted that "the protest took the form of impeding the activities of which they disapproved" but considered "nonetheless that it constituted an expression of opinion within the meaning of article 10" and that "The measures taken against the applicants were, therefore, an interference with their right to freedom of expression". Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

66 In *Kudrevičius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to article 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by articles 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that

heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage had not been calculated.

67 The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevičius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usukhchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance (see *Galstyan* [*Galstyan v Armenia* (2007) 50 EHRR 25], paras 116–117, and *Bukta* [*Bukta v*

Hungary (2007) 51 EHRR 25], para 37). The appropriate 'degree of tolerance' cannot be defined in abstracto: the court must look at the particular circumstances of the case and particularly to the extent of the 'disruption of ordinary life'."

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

69 This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of article 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to "peaceful assembly". As the ECtHR stated at para 92 of *Kudrevičius*:

> "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevičius*. At para 155 of its judgment in *Primov and v Russia* the ECtHR stated that "article 11 does not cover demonstrations where the organisers and participants have violent intentions . . . However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour". Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

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".

Factors in the evaluation of proportionality

71 In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

72 A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] PTSR 1624 (see para 17 above). The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of

A 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". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is B hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

73 In *Nagy v Weston* [1965] 1 WLR 280 (see para 9 above) one of the factors identified was "the place where [the obstruction] occurs". It is apparent, as in this case, that an obstruction can have different impacts C depending on the commercial or residential nature of the location of the highway.

74 A factor listed in *City of London Corpn v Samede* was "the extent of the actual interference the protest causes to the rights of others". Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in D relation to proportionality by the ECtHR was the availability of "alternative thoroughfares where the traffic could have been diverted by the police".

75 Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevičius* in that it took into account that "the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of E another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products". So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

76 Another factor identified in *City of London Corpn v Samede* was "the importance of the precise location to the protesters". In *Mayor of* F *London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 37 it was acknowledged by Lord Neuberger MR, with whom Arden and Stanley Burnton LJJ agreed, that "The right to express views publicly . . . and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends . . . to the location where they wish to express and exchange their views". In *Sáska v Hungary* G (Application No 58050/08) (unreported) 27 November 2012, at para 21 the ECtHR stated that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11". This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia*, 7 February 2017. At para 405 it was stated that:

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> "the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target*

object and at a time when the message may have the strongest impact." (Emphasis added.)

In this case the appellants ascribed a particular "symbolic force" to the location of their protest, in the road, leading to the Excel Centre.

77 It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corpn v Samede*, namely "the extent to which the continuation of the protest would breach domestic law". So, the manner and form of a protest on a highway will potentially involve the commission of an offence contrary to section 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (Application No 25/02) (unreported) 29 November 2007, at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case "presented a danger to public order, apart from possibly blocking the tram line". So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

78 Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, paras 34–38 and *DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301, para 61.

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

79 A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the case stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the articles 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

80 The Divisional Court at paras 111–118 considered the assessment of proportionality carried out by the district judge (see para 21 above). The

A Divisional Court considered that the factors at paras 38(a) to (c) were of little or no relevance. We disagree. In relation to the factor at para 38(a), article 11 protects peaceful assembly. The ECtHR requires "a certain degree of tolerance towards peaceful gatherings", see *Primov v Russia* at para 68 above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in para 38(b) that the appellants' actions did
B not give rise, directly or indirectly, to any form of disorder was also relevant. There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest
C was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no "clashes" with the police. The factor taken into account by the district judge at para 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corpn v Samede* (see para 17 above) in which one of the factors listed was "the extent to which the continuation of the protest would breach domestic law". The Divisional
D Court considered that none of these factors prevented the offence of obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether
E the appellants should be convicted under section 137 of the 1980 Act.

81 The Divisional Court's core criticism related to the factor considered by the district judge at para 38(d). We have set out in para 27 above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para 112 the Divisional Court stated that the "highway
F *to and from* the Excel Centre was completely obstructed" but later stated that "members of the public were *completely prevented* from" using "the highway for passage *to* get to the Excel Centre" (emphasis added). We also note that at para 114 the Divisional Court again stated that there was there was "*a complete obstruction of the highway*" (emphasis added). In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be
G used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not "completely prevented" from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that "actions" were carefully targeted and were aimed only at
H obstructing vehicles headed to the DSEI arms fair was relevant: see para 75 above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed

since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot . . . be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

85 The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated was "of little if any relevance to the assessment of proportionality". The factor was that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no

substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a "relatively minor issue", noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that "This was not a group of people who randomly chose to attend this event hoping to cause trouble". The Divisional Court held that this factor had "no relevance to the assessment which the court was required to carry out when applying the principle of proportionality" and that "It came perilously close to expressing approval of the viewpoint of the defendants, something which . . . is not appropriate for a neutral court to do in a democratic society". However, as set out at para 72 above, whether the appellants "believed in the views they were expressing" was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike "vapid tittle-tattle" are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

87 We would answer the second certified question "yes". The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under section 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. Overall conclusion

88 For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para 54 above; answering the certified question set out in para 7(2) "yes"; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN JSC

The context in which the certified questions arise

89 This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two

A certified questions set out in para 7 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by the Human Rights Act 1998. The European Court of Human Rights ("the Strasbourg court") has described this important right as follows:

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> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted restrictively." (*Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 91.)

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90 The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

> "1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ('DSEI') weapons fair taking place at the centre.
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> "2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ('lock box'), using a carabiner.
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> "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', intended to persuade them to remove themselves voluntarily from the public highway.
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> "4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).
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> "5. The left-hand dual lane carriageway of the public highway leading to the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.
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> "6. The appellants were charged with obstructing the highway contrary to section 137 of the Highways Act 1980.
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> "7. They were tried before District Judge (Magistrates' Court) ('DJ(MC)') Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.
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> "8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under articles 10 and 11, 'on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'." (Case stated, para 40.)
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91 Section 137(1) of the Highways Act 1980 provides: "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 a fine not exceeding [level 3 on the standard scale]." A

92 As Lord Sales JSC, with whom Lord Hodge DPSC agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by articles 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful. As Lord Bingham of Cornhill observed in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 127: "The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a 'constitutional shift'." B C

93 Article 11, which I set out in para 95 below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to article 10 of the Convention (freedom of expression), as well as article 11, but its importance as a Convention right must also be acknowledged. D

94 I pause here to address a point made by Lord Sales JSC and Lord Hodge DPSC that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is article 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself article 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair—a high profile and controversial event—and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was article 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under article 11 or not. E F G H

95 Article 11 provides:

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

A "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 B these rights by members of the armed forces, of the police or of the administration of the state."

96 Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an C end marks the end of the duration of any offence under section 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under section 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales JSC and Lord Hodge DPSC in Lord Sales JSC's judgment, the appellants did not in fact intend that their protest D should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

97 It follows from the structure of article 11 and the importance of the E right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (2018) 68 EHRR 25:

"137. The court has previously held that the exceptions to the right to F freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the G notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

The certified questions

H 98 The issues of law in the appeal, as certified by the Divisional Court, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in

particular the lower court's assessment of whether an interference with Convention rights was proportionate? A

(2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time? B

Overview of my answers to the two certified questions

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("*R (R)*"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("*In re B*"), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49). C D E

(2) *Whether the exercise of articles 10 and 11 rights may involve legitimate levels of obstruction.* My answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens JJSC on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did. F

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these types of appellate review is clear. G H

101 But there are many other standards. In appeals by case stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, section 111). As Lord Hamblen and Lord Stephens JJSC have explained, the standard of review is

A that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone* [2001] B STC 214.

102 Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one C end of the gamut of possibilities, there is the de novo hearing and the pure correctness standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because D there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, E which even though for well-intentioned reasons may also be inconsistent with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the F evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

103 I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to G disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the H recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for

example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court. A

104 As to the standard of appellate review of proportionality assessments, no one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *In re B* [2013] 1 WLR 1911, a family case. However, in *R (R)* [2018] 1 WLR 4079 this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para 64 of the judgment of Lord Carnwath JSC with whom the other members of this court agreed: B

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'." C D E

105 The refinement by this court of the *In re B* test in *R (R)* as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations. F

106 In short, I would hold that the standard of appellate review applicable in judicial review following *R (R)* should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it. G

107 Since circulating the first draft of this judgment I have had the privilege of reading paras 49–54 and 78 of the joint judgment of Lord Hamblen and Lord Stephens JJSC. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R (R)* which I have already set H

A out in para 104 of this judgment, Lord Carnwath JSC was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for B example, what actually was the legitimate aim and how far was it furthered by the action of the state and was there any less restrictive means of achieving the legitimate end.

108 In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to C analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para 102 above).

109 As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales JSC and Lord D Hodge DPSC for two reasons. First, they hold that the district judge was in error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was "completely blocked" by the appellants' actions (Lord Sales JSC's judgment, para 144). But, as para 5 of the statement of facts and issues set out in para 90 above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute E that such routes were available. As the district judge said at para 16 of the case stated:

> "All eight defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not* F *in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route.*" (Emphasis added.)

110 The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge G could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete H impediment to other road-users that that conclusion could be challenged under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality

assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para 96 above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under section 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

112 This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the case stated which reads:

> "The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

> "Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance."

115 In the case stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of articles 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

116 I agree with Lord Hamblen and Lord Stephens JJSC's thorough review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales JSC and Lord Hodge DPSC consider were rightly made. So, I make only some brief concluding points at this stage.

117 Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Crim PR r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales JSC and Lord Hodge DPSC, which could enable the prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the case stated.

Conclusion

118 For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens JJSC.

LORD SALES JSC (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton

("the district judge") in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under section 137 of the Highways Act 1980 ("section 137"). The case stated procedure is governed by section 111 of the Magistrates' Courts Act 1980 and section 28A of the Senior Courts Act 1981. So far as relevant, section 111 only permits the appeal court to allow an appeal if the decision is "wrong in law": section 111(1).

120 I respectfully disagree with what Lord Hamblen and Lord Stephens JJSC say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" under section 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the

duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

125 This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, the interference must be "necessary in a democratic society" in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and article 11, alleging that their arrest and removal by the police would be in breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an

alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

129 The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under section 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of article 10 and article 11 and therefore held that a protester had no "lawful excuse" defence under section 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

130 It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40–42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29–31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the

proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

132 Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate court is entitled to find an error of law if the decision of the lower court or tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC, explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do.

In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *In re B (A Child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London Borough Council*.

133 In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with article 10 or article 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was "wrong" according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

134 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

135 By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against the police, to enforce their obligation under section 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of section 137. The approach on an appeal in such judicial review proceedings would be that set out in *In re B (A Child)* and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

136 To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *In re B (A Child)* is not inconsistent with the leading authority of *Edwards v Bairstow* [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said (p 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word "trade" or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits "within which it would be permissible to say that a 'trade' [within the meaning of the statutory rule] does or does not

A exist". If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows (p 36):

> "If the case [as stated] contains anything ex facie which is bad law and
> B which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law
> C and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.
> D For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

137 In a well-known passage in *Council of Civil Service Unions v*
E *Minister for the Civil Service* [1985] AC 374, 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law.
F However, as stated by Lord Bingham in the *Belmarsh* case and other authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it
G may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of
H proportionality.

138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester*

Police [2018] 1 WLR 4079 at para 64 (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens JJSC also draw attention:

> "to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

139 I find myself in respectful disagreement with para 44 of the judgment of Lord Hamblen and Lord Stephens JJSC. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow*. The effect of the rights-compatible interpretation of section 137 pursuant to section 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of "lawful excuse" in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

140 It is clearly right to say, as Lady Arden JSC emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under article 10 (para 52(iii), omitting footnotes):

> "The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and

A determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."

B Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

The decision of the district judge

141 I turn, then, to the decision of the district judge in applying C section 137, in order to assess whether the case stated discloses any error of law.

142 Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective D way: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97. The district judge directed himself correctly as to the interpretation of section 137 and the significance of an assessment of the proportionality of the intervention by the police.

143 However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at E para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para 112 of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the F proportionality of police action to clear the highway, this was a highly material feature of the case. Since it was not referred to by the district judge, he failed to take account of "a material factor" (in the words of Lord Carnwath JSC) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

G 144 Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para 114 of its judgment, the Divisional Court said:

> "In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the police intervened to make arrests and to remove the respondents from H the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not

> insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality."

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce.

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

> "The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of

section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

150 In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect would have been that there was a mistrial and further examination of the facts would have to be by way of a retrial.

151 I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the convictions which the Divisional Court ordered should be entered.

152 In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the protesters had committed the offences under section 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens JJSC, I do not myself read the Divisional Court as saying that points (a) to (c) in para 38 of the case stated were of little or no relevance; at para 111 of its judgment the court only said that none of those points "prevents the offence of obstruction of the highway being committed in a case such as this". The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens JJSC that the Divisional Court's assessment of point (h) at para 116 was flawed: para 80 above and *City of London Corpn v Samede* [2012] PTSR 1624, paras 39–41. This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

153 I would answer the first question certified by the Divisional Court (para 7(1) above) as follows: in a case like the present, where the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *In re B (A Child)* and the cases which follow and apply it.

154 I would answer the second question certified by the Divisional Court (para 7(2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a "lawful excuse" for the purposes of section 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister

A Queen's Bench Division

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

[2019] EWHC 2459 (QB)

B 2019 Jan 29; Sept 20

Nicklin J

Practice — Parties — Unnamed defendant — Claimants applying for injunction against protestors to restrain harassment and other wrongdoing — Without notice interim injunction granted against "persons unknown" — Numerous protestors served with injunction but none served with claim form — Whether C *claimants entitled to summary judgment — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11[1] — CPR rr 6.5, 6.15, 6.16[2]*

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

On the application—

Held, refusing the application, (1) that the Civil Procedure Rules provided a comprehensive framework for the commencement of claims and the service of originating process upon defendants, with the object of seeking to ensure that

[1] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 91.

G Art 11: see post, para 92.

[2] CPR r 6.5: "(1) Where required by another Part, any other enactment, a practice direction or a court order, a claim form must be served personally. (2) In other cases, a claim form may be served personally except— (a) where rule 6.7 applies; or (b) in any proceedings against the Crown . . . (3) A claim form is served personally on— (a) an individual by leaving it with that individual; (b) a company or other corporation by leaving it with a person holding a senior position within the company or corporation; . . ."

R 6.15: "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order H permitting service by an alternative method or at an alternative place . . . (4) An order under this rule must specify— (a) the method or place of service; (b) the date on which the claim form is deemed served; and (c) the period for— (i) filing an acknowledgment of service; (ii) filing an admission; or (iii) filing a defence."

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

defendants to civil claims were given proper notice of the claim that was being made against them and a reasonable opportunity to put forward any defence to the claim; that the fact that the court, exceptionally, permitted a claim to be brought against "persons unknown" did not lead to the abandonment of that basic principle; that while there might be practical difficulties in achieving the objective where the identity of the defendant was not presently known, it did not lessen the obligation to attempt to do so, and even people who shielded themselves behind anonymity were to be afforded the basic right, so far as possible, to be given notice that a claim was being made against them and an opportunity to defend themselves; that in the present case the court had made no order permitting alternative service of the claim form pursuant to CPR r 6.15, having permitted alternative service in respect of the injunction order only; that that omission could not be corrected under the "slip rule", which permitted corrections only where an order did not properly reflect the order made by the court, and not in respect of orders which a party considered the court ought to have made but had not; that, in the absence of an order permitting alternative service, the only method by which the persons unknown could be validly served was by personal service in accordance with CPR r 6.5, which had not occurred; that, since there had been no service by any of the methods permitted by rule 6.5, the claim form had not been validly served on any defendant in the proceedings; and that it was not appropriate to make an order dispensing with service of the claim form pursuant to CPR r 6.16 without a proper application notice, on which application, in any event, the claimants would face significant obstacles in persuading the court to grant dispensation (post, paras 24, 58–59, 138–142).

Cameron v Hussain [2019] 1 WLR 1471, SC(E) applied.

(2) That the grant of quia timet interim injunctions against "persons unknown" was provisional, in that the party seeking the injunction was expected to take all practical steps to identify the alleged wrongdoers so that they could have an opportunity, if they wished, to defend themselves, and was conditional upon the court being satisfied that (i) there was a sufficiently real and imminent risk of a tort being committed to justify quia timet relief, (ii) it was impossible to name the persons who were likely to commit the tort unless restrained, (iii) it was possible to give effective notice of the injunction and (iv) the terms of the injunction corresponded to the threatened tort and were not so wide that they prohibited lawful conduct; that, further, the imposition of an order that interfered with protestors' rights to freedom of expression and assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms had to be justified as necessary, not just expedient; that, in breach of their obligation to identify the individuals against whom they were pursuing their claim and make them defendants as promptly as practicable, the claimants had made no effort to narrow the class of persons unknown in a way that enabled them to be identified, even if not named, and for a decision to be made, on an assessment of the evidence, whether each person had committed or was threatening to commit a civil wrong; that the class of people potentially captured as "persons unknown" in the injunction could not properly be regarded as a homogenous unit, all of whom were guilty of, or complicit in, the wrongful acts about which complaint was made, nor did anything in the operative definition of "protestor" require or assume any wrongdoing on that person's part, with the effect that the injunction captured in the net, indiscriminately, the guilty and the innocent with no way of distinguishing between them and making it impossible to identify against whom the court would or could enter judgment; that, therefore, the restrictions placed on demonstrations in the injunction were neither a necessary nor proportionate interference with the protestors' article 10 and 11 rights; and that, since it would be fundamentally wrong in principle to grant judgment in a civil claim against a person when the court was not satisfied that the person had committed or was threatening to commit any civil wrong, it was inappropriate to grant summary judgment (post, paras 21, 68–70, 78, 81–82, 98–99, 111, 116, 146, 149, 150, 151, 154–156, 160–163, 165–166).

Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2019] 4 WLR 100, CA applied.

Summary of the law on service of proceedings including on "persons unknown" (post, paras 59–61).

Summary of the correct approach to human rights on an application for injunctive relief to restrain demonstrations (post, paras 98–99).

The following cases are referred to in the judgment:

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

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)

Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752; The Times, 11 July 2011, CA

Attorney General v Newspaper Publishing plc [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, Sir Nicolas Browne-Wilkinson V-C and CA

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

Birmingham City Council v Afsar [2019] EWHC 1560 (QB); [2019] ELR 373

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

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

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

Cream Holdings Ltd v Banerjee [2004] UKHL 44; [2005] 1 AC 253; [2004] 3 WLR 918; [2004] 4 All ER 617, HL(E)

Daiichi Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty [2003] EWHC 2337 (QB); [2004] 1 WLR 1503

Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC

Dowson v Chief Constable of Northumbria Police [2010] EWHC 2612 (QB)

Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA

Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490, CA

EMI Records Ltd v Kudhail [1985] FSR 36, CA

Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA

Emerson Developments Ltd v Avery [2004] EWHC 194 (QB)

Guardian News and Media Ltd, In re [2010] UKSC 1; [2010] 2 AC 697; [2010] 2 WLR 325; [2010] 2 All ER 799, SC(E)

GYH v Persons Unknown [2017] EWHC 3360 (QB)

Handyside v United Kingdom CE:ECHR:1976:1207JUD000549372; 1 EHRR 737

Hayes v Willoughby [2013] UKSC 17; [2013] 1 WLR 935; [2013] 2 All ER 405; [2013] 2 Cr App R 11, SC(E)

Hirst v Chief Constable of West Yorkshire (1986) 85 Cr App R 143, CA

Hourani v Thomson [2017] EWHC 432 (QB)

Huntingdon Life Sciences Ltd v Curtin The Times, 11 December 1997

Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch); (*Friends of the Earth intervening*) [2019] EWCA Civ 515; [2019] 1 WLR 100; [2019] 4 All ER 699, CA

Jacobson v Frachon (1927) 138 LT 386, CA

Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E)

Kerner v WX [2015] EWHC 178 (QB)

Khan (formerly JMO) v Khan (formerly KTA) [2018] EWHC 241 (QB)
Kudrevičius v Republic of Lithuania CE:ECHR:2015:1015JUD003755305; 62 EHRR 34, GC
Lashmankin v Russia CE:ECHR:2017:0207JUD005781809; 68 EHRR 1
Lawrence David Ltd v Ashton [1989] ICR 123; [1991] 1 All ER 385, CA
Lyons (J) & Sons v Wilkins [1899] 1 Ch 255, CA
Majrowski v Guy's and St Thomas's NHS Trust [2006] UKHL 34; [2007] 1 AC 224; [2006] 3 WLR 125; [2006] ICR 1199; [2006] 4 All ER 395, HL(E)
Merlin Entertainments LPC v Cave [2014] EWHC 3036 (QB); [2015] EMLR 3
R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R v Smith (Mark) [2012] EWCA Crim 2566; [2013] 1 WLR 1399; [2013] 2 All ER 804; [2013] 2 Cr App R (S) 28, CA
R (Lord Carlile of Berriew) v Secretary of State for the Home Department [2014] UKSC 60; [2015] AC 945; [2014] 3 WLR 1404; [2015] 2 All ER 453, SC(E)
Redmond-Bate v Director of Public Prosecutions [2000] HRLR 249, DC
RXG v Ministry of Justice [2019] EWHC 2026 (QB); [2019] EMLR 25, DC
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429, [2006] 1 WLR 658, CA
Sunday Times v United Kingdom (No 2) CE:ECHR:1991:1126JUD001316687; 14 EHRR 229
Sürek v Turkey CE:ECHR:1999:0708JUD002392794; 7 BHRC 339, GC
Stone v WXY [2012] EWHC 3184 (QB)
Trimingham v Associated Newspapers Ltd [2012] EWHC 1296 (QB); [2012] 4 All ER 717
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
YXB v TNO [2015] EWHC 826 (QB)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Appleby v United Kingdom CE:ECHR:2003:0506JUD004430698; 37 EHRR 38
Cameron v Hussain [2017] EWCA Civ 366; [2018] 1 WLR 657, CA
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Cooper v Metropolitan Police Comr (1985) 82 Cr App R 238
Dulgheriu v Ealing London Borough Council [2018] EWHC 1667 (Admin); [2019] PTSR 706; [2018] 4 All ER 881
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)
Société Colas Est v France CE:ECHR:2002:0416JUD003797197; 39 EHRR 17
Sunderland City Council v Conn [2007] EWCA Civ 1492; [2008] IRLR 324, CA
Harvey Nichols & Co Ltd v Coalition To Abolish The Fur Trade [2014] EWHC 4685 (QB)
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Jones (L E) (Insurance Brokers) Ltd v Portsmouth City Council [2002] EWCA Civ 1723; [2003] 1 WLR 427, CA
Novartis Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty [2014] EWHC 3429 (QB)
OPQ v BJM [2011] EWHC 1059 (QB); [2011] EMLR 23
Phytopharm plc v Avery [2004] EWHC 503

A **APPLICATION** for summary judgment

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

The facts are stated in the judgment, post, paras 2–6.

Michael Buckpitt (instructed by *Lewis Silkin llp*) for the claimants.

E The defendants did not appear and were not represented.

The court took time for consideration.

20 September 2019. **NICKLIN J** handed down the following judgment.

1 This judgment is divided into the following sections:

F

Section		Paragraphs
A	Introduction	2–9
B	The claim form and particulars of claim	10–16
G C	The interim injunction: 29 November 2017	17–27
D	The continuation of the interim injunction: 15 December 2017	28–43
E	Further steps in the action	44–48
H F	Protection from Harassment Act 1997	49–54
G	Fundamental principles of civil litigation	55–61
H	Interim injunctions	62–63

A. Introduction

2 Canada Goose is an international retail clothing company. The first claimant is its United Kingdom trading arm. On 9 November 2017, it opened a store in London at 244 Regent Street ("the Store"). The second claimant is the manager of the Store.

3 Within the range of items sold by Canada Goose are products—particularly coats—manufactured using animal products including fur and/or down. This has made it a target of protests by those who are opposed to the sale of fur and animal products. From its opening, the Store became a focus of protests outside (and occasionally, inside) the premises.

4 On 29 November 2017, the claimants issued a claim form (accompanied by particulars of claim) against "persons unknown", seeking an injunction against them for alleged acts of harassment, trespass and/or nuisance arising from the protest.

5 On the same date—29 November 2017—the claimants were granted a without notice interim injunction against "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". Limited modifications were made to the terms of the injunction following a hearing on 15 December 2017. At that hearing, the second defendant was added as a party—at its request. Since it was granted, the interim injunction has been served on over 300 people who have taken part in the protest. None has been made a party to the proceedings or has sought to be joined to the proceedings.

A 6 For nearly a year afterwards, the proceedings essentially lay dormant, a stay having been granted in the order of 15 December 2017. The interim injunction has remained in place throughout that period. On 30 November 2018, the claimants issued an application notice seeking summary judgment against the defendants pursuant to CPR Pt 24. That is how the matter came before me. Mr Michael Buckpitt represented the claimant at the hearing. None of the defendants attended the hearing or was represented.

B 7 This case has raised important issues in relation to the grant of interim injunctions against "persons unknown" generally and particularly against those engaged in protests.

8 In light of the complicated legal issues that have arisen, it is particularly unfortunate that, as is commonplace with actions against "persons unknown", only the claimants were represented at the hearing.
C The second defendant was served with the application notice, and filed a witness statement indicating that it would not formally oppose the application, but stated that it would be for the claimants to persuade the court that it was appropriate to grant the order they sought. That has placed an unusual burden on the court to ensure that proper regard is paid to the rights of the absent parties which, in this case, include all who fall within the wide definition of "protestor" (see para 20(ii) below).

D 9 Several issues arose for consideration during the original hearing, some of which Mr Buckpitt had not had an opportunity fully to consider. To avoid any potential unfairness, I gave him an opportunity to provide further written submissions after the hearing. He did so. Since the hearing, there has been some further delay before I have been able to hand down judgment. This has been caused principally by two important decisions that bear
E significantly on the issues I have to decide. First, the Supreme Court decision in *Cameron v Hussain)* [2019] 1 WLR 1471, then the Court of Appeal decision in *Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening)* [2019] 4 WLR 100. Happily, these decisions have resolved a number of points that had troubled me about this case. Mr Buckpitt has also supplied further written submissions dealing with *Cameron* and *Ineos*, and separate submissions on a point as to service of the proceedings that I raised
F following the hearing. I am very grateful for the obvious care and thought that has gone into these thorough submissions, and for Mr Buckpitt's assistance throughout this case.

B. The claim form and particulars of claim

10 The claim form and particulars of claim identified the basis on which
G the claimants sought injunctions against the defendants, "persons unknown". The defendants were identified as follows:

> "Animal rights protestors/activists [who] campaign against the manufacture and/or sale of animal products including under the brand 'Canada Goose' and campaign against the sale of animal products by the first claimant and seek to persuade members of the public to boycott the
H Store until the first claimant ceases the lawful activity of selling animal products ('the Campaign')."

11 The acts complained of were described as follows: "the defendants have taken part in and/or counselled and procured various acts of unlawful harassment and/or trespass and or nuisance against the first and/or second

claimant and the protected persons" and were particularised in a Schedule of Incidents.

12 In a section headed "The legal basis of each claimant's claim" the following torts were identified: (i) trespass; (ii) watching and besetting; (iii) harassment pursuant to the Protection from Harassment Act 1997 ("the PfHA") (the relevant parts of which are set out in para 49 below); (iv) private nuisance (by restricting rights of access/egress and/or causing excessive noise) and public nuisance (by blocking the highway); and (v) conspiracy to injure by unlawful means, the unlawful means being acts constituting offences under: (a) section 241(1) of the Trade Union and Labour Relations (Consolidation) Act 1992[1*]; and/or (b) section 1 of the Criminal Damage Act 1971[2]; and/or (c) section 137 of the Highways Act 1980 (set out in para 107 below); and/or (d) section 2 of the PfHA (set out in para 49 below).

13 In their particulars of claim, the claimants acknowledged the freedom of expression and other rights of the "persons unknown":

> "Whilst it is admitted that the defendants have a right of freedom of expression and of association and a right to demonstrate against the manufacture and sale of animal products it is averred that *certain* of the conduct complained of (and likely to reoccur) is not permitted *and/or necessary* for the pursuance of such rights." (Emphasis added.)

14 The claimants sought to rely upon articles 5 (security) and 8 (right to private life and respect for home, which they contend embraces a place of business) of, and article 1 of the First Protocol (right to enjoyment of possessions) to, the Convention for the Protection of Human Rights and Fundamental Freedoms as justifying the interference with the defendants' rights of freedom of expression and assembly/demonstration.

15 The claimants contended that:

> "it is incumbent on the court to seek to give effect to each party's rights so far as possible and it is averred that an injunction order in the terms sought achieves such result and is proportionate *and appropriate* in the circumstances." (Emphasis added.)

16 The basis of the claim for an injunction was:

> "the claimants fear that unless restrained . . . the matters complained of will continue and in particular by reason of the intention to prevent the first claimant selling animal products matters will escalate such that conduct of a similar nature . . . will occur."

C. *The interim injunction: 29 November 2017*

17 The claimants applied, without notice, for an interim injunction to restrain further acts of harassment, trespass and/or nuisance by the "persons unknown". The application came before Teare J.

18 The claimants sought—and obtained—an order under CPR r 19.6 (the rule is set out in para 117 below) to enable the second claimant to act in a representative capacity on behalf of "protected persons" (necessarily so for the harassment claim, as the first claimant could not bring such a claim in its

* *Reporter's note.* The superior figures in the text refer to the notes at the end of the judgment on pp 478–479.

own right: see para 50 below). Protected persons were defined in the order as:

> "(a) the employees of the first claimant and the security personnel working at the Store . . . (b) the customers of the first claimant being persons who attend the Store in order to peruse and/or purchase the items for sale . . . and (c) any person visiting or seeking to visit the Store."

19 I would note, here, that the width of categories (b) and (c) of protected persons means that there is a large class of further "persons unknown" whose interests are represented by the second claimant. Whilst, those in class (a) could be identified (and listed), those in categories (b) and (c) cannot, indeed they are protean. I struggle to see how people in categories (b) and (c), who cannot be identified, and are constantly changing, could be said to have "the same interest" in the claim. Nevertheless, the practical effect of this is that this litigation embraces claims brought by persons who cannot be identified against persons unknown. It might be thought that that was an undesirable state of affairs in any piece of litigation. In a claim in which fundamental human rights are engaged, it forces a level of abstraction and generality that, for the reasons I explain below, makes it practically impossible for the court to apply the required intense focus on the engaged rights of the parties: *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17; *In re Guardian News and Media Ltd* [2010] 2 AC 697, paras 50–51: see the discussion in paras 90–99 below. This is not a mechanical exercise to be decided upon the basis of rival generalities: *RXG v Ministry of Justice* [2019] EMLR 25, para 30, per Dame Victoria Sharp P.

20 The judge granted the claimants an interim injunction. It is necessary for me to set out some of its terms.

(i) As to the basis of the injunction, the order recited:

> "AND UPON the court being satisfied that it is *appropriate* and proportionate on an interim basis to make the injunction order below both at common law and pursuant to sections 3 and 3A of the Protection from Harassment Act 1997." (Emphasis added.)

(ii) The order contained several definitions, which were important in governing its scope and application: "Demonstrating" and "demonstrate" were defined as embracing "carrying out any activity including handing out leaflets as part of or in furtherance of the campaign against the production and/or sale and/or supply of animal products [also defined]". "Protestor" or "protestors" were defined as "any person who demonstrates or intends to demonstrate against the production and/or sale and/or supply of animal products by the first claimant". "Defendant" or "defendants" were defined as "the parties referred to in the heading to this order including (for the avoidance of doubt) any protestor or protestors".

(iii) The operative part of the injunction provided:

> "The [first] defendants and each of them be restrained whether by themselves or by instructing or encouraging any person from:
>
> "(1) Assaulting, molesting, or threatening the protected persons;
>
> "(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 three 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 save that no more than five protestors may at any one time demonstrate and hand out leaflets within outer exclusion zone B (but not within the inner exclusion zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;

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

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

(iv) Attached to the injunction order was a plan showing the inner and outer exclusion zones. Essentially, these zones (with a combined width of 7·5 metres) covered roughly a 180-degree radius around the entrance to the Store. The inner exclusion zone extended out from the Store front for 2·5 metres. The outer exclusion zone extended a further five metres outwards. The outer exclusion zone was divided into zone A (a section of pavement on Regent 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.

(v) Paragraph 4 of the order provided liberty to apply to discharge or vary to anyone affected by the order:

"This order is made without notice to the defendants. There is permission to any protestor not named party to these proceedings to apply to the court at any time to be added as a named party and permission to any party to this claim or person affected by this order to apply to vary, discharge or extend this order but if they wish to do so, they must (save in the case of urgency) give not less than two clear days' written notice to all named parties, via the parties' solicitors where solicitors are instructed."

A **21** The terms of the order had the following effects:

(i) The injunction was expressly granted pursuant to sections 3 and 3A of the PfHA (set out in para 49). As Mr Buckpitt acknowledged, the claimants regarded this as a key advantage of the injunction because, pursuant to section 3(6) of the PfHA, breach of a harassment injunction is a criminal offence, rendering the person in breach liable to arrest. I am not convinced B that section 3(6) has this effect against "persons unknown" (see the discussion in paras 119–126 below), but Mr Buckpitt told me that the police welcomed an injunction in these terms that also provided for "exclusion zones" because it made policing a demonstration easier. I do not have any evidence from the police confirming that.

(ii) The width of the definition of "protestor" meant that it captured even a person, standing silently on the pavement outside the Store, holding a C placard, or wearing a t-shirt, bearing a message of opposition to the production and/or sale and/or supply of animal products. In other words, it potentially caught people that were not even arguably breaking the civil or criminal law and then subjected them, in particular, to the restrictions imposed by the injunction, in particular paragraphs (2), (10)–(12).

(iii) Indeed, subject only to issues of service, any "protestor" could D become subject to the terms of the injunction. Such is the width of the definition of this term that, as Mr Buckpitt for the claimants accepted, *anyone* who protested against the first claimant, for example by posting online or by marching up and down a street in Penzance, was captured by the definition of "persons unknown" in the order. The definition of protestor did not require physical presence at the Store.

E (iv) Any person caught by the wide definition of "protestor" who arrived to demonstrate outside the Store would breach the terms of the injunction (and potentially be liable to punishment for contempt or, the claimants contended, arrest and prosecution for a breach of section 3(6) of the PfHA) if s/he joined three other "protestors" in outer exclusion zone A or five other "protestors" in outer exclusion zone B. That was so even if the existing protestors in those zones were themselves standing silently each F wearing a t-shirt bearing a "protest" slogan or holding a placard with a similar message. If the arriving "protestor" discovered that the maximum permitted number of "protestors" were already within the relevant exclusion zones, then s/he would be in breach of the injunction—and, the claimants contend, liable to arrest—unless s/he stood outside the exclusion zones. To demonstrate outside the Store front, avoiding the exclusion G zones, a person would have to stand in the carriageway on Regent Street. This would apply, as I say, even if both the arriving and existing protestors were not committing (or threatening to commit) any tort or other civil wrong.

22 The order recited that the claimants had provided the following undertakings to the court:

H > "(i) to pay any damages which the defendants sustain as a result of the injunction order and which the court considers the claimants or any of them should pay; and (ii) to effect e-mail service as provided below of the order the claim form and particulars of claim and application notice and evidence in support, as soon as is practicable."

23 As to service of the "persons unknown": A

(i) Paragraph 2 of the order permitted the claimants to serve the order upon "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".

(ii) Paragraph 3 of the order provided: "the claimants shall serve this order by the following alternative method namely by serving the same by e-mail to 'contact@surgeactivism.com' and 'info@peta.org.uk'." B

24 I note the following:

(i) The claimants had undertaken to "effect e-mail service as provided for below" of the claim form. The order had not, however, imposed any requirement on the claimants (or required from them any undertaking) to serve the claim form on the "persons unknown"; paragraph 2 had simply C permitted the *order* to be served on people "demonstrating at or in the vicinity of the Store".

(ii) Paragraph 3 permitted alternative service of the injunction order on the two stated e-mail addresses.

(iii) CPR r 6.3(1) sets out the methods of permissible service for a claim form. Without an order for alternative service, the only method by which D the persons unknown could be validly served was by personal service in accordance with CPR r 6.5.

(iv) Although the application notice did seek such an order, no order permitting alternative service of the claim form was made by the court in the order of 29 November 2017 or subsequently. In consequence, there has been no compliance with CPR r 6.15(4), which requires an order for alternative service to specify: (a) the method or place of service; (b) the date on which E the claim form is deemed served; and (c) the period for (i) filing an acknowledgment of service, (ii) filing an admission, or (iii) filing a defence.

25 Although the order of Teare J did not expressly state that there had been any consideration of section 12 of the Human Rights Act 1998 (set out in para 65 below), Mr Buckpitt confirmed, and I am satisfied, that the court was referred to and considered its provisions. The court will always require F to be strictly satisfied that the requirements of section 12 have been observed. Applications for injunctions against "persons unknown" are no exception. In a protestor case, there are many "practicable steps" (section 12(2)(a)) that can be taken to notify at least some of the respondents of the application for an injunction. The most obvious expedient being notices informing protestors of the intention to apply for an injunction. Such notices could provide details of the time and place that the application G together with details of the order the applicant intends to ask the court to make.

26 The claim form and particulars of claim have been served only in the following ways: (i) by e-mail on 29 November 2017 to the second defendant; (ii) by e-mail on 29 November 2017 to "contact@surgeactivism.com"; and (iii) by e-mail on 3 December 2017 to Luke Steele (who had contacted the H claimants' solicitors and asked for a copy). Mr Steele appears to have been sent the documents for his information, rather than by way of service upon him as one of the "persons unknown".

27 The claimants served the order of 29 November 2017 and the application notice seeking the injunction and evidence in support by sending

A them to the two e-mail addresses (see para 23(ii) above). Because of the size of the attachments, Mr Hayes sent the documents using Mimecast. Although he received confirmation that PETA had accessed the documents on 4 December 2017, no similar confirmation of receipt was received in respect of service on contact@surgeactivism.com. There is therefore no evidence confirming that the claim form has been served upon, or has come to the attention of, any person falling within the class of persons unknown who are the first defendants.

B

D. The continuation of the interim injunction: 15 December 2017

28 Teare J directed a further hearing of the claimants' application for an interim injunction on 13 December 2017. On 30 November 2017, the claimants issued an application notice seeking the continuation of Teare J's order. In a witness statement dated 12 December 2017, the second claimant set out what had happened since the grant of the interim injunction (and exhibited video footage of some protests—which I have watched). He suggested that continuation of the restrictions imposed by the injunction would be "fair and balanced" and allowed persons unknown "to protest and get their message across without causing significant disturbance and harassment to the claimants, their staff, customers and members of the public".

C

D

29 The application came before Judge Moloney QC sitting as a judge of the Queen's Bench Division on 13 December 2017. The day before, the second defendant had issued an application seeking (a) to be joined to the proceedings on behalf of itself and "its employees and members", and (b) a variation of the interim injunction.

E

30 PETA's application was supported by a witness statement from Mimi Bekhechi, the director of international programmes for PETA. She stated that PETA had over 1·2 million members and supporters and operated as a charitable company limited by guarantee. She described the work of PETA as follows:

> "PETA is dedicated to establishing and protecting the rights of all animals, focusing on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in the food industry, in the clothing trade, in laboratories, and in the entertainment industry . . . PETA has for the last 21 years carried out lawful, peaceful demonstrations against corporations or institutions whose practices cause animals to suffer. These demonstrations have been instrumental in achieving ground-breaking changes for animals, from the ban on cosmetics testing and fox hunting, to ending the sale of foie gras in all major British supermarkets. The importance of preserving our right to public demonstration can't be overstated . . ."

F

G

She gave particular examples of successes that PETA believed had come about as a result of public demonstrations.

H

31 Ms Bekhechi stated PETA's approach to demonstrations, and in particular, with reference to the actions of certain protestors outside the Store:

> "While we are aware that many other people and organisations also feel passionately about ending the suffering inflicted on coyotes and geese

for Canada Goose's fur-trimmed, down-filled coats, and regularly demonstrate outside the European flagship shop on Regent Street, PETA has no direct involvement with, or control over their actions. PETA has always been and remains committed to achieving its aims by wholly lawful and peaceful means. Not only is this a moral and ethical position taken by the organisation, but we also have many high profile and influential supporters who may well be alienated if PETA were to involve itself in violent or disorderly forms of protest. It is for those reasons that PETA expects the highest standards of behaviour from any persons working for, or representing, the organisation or taking part in a PETA demonstration."

32 PETA sought the variation of Teare J's order on the grounds, explained by Ms Bekhechi, that

"the exclusion zones contained in the court's order prevent PETA from being able to adequately organise in sufficient numbers at the locations of our choosing to inform shoppers . . . about the cruelty that is involved in the production of Canada Goose's coats."

In particular, the limit on numbers permitted within the exclusion zones, meant that PETA demonstrators who arrived at the Store and found that eight other protestors were already within the exclusion zones, were required to locate themselves either near or even in the carriageway, in areas that might obstruct the free flow of pedestrian traffic or in the vicinity of other retail outlets "thus causing confusion in the delivery of PETA's message and also unfairly associating those stores with the fur trade and animal cruelty".

33 PETA also filed a witness statement from Teodora Zglimbea. She was PETA's outreach co-ordinator and, as part of that role, she arranged various demonstrations. Ms Zglimbea stated that PETA maintained good relations with the Metropolitan Police:

"PETA demonstrations are carefully and professionally conceived, organised and conducted, including very often notifying the Metropolitan Police of the date, time and location of our demonstrations so they can arrange any presence they feel is necessary and to provide a productive dialogue and relationship with the Metropolitan Police. As such, PETA have a long-standing and good working relationship with the Metropolitan Police, who are always supportive of us exercising our free speech during demonstrations. At no time during my three years with PETA has any PETA employee or authorised volunteer or activist participating in any PETA-sponsored demonstration which I planned, co-ordinated and/or attended been arrested or acted in any way contrary to the law, and all such personnel have at all times followed the directions of the Metropolitan Police when present at our demonstrations.

"It is PETA's standard operating procedure that all PETA staff members and volunteer activists participating in a PETA-sponsored demonstration are instructed to dress appropriately (including wearing a PETA logo t-shirt if requested), to act respectfully toward all members of the public they encounter throughout the demonstration, follow the instructions of the designated PETA staff member responsible for

A conducting the demonstration and follow the instructions of any police officers present."

34 Ms Zglimbea gave details of four PETA-organised demonstrations at the Store that had taken place:

9 November 2017

(i) Ms Zglimbea notified the police in advance of the demonstration by
B e-mail (a copy was exhibited) and gave the officer her mobile telephone number.

(ii) The protest started at midday. 14 PETA staff members attended. One was dressed in a large plucked goose costume and the others held signs. They stood shoulder-to-shoulder in a single file line immediately in front of the Store facing towards Regent Street. Some protestors handed out leaflets
C to passers-by. The demonstration ended at 1 p m. There was no obstruction to the entrance to the Store and no loudhailer was used.

(iii) The point is made in PETA's evidence that the protestors on this occasion were standing in what is now the inner exclusion zone and would therefore now be prohibited.

24 November 2017

(iv) Ms Zglimbea again provided advance notification to the police by
D e-mail. Two police officers attended the demonstration, but simply observed from a distance.

(v) The protest started at midday. Ms Zglimbea attended. There were ten PETA staff members and approximately 20 volunteer activists, holding signs and some handing out leaflets. Nearly all of the protestors stood shoulder-to-shoulder, again in single file, immediately in front of the Store window
E facing Regent Street. One activist was painted red, wore a coyote mask and had one leg caught in a trap. He was positioned close to the Store entrance but not in a way that obstructed access.

(vi) Ms Zglimbea noted apparent confirmation of this in the witness statement of the second claimant: "the protest commenced at 12.00. The Store security log confirmed that a group of PETA protestors arrived with approximately 15 individuals and staged a short protest and left the Store at
F 13.00."

29 November 2017

(vii) There was a further PETA-organised protest on this date. It was a small-scale event. Four people attended for the purposes of a photo shoot. It began at midday and ended at 12.15. The protest did not feature in the evidence of the claimants.

8 December 2017

G (viii) Ms Zglimbea again notified the police of the planned demonstration by e-mail. The event began at midday and ended at 12.20. The protestors were instructed by the police to stay within exclusion zone B. The limit on numbers meant that Ms Zglimbea and three photographers who were present were required to stand off the pavement and in the road. The police officers advised them to "mind the traffic".

H 35 Ms Zglimbea confirmed that, apart from those four demonstrations, none of the other events complained about by the claimants related to any PETA-sponsored or PETA-organised activities. She stated:

> "at no time in any of the four demonstrations described above, or generally, has PETA engaged in unlawful or disorderly activities . . .

[There] is no need to restrict its activities to the extent set out in the terms of the injunction order."

36 At the hearing on 13 December 2017, the judge joined the second defendant to the action and permitted it to represent "its employees and members" under CPR r 19.6, but adjourned the claimants' application for a continuation of the interim injunction to 15 December 2017. The order joining the second defendant to the proceedings did not contain any directions as to service of the claim form on the second defendant (e g requiring service by a particular date or dispensing with service) and nor did it contain any directions requiring the second defendant to file a defence or acknowledgment of service.

37 The claimants responded to PETA's evidence in a witness statement dated 14 December 2017 from Geoff Marr, the first claimant's "Director in Legal", based in Toronto. He stated: (i) the four PETA protests described by Ms Zglimbea "were carried out without incident and her summary broadly accords with the claimants' understanding of what took place"; but (ii) nevertheless, the claimants believed that PETA members had attended other demonstrations and that Ms Zglimbea had attended a large demonstration on 11 November 2017. He provided little by way of further evidence to substantiate that claim. Perhaps most importantly, Mr Marr did not suggest that any of those who participated in the PETA demonstrations had acted in any way unlawfully.

38 Mr Marr did however identify an issue to which I will return. He complained that "it is not understood how an order can be made in respect of general protests that differentiates between the second defendant and other protestors". He confirmed that the claimants were prepared to agree to some variation of the order which allowed for co-ordinated protests by PETA "from time to time". More generally, Mr Marr indicated that the claimants would "not oppose" a limited variation in the injunction order to permit a demonstration by 15 people, once a week for two hours, between 8 a m to 4 p m, Monday to Friday.

39 The matter came back before Judge Moloney QC on 15 December 2017. At the hearing, Mr Buckpitt represented the claimants and Mr Andrew Locke represented PETA. PETA sought the variation of the injunction order to modify the exclusion zones, alternatively for permission to hold "controlled demonstrations" in those zones on notice to the claimants. PETA also raised an issue as to the use of loudhailers.

40 The judge gave an ex tempore judgment [2017] EWHC 3735 (QB). In summary: (i) he maintained the restrictions preventing any "protestor" from entering the inner exclusion zone; (ii) he amalgamated zones A and B in the outer exclusion zone and increased the number of protestors permitted within the outer exclusion zone to 12 people; and (iii) he varied para 14 of Teare J's order (see para 20(iii) above), regarding the use of loudhailers (defined in the order), to prohibit:

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

41 The judge, given his experience in the area, was clearly alive to the protestors' rights of freedom of expression and freedom of association. He said, at para 7:

> "All the restrictions I am invited to consider granting or lifting have the effect, to a greater or lesser extent, of limiting the right of the protestors to free expression under article 10 of the [Convention for the Protection of Human Rights and Fundamental Freedoms] and indeed of free assembly under article 11 of that Convention . . . So far as the Protection from Harassment Act 1997 is concerned, the acts I am asked to restrain or permit are acts which are capable of constituting or contributing to harassment of the customers and staff of [the] claimant company. The restrictions are intended to minimise the opportunity for harassment or the temptation for harassment. But under that Act, those acts, if carried out as part of a principled demonstration would arguably be defensible as reasonable. In other words, under the Protection from Harassment Act not every act of harassment is actionable; it depends ultimately on reasonableness, and I have no doubt that acts otherwise of a harassing nature carried out in the course of lawful demonstration might, depending on the nature and extent of their severity, be entitled to that defence."

42 An order reflecting the judge's variations to the injunction was drawn up and sealed ("the 15 December 2017 Order"). It remained in force "unless varied or discharged by further order of the court".

43 In terms of case management directions, the 15 December 2017 Order also provided: (i) that "all further procedural directions" were stayed unless "a named party in this claim gives written notice to the other parties . . . that such stay of directions should be lifted"; and (ii) further directions in the event that request to lift the stay was received and a "long-stop" or default provision in the following terms:

> "Within 21 days of the giving or receipt of written notice to lift the stay (and in any event not later than 4 p m on 1 December 2018) the claimants shall apply for summary judgment and for directions in respect of such application the claimant being permitted (pursuant to CPR r 24.4(1)) to make such application in so far as by such date no acknowledgment of service or defence has been filed. If neither such application is made by 1 December 2018 the claim shall stand dismissed and the injunction will be discharged without further order."

E. Further steps in the claim

44 The 15 December 2017 Order effectively stayed the proceedings until such time as a "named party" re-activated them, subject to the "long-stop" requirement that the claimants were to issue an application for summary judgment/directions. I am not sure who it was envisaged would qualify as a "named party". As the proceedings stood at the date of the 15 December 2017 order, the only named parties were the claimants and the second defendant.

45 The definitions included in the 15 December 2017 Order (like the Teare J order before that), provided that, in the order: "'defendant' or 'defendants' shall mean the parties referred to in the heading to this order

including (for the avoidance of doubt) any protestor or protestors . . . [as defined: see para 20(ii) above]."

46 It appears to me unclear whether the 15 December 2017 Order permitted someone served with the order to request the lifting of the stay. On one reading, it did not. The point may not matter, as, in the event, no party (or third party) did seek to lift the stay and so the proceedings lay in their dormant state. That is not to say that there were no important developments. The injunction contained in the 15 December 2017 Order remained in full force and the claimants took full advantage of the opportunity to serve it on over 300 "protestors" whenever they judged it appropriate. Anyone so served was thereafter bound by the terms of the injunction, albeit s/he was given the opportunity to apply to the court to vary or discharge it.

47 In a witness statement in support of the application for summary judgment, the claimants' solicitor, Mr Paul Hayes stated:

> "None of the defendants in this matter have filed a defence or acknowledged service of the proceedings. As regards the first defendants this is certainly the case (and such defendants are 'added' every time a copy of the order is served on them). The second defendant applied to be joined as a party to the proceedings, which application was not opposed by the claimants. The second defendant has not served a defence and their challenge in the main related to the terms of the order rather than the making of an injunction . . ."

48 At the hearing of the claimants' application and in response to my questions, Mr Buckpitt gave me information about the number of people who had been served with the injunction and how many of them had been identified by the claimants. Following the hearing, this evidence has been set out in a further witness statement from Mr Hayes. The evidence is:

(i) Between 29 November 2017 and 19 January 2019, entries in a "security log" recorded that 385 copies of the injunction have been served. That may not represent the actual number of people who have been served because it appears some have been served more than once.

(ii) No copies of the claim form or a response pack have been served on any protestor.

(iii) Of the 385 copies of the injunction that the claimants have records of having been served, 135 have been served in a way that enables the individual to be identified (e g from body-camera footage). Removing those who can be identified as having been served more than once, the total number of identifiable individuals served with the injunction is 121.

(iv) Of those 121, the claimants have identified 37 by name, although the claimants believe that a number of the names are pseudonyms. The entries in the security log suggest that several of the protestors were "regulars" and who were identified by name.

(v) No attempt has been made by the claimants to join any of these 37 individuals (or the larger group of 121) to this action whether by serving them with the claim form or otherwise. Mr Buckpitt told me at the hearing that the reason why this had not been done was the cost and inconvenience of doing so. He suggested that this might be welcomed by the putative defendants as they would then not be exposed to potential liability for costs. The effect, however, is that these proceedings have remained essentially uncontested.

A *F. Protection from Harassment Act 1997*

49 A significant, if not the principal, basis on which the claimants bring this claim is alleged harassment by the protestors of the protean class of "protected persons" (as defined in the injunction: see para 18). A central issue is therefore what restrictions can be imposed by way of civil injunction to restrain actual or threatened harassment. The key provisions of the PfHA
B that have a bearing in this case are as follows:

"1 *Prohibition of harassment*

"(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
C 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
D 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 or involved 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
E 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.

"2 *Offence of harassment*

"(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.

F "(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both."

"3 *Civil remedy*

"(1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the
G victim of the course of conduct in question.

"(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

"(3) Where— (a) in such proceedings the High Court or the county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and (b) the
H plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction, the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

"(4) An application under subsection (3) may be made— (a) where the injunction was granted by the High Court, to a judge of that court, and

(b) where the injunction was granted by the county court, to a judge of that court.

"(5) The judge to whom an application under subsection (3) is made may only issue a warrant if— (a) the application is substantiated on oath, and (b) the judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

"(6) Where— (a) the High Court or the county court grants an injunction for the purpose mentioned in subsection (3)(a), and (b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction, he is guilty of an offence.

"(7) Where a person is convicted of an offence under subsection (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

"(8) A person cannot be convicted of an offence under subsection (6) in respect of any conduct which has been punished as a contempt of court.

"(9) A person guilty of an offence under subsection (6) is liable— (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

"3A *Injunctions to protect persons from harassment within section 1(1A)*

"(1) This section applies where there is an actual or apprehended breach of section 1(1A) by any person ('the relevant person').

"(2) In such a case— (a) any person who is or may be a victim of the course of conduct in question, or (b) any person who is or may be a person falling within section 1(1A)(c), may apply to the High Court or the county court for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction.

"(3) Section 3(3) to (9) apply in relation to an injunction granted under subsection (2) above as they apply in relation to an injunction granted as mentioned in section 3(3)(a)."

"5 *Restraining orders on conviction*

"(1) A court sentencing or otherwise dealing with a person ('the defendant') convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.

"(2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which— (a) amounts to harassment, or (b) will cause a fear of violence, prohibit the defendant from doing anything described in the order.

"(3) The order may have effect for a specified period or until further order.

"(3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.

"(4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

"(4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).

A "(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

"(6) A person guilty of an offence under this section is liable— (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory B maximum, or both.

"(7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.

"5A *Restraining orders on acquittal*

"(1) A court before which a person ('the defendant') is acquitted of an offence may, if it considers it necessary to do so to protect a person from C harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

"(2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one.

"(3) Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to D proceed under this section.

"(4) Where— (a) the Crown Court allows an appeal against conviction, or (b) a case is remitted to the Crown Court under subsection (3), the reference in subsection (1) to a court before which a person is acquitted of an offence is to be read as referring to that court.

"(5) A person made subject to an order under this section has the same right of appeal against the order as if— (a) he had been convicted of the E offence in question before the court which made the order, and (b) the order had been made under section 5."

"7 *Interpretation of this group of sections*

"(1) This section applies for the interpretation of sections 1 to 5A.

"(2) References to harassing a person include alarming the person or causing the person distress.

F "(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 G 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.

H "(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual."

50 A corporate entity is not a "person" capable of being harassed under the Act: section 7(5) and *Daiichi Pharmaceuticals 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) at [2].

51 What amounts to harassment is far from straightforward (see the discussion in *Hourani v Thomson* [2017] EWHC 432 (QB) at [138]–[146], per Warby J):

(i) Reference in the PfHA to harassment including alarming the person or causing the person distress is not a definition of the tort; it is merely guidance as to one element of it: para 138. Nor is it an exhaustive statement of the consequences that harassment may involve. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct para 139, which is calculated to, and does, cause that person alarm, fear or distress: *Hayes v Willoughby* [2013] 1 WLR 935, para 1, per Lord Sumption JSC.

(ii) The behaviour must reach a level of seriousness before it amounts to harassment within the scope of section 1 of the PfHA; not least because the Act creates both a tort and, by section 2, a crime of harassment: para 139. The authoritative exposition of this point is that of Lord Nicholls of Birkenhead in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224, para 30:

> "[Where] the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2."

(iii) There must be conduct, on at least two occasions, which is, from an objective standpoint, calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that it would sustain criminal liability: para 140 and *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) at [142], per Simon J.

(iv) The objective nature of the assessment of harassment is particularly important where the complaint is of harassment by publication. In any such case, the claim engages article 10 of the Convention and, as a result, the court's duties under sections 2, 3, 6 and 12 of the 1998 Act.

> "It would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on *subjective* claims by individuals that they feel offended or insulted": *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717, para 267, per Tugendhat J (emphasis added).

52 Injunctions under the PfHA have been made in several cases against protestors. However, the Act was not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration: *Huntingdon Life Sciences Ltd v Curtin* The Times, 11 December 1997, per Eady J.

53 When article 10 is engaged then the court must apply an intense focus on the relevant competing rights (see para 99 below). Harassment by

A speech cases are usually highly fact- and context-specific. For example, in *Merlin Entertainments LPC v Cave* [2015] EMLR 3, Elizabeth Laing J noted:

> "40. Harassment can take different forms. Where the harassment which is alleged involves statements which a defendant will seek to justify at trial, there may be cases where an interim injunction will be
B appropriate. These are cases where such statements are part of the harassment which is relied on, but where that harassment has additional elements of oppression, persistence or unpleasantness, which are distinct from the content of the statements. An example might be a defendant who pursues an admitted adulterer through the streets for a lengthy period, shouting 'You are an adulterer' through a megaphone. The fact that the statement is true, and could and would be justified at trial, would
C not necessarily prevent the conduct from being harassment, or prevent a court from restraining it at an interlocutory stage."
>
> "41. This means that the real question is whether the conduct complained of has extra elements of oppression, persistence and unpleasantness and therefore crosses the line referred to in the cases. There may be a further question, which is whether the content of the
D statements can be distinguished from their mode of delivery . . . [The] fact that conduct consists of, or includes, the making and repetition of statements which a defendant will seek to justify at trial means that a court must scrutinise very carefully claims that that line has been crossed in any particular case, *and ensure that any relief sought, while restraining objectionable conduct, goes no further than is absolutely necessary in interfering with article 10 rights*." (Emphasis added.)

E

54 The megaphone example demonstrates the importance of context. It was potentially harassment because of the element of pursuit. Yet,

> "If the respondent used a megaphone to broadcast his remarks in a town square 200 miles away from the applicant, it is hard to see how that conduct would bear the description 'harassment' (in the ordinary sense of
F that word)": *Khan (formerly JMO) v Khan (formerly KTA)* [2018] EWHC 241 (QB) at [69].

This is just one of the issues that makes defining the terms of any injunction to restrain alleged harassment particularly difficult.

G. Fundamental principles of civil litigation

G 55 Civil litigation in England and Wales is adversarial:

> ". . . English civil courts act in personam. They adjudicate disputes between the parties to an action and make orders against those parties only. This is true even in proceedings . . . against 'persons unknown'. They become parties. What is not permissible is to make an order against a stranger to the action." (*Attorney General v Newspaper Publishing plc*
H [1988] Ch 333, 369, per Sir John Donaldson MR.)

56 A claimant can bring a claim against a defendant alleging that s/he has committed some wrong. The defendant can admit the claim, in whole or in part, or s/he can deny the claim (or challenge the court's jurisdiction). Absent an earlier summary determination, or default by one of the parties,

any dispute between the parties will be adjudicated upon at a trial at which the court will consider evidence presented by each party. If the court finds for the claimant, it will usually enter judgment for the claimant against the defendant and grant the remedies to which it considers the claimant is entitled consequent on the judgment. Subject to any appeal, that brings the litigation to an end. It is in the public interest that there should be finality to litigation: *Johnson v Gore Wood & Co* [2002] 2 AC 1, 59A, per Lord Millett.

57 The court will consider claims based on the commission of wrongs in the past, and those based on the claimant's contention that the defendant threatens to commit a wrong against him/her in the future. Where justified, and where the claimant has demonstrated, by evidence, a credible threat that the defendant will act wrongfully unless restrained, the court has the power to grant an injunction to prevent a defendant from doing the act which the claimant contends would be a civil wrong. The purpose of an interim injunction is usually to protect the position pending the court's final assessment of evidence at a trial. The court will not normally grant an interim injunction if it considers that the claimant could be adequately compensated in damages if the defendant did commit a civil wrong. Fundamentally, however, the court will only grant an injunction where it is satisfied that the claimant has a substantive cause of action against the defendant that gives rise to a serious issue to be tried. More onerous requirements may apply in some types of case (e g defamation claims and/or those that engage section 12 of the 1998 Act).

58 The Civil Procedure Rules provide a comprehensive framework for the commencement of claims and the service of originating process upon defendants. In broad terms, the object is to seek to ensure that defendants to civil claims are given proper notice of the claim that is being made against them and a reasonable opportunity to put forward any defence to the claim. The fact that the court, exceptionally, permits a claim to be brought against "persons unknown" (see further para 59(v)–(xiv) below) does not lead to the abandonment of this basic principle. There may be practical difficulties in achieving the objective where the identity of the defendant is not presently known, but it does not lessen the obligation to attempt to do so. Even people who shield themselves behind anonymity are to be afforded the basic right, so far as possible, to be given notice that a claim is being made against them and an opportunity to defend themselves.

59 These fundamental principles were clearly articulated in Lord Sumption JSC's judgment in *Cameron* [2019] 1 WLR 1471, paras 9–26, the first case in which the House of Lords or Supreme Court have considered proceedings against "persons unknown". In summary:

The requirements of service

(i) Justice in legal proceedings must be available to both sides. 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. In *Jacobson v Frachon* (1927) 138 LT 386, 392, Atkin LJ described the principles of natural justice as follows:

> "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and

A the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

(ii) Service of originating process is central to domestic litigation procedure and was required long before statutory rules of procedure were introduced following the Judicature Acts of 1873. Different modes of
B service were permitted, but each had the common object of bringing the proceedings to the attention of the defendant.

(iii) CPR r 6.15 does not include an express requirement that the method authorised should be likely to bring the proceedings to the person's notice, but "service" is defined in the indicative glossary of the Civil Procedure Rules as "steps required by rules of court to bring documents used in court
C proceedings to a person's attention". The whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: *Abela v Baadarani* [2013] 1 WLR 2043, para 37, per Lord Clarke of Stone-cum-Ebony JSC. 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.

D (iv) CPR r 6.16 enables the court to dispense with service of a claim form, but it is difficult to envisage the circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware of the proceedings. To do so would expose the defendant to a default judgment without having had the opportunity to be heard or otherwise to defend his/her interests.

E *Proceedings against persons unknown*

(v) A claim form may be issued against a named defendant even though, at the time, it is not known where, how or indeed whether s/he can be served. The legitimacy of issuing a claim form against an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts in personam. An action is
F completely constituted when the claim form is *issued*, but it is not until the claim form is *served* that the defendant becomes subject to the court's jurisdiction: *Barton v Wright Hassall llp* [2018] 1 WLR 1119, para 8. Under the old Rules of the Supreme Court, and for the purposes of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), an English court was "seised" of an action
G when the writ was served, not when it was issued: *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523. The same principles apply to an unserved claim form under the Civil Procedure Rules.

(vi) Where it is possible to locate or communicate with the anonymous defendant, and to identify him as the person described in the claim form, then it is possible to serve the claim form, if necessary, by alternative service under CPR r 6.15. In *Brett Wilson llp v Persons Unknown* [2016] 4 WLR
H 69, for example, alternative service was effected by e-mail to a website which had published the defamatory material. In trespass cases, CPR r 55.6 provides that service on the anonymous trespassers must be effected by 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.

(vii) Nevertheless, the general rule remains that proceedings may not be brought against unnamed parties. Apart from representative actions under CPR r 19.6, the only express provision of the CPR that permits claims against an unnamed defendant is CPR r 55.3(4), which allows a claim for possession of land to be brought against trespassers whose names are unknown. There are also certain specific statutory exceptions to broadly the same effect, eg proceedings for an injunction to restrain "any actual or apprehended breach of planning controls" under section 187B of the Town and Country Planning Act 1990[3].

(viii) The court has permitted actions, and made orders, against unnamed wrongdoers where the identities of some of the alleged wrongdoers were known. They could be sued both personally and as representing their unidentified associates, eg copyright piracy claims: *EMI Records Ltd v Kudhail* [1985] FSR 36.

(ix) A wider jurisdiction permitting claims against persons unknown was first recognised in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633. Copies of the latest book in the Harry Potter series had been stolen from printers before publication and offered to the press by unnamed persons. An injunction was granted in proceedings against

> "the person or persons who have offered the publishers of 'the Sun', the 'Daily Mail' and the 'Daily Mirror' newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by JK Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants": para 4.

Sir Andrew Morritt V-C held that a person could be sued by a description, provided that the description was "sufficiently certain as to identify both those who are included and those who are not": para 21.

(x) There are therefore two distinct categories of case in which the defendant cannot be named: (a) anonymous defendants who are identifiable but whose names are unknown, eg squatters who are identifiable by their location, although they cannot be named; and (b) defendants who are not only anonymous but cannot even be identified, eg 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.

(xi) In some cases, quia timet injunctions have been granted against "persons unknown", where the defendants could be identified only as those persons who might in future commit the relevant acts. However, the grant of interim relief before the proceedings have been served (or even issued) is the exercise of an emergency jurisdiction and is both provisional and strictly conditional.

(xii) Nevertheless, this jurisdiction has regularly been invoked and, recently, there has been a significant increase in its use, principally in abuse of internet cases and trespasses (and other torts) committed by demonstrators and paparazzi.

(xiii) In proceedings against "persons unknown" where the court grants an injunction to restrain specified acts, a person can become both a

defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, 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.

(xiv) Defining an unknown person by reference to something that he has done in the past does not identify anyone. It is impossible to know whether any particular person is the one referred to and there is no way of bringing the proceedings to his/her attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but also to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is not enough that the wrongdoer him/herself knows who s/he is.

60 The following provisions of the CPR seek to achieve these objectives:

(i) Unless, in exceptional circumstances, the court dispenses with service under CPR r 6.16, a defendant does not become a party to the proceedings until s/he is served with the claim form.

(ii) When particulars of claim are served, they must be accompanied by what is called the "response pack", which includes the acknowledgment of service form that the defendant is required to complete and return with 14 days of service: CPR rr 7.8 and 10.2. In the acknowledgment of service, the defendant must indicate whether s/he admits the claim (in whole or in part) or whether s/he disputes the claim.

(iii) Where the claimant serves the claim form, the claimant must file a certificate of service within 21 days of service of the particulars of claim, unless all defendants to the proceedings have filed acknowledgments of service within that time: CPR r 6.17(2)(a).

(iv) A defendant who has been served with a claim form and particulars of claim is liable to have judgment in default entered against him/her if s/he has not filed an acknowledgment of service or defence within the required period: CPR r 12.3(1).

(v) To obtain default judgment, a claimant must file a certificate of service (see para 60(iii) above): CPR r 6.17(2)(b).

(vi) Without the court's permission (or unless a practice direction otherwise permits), a claimant cannot apply for summary judgment against a defendant until s/he has filed an acknowledgment of service or defence: CPR r 24.4(1).

61 The CPR imposes time limits—separate from any period of limitation—on the bringing of a claim.

(i) CPR r 7.5 requires a claimant to complete the necessary step to effect whichever method of service of the claim form is used "before 12.00 midnight on the calendar day four months after the date of issue of the claim form".

(ii) Under CPR r 7.6, a claimant can apply to extend the period for service of the claim form under CPR r 7.5. Such an application must generally be made within the permitted four-month period: CPR r 7.6(2). If made after the period has expired, the claimant must show that s/he has "taken all reasonable steps to comply with rule 7.5 but has been unable to do so" and that s/he "has acted promptly in making the application": CPR r 7.6(3)(b) and (c).

H. Interim injunctions

62 Interim injunctions to restrain the threatened commission of a civil wrong are still known by the Latin as quia timet injunctions.

63 In *Elliott v Islington London Borough Council* [2012] 7 EG 90 (CS), para 31, Patten LJ identified the governing principles, including:

(i) When considering whether to grant a quia timet injunction, a two-stage test is applied: (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?

(ii) When assessing, at the first stage, whether the claimant has shown a "strong probability", the relevant factors include: (a) If the threatened wrong is entirely anticipated, it is relevant to ask what other steps the claimant could take to ensure that the infringement does not occur. (b) The attitude of the defendant or anticipated defendant in the case of an anticipated infringement is significant. 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 and the application must not be premature.

(iii) As to the second stage, it is necessary to ask: if no quia timet injunction is granted, how effective will an interim injunction (plus and award of damages subsequently) be as a remedy for that infringement? The following other factors are material: (a) The gravity of the anticipated harm. If the consequences of an infringement are potentially very serious and incapable of remedy later, the seriousness of these irremediable harms is a factor that must be borne in mind. (b) The distinction between mandatory and prohibitory injunctions.

I. Section 12 of the Human Rights Act 1998

64 When considering whether to grant an interim injunction, the court will usually apply the well-established test from *American Cyanamid Co v Ethicon Ltd* [1975] AC 396: (a) Is there a serious issue to be tried? (b) Would damages be an adequate remedy? (c) Does the balance of convenience favour the grant of an injunction?

65 A more exacting test is required in certain types of case. Where the injunction sought may interfere with freedom of expression, the test is not that under *American Cyanamid* but that provided in section 12(3) of the 1998 Act. 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.

"(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to— (a) the extent to which— (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code.

"(5) In this section— 'court' includes a tribunal; and 'relief' includes any remedy or order (other than in criminal proceedings).

66 "Likely" in section 12(3) means "more likely than not": *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. Warby J summarised the position for the court at the interim stage in *YXB v TNO* [2015] EWHC 826 (QB) at [9]:

"The test that has to be satisfied by the claimant on any application for an injunction to restrain the exercise of free speech before trial is that he is 'likely to establish that publication should not be allowed': Human Rights Act ('HRA'), section 12(3). This normally means that success at trial must be shown to be more likely than not: *Cream Holdings* . . . In some cases it may be just to grant an injunction where the prospects of success fall short of this standard; for instance, if the damage that might be caused is particularly severe, the court will be justified in granting an injunction if the prospects of success are sufficiently favourable to justify an order in the particular circumstances of the case: see *Cream Holdings* at paras 19, 22. But ordinarily a claimant must show that he will probably succeed at trial, and the court will have to form a provisional view of the merits on the evidence available to it at the time of the interim application."

67 "Publication" in section 12(3) is not restricted to commercial publication; it applies to any method of communication that would engage article 10: *Birmingham City Council v Afsar* [2019] ELR 373, paras 60–61, per Warby J:

"60. . . . In the law of defamation, 'publication does not mean commercial publication, but communication to a reader or hearer other than the claimant': *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, para 18 (Lord Sumption JSC). This is generally true of the torts associated with the communication of information, sometimes known as 'publication torts', and the related law (see the discussion in *Aitken v Director of Public Prosecutions* [2016] 1 WLR 297, paras 41–62). Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint

of any form of communication that falls within article 10 of the Convention." A

61. . . . [There] can be no doubt as to the materiality of section 12(3) in this case. It contains a statutory prohibition on the grant of a pre-trial injunction which interferes with freedom of expression, unless the court is satisfied that the claimant is likely to obtain a final injunction."

B

J. Persons unknown: The need for precision in the terms of any injunction and that its terms only restrain wrongdoing

68 The Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 considered the application of two important principles when applications are made for interim injunctions against persons unknown: (1) the need for precision in the terms of any order; and (2) the need to ensure that the order restrains only unlawful conduct. C

69 If a claimant cannot define the relief sought with a sufficient degree of precision (e g the extent of an area of land or the confidential information alleged to be protected), then the injunction is likely to be refused: *Lawrence David Ltd v Ashton* [1989] ICR 123, 132, per Balcombe LJ:

"I have always understood it to be a cardinal rule that any injunction must be capable of being framed with sufficient precision so as to enable a person enjoined to know what it is he is to be prevented from doing. After all, he is at risk of being committed for contempt if he breaks an order of the court. The inability of the plaintiffs to define, with any degree of precision, what they sought to call confidential information or trade secrets militates against an injunction of this nature. That is indeed a long recognised practice." D E

70 A civil wrong can be committed (or threatened) by one or more people whose identity is not known to the putative claimant. The court will not lightly allow justice and the rule of law to be thwarted by the inability immediately to identify the wrongdoer. But it is axiomatic that the court requires evidence (to the required standard) that the person, against whom an injunction is sought, has done (or is threatening to do) something unlawful, and that the terms of any injunction will restrain only conduct which is unlawful. If these requirements are not met, the injunction will usually be refused. Consistent with the principles identified in *Elliott* [2012] 7 EG 90 (CS) (see para 63 above) the court does not grant injunctions "to be on the safe side". F

71 *Ineos* was a claim against demonstrators. The claimants were ten companies who were involved in fracking in the UK. They obtained injunctions, without notice, against "persons unknown" who were (or were expected to become) protestors at various fracking sites. The injunctions were granted to prevent various acts, including trespass and criminal damage. At first instance, Morgan J [2017] EWHC 2945 (Ch) at [102] had declined to order injunctions based on apprehended harassment under the PfHA, "largely because of the lack of clarity of that term for the purposes of being included in an injunction". G H

72 Two named defendants, who had been joined to the proceedings in order to challenge the injunctions, appealed to the Court of Appeal contending that, at first instance, the court had failed adequately (or at all) to

A apply section 12(3) of the 1998 Act (the terms of which are set out in para 65 above).

73 The various defendants (or categories of defendant) in *Ineos* were identified as follows:

(i) The first defendant: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on
B the plans annexed to the amended claim form."

(ii) The second defendant:

> "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
C claimant(s)."

(iii) The third defendant:

> "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
D on the plans annexed to the amended claim form."

(iv) The fourth defendant: "Persons unknown pursuing any course of conduct such as amounts to harassment of the claimants and/or any third party contrary to the [PfHA] with the intention set out in . . . the [relevant] order."

(v) The fifth defendant: "Persons unknown combining together to commit
E the unlawful acts as specified in . . . the [relevant] order with the intention set out in . . . the [relevant] order."

(vi) The sixth and seventh defendants were Mr Boyd and Mr Corré. Morgan J did not grant any relief against them. Nevertheless, they sought, and were granted, permission to appeal the orders made against "persons unknown" and made submissions on behalf of the "persons unknown"
F against whom an injunction had been granted.

74 The Court of Appeal [2019] 4 WLR 100 allowed the appeal, discharged the injunctions against the third and fifth defendants and remitted the claims against the others for the High Court to consider if, and if so in what terms, any interim order should be made against the first and second defendants, respectively those alleged to be guilty of trespass and those interfering with access to the sites: para 50.

G 75 Longmore LJ (with whom David Richards and Leggatt LJJ agreed) was concerned as to the width or and clarity of the terms in which the injunctions had been granted. That was particularly so because the orders interfered with the protestors' Convention rights of freedom of expression (article 10) and peaceful assembly (article 11). As to the importance of the latter, he quoted *Dicey, Introduction to the study of the Law of the*
H *Constitution*, 10th ed (1959), para 36, which the judge, at para 37, considered continued to represent the common law:

> "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."

76 In *Ineos* [2019] 4 WLR 100 the focus was on torts other than harassment. The court noted that an injunction to prohibit trespass "can be framed in clear and precise terms": para 37. Indeed, injunctions directed at "persons unknown" concerning the unlawful occupation of land are relatively straightforward. Once the applicant's right to exclude or remove people from the land is established, and the land clearly defined, the issue of whether the person is or would be committing a civil wrong is binary and usually easily resolved: is the "person unknown" on the land or not?

77 *Ineos* demonstrated the complexity of defining other instances of alleged wrongdoing sufficiently clearly in an injunction against persons unknown. The focus was on the difficulties of framing injunctions based on obstruction of the highway. However, Longmore LJ's identification and discussion of these issues is of general application to injunctions against persons unknown:

"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 . . . 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.

"40. As [counsel for the sixth defendant] pointed out in her submissions . . . 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 V-C said in [*Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9, para 9],

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

78 The injunction in the present case, targeting as it does alleged "harassment" by the protestors, is a fortiori. Harassment injunctions against protestors raise much more complicated issues. The subject matter of the action is not a property right. The issue is not binary. Whether someone is guilty of harassment and, if so, whether s/he has a defence under section 1(3) of the PfHA is a complicated and inherently fact-specific decision (see the discussion in paras 51–54 above). It for these reasons that Morgan J refused to grant relief against alleged harassment in *Ineos* [2017] EWHC 2945 (Ch) (see para 71 above). The same problem presented itself in relation to obstruction of the highway: see underlined passage in *Ineos* [2019] 4 WLR 100, para 40 (at para 77 above). A quia timet interim injunction which prohibits the respondent from "carrying out a course of conduct amounting to harassment" falls foul of the objection identified by Longmore LJ in

[2019] 4 WLR 100, paras 39–40. There can be (and often is) reasonable disagreement between lawyers as to what amounts to harassment (see para 51 above). The terms of an injunction should not leave it to a layperson to make that difficult assessment him/herself, on pain of imprisonment if s/he gets it wrong. The position is not saved if the prohibition continues "including in particular the following acts" which are then specified. The order must specify the particular acts, clearly and unambiguously, which the court is prohibiting.

79 As to the lawfulness of granting injunctions against "persons unknown", Longmore LJ reviewed *Cameron* [2019] 1 WLR 1471 and concluded that Lord Sumption JSC had given express approval to *Bloomsbury Publishing* [2003] 1 WLR 1633: paras 26–29. He held, at para 30, that "there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort". However, Longmore LJ emphasised, at para 31, that courts should be "inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance".

80 The Court of Appeal considered that there was "considerable force" in the submission that an injunction against the fifth defendants (alleged to be those conspiring to cause damage to the claimants by unlawful means) should not have been granted because its terms were neither framed to catch only those who were committing the tort, nor clear or precise in their scope: para 33.

81 Longmore LJ suggested at para 34 that, on an application for an injunction against persons unknown, the applicant was required to demonstrate that: (i) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (ii) it is impossible to name the persons who are likely to commit the tort unless restrained; (iii) it is 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 must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (v) 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 (vi) the injunction should have clear geographical and temporal limits.

82 The importance of requirement (iv) has been recognised in earlier cases.

(i) In *Stone v WXY* [2012] EWHC 3184 (QB) at [16], Eady J considered the terms of an injunction in a case that concerned alleged harassment of the claimants by paparazzi photographers. The proposed wording of the order sought to prohibit photographs of the claimants being taken "in other places". As that would have included conduct that would not (or not clearly) be a tort, and the claimants had disavowed a claim in respect of photographs of them taken in public elsewhere, these words could not be included.

(ii) In *R v Smith (Mark)* [2013] 1 WLR 1399, a case that did not engage articles 10 or 11, the court made a restraining order, pursuant to section 5A of the PfHA (set out in para 49 above), against a defendant in criminal proceedings following his acquittal of an offence under section 1 of the PfHA. Toulson LJ noted at para 30:

A "the power to make an order under section 5A is circumscribed by the important words 'necessary . . . to protect a person from harassment by the defendant'. The word 'necessary' is not to be diluted. To make an order prohibiting a person who has not committed any criminal offence from doing an act which is otherwise lawful, on pain of imprisonment, is an interference with that person's freedom of action which could be
B justified only when it is truly necessary for the protection of some other person."

83 At the hearing, and before the Court of Appeal's decision in *Ineos* [2019] 4 WLR 100 was available, Mr Buckpitt relied upon *Burris v Azadani* [1995] 1 WLR 1372 as demonstrating that injunctions could be granted that included restraint of conduct that was not unlawful. In that case, the
C defendant had persistently threatened and harassed the claimant, by making uninvited nocturnal visits to her home. The claimant obtained an interim injunction from the county court restraining the defendant from, inter alia, assaulting, harassing or threatening her or communicating with her. The terms of the order prohibited him from entering or remaining within 250 yards of her home. The defendant did not seek to challenge or vary the terms of the order but repeatedly acted in breach of it. In committal proceedings
D brought by the claimant, a suspended custodial sentence was imposed on him. On two subsequent occasions he cycled along the road past the claimant's home in breach of the order. In fresh committal proceedings, the judge rejected the defendant's contention that the county court had no jurisdiction to impose the term excluding him from the vicinity of the plaintiff's home. The defendant appealed, contending it was wrong in
E principle for an injunction to restrain activity which was not unlawful.

84 Sir Thomas Bingham MR said, at p 1377:

"If an injunction may only properly be granted to restrain conduct which is in itself tortious or otherwise unlawful, that would be a conclusive objection to [the part of the injunction that prohibited the defendant from coming or remaining within 250 yards of the plaintiff's
F home address], since it is plain that Mr Azadani would commit no tort nor otherwise act unlawfully if, without more, he were to traverse Mandrake Road without any contact or communication with Miss Burris, exercising his right to use the public highway peacefully in the same way as any other member of the public. I do not, however, think that the court's power is so limited. A *Mareva* injunction granted in the familiar form restrains a defendant from acting in a way which is not, in
G itself, tortious or otherwise unlawful. The order is made to try and ensure that the procedures of the court are in practice effective to achieve their ends. The court recognises a need to protect the legitimate interests of those who have invoked its jurisdiction."

"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
H tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest."

Further, at p 1380:

"Neither statute nor authority in my view precludes the making of an 'exclusion zone' order. But that does not mean that such orders should be

made at all readily, or without very good reason. There are two interests to be reconciled. One is that of the defendant. His liberty must be respected up to the point at which his conduct infringes, or threatens to infringe, the rights of the plaintiff. No restraint should be placed on him which is not judged to be necessary to protect the rights of the plaintiff. But the plaintiff has an interest which the court must be astute to protect. The rule of law requires that those whose rights are infringed should seek the aid of the court, and respect for the legal process can only suffer if those who need protection fail to get it. That, in part at least, is why disobedience to orders of the court has always earned severe punishment. Respect for the freedom of the aggressor should never lead the court to deny necessary protection to the victim."

85 Similarly, Schiemann LJ said, at p 1381:

"I agree with the judgment delivered by Sir Thomas Bingham MR. As he points out, there are in these cases two interests to be reconciled—that of the plaintiff not to be harassed and that of the defendant to be allowed to move freely along the highway. An exclusion zone order interferes with the latter in order to secure the former. On its face it forbids what are lawful actions. The defendant has rendered himself liable to such an order because of his previous harassing behaviour. Nonetheless a judge imposing such an order must be careful not to interfere with the defendant's rights more than is necessary in order to protect the plaintiff's."

86 *Burris* was not cited to the Court of Appeal in *Ineos* [2019] 4 WLR 100. I would distinguish *Burris* on the grounds: (1) that the defendant had already been found to have committed acts of harassment against the plaintiff; and (2) that an order imposing an exclusion zone around the claimant's home did not engage the defendant's rights of freedom of expression or freedom of assembly. It was also 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. The case is therefore very different from *Ineos* and the present case.

87 More generally, the court must "keep a watchful eye on claims brought against persons unknown, to guard against any abuse of the facility to bring claims in this way": *GYH v Persons Unknown* [2017] EWHC 3360 (QB) at [10], per Warby J. In *Brett Wilson llp v Persons Unknown* [2016] 4 WLR 69 Warby J also emphasised, at para 11, that in cases against "persons unknown", "[the] relevant procedural safeguards must of course be applied". Specifically, the judge noted the difficulties that can arise in ensuring that the unknown defendants have been duly served with the proceedings, and with any application for interim or final relief.

88 Some of those difficulties presented themselves in *Kerner v WX* [2015] EWHC 178 (QB), a harassment case in which the claimant lacked an immediate method of serving the "person(s) unknown". Warby J, at paras 6–7, required the claimant to provide an undertaking that she would apply to the court, within three months, for further directions if she had been unable to identify the defendant:

"6. The purpose of requiring this undertaking is to ensure that the interim order I make today does not by default become in effect a

permanent one, because the defendants cannot be traced. There are ways of bringing to a conclusion an action against persons unknown who cannot be traced. The general issue is addressed in para 41 of the Master of the Rolls' *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 as part of a section headed 'Active case management': 'where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (*XJA v News Group Newspapers* [2010] EWHC 3174 (QB) at [13]; *Gray v UVW* [2010] EWHC 2367 (QB) at [37]; *Terry v Persons Unknown* [2010] EMLR 16, paras 134–136).'

"7. This guidance relates to actions involving interim non-disclosure orders which affect the Convention right to freedom of expression. Active case management in accordance with this guidance is of particular importance in cases of that kind. The injunctions in this case do not include non-disclosure provisions. However, they do relate to the activities of individuals who are involved with the news media and some at least of the principles that apply in non-disclosure cases are applicable on that account. It is in any event inconsistent with modern litigation principles for the court to allow an interim order to remain in place with the case otherwise 'going to sleep'."

89 In my judgment, these principles apply with equal force to this case.

K. Demonstrations: The human rights context

90 The "right to protest" is one of the deeply embedded rights of the common law. Under the Convention, the right to protest is protected by the rights of freedom of expression and freedom of assembly. These are rights possessed by each citizen, whether exercised alone or with others. Labels may be applied, such as "fracking protestors", but care must be taken not to assume that all in the identified group share the same objectives or use the same methods of protesting.

91 Article 10 provides:

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

92 Article 11 provides:

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

"2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. 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."

93 Articles 10 and 11 are "qualified rights"; restrictions can be placed on the exercise of those rights to protect other identified interests.

94 To a greater or lesser extent, and depending upon the particular facts in each case, the countervailing "rights of others" likely to arise in protest cases are usually article 8 (privacy) and article 1 of the First Protocol ("A1P1") (protection of property/possessions). The criminal law, its enforcement by the police and powers granted to local authorities also have an important role to play in controlling demonstrations, particularly those that raise public order issues (see paras 100–104 below).

95 Article 8 provides:

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

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

96 A1P1 provides:

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

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

97 In *Director of Public Prosecutions v Ziegler* [2019] 2 WLR 1451, the Divisional Court (Singh LJ and Farbey J) described the engaged Convention rights as follows:

"48. The right to freedom of expression in article 10 of the [Convention] is one of the essential foundations of a democratic society. This has long been recognised by the European Court of Human Rights. It has been recognised by the courts of this country, both before and since the introduction of the [Human Rights Act]. It has also been recognised

by the highest courts of other democratic societies, for example in the United States, where freedom of speech and freedom of assembly are protected by the First Amendment to the US Constitution.

"49. The jurisprudence, which is too well known to require citation here, discloses the following essential bases for the importance of the right to freedom of expression:

"(1) It is important for the autonomy of the individual and his or her self-fulfilment. It is clear that the right extends far beyond what might ordinarily be described as 'political' speech and includes, for example, literature, films, works of art and the development of scientific ideas. It is also clear that the right protects not only expression which is acceptable to others in society (perhaps the majority) but also that which may disturb, offend or shock others.

"(2) It is conducive to the discovery of truth in the 'marketplace of ideas'. History teaches that what may begin as a heresy (for example the idea that the earth revolves around the sun) may end up as accepted fact and indeed the orthodoxy.

"(3) It is essential to the proper functioning of a democratic society. A self-governing people must have access to different ideas and opinions so that they can effectively participate in a democracy on an informed basis.

"(4) It helps to maintain social peace by permitting people a 'safety valve' to let off steam. In this way it is hoped that peaceful and orderly change will take place in a democratic society, thus eliminating, or at least reducing, the risk of violence and disorder.

"50. It is also clear from the jurisprudence of the European Court of Human Rights (like that of other democratic societies such as the United States) that the right to freedom of expression goes beyond what might traditionally be regarded as forms of 'speech'. It is thus not confined, for example, to writing or speaking as such. It can include other types of activity, even protests which take the form of 'impeding the activities of which they disapprove': see *Hashman v United Kingdom* (1999) 30 EHRR 241, para 28. In that passage the court cited its earlier judgment in *Steel v United Kingdom* (1998) 28 EHRR 603, para 92, where the court said: 'the first and second applicants were arrested while protesting against a grouse shoot and the extension of a motorway respectively. It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the court considers none the less that they constituted expressions of opinion within the meaning of article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression.' "

98 In a democratic society, those who demonstrate seek to effect change in several ways. For example, to campaign for changes to the law, to persuade other citizens to support their cause or to persuade others to cease activities or modify their behaviour. History provides many examples of individuals whose powerful advocacy achieved significant change, but almost without exception, those individuals could not have succeeded alone. They depended upon inspiring the support of others, often in large numbers. In demonstrations and protests, as in democracy more widely, numbers matter. As an exercise of democratic autonomy and self-fulfilment, each

individual must be permitted to add his/her voice in support of a cause, for example by signing a petition to Parliament or by joining a demonstration. It is not for a public authority to determine what number of demonstrators is "enough" or "sufficient". To impose such a limit would effectively curtail the democratic rights of those who wished to demonstrate but who fell outside the permitted number. Further, if the number of demonstrators were to be restricted, who would set the limit, on what basis, and how are those "permitted" to demonstrate to be chosen?

99 As to the assessment of competing human rights, I would summarise the principles as follows:

(i) Freedom of expression (a fortiori when part of lawful protest) is one of the core rights protected by the Convention. It "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment": *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945, para 13, quoting *Sürek v Turkey* (1999) 7 BHRC 339.

(ii) The qualifications in article 10.2 must therefore be "construed strictly, and the need for any restrictions must be established convincingly": see *Sürek*, at para 57.

(iii) Any interference with the article 10/11 rights must: (a) be prescribed by law; (b) be necessary in a democratic society (necessity being "convincingly established"); and (c) pursue one or more of the legitimate aims specified in article 10.2 or 11.2, as the case may be.

(iv) "Necessary" means that the interference complained of corresponded to a "pressing social need"; it is not synonymous with "indispensable" but neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48; *R v Shayler* [2003] 1 AC 247, para 23. Something that is merely "expedient" cannot be described as "necessary".

(v) When Convention rights come into conflict, the approach to be adopted is as set out in *In re S* [2005] 1 AC 593, para 17: (a) neither article has as such precedence over the other; (b) an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (c) the justifications for interfering with or restricting each right must be taken into account; and d) the proportionality test must be applied to each.

(vi) When the court considers whether an interference with a fundamental right is proportionate, it adopts a three-stage analysis: (a) First, whether the objective which is sought to be achieved—the pressing social need—is sufficiently important to justify limiting the fundamental right. (b) Second, whether the means chosen to limit that right are rational, fair and not arbitrary. (c) Third, whether the means used impair the right as minimally as is reasonably possible; in other words, could a lesser measure be used to achieve the legitimate aim. *R v Shayler*, at paras 60–61.

(vii) Article 10 protects not only "information" or "ideas" that are favourably received, or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb: *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229, para 50; *Kudrevičius v Republic of Lithuania* (2015) 62 EHRR 34, para 145. In the memorable words of Sedley LJ (*Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249, para 20): "Free speech includes not only the inoffensive but the

A 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." Applied to article 11 rights, a freedom to demonstrate inoffensively, in an "approved" manner, or upon terms suggested by the subject of the demonstration (e g no more than 15 people, protesting once a week for up to two hours), might not be thought to have much value either. In *Lashmankin v Russia* (2017) 68 EHRR 1, B para 405 the European Court of Human Rights held that the right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in article 11.2, and observed at para 412 (relying upon *Kudrevičius* at para 145):

> "Freedom of assembly as enshrined in article 11 of the Convention C protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote . . . Any measures interfering with 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 . . ."

D (viii) Article 11 protects the right to "peaceful assembly". It applies to all gatherings except those where the organisers and participants have an intention to incite violence or otherwise reject the foundations of a democratic society. An individual protestor does not lose the right to freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if E the individual in question remains peaceful in his or her own intentions or behaviour: *Kudrevičius*, at paras 92–94.

(ix) An obstruction of the highway in the course of a demonstration does not fall outside the scope of the Convention, but the fact and extent of any obstruction caused may well be a relevant factor at the stage of assessing whether any interference with the article 10/11 rights is necessary and F proportionate: *Kudrevičius*, at para 98; and *Ziegler* [2019] 2 WLR 1451, paras 52–53:

> "One reason for this is that the essence of the rights in question is the opportunity to persuade others. In a democratic society it is important that there should be a free flow of ideas so that people can make their own minds up about which they accept and which they do not find persuasive. However, persuasion is very different from compulsion. Where people G are physically prevented from doing what they could otherwise lawfully do, such as driving along a highway to reach their destination, that is not an exercise in persuasion but is an act of compulsion. This may not prevent what is being done falling within the concept of expression but it may be highly relevant when assessing proportionality under paragraph 2 of articles 10 and 11." (*Ziegler*, at para 53.)

H

L. Demonstrations: Public order and the role of the police and local authorities

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 in *Ineos* [2019] 4 WLR 100 and *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* [2011] EWCA Civ 752; The Times, 11 July 2011 (see para 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 para 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 para 107 below), criminal damage, aggravated trespass (contrary to section 68 of the 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 section 14 of the Public Order Act 1986; and/or (v) an application for a prohibition of trespassory assembly under section 14A of the 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 section 59 are met: see *Dulgheriu v Ealing London Borough Council* [2019] EWCA Civ 1490.

M. The other causes of action relied upon by the claimants

105 Although I consider that the focus of this case has been harassment (not least for the reasons identified in para 21(i) above), I should briefly identify and consider the other causes of action relied upon by the claimants.

A *(1) Trespass*

106 An injunction based on the claim of trespass would be straightforward. The first claimant is entitled to exclude anyone from its property, including protestors. Whether, in any individual case, an interim injunction is justified requires an application of the principles identified in *Elliott* [2012] 7 EG 90 (CS) (see para 63 above).

B *(2) Obstruction of the highway*

107 Section 137(1) of the Highways Act 1980 provides: "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 . . ."

108 Obstruction of the highway gives the first claimant only an indirect C cause of action on the basis that the alleged obstruction amounts to a nuisance. There is an obvious tension between those exercising a right to demonstrate and obstruction of the highway. Almost by definition, those using the highway to demonstrate are likely to cause some obstruction of it, and in this respect, Mr Buckpitt relied on authorities that would support that conclusion: eg *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143.

D 109 It is now clear that this tension is to be resolved by interpreting "lawful excuse" in section 137(1) compatibly with articles 10 and 11 of the Convention. The Divisional Court explained how this was to be achieved in *Ziegler* [2019] 2 WLR 1451:

> "62. . . . [In] circumstances where there would be a breach of E articles 10 or 11, such that an interference would be unlawful under section 6(1) of the [Human Rights Act ('HRA')], a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).
>
> "63. That then calls for the usual inquiry which needs to be conducted F under the HRA. It requires consideration of the following questions: (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11? (2) If so, is there an interference by a public authority with that right? (3) If there is an interference, is it 'prescribed by law'? (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others? G (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
>
> "64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate: (1) Is the aim sufficiently important to justify interference with a fundamental right? (2) Is there a rational connection between the means chosen and the aim in view? (3) Are there H less restrictive alternative means available to achieve that aim? (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?
>
> "65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance

must be struck between the different rights and interests at stake. *This is inherently a fact-specific inquiry.*" (Emphasis added.)

110 Mr Buckpitt argued that standing and handing out leaflets on the pavement is an obstruction per se. This is so whether a person does so alone or with others. He submits, the greater the numbers the greater the obstruction. He submitted that, before the injunction was granted on 29 November 2017, there had been instances where the highway was obstructed. He drew a distinction between obstructions that had been caused by the protestors' lawful exercise of their Convention rights and those caused by unlawful activities.

111 For present purposes, I do not need to resolve this issue. I simply note that the problem confronting the claimants is that, as the court stated in *Ziegler*, the issue is inherently fact-specific to be determined, protestor by protestor, incident by incident. It requires an assessment of what any individual protestor did, where, for how long, for what purpose, and to what effect? I regard it as practically impossible, carrying out the required analysis (summarised in *Ziegler*, at paras 63–64), to frame restrictions prospectively, by way of civil injunction, against persons unknown, which discriminate between lawful exercise of article 10/11 rights and unlawful obstruction of the highway.

112 In so far as the claim for public nuisance is based upon obstruction of the highway, it is dependent upon the same factual analysis and my conclusion is the same.

(3) Watching and besetting

113 This was the first time that I had come across this "tort". Given that one of the drivers for the PfHA was the problem of stalking, I was sceptical as to (a) the parameters of this cause of action; and (b) whether it had survived the enactment of the PfHA. Mr Buckpitt submitted that the cause of action does remain, albeit the act of merely being present outside of premises is likely no longer actionable in itself. He relied upon *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, 267–268, where Lindley MR stated:

> "The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law . . . Proof that the nuisance was 'peaceably to persuade other people' would afford no defence to such an action. Persons may be peaceably persuaded provided the method employed to persuade is not a nuisance to other people."

114 I do not need to consider whether this "tort" still exists and if so in what form. If it does, I am satisfied that it would fall to be construed in a Convention-compliant manner in the same way as the Divisional Court approached obstruction of the highway in *Ziegler* [2019] 2 WLR 1451. Fundamentally, the claimants face the same problem. As Mr Buckpitt accepts, not all "watching and besetting" is unlawful. Whether it is will depend upon an assessment of the particular facts. In reality, I am doubtful

A that this adds anything to the other causes of action relied upon by the claimants.

(4) Private nuisance

115 This presents the same problems for the claimants; whether any individual has committed a private nuisance is again fact-sensitive. As the B evidence demonstrates, only a handful of people have been using a loud-hailer and causing allegedly excessive noise. The claim that entry to/exit from the Store has been restricted raises factual issues similar to the question of obstruction of the highway.

(5) Conspiracy to injure by unlawful means

C 116 There appear to me to be formidable hurdles in the way of a claim of "conspiracy" when none of the alleged conspirators has been identified. How can the court even begin to assess whether two or more individuals have combined in furtherance of some object without, at least, being able to identify them sufficiently (even if they cannot be named) to know what each individual is alleged to have done? Even then, the claimants would still have to show that commission of the relevant act by each individual was D unlawful. As the above analysis demonstrates, harassment and obstruction of the highway are inherently fact-sensitive. Whilst criminal damage is a more realistic candidate for "unlawful means", the evidence discloses very few instances of alleged criminal damage and then only by a very small number of individuals. Mr Buckpitt has not advanced alleged offences of criminal damage (or breaches of section 241(1) of the Trade Union and E Labour Relations (Consolidation) Act 1992) as a realistic basis for an injunction against "persons unknown".

N. Representative parties

117 In this case, as I have already noted, two of the named parties are acting also in a representative capacity: the second claimant has been permitted to represent various "protected persons" (see para 18 above); and F the second defendant represents its "employees and members" (see para 36 above). Permission to act in these representative capacities was granted by the court under CPR r 19.6, which provides (so far as material):

> "(1) Where more than one person has the same interest in a claim— (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more persons who have the same interest G as representatives of any other persons who have that interest.
>
> "(2) The court may direct that a person may not act as a representative.
>
> "(3) Any party may apply to the court for an order under paragraph (2).
>
> "(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule— H (a) is binding on all persons represented in the claim; but (b) may only be enforced by or against the person who is not a party to the claim with the permission of the court."

118 It is important to note that the "persons unknown", as the first defendants, are *not* sued in a representative capacity. They are sued as a

class of persons defined in the title to the action. Every member of the class, subject to issues of service, is notionally a personal defendant and faces a claim that s/he is guilty of one or more of the torts identified in para 12 above. S/he is unknown, presently, but ex hypothesi, subsequently his/her name could be added to the list of defendants as the protestors are identified.

119 The choice whether to sue defendants as "persons unknown" or to sue one or more defendants in a representative capacity for the members of the class has certain consequences. In *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty* The Times, 11 July 2011 the Court of Appeal considered the enforcement of a harassment injunction in a claim brought against the defendant in a representative capacity. The deputy judge had refused to grant the claimant permission (under CPR r 19.6(4)(b)) to enforce an injunction against the individuals who defendant represented. The claimant appealed.

120 In echoes of this case, the claimants had sought summary judgment and a final injunction restraining various persons, identified in the draft order it had submitted as "protestors", from pursuing a course of conduct amounting to the harassment of various people described as "protected persons". As the claim against the defendant was proceeding as a representative action, the claimants also sought an order directing that the injunction be enforceable against all protestors as defined in the order.

121 The judge made an order in the very wide terms sought by the claimants restraining the "protestors" from harassing the "protected persons", from demonstrating within 100 yards of their homes or any premises occupied by them and from conducting protests in certain specified areas. But he refused permission to enforce the order against all protestors because he considered that it would be unjust to make an order against unidentified persons without giving them an opportunity to be heard and without giving some consideration to their individual circumstances.

122 As was made clear by the claimants before the judge, their principal aim was to ensure that the police, whose responsibility it is in the interests of public order to supervise and control demonstrations of the kind contemplated by the injunction, were able to enforce it by exercising the power of arrest in respect of an offence under section 3(6) of the PfHA (see para 49 above).

123 Dismissing the claimants' appeal, Moore-Bick LJ gave the main judgment for the Court of Appeal (with whom Rimer and Ward LJJ agreed) and held as follows (emphasis added):

> "14. The term 'protestors' as used in these orders is very broadly defined. It includes not only the defendants themselves and those acting in concert with them who have notice of the terms of the orders, but also 'any other person who is protesting against—the conduct of experimentation on live animals by Huntingdon Life Sciences or the Astellas Group; [or] —the business relationship between the Astellas Group and any animal research organisation . . .' whether he or she has notice of the order or not.
>
> "15. The width of the order seems to have been the main factor that led the judge to refuse the appellants' application to include the additional paragraph mentioned above or to give permission to enforce them against protestors in general. In response to a submission from [counsel for the

claimants] that any person bound by the decision was to be regarded as a 'defendant' for the purposes of section 3(6) of the Act the judge pointed out that rule 19.6 makes a clear distinction between an order's being binding on a person who is not a party to the proceedings and its being enforceable against him."

"16. [Counsel for the claimants] submitted that on the correct interpretation of sections 3A and 3(6) of the Act the expression 'the defendant' in section 3(6) includes any 'relevant person' mentioned in section 3A(2) and that since all protestors are 'relevant persons', they are necessarily also defendants for the purposes of that section. In my view, however, that is not right. Section 3A(1) simply gives a victim of an actual or apprehended course of conduct falling within section 1(1A), or a third party at whom such conduct is ultimately directed, the right to apply to the court for an injunction to restrain the person in question ('the relevant person') from engaging in or continuing to engage in that course of conduct. *The statute naturally envisages that that person will be identifiable and will therefore be a defendant to the claim for an injunction.* Section 3(6) applies in such a case in the same way as in the case of simple harassment contrary to section 1(1). In my view the reference to 'the relevant person' in section 3A(1) has nothing to do with the correct interpretation of the word 'defendant' in section 3(6).

"17. . . . Having recognised the concern of the claimant to clarify scope of section 3(6), *[the judge] declined to meet it by giving permission under rule 19.6 to enforce the injunction against unnamed persons without their individual circumstances having been considered by the court.*"

"18. . . . [Counsel for the claimants] submitted that the judge should have included the additional paragraph in the order, or should at least have given them permission to enforce the order against the protestors in general, in order to dispel any doubt about the right of the police to exercise their powers of arrest in relation to an offence under section 3(6). That, of course, turned in part on the meaning of 'the defendant' as used in that subsection, but the meaning of section 3(6) was not in issue before the judge. The only question he had to decide was whether in the exercise of his discretion he should include the additional paragraph in the order or otherwise give the appellants permission to enforce it against all protestors."

"19. Whether the word 'defendant' in section 3(6) of the Act includes a person who is bound by an order made in representative proceedings, despite the court's refusal to give permission for it to be enforced against him, is one that may arise for decision in other proceedings, probably of a criminal nature. There is clearly quite a strong argument for saying not only that the word 'defendant' has a clearly established meaning of its own but also that because section 3(6) is penal in nature it ought to be construed narrowly. *If that is right, it would be necessary for the court to order that an individual protestor be joined as a defendant to the action in order to bring him within the reach of that subsection.* However, as Teare J pointed out in *SmithKline Beecham plc v Avery* [2007] EWHC 948 (QB), it is possible that the section might be given a broader interpretation in order to achieve the purposes of the legislation. [Counsel for the claimants] made it clear that one of the purposes of

bringing this appeal was to obtain an authoritative decision on the interpretation of section 3(6), but the issue does not arise on these appeals and like Teare J. I prefer not to express a concluded opinion on it. However, the judge assumed that a protestor would, or at any rate might, fall within section 3(6) if the court had given permission under rule 19.6(4)(b) for the order to be enforced against him, so it cannot be said that it was a matter which he failed to take into account when exercising his discretion.

"20. The nearest that [counsel for the claimants] came to identifying an error on the judge's part was in his submission that these orders were likely to be of little practical value to the appellants if he did not do all in his power to ensure that they could be effectively enforced by the police using their powers of arrest. I have some sympathy with the appellants on this score because intimidation by animal rights protestors is a very real threat which has proved difficult to control. *However, against that the judge had to balance the potential injustice to unidentified protestors of giving permission to enforce the orders against them, possibly by criminal process, without considering their individual circumstances. The judge was well aware, as were judges in previous similar cases, of the difficulties facing organisations in the position of the appellants, but the main sticking point in this as in other cases proved to be the extreme width of the order.* In my view the judge was entitled to reach the conclusion that it was not appropriate or in the interests of justice either to include in his order the additional paragraph sought by the appellants or to give permission to enforce the order against persons who were unidentified at the time and who might not have become aware of its terms when they committed the acts which would amount to a breach of it.

"21. By way of an alternative argument [counsel for the claimants] submitted that by naming SHAC and ALF as defendants the appellants were in fact bringing proceedings against all members of those organisations, who were sufficiently identified by the fact of their membership, and that it would be anomalous to draw a distinction between those who are formally defendants and those who, although not defendants, are none the less bound by the order. In support of that submission he relied on the decision of Sir Andrew Morritt V-C in *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633.

"22. In my view that argument cannot succeed in the present case. Rule 19.6(4) draws a distinction between those who are defendants and those who are not and Irwin J's order makes it quite clear that the proceedings in this case were to continue as representative proceedings. It does not seem to have occurred to anyone at the time that order was made that individual members of SHAC and ALF might already be parties to the action and the order is inconsistent with that being the case. I doubt very much whether it is possible to join as defendants all current members of an unincorporated association simply by naming the association itself as a defendant, but in any event the argument does not advance matters as far as the present appeals are concerned. *The submission was made partly in an attempt to obtain from this court a decision that all those who are described as protestors in the order are amenable to prosecution under section 3(6) of the Act because they are defendants. That was not an issue*

before the judge and is not an issue that arises on the appeal, but the argument must fail in any event for the reasons I have just given.

"23. Finally, if all else failed, [counsel for the claimants] applied to join as defendants unknown persons falling within the definition of protestors. The application was made very much as an afterthought and was not fully argued. It raises difficult questions of law and I do not think that it would be right for this court to entertain it on appeal. If such an application is to be made, it must, in my view, be made to the High Court."

124 The parameters of the appeal meant that the court did not have to consider, directly, the effect of, and impact on, the protestors' article 10 rights, but Moore-Bick LJ did observe at para 35:

"Among the matters which will call for consideration by the court is how to balance the conflict between the rights of the claimants under article 8 of the [Convention] calling for respect to their private life and home and the rights of the protestors to free expression under article 10. Careful consideration may have to be given to the exact description of the persons unknown and precisely what activities are covered by the order to distinguish that from lawful protest . . . [The] cases show that difficult issues arise from seeking to join unknown defendants and to enforce injunctions against them."

125 In my judgment, Moore-Bick LJ's analysis has a bearing on several issues in this case. Perhaps most importantly, as the current case is brought against "persons unknown", not on any representative basis but as individuals, the safeguard provided by CPR r 19.6(4)(b) does not apply. The claimants have argued that the consequence of that is that *anyone* served with the injunction who fell within the broad definition of "protestor", and without having been a defendant in the proceedings, would be prima facie liable to arrest if s/he broke its terms (whether or not s/he read it: see para 23(i) above). The hypothetical silent t-shirt-wearing "protestor", who had been served with the injunction (as amended on 15 December 2017) and who joined 12 other silent t-shirt-wearing "protestors" in the exclusion zone, would be liable to arrest under section 3(6) of the PfHA, it is argued. Worse, subject only to whether s/he had a "reasonable excuse" for non-compliance, the issue in any criminal prosecution would not be whether s/he had been guilty of harassment, but whether s/he has broken the terms of the injunction. The unlucky thirteenth silent t-shirt-wearing protestor would be liable to be arrested, prosecuted and, if convicted, punished with up to five years in prison. It hardly needs saying, but such a consequence would require the most compelling justification, if indeed it could be justified.

126 In *Astellas* the Court of Appeal clearly thought that to arrive at that position was wrong, because (referring to the underlined passages from the judgment quoted above): (i) the PfHA envisaged that the defendant in any criminal proceedings under section 3(6) would have been an identifiable defendant in the civil proceedings in which the injunction was granted: para 16; (ii) arguably, an individual protestor had to be joined as a named defendant to the civil proceedings in order to bring him within the reach of section 3(6): para 19; and (iii) it was wrong in principle, and potentially unjust, to subject an unidentified protestor to potential criminal sanction

without considering his/her individual circumstances; a fortiori where the prohibition in the injunction was extremely wide: para 20.

O. Application for summary judgment: 30 November 2018

127 In accordance with the "long-stop" provision in the 15 December 2017 Order, on 30 November 2018, the claimants issued an application notice seeking summary judgment on their claim pursuant to CPR Pt 24. It was supported by a witness statement of the second claimant dated 29 November 2018.

128 In summary, the claimants sought: (i) judgment against the first defendant—"persons unknown"—and PETA (and the persons for whom PETA acted in a representative capacity); and (ii) a final injunction, modified in limited respects from the 15 December 2017 Order.

129 In his witness statement, Mr Hayton set out his understanding that the court could deal with the matter by way of summary judgment and that this course had been adopted "in other cases concerning similar protests against other retailers" and that "in simple terms", the interim order would be made a final order. The witness statement contained the following sentence: "the claimants believe that on the evidence the defendants have no real prospect of defending this claim and the claimants know of no other reason why the disposal of the claim should await trial." This, of course, is a necessary averment before the court could grant summary judgment (see CPR r 24.2).

130 I need to resolve three issues: (i) On the basis of the evidence, have the claimants shown that the defendants have no real prospect of defending this claim? (ii) Is there any other reason why disposal of this claim should await trial? (iii) Should the court grant a final injunction and, if so, in what terms?

P. Evidence

131 The claimants have relied on evidence as to the nature and extent of the protests that had taken place both before and after the grant of the injunction on 29 November 2017. Principally, this was provided in witness statements from the second claimant together with video footage and photographs.

132 From that body of evidence, Mr Buckpitt has placed particular reliance on several incidents of alleged harassment, summarised in chronological order:

(i) 9 November 2017: member of staff insulted whilst on break and words "fur hag" posted on Instagram.

(ii) 10 November 2017: male protestor entered the Store and said to member of staff "imagine if I killed you and plucked the fur from your face".

(iii) 11 November 2017: 400 protestors outside the Store which had to be locked shut. One protestor enters the Store and stares at security guard at close quarters.

(iv) 14 November 2017: protestor follows two young adults into H&M—language and conduct alleged to be offensive and threatening.

(v) 14 November 2017: stickers placed on people's backs, "I'm an arsehole, I wear fur".

(vi) 18 November 2017: 300 protestors in attendance, five of whom were arrested. Alleged assault on male victim and two small children in tears. Reports from customers that they had been hit and kicked entering the Store. Member of staff called "bitch" and "murderer". Alleged intimidation of other customers.

(vii) 24 November 2017: 100 protestors estimated to be in attendance. Police declare major incident. 300 customers taken into the Store for their own safety, then evacuated and the Store was locked for two hours.

(viii) 9 December 2017: member of the public called a "fur hag".

(ix) 14 January 2018: protestor allegedly antagonistic to family with nine-year-old child and suggests setting her pompom alight.

(x) 15 March 2018: protestor enters the Store and later allegedly threatens to knock out a security officer.

(xi) 18 April 2018: doors of the Store closed in response to an alleged threat to "rush" the Store.

(xii) 30 June 2018: member of staff allegedly subjected to insults (including homophobic comments).

(xiii) 8 November 2018: member of public allegedly abused for wearing fur hat—protestor appears to try and grab it.

(xiv) 23 November 2018: protestors' abuse of lady with fur jacket calling her a "fur hag" and surrounding her companion.

(xv) 29 December 2018: a family with young children and couple with a lady in wheelchair leave the Store via side door but are pursued and subjected to abuse.

(xvi) 12 January 2019: a man with four-year-old son is told, in son's presence, "if you shop in that store you are a murdering cunt". He is pursued when leaving and hit with a stuffed coyote. There is a brawl and punches are thrown. Customer allegedly kicked by another protestor. Police called, child in tears.

133 I also have considered the evidence that was filed by PETA earlier in the proceedings (see paras 30–35 above).

134 My assessment of the evidence is as follows:

(i) The claimants have identified three main occasions—11, 18 and 24 November 2017—on which the sheer number of protestors seriously impacted upon the operation of the Store. The police were present on each of these occasions, sometimes in force, and on one occasion five arrests were made. On at least one occasion, the police appear to be filming the demonstration. It appears from the video footage that the police had closed off one lane of the carriageway on Regent Street on 18 November 2017.

(ii) In one incident, on 18 November 2017, a female protestor can be seen shouting at a "customer" who indicated that he intended to return to the Store to make a purchase. The protestor then removes a container of red liquid from her handbag and tips it over the "customer". The police intervened immediately, but in his witness statement, Mr Hayton states that he understands that this incident was staged by the individuals involved. Although this was apparently a stunt, there is evidence of incidents where paint or dye has been thrown on customers, which (if done deliberately) would appear to constitute assault and/or criminal damage. There have also been incidents of criminal damage. On 4/5 November 2018, the front doors and windows of the Store were vandalised with comments "Don't shop here" and "We sell cruelty" painted onto the windows and red paint thrown

over the front door. It is not clear on the evidence whether these incidents were reported to the police.

(iii) There is evidence of the commission of criminal offences by certain individual protestors, including offences of violence: see eg incidents on 18 November 2017, 15 March 2018 and 12 January 2019. All three incidents were reported to the police.

(iv) Whilst there have been isolated incidents of aggression towards people entering and leaving the Store, the video evidence tends to indicate that the majority simply ignored the protestors and their efforts to hand them leaflets or engage in conversation. One customer responded to a protestor's comments directed towards him by saying, "No, you're just bullying people". Most interactions between members of the public and demonstrators comfortably fall within the "irritations and annoyances" of daily life described by Lord Nicholls in *Majrowski* [2007] 1 AC 224: see para 51(ii) above. Very few could, even arguably, be said to have crossed the line to conduct towards any individual that was "oppressive and unacceptable". Police officers intervened to calm the situation in incidents that flared up into more significant altercations. There is evidence of some of the protestors being assaulted by members of the public. Mr Buckpitt has made the point that most of these incidents took place after the injunction was in place.

(v) Objectively judged, the pursuit of the two people into H&M might have been intimidating and unpleasant, but it is not clear to me (a) whether this amounted to the commission of any criminal offence; and/or (b) whether the conduct would have been restrained by the injunction as the evidence does not demonstrate that one or both of the pursued individuals fell within the definition of a protected person. It appears, however, that the two individuals were laughing at their pursuer (he repeatedly refers to this fact whilst shouting at them), so I cannot assess whether the individuals were in fact intimidated or harassed by what took place. Generally, they appeared to ignore him.

(vi) There is evidence of incidents of trespass in the Store on several occasions. For example, on 30 December 2017—after the grant of the injunction—there is video evidence of a protestor (identified by Mr Hayton by name) entering the Store and then standing on a display stand with a banner reading "Canadians Against Fur". She then shouted at people in the Store: "You're buying dogs, you're wearing dogs, these animals were caught in a leg-hold trap. This is torture, I am ashamed that you are selling this absolute torture in England. Absolute torture . . ." She did not comply with requests by security officers to leave the Store, so she was removed. Mr Hayton says that the individual was arrested by the police for aggravated trespass, but subsequently "de-arrested". It is not clear from the evidence whether the individual had been served with the injunction before or after the incident. Although her name is known by the claimants, no attempt has been made to join her to the proceedings. On 11 October 2018, two protestors entered the Store and left leaflets in the pockets of some coats and on a changing room floor. They shouted generally at customers and staff about animal cruelty and suffering, but did not make any threats. They were escorted from the Store by security staff.

(vii) There are other individual protestors who are named in the evidence of Mr Hayton and details given of their allegedly unlawful conduct

(including incidents set out in para 132 above). None of these individuals has been made a defendant to the proceedings.

(viii) Whether the balance of the incidents identified in para 132 above amounted to breaches of the civil or criminal law would depend upon an assessment of the evidence relating to each particular incident.

(ix) In his statement, the second claimant has identified efforts by "Surge Activism" to co-ordinate protests, but I do not consider that, overall, the evidence demonstrates that the protestors as a group are acting (or being co-ordinated) as a single group, indeed there is evidence that groups of protestors argue amongst themselves. Whilst the protestors may share a common objection to animal cruelty, the evidence does not support a conclusion that there is any general agreement about the methods of protest to be deployed (the evidence of PETA's approach being the best example of this). Whilst some protests/protestors may have been co-ordinated by "Surge Activism", the evidence suggests that, within the protestor group, there are some who have joined the protest as individuals not as part of any wider group. Many placards that can be seen on the video appear to be home-made rather than the product of any mass-production. Some placards bear confrontational messages, others are inoffensive: "Choose Love, Go Vegan"; all are comfortably within the width of freedom of expression. The extent of involvement of, and the acts carried out by, individual protestors varies significantly. The video evidence suggests that the vast majority of the protestors are not engaging in any of the acts of violence or aggression identified in para 132 above. The people acting in this way are a small minority. In the video evidence, most protestors can be seen standing on the pavement holding placards. Some occasionally join in with the chanting, others remain silent.

(x) The claimants have included in their evidence incidents which are trivial. For example, Mr Hayton complaints about an incident, on 10 November 2018, when protestors had erected an "open coffin on a mock headstone . . . with a [toy] coyote head protruding from the coffin". I have reviewed the photographic and video evidence of this coyote coffin. There was a suggestion that this amounted to a public order offence. I struggle to see how a stuffed toy in a small makeshift coffin atop a mock headstone could constitute such an offence, or indeed any offence. Mr Hayton also complained about the protestors chalking murals onto the pavement. Originally, the claimants had sought to extend the terms of the final injunction to include a prohibition on chalk murals, but that has not been pursued.

(xi) The evidence does not disclose any wrongdoing by PETA or its members or representatives at any of the demonstrations.

(xii) The evidence also suggests that there has been police presence on every occasion on which there has been a large number of protestors present. The claimants complained that the police response was ineffective and/or deficient on 12 and 18 November 2017 and on one occasion the Store had to be closed for several hours. Although the occasions when the protestors numbered in the hundreds no doubt presented challenges, the video evidence does not suggest that the police lost control of any of the demonstrations. On the contrary, the evidence shows the police acting professionally (and apparently in good humour), in control of the situation, maintaining a

proper balance between the protestors' rights to demonstrate and the rights of others (including the claimants and their customers) and acting when necessary. Apart from a single incident of protestors shoving of a line of police officers at the height of the demonstration, the video evidence does not show any violence being used or threatened against the police. I have little doubt that the Metropolitan Police, in particular, have substantial experience of policing demonstrations; maintaining public order whilst paying due regard to the important rights of freedom of expression and freedom of assembly. The video evidence in this case supports that conclusion. There is no suggestion that the police lack powers to deal effectively with any of the matters about which the claimants complain.

(xiii) I have been referred to some letters/e-mails from three unidentified staff members who complain that they have felt harassed, but no witness statement has been provided from any individual employee or customer (or potential customer) to support a claim that s/he has been subjected to unlawful activity.

(xiv) The claimants have provided no evidence as to any economic impact on the first claimant caused by the protests. It is not possible, therefore, to assess whether and, if so, to what extent there has been interference with the first claimant's A1P1 rights, still less whether any interference is necessary or proportionate.

135 On the basis of the evidence as a whole, Mr Buckpitt submitted:

> "The written and video evidence obtained before the [injunction was granted], reveals scenes which are quite shocking. Hundreds of protestors pushing back and forth with on occasions hundreds of police officers present. Sirens sounding and entry to the Store blocked. That is how it was when there was no order. That is how it will be if no order is made. As a matter of certainty. In these circumstances, it is respectfully submitted that not only is this court equipped and able to make an order, but it is obliged to make an order that ensures that there is no such repetition, and which gives proper protection to [the claimants'] rights, whilst ensuring that meaningful and effective protests may continue to take place."

136 The fundamental problem with this submission is it treats the "protestors" as a single class, not as individuals. Injunctive relief is then sought to be justified against the entire class by reference to the worst behaviour of a small minority of the individuals within it. This is the wrong approach (see para 99(viii) above). It leads unjustifiably to the interference with the right of protest of individuals who are doing nothing wrong.

Q. Discussion

137 In most summary judgment applications, the court would usually start with an assessment of whether the applicant had demonstrated, on the evidence, that the defendant had no real prospect of defending the claim. However, in this case, the procedural complications of this case mean that I should first consider the issue of whether this case is amenable to summary judgment or whether there are reasons why the resolution of the claim should await a trial.

Service of the claim form

138 For the reasons set out in paras 24, 26–27 and 48, the claim form has not been *validly* served on *any* defendant in these proceedings. No order for substituted service has been made and there has been no service by any of the methods permitted by CPR r 6.5. The claim form has only been *effectively* served on the second defendant (the organisation), in the sense that there is evidence that the contents of the claim form have come to the attention of the second defendant. The second defendant, in any event, positively sought to be joined to the proceedings, albeit the order joining the second defendant contained no directions for service of the claim form (see para 36 above).

139 The claimants' solicitor's assessment of the issue of service of the defendants (see para 47 above) is flawed in two respects:

(i) Whilst it may be correct that none of the defendants has filed a defence or acknowledgment of service, the failure validly to serve the claim form means that no defendant has been placed under any obligation to do so.

(ii) The suggestion that defendants within "persons unknown" as the first defendants were "added" each time a copy of the injunction order was served on them is not correct. Only service of a claim form (by a permitted method) or an order dispensing with the requirement to serve the claim form can make someone a defendant to a civil claim. A person served with the injunction was bound by its terms and, subject to whether that person fell within the definition of "protestor", may have fallen within the definition of the "persons unknown" identified as the first defendants.

140 In written submissions submitted after the hearing, Mr Buckpitt appeared to recognise that there had not been valid service of the claim form in accordance with the provisions of the CPR. However, he contended that an application for an order for alternative service had been included within the claimants' without notice application for an injunction on 29 November 2017. At the hearing, the claimants gave an undertaking to effect service by e-mail of the order the claim form and particulars of claim and application notice and evidence in support (see para 22(ii) above). Mr Buckpitt accepts that, he submits in error, the order of 29 November 2017 provided only for alternative service of the order and not the claim form: see para 23 above. He contends that this error was a "slip", albeit the fault lay not with the court but was contained in the draft that was provided. He acknowledges that, for a valid order for alternative service to be made, the requirements of CPR r 6.5(4) must also be observed (see para 24(iv) above). He argues that the 29 November 2017 order should be amended under the "slip rule" (CPR r 40.12) to correct these defects.

141 Although paragraph 4.2 of Practice Direction 40B permits an application to correct an error in an order to be made informally, I am not prepared to make any on this basis for the following reasons:

(i) A court will only grant an order for alternative service where it is satisfied that the proposed method of service can reasonably be expected to bring proceedings to the attention of the defendant—see para 59(iii) above. Service on the e-mail address contact@surgeactivism.com could not reasonably have been expected to bring the proceedings to the attention of anyone other than the person who accessed that e-mail address (or, at best, to the attention of others in the same group). There could be no reasonable expectation that this method would bring the proceedings to the attention of

the wide class of person defined as the "persons unknown". Although not known at the time the 29 November 2017 order was made, there is no evidence that sending the claim form (or any of the other documents) to that e-mail address did lead to it coming to the attention of anyone: see para 27 above.

(ii) The "slip rule" enables the court to correct errors where orders do not properly reflect the orders made by the court. There is an important distinction between orders that the court *did* make, but were not correctly recorded, and orders a party considers the court *should have made* but were not. The slip rule allows correction of the former, not the latter. On the available evidence, I cannot be satisfied that this was simply a slip. The order did not include provisions in compliance with CPR r 6.15(4). I do not have a transcript of the hearing, but I have been provided with the solicitor's note. The issue of alternative service of the claim form is not addressed. Mr Buckpitt submits that by accepting the undertaking regarding service (see para 22(ii) above), Teare J was satisfied that use of the "Surge Activism" e-mail address was appropriate. I do not accept this. If the court had addressed the issue of alternative service, then the requirements of CPR r 6.15(4) would have been considered. That would have focused attention on the artificiality of service of the claim form via the proposed alternative method as an effective means of bringing the contents of the claim form to the attention of all those in the category of the "persons unknown".

(iii) Any application to amend the 29 November 2017 order under the slip rule can only fairly be considered and determined with the benefit of a transcript of the hearing and, in light of paragraph 4.2 of Practice Direction 40B, arguably ought to be considered by Teare J.

142 Mr Buckpitt's fallback position was that the court ought to dispense with service of the claim form on the first defendants pursuant to CPR r 6.16. I am not prepared to make any such order without a proper application notice. Given the principles identified in para 59(iv) above, it would appear to me that the claimants would face significant obstacles in persuading the court to grant any such order.

143 There is a further issue that may need to be addressed by the claimants. The period of validity of the claim form is four months from issue: CPR r 7.5 (see para 61 above). Prima facie, that period has expired. In his written submissions, Mr Buckpitt has acknowledged this issue. He contends, however, that the effect of the stay granted by the 15 December 2017 Order was to suspend the operation of this four-month time limit. I am sceptical that this is correct. A stay of proceedings is conceptually distinct from an extension of time that would otherwise be required under the rules.

Who are the defendants against whom the court would grant judgment?

144 In his witness statement in support of the application for summary judgment, Mr Hayton stated that the claimants believed that the defendants have no real prospect of defending the claim (see para 129 above). I am not sure to what extent Mr Hayton thought carefully about these words. Had he done so, two fairly fundamental questions may have presented themselves: (i) who are the "defendants"? and (ii) how can it be said that all or any of them have no real prospect of defending the claim?

145 Indeed, if Mr Hayton had focused particularly on PETA (simply in its non-representative capacity), how could it be said that PETA had no real prospect of defending the claim? On the basis of the—essentially uncontradicted—evidence of its protest activities (filed before the 15 December 2017) hearing (see para 30–35 above), the conclusion might be reached that, far from PETA having no real prospect of defending the claim, the claimants had no real prospect of succeeding with it. My conclusion, based on the evidence presented to the court, is that the claimants cannot show that PETA has done anything unlawful (see para 134(xi) above).

146 Then there is the issue of who are the "defendants" caught by the first defendant "persons unknown". Leaving to one side, for the moment, the fact that no one in this category has been validly served with the claim form, the class of people potentially captured as "persons unknown" was not homogenous. Nothing in the operative definition of protestor required or assumed any wrongdoing on his/her part. If the court granted judgment against the whole class of "persons unknown" it would capture in the net, indiscriminately, the "guilty" and the "innocent" with no way of distinguishing between them. It is fundamentally wrong in principle to grant judgment in a civil claim against a person when the court is not satisfied s/he has committed or is threatening to commit any civil wrong.

147 In submissions following the hearing, Mr Buckpitt suggested that these concerns could be addressed by "persons unknown" being redefined as:

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

148 In my judgment, although this may address the point of demonstrators in Penzance (see para 21(iii) above), it does not define the class of person unknown by their wrongdoing. A form of wording that defined "persons unknown" by reference to their presence (without consent) in the Store would isolate people who are arguably guilty of trespass, but defining the group on the basis of an individual's involvement "in any of the acts prohibited by the terms of this order" is not acceptable. The fundamental problem in the terms of the order is that they include prohibitions on acts that are not unlawful per se.

149 These are the unavoidable consequences of utilising the expedient of suing "persons unknown" without making any attempt to discriminate between those against whom there is evidence of wrongdoing and those against whom there is not. Mr Buckpitt advanced an argument that the claimants have had no choice but to proceed in this way because it is the only way in which they can protect their lawful interests. Indeed, he went to far as to suggest that, "not only is [the] court equipped and able to make an order, but it is obliged to make an order that ensures that there is no [repetition of the acts complained of], and which gives proper protection to [the claimants'] rights". The claimants have used the language of expediency to justify the order made against "persons unknown": e g that it is "appropriate" to make the injunction (paras 15 and 20(i) above); that the terms of the injunction were "fair and balanced" (para 28 above); and that there was no way of differentiating between protestors who broke the law

and those who did not: para 38 above. The imposition of an order that interfered with the protestors' article 10/11 rights required to be justified as necessary, not just expedient. Applying the principles identified in paras 98–99 above, the restrictions placed on demonstrations in the injunction are neither necessary nor proportionate.

150 In any event, I reject the submission that an injunction in the terms sought against "persons unknown" is the only effective way of protecting the claimants' rights. The claimants have chosen not to join as a defendant a single individual protestor from the hundreds that the claimants judged should be served with the injunction. That is so despite the fact that the claimants could have named 37 protestors and identified up to 121. The identities of the alleged tortfeasors may have been "unknown" when the interim injunction was first granted, but that is not the position now. Many have been identified by name, others could readily be identified on the video and/or body-camera footage as alleged "wrongdoers" and, if necessary, given a pseudonym (e g "Demonstrator 38—the man shown in the footage at time code xx.xx holding the loudhailer"). It is only if this is done that the court can begin the task of assessing whether each of the alleged wrongdoers can be shown to have committed any civil wrong. This is the fundamental process of discriminating between those against whom there is, and against whom there is not, evidence of wrongdoing. The claimants' legitimate interests can also be protected by the powers available to the police and/or local authority (see paras 100–104 above).

151 As Lord Sumption JSC made clear in *Cameron* [2019] 1 WLR 1471 (see para 59(xi) above), the grant of quia timet interim injunctions against "persons unknown" is the exercise of an emergency jurisdiction which is provisional and strictly conditional:

(i) It is provisional because the party seeking the injunction will be expected to take all practical steps to identify the alleged wrongdoers so that they can have an opportunity, if they wish, to defend themselves. The continuation of an injunction against "persons unknown" can only be justified for as long as it remains practically impossible to identify the alleged wrongdoers.

(ii) It is conditional upon the court being satisfied that there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; that it is impossible to name the persons who are likely to commit the tort unless restrained; that it is possible to give effective notice of the injunction; and that the terms of the injunction correspond to the threatened tort and are not so wide that they prohibit lawful conduct: see *Ineos* [2019] 4 WLR 100, paras 29 and 34.

152 Mr Buckpitt has relied upon the decision in *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2 as authority for the proposition that quia timet relief can be granted by final injunction. I accept that, but *Vastint* appears to me to meet the requirements set out by Lord Sumption JSC. *Vastint* was a trespass case, not involving protest or alleged harassment: see para 76 above.

153 In their written submissions, the claimants have provided the following explanation for not joining any individual protestor as a defendant to the claim:

> "To join all potential defendants, with all the commitment, responsibilities and risks that that involves, is unnecessary and

A disproportionate, and contrary to the overriding objective. The fact that the claimants have not sought out and named individuals should not be viewed in a negative light, rather it is reflective of a 'light touch' approach, reflected also in no steps having been taken by the claimants (thus far) in respect of those breaches that have occurred. The claimants have been clear in their evidence that the right to protest is acknowledged and
B respected. They do not intend to stifle protest. All that they seek are limited, necessary, restrictions on this in a very confined area (the exclusion zones) to ensure public order and that the competing rights of the claimants and members of the public are safeguarded. As is submitted below, these competing rights deserve at least equal respect.

"Indeed, to single out specific individuals and make them parties, with the attendant costs risks they would then bear, would if anything be
C 'heavy handed'. It would be likely to have a chilling effect on other protestors. That is not, and has never been the claimants' wish: all they wish is to be able to continue their lawful business activities, whilst respecting the rights of protestors to make clear their competing views."

154 The wish not to act in a "heavy-handed" or disproportionate way is
D both understandable and laudable. However, I do not accept that this justifies the failure to join individual defendants. If the claimants wish to alleviate any anxiety that might be felt by an individual defendant as to his/her potential costs' liability, then that could readily be achieved in other ways (e g an assurance as to enforcement of any order for costs). There is a critical difference between a "light touch" to litigation and a failure properly to observe the fundamental requirements of adversarial civil litigation. It
E was not "unnecessary" or "disproportionate" to join individual defendants. On the contrary, where they could be identified, it is essential if any judgment, or any sort of relief, is to be granted against them. Otherwise, the action simply remains in a state of suspended animation, unable to be progressed to a conclusion, but with an interim injunction order remaining in full force.

F 155 The justification for any order against "persons unknown" in this case could only be made out if the "protestors" could properly be regarded as a homogenous unit, all of whom are guilty of, or complicit in, the wrongful acts about which complaint is made. Once this proposition is rejected—as it must be—in favour of an assessment of the alleged wrongdoing of each protestor separately, the claimants' claim simply disintegrates. Returning to
G the fundamental question, it is impossible to identify against whom the court would or could enter judgment. It cannot be granted against the entire class of "persons unknown". First, the court has no idea against how many people it would be granting judgment (or who they are), but more fundamentally, it has no idea who in the class had committed (or threatened) any civil wrong and, if s/he had, what it was. That is before any consideration of what if any remedy should be granted consequent on the
H judgment in any particular case. Although the claimants are not claiming damages, consideration of this remedy serves to demonstrate how unreal the claimants' submission is. Suppose, despite all the procedural obstacles, the court nevertheless granted judgment against "persons unknown" and ordered payment of damages of £100,000. What possible justification could

there be for a protestor who had committed no civil wrong being made liable to pay some or all of the damages ordered by the court? A

156 If this were not sufficient for the court to conclude that summary judgment could not be entered in this case, consideration of what would happen after judgment had been granted produces results that are so extraordinary as to leave no doubt, not only that it is not appropriate to grant summary judgment, but that it would be wrong to do so.

157 I asked Mr Buckpitt what the claimants intended to do with any final injunction if they were granted summary judgment. He confirmed that the claimants planned to continue serving this "final injunction" on new protestors attending future demonstrations ("the newcomer(s)"). These, he submitted, once served, became defendants and immediately bound by this "final order", despite the fact that: (i) the relevant alleged wrong had been committed *after* the court had granted a final judgment against the "persons unknown" which did not include the newcomer; (ii) the newcomer had been not been served with the original claim and so had been given no opportunity to advance any defence before s/he was bound by the "final order"; (iii) the court had made no adjudication on whether what the newcomer was alleged to have done was a tort (or otherwise unlawful) and, if so, justified an injunction being granted against him/her; and (iv) service of the order alone did not make the newcomer a "defendant"; only service of a claim form could achieve that (on the assumption that it was even possible to add new defendants to a claim in which the court had already entered judgment and granted a "final order"). B C D

158 Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the "final order" permitting any newcomers to apply to vary or discharge the "final order". E

159 Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55–60 above. Unknown individuals, without notice of the proceedings, would have judgment and a "final injunction" granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the "final order" at future protests, the court could be faced with an unknown number of applications by individuals seeking to "vary" this "final order" and possible multiple trials. This is the antithesis of finality to litigation. F G

160 This state of affairs arises because the claimants have made no effort to narrow the class of persons unknown in a way that enables them to be identified (even if not named) and for a decision to be made, on an assessment of the evidence, whether each person has committed (or is threatening to commit) a civil wrong.

161 In my judgment, in this case, the claimants were required to identify the individuals against whom they were pursuing their claim and make then defendants to the proceedings as promptly as practicable. The majority of the individual protestors captured on the video footage are not people against whom the claimants could maintain any claim that would have any H

real prospect of success. If the claimants had addressed this point, they would have excluded these people as possible defendants. These people should not be left to be swept up into the definition of "persons unknown" on the basis of expediency or want of a more discriminating approach.

162 I reject Mr Buckpitt's suggestion that by refusing summary judgment the court would be failing in its duty. On the contrary, I am quite satisfied that summary judgment must be refused. The claimants are not left without remedy. The court is simply insisting that the claimants should bring forward claims against identifiable individuals that are, so far as practicable, capable of being resolved in accordance with the court's established procedures for deciding civil claims. The evidence in this case demonstrates that this is neither unachievable nor unreasonable. 37 people have been identified by name, more still can be identified by description from the video or other evidence. Ultimately, when this is done, the court could adjudicate whether these people have committed any civil wrong (or might do if not restrained) and, if so, what remedy should be granted against them. The court's resources and its orders are thereby targeted only at those against whom there is evidence of actual or threatened wrongdoing. Perhaps most importantly, it avoids the imposition, by injunction, of restrictions on the Convention rights of people, against whom there is no evidence of actual or likely wrongdoing; restrictions that are therefore neither necessary nor proportionate.

163 Mr Buckpitt submitted that a final injunction substantially in the terms of the interim injunction would meet the requirements suggested by the Court of Appeal in *Ineos* [2019] 4 WLR 100, para 34. I disagree. 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 (see para 98 above). 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?

Do the defendants have a real prospect of defending the claim?

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.

R. Decision

166 For the reasons I have set out, I refuse the claimants' application for summary judgment.

167 I am also satisfied that, applying the principles from *Cameron* [2019] 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the claimants need to address regarding the validity of the claim form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not 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*.

168 Finally, the case number of this claim suggests that it has already been allocated to the Media and Communications List, but if it has not, and subject to any submissions the claimants wish to make, it appears to me that the issues raised in the claim mean that it should be allocated to the Media and Communications List. I note that, when the modifications to CPR Pt 53 come into force from 1 October 2019, claims like this, that include claims for harassment by speech, must be issued in the Media and Communications List of the Queen's Bench Division (CPR r 53.1(3)(c)).

Notes

1. "*Intimidation or annoyance by violence or otherwise.* (1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority— (a) uses violence to or intimidates that person or his spouse or civil partner or children, or injures his property, (b) persistently follows that person about from place to place, (c) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof, (d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or (e) follows that person with two or more other persons in a disorderly manner in or through any street or road. (2) A person guilty of an offence under this section is

liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both."

2. "*Destroying or damaging property* (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence. (2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another— (a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered; shall be guilty of an offence."

3. "*Injunctions restraining breaches of planning control* (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part. (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown. (4) In this section 'the court' means the High Court or the county court."

Application refused.

BENJAMIN WEAVER ESQ, Barrister

Court of Appeal

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

[2020] EWCA Civ 303

2020 Feb 4, 5; March 5

Sir Terence Etherton MR, David Richards, Coulson LJJ

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

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

On the claimants' appeal—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attorney General v Times Newspapers Ltd (No 3) [1992] 1 AC 191; [1991] 2 WLR 994; [1991] 2 All ER 398, HL(E)
Birmingham City Council v Afsar [2019] EWHC 3217 (QB)
Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2) [2001] EWCA Civ 414; [2001] RPC 45, CA
Burris v Azadani [1995] 1 WLR 1372; [1995] 4 All ER 802; [1996] 1 FLR 266, CA
Cameron v Hussain (Motor Insurers' Bureau intervening) [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79, CA
Hubbard v Pitt [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
Ineos Upstream Ltd v Persons Unknown (Friends of the Earth intervening) [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429; [2006] 1 WLR 658, CA
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

The following additional cases were cited in argument:

Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty [2011] EWCA Civ 752, CA
Attorney General v Punch Ltd [2001] EWCA Civ 403; [2001] QB 1028; [2001] 2 WLR 1713; [2001] 2 All ER 655, CA
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2016] EWCA Civ 658; [2017] Bus LR 1; [2017] 1 All ER 700, CA
Jockey Club v Buffham [2002] EWHC 1866 (QB); [2003] QB 462; [2003] 2 WLR 178
Novartis AG v Hospira UK Ltd (Practice Note) [2013] EWCA Civ 583; [2014] 1 WLR 1264, CA

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

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

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

APPEAL from Nicklin J

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

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

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

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

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

Sarah Wilkinson as advocate to the court.

The defendants did not appear and were not represented.

The court took time for consideration.

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

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

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

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

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

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

D *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 paras 132–134. The following is a brief summary.

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

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

8 A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2017, the front doors of the store were vandalised with "Don't shop here" and "We sell cruelty" painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, H 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, e-mail or letter;

(7) Entering the Store;

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

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

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

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

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

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

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

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

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

"(5) Entering the Store;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The summary judgment application

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

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

23 On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Pt 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application differed in some respects from the interim B 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"I am also satisfied that, applying the principles from *Cameron* [2019] 1 WLR 1471 and *Ineos* [2019] 4 WLR 100, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the claimants need to address regarding the validity of the claim form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not 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 r 40.12 or the court's inherent jurisdiction, to provide that service by e-mail was permissible alternative service under CPR r 6.15; alternatively

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

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

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

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

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

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

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

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

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

Discussion

Appeal ground 1: service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E 55 For those reasons we dismiss appeal ground 1.

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

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

G Interim relief against "persons unknown"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72 The Court of Appeal dismissed the appeal. The significance of the B 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 C *Ineos* requirements required some qualification.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Final order against "persons unknown"

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

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

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

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

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

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

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

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

C *Appeal Ground 4: Evidence*

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

Conclusion

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

Appeal dismissed.
No order as to costs.

SUSAN DENNY, Barrister

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Court of Appeal

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

[2020] EWCA Civ 9

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

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

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

On the appeal—

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

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

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

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

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

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

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

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

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

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

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

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

The court took time for consideration.
23 January 2020. The following judgments were handed down.

LEGGATT LJ

Introduction

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

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

Background

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

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

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

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

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

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

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

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

The Injunction

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

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

Paragraph 2: trespass

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

Paragraph 4: nuisance

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

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

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

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

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

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

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

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

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

Paragraph 7: unlawful means conspiracy

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

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

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

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

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

The breaches of the Injunction

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

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

The incident on 24 July 2018

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

The incident on 3 August 2018

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

The other breaches of the Injunction

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

The findings of contempt of court

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

The legal test for contempt

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

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

Knowledge of the Injunction

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

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

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

The intentions proved

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

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

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

The committal order

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

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

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

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

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

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

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

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

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

Variation of the Injunction

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

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

The right to protest

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

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

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

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

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

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

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

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

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

The Ineos case

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

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

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

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

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

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

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

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

This appeal

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

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

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

(1) Was the Injunction unclear?

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

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

The references to intention in the Injunction

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

Types of unclarity

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

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

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

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

The concept of intention

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

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

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

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

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

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

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

Dicta in the Ineos case

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

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

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

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

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

The Hampshire Waste case

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

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

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

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

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

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

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

The width of the Injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Were the sanctions too harsh?

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

The standard of review on appeal

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

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

Sentencing protestors

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

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

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

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

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

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

Were custodial sentences wrong in principle?

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

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

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

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

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

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

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

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

Civil disobedience

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

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

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

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

The judge's approach

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

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

Reference to the Sentencing Council guideline

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

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

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

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

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

Sanction for the first incident

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

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

Sanction for the second incident

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

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

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

Conclusion

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

DAVID RICHARDS LJ

111 I agree.

UNDERHILL LJ

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

Appeal dismissed in part.
Variation of committal order.

ALISON SYLVESTER, Barrister

House of Lords

*Fourie *v* Le Roux and others

[2007] UKHL 1

2006 Nov 13, 14;
2007 Jan 24

Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Carswell

Costs — Discretion of court — Indemnity basis — Freezing order obtained on without notice application subsequently discharged — Order for payment of respondents' costs on indemnity basis — Whether justified

Injunction — Freezing order — Jurisdiction — Liquidator of South African companies applying without notice for freezing order in respect of assets in England — Substantive proceedings not yet instituted — Case for substantive relief not formulated — Whether jurisdiction in court to make order — Whether properly made

The liquidator of two South African companies applied without notice for a freezing order to be made against two individuals and a number of companies. He took the view that two of the respondents had by fraud and deception stripped one of the companies of its assets and removed them, or their proceeds, to England. At the hearing, he stated that he was "intending to proceed in South Africa in terms of statutory inquiries and . . . various claims would be formulated". Park J granted the order. Shortly thereafter, the respondents were served with an originating summons seeking relief in the form of the order. On a respondents' application for the order to be set aside, the deputy judge pointed out that when the matter had been before Park J no proceedings for substantive relief had been commenced or formulated and said that the court had no jurisdiction to grant a freezing order in circumstances where the applicant had no intention of issuing proceedings immediately or almost immediately. He discharged the order and gave directions for the immediate enforcement of the applicant's cross-undertaking in damages. He awarded the respondents costs on an indemnity basis. The Court of Appeal dismissed an appeal by the applicant on the issues of jurisdiction and indemnity costs, stating that jurisdiction to make an interim order depended on its activation by the commencement of substantive proceedings or an undertaking to do so.

On appeal by the claimant—

Held, dismissing the appeal, (1) that a court had jurisdiction, in the strict sense, to grant an injunction where it had in personam jurisdiction over the person against whom it was sought; that a freezing order might, in suitable circumstances, be granted and served on the respondent before substantive proceedings had been instituted, although the judge should pay careful attention to the substantive relief which was, or would be, sought; but that in general a freezing order, on an application without notice, would not be properly made in the absence of any formulation of the case for substantive relief which the applicant intended to institute; and that, in the circumstances as they had stood before Park J, the protection which ought to be associated with the granting of a without notice order had been absent and the order had not been properly made (post, paras 1–4, 5, 25, 30, 35–37, 43, 44, 47–48).

Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA (The Siskina) [1979] AC 210, HL(E); *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, HL(E) and *British Airways Board v Laker Airways Ltd* [1985] AC 58, HL(E) applied.

(2) That the deputy judge's award of indemnity costs was difficult to justify; but that (Lord Hope of Craighead dissenting) the decision of the Court of Appeal

affirming it on the ground that no error of principle could be discerned should not be interfered with (post, paras 1, 39–40, 43, 44, 46, 47, 49).

(3) That, although there had been no appeal against the deputy judge's directions for the immediate enforcement of the applicant's cross-undertaking, his decision had been premature and wrong in principle and the directions should be set aside (post, paras 1, 41–42, 43, 44, 47).

Decision of the Court of Appeal [2005] EWCA Civ 204; [2005] BPIR 756 reversed in part.

The following cases are referred to in their Lordships' opinions:

Advocate General for Scotland v Taylor 2003 SLT 1340

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

Castanho v Brown & Root (UK) Ltd [1981] AC 557; [1980] 3 WLR 991; [1981] 1 All ER 143, HL(E)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664, HL(E)

Edge v Pensions Ombudsman [2000] Ch 602; [2000] 3 WLR 79; [2000] 4 All ER 546, CA

Garthwaite v Garthwaite [1964] P 356; [1964] 2 WLR 1108; [1964] 2 All ER 233, CA

Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, CA

Karl Construction Ltd v Palisade Properties plc 2002 SC 270

Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509; [1980] 1 All ER 213n, CA

Memory Corpn plc v Sidhu (No 2) [2000] 1 WLR 1443, CA

Mercedes-Benz AG v Leiduck [1996] AC 284; [1995] 3 WLR 718; [1995] 3 All ER 929, PC

North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, CA

Reid Minty v Taylor [2001] EWCA Civ 1723; [2002] 1 WLR 2800; [2002] 2 All ER 150, CA

Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428

Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA (The Siskina) [1979] AC 210; [1977] 3 WLR 818; [1977] 3 All ER 803, HL(E)

South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487, HL(E)

Tehrani v Secretary of State for the Home Department [2006] UKHL 47; [2006] 3 WLR 699, HL(Sc)

The following additional cases were cited in argument:

Behbehani v Salem (Note) [1989] 1 WLR 723; [1989] 2 All ER 143, CA

Bekhor (A J) & Co Ltd v Bilton [1981] QB 923; [1981] 2 WLR 601; [1981] 2 All ER 565, CA

Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350; [1988] 3 All ER 188, CA

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

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2006] 3 WLR 689; [2006] 3 All ER 829, PC

Cheltenham and Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts [1993] 1 WLR 1545; [1993] 4 All ER 276, CA

Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA

Customs and Excise Comrs v Barclays Bank plc [2006] UKHL 28; [2006] 3 WLR 1; [2006] 4 All ER 256, HL(E)

Haiti (Republic of) v Duvalier [1990] 1 QB 202; [1989] 2 WLR 261; [1989] 1 All ER 456, CA
Maclaine Watson & Co Ltd v International Tin Council (No 2) [1989] Ch 286; [1988] 3 WLR 1190; [1988] 3 All ER 257, CA
Oriental Credit Ltd, In re [1988] Ch 204; [1988] 2 WLR 172; [1988] 1 All ER 892
Reichert v Dresdner Bank AG (Case C-261/90) [1992] ECR I-2149, ECJ
Thane Investments Ltd v Tomlinson [2003] EWCA Civ 1272, CA
Wight v Eckhardt Marine GmbH [2003] UKPC 37; [2004] 1 AC 147; [2003] 3 WLR 414, PC
Yukong Line Ltd v Rendsburg Investments Corpn [2001] 2 Lloyd's Rep 113, CA

APPEAL from the Court of Appeal

This was an appeal by the applicant liquidator, John Louis Carter Fourie, by leave of the House of Lords (Lord Hoffmann, Lord Walker of Gestingthorpe and Baroness Hale of Richmond) given on 28 July 2005 from the decision of the Court of Appeal (Sir Andrew Morritt V-C, Mance and Jonathan Parker LJJ) on 7 March 2005 dismissing the applicant's appeal against an order made by Mr John Jarvis QC, sitting as a deputy judge of the Chancery Division, on 30 September 2004 [2004] EWHC 2260 (Ch); The Times, 8 October 2004. The deputy judge had discharged a freezing order made by Park J on 9 July 2004 and ordered the applicant to pay the costs of the respondents, Allan Le Roux, Fintrade Investments Ltd and others, on an indemnity basis.

The facts are stated in the opinion of Lord Scott of Foscote.

Leon Kuschke and *Sam Neaman* for the applicant.
Stuart Isaacs QC and *Tom Smith* for the respondents.

Their Lordships took time for consideration.

24 January. **LORD BINGHAM OF CORNHILL**

1 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Scott of Foscote. For the reasons he gives I would dismiss the appeal and make the orders which he proposes.

2 *Mareva* (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign: see *Gee, Commercial Injunctions*, 5th ed (2004), pp 77–83.

3 In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making *Mareva* injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the

terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.

4 On his application to Park J, Mr Fourie failed to do this. It follows that the judge was wrong to make the order he did. It also follows, in my opinion, that Mr Jarvis QC, the deputy judge, was right to discharge it. There had been a clear neglect of the correct procedure, and the court should not absolve the defaulting party from the consequences of its neglect by maintaining the order in force: *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 436. That, I think, is so whether or not the deputy judge foresaw that Mr Fourie might, in the immediate future, reapply successfully in accordance with the recognised practice.

LORD HOPE OF CRAIGHEAD

5 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scott of Foscote. I agree with him, for the reasons that he gives, that the appeal on the main issue should be dismissed. I would however set aside the order for indemnity costs.

6 On the main issue I also agree with the observations of my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. The importance of maintaining safeguards against misuse of such injunctions has recently been emphasised by the Court of Session in two cases dealing with the analogous procedure that is available in Scotland. It has pointed out that the maintenance of these safeguards is necessary if the use of the procedure is not to be held to be incompatible with article 1 of the First Protocol to the European Convention on Human Rights: *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270; *Advocate General for Scotland v Taylor* 2003 SLT 1340.

7 Those cases were concerned primarily with issues of Scots procedure which do not arise in this case. But Lord Drummond Young said in para 54 of his opinion in *Karl Construction Ltd v Palisade Properties plc,* which was approved by the Inner House in *Advocate General for Scotland v Taylor*, that among the requirements that would have to be met if the order was to conform to that article was that the pursuer must establish that he has a prima facie case on the merits of the action in connection with which he is seeking the protective remedy. As he pointed out in para 55, nearly all of the other legal systems in which a protective security is available insist that a test which is broadly of this nature should be satisfied. I agree that the test will not be met if the claimant is unable to identify the claim which he is seeking to protect when he is seeking the remedy.

8 On the indemnity costs issue I share the concerns which have been expressed by Lord Rodger and by my noble and learned friend, Lord Carswell, as to whether an order for costs on the higher scale was appropriate. But I would, with respect, go further and hold that an order for indemnity costs was not justified in this case and that an order for costs on the standard basis should be substituted.

9 I recognise, of course, that there are limits on the extent which this House can properly interfere with orders of this kind. I accept too that the Civil Procedure Rules contain a new procedural code, the object of which is to enable the court to deal with cases justly, and that it is no longer necessary to show that there has to be some sort of moral lack of probity or conduct

deserving moral condemnation on the part of the paying party: *Reid Minty v Taylor* [2002] 1 WLR 2800, para 27, per May LJ.

10 But, as the judgments that were given in that case show, the award of costs on this basis will not be justified unless the conduct of the paying party can be said in some respect to have been unreasonable: see per May LJ, para 32, per Kay LJ, para 37. For example, as Kay LJ said in para 37, if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis. I do not think that the appellant was guilty of conduct of that kind.

11 It is true that Park J was persuaded to make an order that he ought not to have made because, on the information that was laid before him, the making of a freezing order could not yet be justified. But litigants do from time to time persuade judges to make orders in their favour ex parte which on more mature reflection have no sound basis in law and must be set aside. That in itself, without more, does not justify a departure from the ordinary rule that the costs that are awarded to the other party are assessed on the standard basis in such circumstances. I do not detect anything in the appellant's conduct that was unreasonable in the sense referred to in *Reid Minty v Taylor*. I bear in mind also that the making of a freezing order albeit for a lesser amount was within a matter of hours substituted for that made by Park J.

LORD SCOTT OF FOSCOTE

The issues

12 My Lords, on 9 July 2004 Park J, on a without notice application made by the appellant, Mr Fourie, made a freezing order (commonly called a *Mareva* injunction (*Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509)) against two individuals and a number of companies of whom only two are still actively involved in the proceedings. They are Mr Le Roux and Fintrade Investments Ltd. ("Fintrade"), the respondents to this appeal. The order froze the assets in England and Wales of each respondent up to a value of £3·4m. Mr Fourie had made the application for the order in his capacity as liquidator of two South African companies, Herlan Edmunds Engineering (Pty) Ltd ("HEE") and its parent company, Herlan Edmunds Investment Holdings Ltd ("HEI"). Mr Le Roux was the majority shareholder of HEI and, until HEE and HEI went into liquidation in South Africa, had been in control of the two companies. Fintrade is an English company owned and controlled by Mr Le Roux.

13 HEI and HEE went into liquidation in South Africa in June 2004 on a creditor's petition and Mr Fourie was appointed liquidator of both companies. He formed the view that Mr Le Roux and Fintrade had by fraud and deception (some details of which I will refer to later) stripped HEE of its assets and removed those assets, or their proceeds, to England. Hence his application to Park J for the freezing order.

14 By an application dated 28 July 2004 Mr Le Roux, and others of those against whom the freezing order had been made (it is not clear which of them, but Fintrade must have been one) applied for the freezing order to be set aside. The main ground of the application was that "there was no

jurisdiction to make the order" because, at the time the order was made, there had been no subsisting proceedings to which the freezing order could be ancillary and no undertaking to commence any such proceedings had been offered by Mr Fourie. The application came before Mr Jarvis QC, sitting as a deputy judge of the High Court, on 30 September 2004. On the jurisdiction point the deputy judge said that in order to support the grant of a freezing order the applicant needed proceedings to enforce an existing cause of action that had either already been instituted or that would, pursuant to an undertaking given to the court, be instituted within a short time-frame. He pointed out that, when the matter was before Park J, not only had no proceedings for substantive relief been commenced but no such proceedings had yet been formulated. In para 60 of his judgment he said:

> "In my judgment, the court had no jurisdiction to grant a freezing order in circumstances where the applicant had no intention of issuing proceedings immediately or almost immediately. I do not regard this as a simple procedural irregularity which can be cured by issuing proceedings now. I do not regard it as akin to material non-disclosure which, in certain circumstances, the court may overlook and allow an injunction to be continued. In my judgment, this goes to the root of the jurisdiction."

So he discharged the freezing order, made an order for Mr Fourie to pay costs on an indemnity basis and gave directions for the immediate enforcement of the cross-undertaking in damages that Mr Fourie had given.

15 Mr Fourie appealed to the Court of Appeal. On 7 March 2005 Sir Andrew Morritt V-C gave a judgment, concurred in by Mance LJ and Jonathan Parker LJ, dismissing the appeal. He said he agreed with counsel for the respondents that "jurisdiction to make an interim order depends on its activation by the commencement of substantive proceedings or an undertaking to do so" (paras 37 and 38) and went on, in para 38:

> "There was no suggestion of substantive claims being made in England before Park J . . . There had been no activation of the jurisdiction whether by the issue of substantive proceedings in England or an undertaking to do so. Without either, the jurisdiction to grant any form of interim relief in support of the relevant cause of action under English law simply does not exist . . . In my view the deputy judge was right."

Sir Andrew Morritt V-C also dismissed Mr Fourie's appeal against the indemnity costs order that the deputy judge had made. Mr Fourie has appealed to this House.

16 The background facts are much more complex than the previous paragraphs might suggest, and I shall have to refer to some of them later, but the main issue for your Lordships is, as expressed by the parties in their statement of facts and issues, whether Park J had had jurisdiction to make the freezing order. In my opinion, however, this issue cannot be confined to the issue of jurisdiction in its strict sense. Even if Park J did have power to make the freezing order, the question remains whether, in the absence of any proceedings for substantive relief or any undertaking to commence such proceedings, it was proper for him to have made the order.

17 There is also an issue about the propriety of the indemnity costs order and an issue as to whether the directions for the enforcement of the cross-undertaking were premature both of which your Lordships must deal

with. Next, however, I must say rather more about the background facts and the litigation history than I have yet done.

The background facts

18 HEE had carried on business in South Africa but in July 2003 had ceased trading and the story really starts with an ex parte order obtained by Mr Le Roux and Fintrade in November 2003 from the Germiston Magistrate's Court in South Africa ("the Germiston order") for the seizure and handing over of HEE's plant and machinery pursuant to alleged debts owed to them by HEE. Pursuant to the Germiston order Mr Le Roux took possession of HEE's assets. Some were sold. When Mr Fourie became, in June 2004, liquidator of HEE and began an investigation of its affairs he took the view that Mr Le Roux and Fintrade had obtained the Germiston order by fraud and deception and, assisted by the Germiston order, had stripped HEE of its assets and had exported some of these assets to England. He therefore commenced proceedings in the Transvaal Provincial Division of the High Court of South Africa and on 2 July 2004 Preller J made an order nisi requiring Mr Le Roux and other respondents to show cause why an order setting aside the Germiston order should not be made. Fintrade was not one of the respondents to the proceedings. Your Lordships were told that South Africa does not have a procedure that would have enabled Fintrade, an English company with no presence in South Africa, to be served outside South Africa. At the same time Preller J made an order authorising Mr Fourie to institute in England such proceedings as might be necessary, including proceedings for injunctive relief, for the purpose of recovering HEE's assets. Preller J also ordered that

> "letters of request be issued requesting the appropriate Division of the High Court of the United Kingdom to act in aid of the High Court of South Africa (Transvaal Provincial Division) for the purposes of recognising the appointment of [Mr Fourie], the applicant, as the duly appointed provisional liquidator of [HEE] and [HEI] . . ."

19 Preller J's order nisi came before Bosielo J who, in a judgment delivered on 8 September 2004, confirmed the order. Leave to appeal against Bosielo J's judgment was refused at first instance and again in the Supreme Court of Appeal of South Africa. A subsequent application for leave to appeal made by Mr Le Roux and others to the South African Constitutional Court was dismissed with costs. It is convenient to record some of the remarks made by Bosielo J in his judgment. He referred, at p 15, to allegations made against Mr Le Roux as constituting "eloquent and irrefutable evidence of serious fraud which was used to deliberately mislead the magistrate in the Germiston proceedings to grant the order" and expressed his agreement with Mr Fourie's counsel that

> "the proceedings in the Germiston Magistrate's Court were a shameless sham by the parties to hoodwink the magistrate into granting an order the sole purpose and effect whereof was to grant the parties, in particular [Mr Le Roux], the right to strip HEE of all its assets."

Bosielo J commented also that the respondents before him had based their resistance to confirmation of the order nisi on, in effect, technicalities. He said, at p 18: "What I find disturbing is that notwithstanding the fact that

A the replying affidavit contained damning and damaging allegations, the respondents elected to ignore it." In the meantime, and before the order nisi had been confirmed, Mr Fourie had applied to Park J for the freezing order.

20 Another event in South Africa that deserves mention is that on 20 July 2004 an order was made in the Transvaal Provincial Division, on Mr Fourie's application, for an examination under section 417 of the South
B African Companies Act (No 61 of 1973 as amended). Section 417, similar to section 236(2) of the Insolvency Act 1986, enables directors and ex-directors, among others, of an insolvent company which is being wound-up to be brought before the court to answer questions about the company's assets and affairs. Your Lordships were not given any details about the institution or progress of any examination conducted under this order. Its relevance is that it constitutes a potential vehicle for the examination of
C Mr Le Roux.

The litigation history

21 At the hearing before Park J various references were made to the proceedings in aid of which the freezing order was being sought. Park J was told by Mr Selwyn Bloch QC, counsel for Mr Fourie, that "The liquidator is
D intending to proceed in South Africa in terms of statutory inquiries and within the existence of that various claims would be formulated . . ." The reference to "statutory inquiries" was, presumably, a reference to proceedings under section 417 of the South African Companies Act. The transcript of the hearing records, also, Park J asking about the effect of the freezing order he was being asked to make. Both his question and
E Mr Bloch's answer deserve attention:

> "*Park J.* What is going to happen in the end about any assets that are frozen in this way? Who is advancing a claim for those assets and in what proceedings? We are here today in an application which is ancillary to the insolvency jurisdiction of the South African court. What is before me is not a case in which Mr Fourie is seeking some sort of order from the
> F English court that the money be paid over [to] him. The English court can freeze the money, but then, if some sort of order for the recovery of it is going to be sought, how is that going to be done?
>
> "*Mr Bloch.* My Lord has put his finger on a point that has exercised me to some extent. That is what is the formal proceeding leading up to some final form of final relief to which this attaches."

G Mr Bloch then answered the question he had posed by referring, first, to a possible claim in respect of torts committed in England and, secondly, to possible proceedings under section 426 of the Insolvency Act 1986 as a result of which, he appears to have thought, the court might give directions dealing with "pleadings and discovery and the usual procedural points" and eventually "adjudicate on the merits of whether these assets are, for example, traceable". Later Mr Bloch again referred to the possibility of a
H proprietary claim being made. He said:

> "Using the English procedure [presumably a reference to section 236 of the 1986 Act], an inquiry would be sought at which the defendants would be interviewed or cross-examined . . . Depending upon that, if the claimant or the applicant concluded that these assets were, in fact, owned

by the companies in South Africa, it would invoke the South African solvency procedures as part of section 426 in order to recover those assets here."

These exchanges appear to me to demonstrate a muddle as to the purpose and nature of the freezing order that was being sought. The judge seems to have had in mind that the purpose, or perhaps one of the purposes, of the freezing order would be to preserve assets to which a proprietary claim would or might be brought by or on behalf of HEE (see his reference to an order for the "recovery" by Mr Fourie of the frozen money). Mr Bloch's references to assets being "traceable" or "owned by the [South African companies]" points in the same direction. But Mr Bloch's reference to the possibility of the eventual claim being a tort claim suggests that the purpose of the freezing order would be the *Mareva* purpose, namely, to prevent the proposed defendants from making themselves judgment-proof by disposing of their assets against which a damages judgment might be enforced. But whatever the judge and Mr Bloch had in mind the freezing order as granted was unquestionably of the *Mareva* type. Its terms were wholly inconsistent with an intention to preserve assets to which a proprietary claim by, or on behalf of, HEE might eventually be brought. The order being sought by Mr Bloch and granted by the judge was an order under CPR r 25.1(f), not an order under CPR r 25.1(c)(i). It is clear, however, that at the time of the hearing before Park J the nature of the proceedings in aid of which the freezing order was being sought was unformulated and inchoate. The judge knew that the proceedings, whatever they might turn out to be, would result from and be based upon the alleged fraud and breach of fiduciary duty of Mr Le Roux. Everything else about the proceedings was in the air.

22 Park J made the freezing order, subject to the usual cross-undertaking in damages, over 23 July 2004. When the matter came back before the court it was dealt with by Judge Norris QC, sitting as an additional judge of the Chancery Division. He renewed the freezing order for a further four months or thereabouts. Counsel for the respondents told him that an application to discharge the freezing order was in the pipeline. No additional elucidation of the details or nature of the eventual proceedings for substantive relief were proffered by counsel for Mr Fourie.

23 Mr Le Roux's and Fintrade's discharge application was dealt with by Deputy Judge Jarvis QC in the morning of 30 September 2004. The freezing order made by Park J was discharged. Mr Fourie and his lawyers immediately set about formulating a claim for substantive relief that could support a freezing order. They went back before the deputy judge in the afternoon of 30 September, armed with a proposed claim form, and renewed the application for a freezing order. The deputy judge, on their undertaking to issue and serve particulars of claim within seven days, made a freezing order against Mr Le Roux and Fintrade in the same terms as the order he had discharged in the morning save that the protection was reduced to a sum of £1m for each respondent. Counsel for the respondents, who had succeeded in obtaining the discharge of the first freezing order, were present during the afternoon hearing but took no part. This second freezing order and, later, a third freezing order were the subject of several subsequent applications relating, mainly, to the amount of the protection. These applications culminated in a hearing before the Court of Appeal on the same occasion as

A that at which Mr Fourie's appeal against the discharge of the first freezing order was dealt with. The Court of Appeal upheld the third freezing order with a limit of £900,000. This freezing order remains in place and is not at the moment under challenge by either side.

24 In the appeal now before the House Mr Fourie does not seek the re-instatement of the first freezing order, or any increase in the amount of the protection above the £900,000 fixed by the Court of Appeal for the third B and current freezing order. Instead he seeks a declaration that Park J did have power and jurisdiction to grant the first freezing order and an order setting aside the determination to the contrary by Deputy Judge Jarvis QC and the Court of Appeal. Since there is no challenge to the third freezing order and Mr Fourie does not ask for an increase of the £900,000, the question arises as to why he is seeking to invalidate the discharge of the first C freezing order. The answer must be that, if he succeeds, the indemnity costs order must go and, too, the directions for the enforcement of the cross-undertaking in damages must be set aside. These last two desiderata (from Mr Fourie's point of view) are, presumably, the reason why this appeal is being prosecuted. The challenge to the discharge of the first freezing order is no more than a vehicle for their attainment.

D *The first issue*

25 Both the deputy judge and Sir Andrew Morritt V-C referred to the issue as one of "jurisdiction". But jurisdiction is a word of some ambiguity. The ambiguity was referred to by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563. He said:

E > "The first and, in my opinion, 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. But there is another sense in which it is often used, i e, 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."

F The same point was made by Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356, 387, citing with approval Pickford LJ's remarks: see also *Edge v Pensions Ombudsman* [2000] Ch 602, 642–643 and *Tehrani v Secretary of State for the Home Department* [2006] 3 WLR 699, 718–719, paras 66–68 to the same effect. The references to jurisdiction made both by Sir Andrew Morritt V-C and by the deputy judge (see paras 14 and 15 above) read as G though they had in mind jurisdiction in the strict sense. If they did, then I think they were wrong. It seems to me clear that Park J had jurisdiction, in the strict sense, to grant an injunction against Mr Le Roux and Fintrade. Both were within the territorial jurisdiction of the court at the time the freezing order was made. Both were, shortly after the freezing order had been made, served with an originating summons in which relief in the form of the freezing order was sought. There is no challenge to the propriety or H the efficacy of the service on them. The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre-Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) powers of the Chancery courts,

and other courts, to grant injunctions: see section 16 of the 1873 Act and section 19(2)(b) of the 1981 Act. The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue.

26 The line of authority on the power of the court to grant an injunction under section 37 of the 1981 Act, starting from *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA (The Siskina)* [1979] AC 210 and ending with *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, to which your Lordships have been referred by both sides on this appeal, needs, in my opinion, to be examined bearing in mind the ambiguity attendant upon references to the jurisdiction of the court to which Pickford LJ had referred. *The Siskina* is a very well known case and it is unnecessary for me to describe in any detail how the issue about the court's power to grant an injunction arose. Put briefly, a *Mareva*-type injunction was sought against a Panamanian ship-owning company to restrain it from disposing of a fund, consisting of insurance proceeds, in England. The claimant for the injunction was suing the company in a Cyprus court for damages and believed the company to have no other assets from which to meet the hoped-for damages award than the fund in England. No proprietary claim was, or could have been, made by the claimant to the fund. The issue in the case was whether the "long-arm" jurisdiction of the court under RSC Ord 11, r 1 could be invoked. If it could not be invoked, the proceedings claiming the injunction could not properly have been served on the Panamanian company. The claimant relied on sub-rule (1)(i) which permitted the service of proceedings on a defendant out of the jurisdiction if a claim were made for "an injunction . . . ordering the defendant to do or refrain from doing anything within the jurisdiction . . .". The leading judgment, when the case came to this House, was given by Lord Diplock. He referred [1979] AC 210, 254, to section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (the predecessor of section 37(1) of the 1981 Act) and said:

> "That subsection, speaking as it does of interlocutory orders, presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. This factor has been present in all previous cases in which *Mareva* injunctions have been granted . . . it is not present in the instant case."

Lord Diplock went on, at p 256, to say of Ord 11, r 1(1)(i) that the words used in the sub-rule were "terms of legal art" and that the reference to "an

A injunction" "presupposes the existence of a cause of action on which to found 'the action' ". He continued:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the
B enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction"

C and concluded that

> "To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and
D enforceable here by a final judgment for an injunction."

The effect of this, concurred in by the other members of the Appellate Committee, was that the case could not be brought with Ord 11, r 1(1)(i) and service of the writ on the Panamanian company had to be set aside. At which point there was, unarguably, an absence of any jurisdiction, in the strict sense, to grant any injunction against the company.

E 27 *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 and *British Airways Board v Laker Airways Ltd* [1985] AC 58 both involved claims for anti-suit injunctions. In *Castanho's* case Lord Scarman referred, at p 573, to what Lord Diplock had said in *The Siskina* [1979] AC 210, 256 and commented:

> "No doubt, in practice, most cases fall within one or other of these two
F classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."

G His remarks were concurred in by the other members of the Appellate Committee, who included Lord Diplock. In *British Airways Board v Laker Airways Ltd*, where considerable reliance was placed by the unsuccessful respondents on Lord Scarman's dictum in *Castanho's* case, cited above, Lord Diplock, at p 81, referred to what he had said in *The Siskina*, at p 256, but agreed that the "statement of principle in the stark terms in which [he]
H expressed it in the *Siskina* case" needed to be qualified by what Lord Scarman had said in *Castanho's* case. And Lord Scarman, in the *British Airways* case, at p 95, emphasised that his remark in *Castanho* about an injunction being an available remedy "against a party properly before the court, where it is appropriate to avoid injustice" stated "an approach and a principle which are of general application". It is to be noted that in *The*

Siskina the Panamanian company had not been "a party properly before the court".

28 In *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, another anti-suit injunction case, Lord Brandon of Oakbrook referred, at p 40, to section 37 of the 1981 Act and to the three cases in this House to which I have just referred and continued:

> "The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

But Lord Goff of Chieveley, while agreeing with Lord Brandon's conclusion, expressed a reservation (with which Lord Mackay of Clashfern associated himself). Lord Goff said, at p 44:

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

29 And, finally, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, the House rejected the proposition that an English court can never grant an interlocutory injunction where the cause of action is being litigated in arbitration proceedings abroad: see per Lord Mustill, at pp 361–362. Lord Browne-Wilkinson said, at p 342:

> "Although the respondents have been validly served (i e, there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i e, there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction. In my judgment that submission is not well founded."

And he concluded, at p 343, that

> "the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or abitral body."

30 My Lords, these authorities show, in my opinion, that, provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* [1979] AC 210 was decided and is

unrecognisable from the practice to which Cotton LJ was referring in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 and to which Lord Diplock referred in *The Siskina*, at p 256. *Mareva* injunctions could not have been developed and become established if Cotton LJ's proposition still held good. In *The Siskina* the jurisdiction of the court over the defendant depended upon the ability of the plaintiff to obtain leave to serve the defendant out of the jurisdiction. Once the leave that had been granted had been set aside there was no jurisdictional basis on which the grant of the injunction could be sustained. On the other hand, if the leave had been upheld, or if the defendant had submitted to the jurisdiction, it would still have been open to the defendant to argue that the grant of a *Mareva* injunction in aid of the foreign proceedings in Cyprus was impermissible, not on strict jurisdictional grounds, but because such injunctions should not be granted otherwise than as ancillary to substantive proceedings in England. In 1977 *Mareva* injunctions were in their infancy and the House might well have agreed (cf *Mercedes-Benz AG v Leiduck* [1996] AC 284).

31 Whatever might have been the impact if that point had been raised in 1977 it would, today, fail. The effect of section 25 of the Civil Jurisdiction and Judgments Act 1982, as extended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302), is to enable the High Court "to grant interim relief" in relation to "proceedings" that have been or are about to be commenced in a foreign state, for example, South Africa. The consequence of this, in relation to the present case, is in my opinion to settle the question of jurisdiction, in its strict sense. Whether the interlocutory freezing order made by Park J was to protect the ability of Mr Fourie, or HEE, to recover money awards they might succeed in obtaining in proceedings in England, or to recover money awards they might succeed in recovering in proceedings in South Africa, there was, in my opinion, jurisdiction, in the strict sense, for the order to be made.

32 In para 38 of his judgment in the Court of Appeal Sir Andrew Morritt V-C referred to the need for there to be an "activation of the jurisdiction [to make the freezing order] whether by the issue of substantive proceedings in England or an undertaking to do so". I would agree that, without the issue of substantive proceedings or an undertaking to do so, the propriety of the grant of an interlocutory injunction would be difficult to defend. An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief. But it is not in dispute that in suitable circumstances a freezing order may be, and often is, granted and served on the respondent before substantive proceedings have been instituted. Such an order is not a nullity. It is of immediate effect. If proceedings for substantive relief are not instituted, the freezing order may lapse in accordance with its own terms or, on an application by the respondent, may be discharged. But none of this indicates that the court had no jurisdiction to make the order. No "activation" of the jurisdiction is needed.

33 Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a

greater burden on the respondent than is necessary. The yardstick in section 37(1) of the 1981 Act, "just and convenient", must be applied having regard to the interests not only of the claimant but also of the defendant. This is particularly so in the case of freezing orders applied for without notice. Assets of the defendant to which the claimant has no proprietary claim whatever are to be frozen so as to constitute a source from which the claimant can hope to satisfy the money judgment that, in the substantive proceedings, he hopes to obtain. The frozen assets are removed for the time being from any beneficial use by their owner, the defendant. This is a draconian remedy and the strict rules relating to full disclosure by the claimant are a recognition of the nature of the remedy and its potential for causing injustice to the defendant.

34 In *Memory Corpn plc v Sidhu (No 2)* [2000] 1 WLR 1443, 1460, Mummery LJ referred to the "high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case". He went on to say:

> "It is the particular duty of the advocate to see that the correct legal procedures and forms are used . . . and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

35 In the present case no claim for substantive relief was formulated and shown to Park J, nor for that matter to Judge Norris QC, nor to Deputy Judge Jarvis QC until the afternoon of 30 September 2004. I find it very difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute. It has to be inferred that, at the time of the application to Park J, Mr Fourie's counsel were unclear whether the substantive proceedings would be proceedings in South Africa or in England and, in either case, unclear what the cause or causes of action would be. But at the least a draft claim form could have been prepared claiming an inquiry as to what Mr Le Roux and Fintrade had done with the assets they had seized under the Germiston order and for the return of those assets or damages for their conversion. It seems to me significant that, when the freezing order was discharged in the morning of 30 September 2004, an adequate claim form was produced by that afternoon.

36 In my opinion, in the circumstances as they stood before Park J, the protection for the defendant that ought to be associated with the grant of a without notice freezing order was absent. The protection ought to include directions about the institution of proceedings for substantive relief. Here there were none. In the circumstances a challenge to the propriety of the making of the order was entitled to succeed, and to succeed for much the same reasons as were relied on by the deputy judge and Sir Andrew Morritt V-C for their conclusion that Park J had lacked jurisdiction to make the order. I disagree with that conclusion but am in respectful agreement with them about the deficiencies in the case for the freezing order that had been laid before Park J.

37 I am, none the less, uneasy about the discharge by the deputy judge of the freezing order. It may be that he did not know when he announced his

A decision on the discharge application that he would, an hour or so later, be dealing with an application for a renewed freezing order fortified by a draft claim form. If he did know that, I think it would have been sensible to postpone his conclusion on the discharge application until he had heard the renewed application. It is often said that nature does nothing in vain and I think that courts of equity should follow suit. But, since the deputy judge, when he discharged the freezing order, may not have realised that he was B likely in a short time to grant another, I will quell my doubts and concur in the dismissal of Mr Fourie's appeal against the discharge.

Indemnity costs

38 There is, in the record, a very short note of the deputy judge's decision to award indemnity costs against Mr Fourie. Mr Isaacs is recorded C as having relied on three matters: "(1) the English claims were not thought out; (2) non-compliance with the practice direction [concerning issue of a claim form]; (3) failure to comply with warning of Mummery LJ in the *Memory* case". The note then records the deputy judge as saying: "It seems to me that when [a freezing] order is granted on a wrong basis which could have been avoided . . . indemnity costs". Sir Andrew Morritt V-C, D dismissing Mr Fourie's appeal, explained his decision by saying:

> "The question is not whether I would have made the same order as Mr Jarvis did, but whether he erred in principle in the exercise of his discretion. I see no error in principle. The judge plainly had all material facts in mind and those facts justified the conclusions he reached."

39 My Lords, I think it needs to be understood that the difference E between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great. According to CPR r 44.5(1), where costs are assessed on the standard basis the payee can expect to recover costs "proportionately and reasonably incurred" or "proportionate and reasonable in amount"; and where costs are assessed on the indemnity basis the payee can expect to recover all his costs except those F that were "unreasonably incurred" or were "unreasonable in amount". It is difficult to see much difference between the two sets of criteria, save that where an indemnity basis has been ordered the onus must lie on the payer to show any unreasonableness. The criterion of proportionality, which applies only to standard basis costs, seems to me to add very little to the reasonableness criterion. The concept of costs that were unreasonably but proportionately incurred or are unreasonable but proportionate in amount, G or vice versa, is one that I find difficult to comprehend.

40 For my part I find it difficult to identify why the procedural deficiencies of the application for the freezing order before Park J should have warranted an indemnity costs order against the applicant. However CPR rr 43 and 44 are a product of Lord Woolf's civil justice reforms, one object of which was to produce greater flexibility in award of costs. It was, I believe, contemplated that greater use would be made of the discretion to H award costs on an indemnity basis than had previously been the practice. Costs awards, as with most matters of practice and procedure, are primarily the responsibility of first instance judges with the Court of Appeal available to correct obvious errors. In the present case the Court of Appeal has affirmed the deputy judge's award on the ground that no error of principle

could be discerned. I do not think your Lordships should interfere. I would dismiss the appeal on this point too.

The directions regarding the cross-undertaking

41 There was no appeal directed to the deputy judge's directions for the immediate enforcement of Mr Fourie's cross-undertaking in damages but they seem to me so plainly wrong in principle that I do not think your Lordships should let them stand.

42 The cross-undertaking was expressed in these terms:

> "If the court later finds that this order has caused loss to [a] respondent, and decides that the respondent should be compensated for that loss, the applicant will comply with any order the court may make."

The gravamen of Mr Fourie's complaint against Mr Le Roux and Fintrade, namely, that each had taken part in fraudulently stripping HEE of its assets, had been made clear to Park J and, later, to the deputy judge. The deputy judge knew, therefore, that there were substantial claims that Mr Fourie, or HEE, had against Mr Le Roux and Fintrade, and that the claims were at least reasonably arguable. To the extent that the Park J freezing order did no more than prevent them from disposing of or dealing with assets, or the proceeds of assets, that they had fraudulently obtained from HEE, or from dealing with a sum of money representing the amount of damages payable by them on account of the fraud, it seems to me very highly questionable whether it can be right that they should be enabled to obtain compensation for loss caused to them by being so prevented. In a case of this sort it seems to me that a decision as to what, if anything, should be paid to Mr Le Roux and Fintrade for loss caused to them by the freezing order over the period 12 July 2004 to 30 September 2004 should not be taken until the result of the litigation is known. To take the decision at the stage the deputy judge took it was, in my opinion, in the circumstances of this case, wrong in principle. I think the directions for the immediate enforcement of the cross-undertaking should be set aside.

Conclusion

43 In summary, I would dismiss Mr Fourie's appeal so far as the discharge of the Park J freezing order and the award of indemnity costs are concerned, but I would set aside the deputy judge's directions, in paras 4 to 9 (inclusive) of his order of 30 September 2004, for the enforcement of the cross-undertaking.

LORD RODGER OF EARLSFERRY

44 My Lords, I have had the advantage of considering the speech of my noble and learned friend, Lord Scott of Foscote, in draft. For the reasons which he gives I too would dismiss the appeal and make the order which he proposes.

45 I should wish to associate myself, in particular, with the remarks of my noble and learned friend, Lord Bingham of Cornhill, about the desirability of not weakening the safeguards which have been developed to protect defendants against possible misuse of *Mareva* injunctions or freezing orders. Here, as Lord Scott shows, it is all too clear that, at the time when

A he made the application to Park J, the claimant had neither brought proceedings nor worked out what proceedings he was going to bring to which the freezing order would be relevant. That being so, one of the important safeguards was missing and so, even if he had the power to do so, the judge ought not to have granted the order at that stage. It was accordingly right for the deputy judge to discharge it—even though, shortly
B afterwards, when a claim form was produced and the claimant undertook to issue and serve particulars of claim within seven days, he himself made a freezing order which differed only in the amount of the protection.

46 Whatever the exact scale of the difference may be in any particular case, an order for indemnity costs does, and is intended to, weigh more heavily on the party against which it is made than an order for costs on the standard basis. I share the doubts expressed by others as to whether the
C order for costs on this higher scale was appropriate in the present case, but I too have reluctantly come to the view that it is not a matter with which the House can properly interfere.

LORD CARSWELL

47 My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Scott of Foscote, with which
D I agree, and for the reasons he has given I would make the order which he proposes.

48 I share his unease about the strangeness of the position, where the deputy judge discharged the freezing injunction made by Park J and continued by Judge Norris QC, then within a matter of hours made another order of like nature substituting a different sum as the limit of protection.
E There is a considerable air of artificiality about an appeal which centres round the correctness of the deputy judge's action in discharging the earlier order. That unreality is not decreased by the fact, as Lord Scott has clearly demonstrated, that the decision of the deputy judge and that of the Court of Appeal which upheld it were based on a flawed approach to the issue of the propriety of the injunction granted by Park J. I was during the hearing before the House attracted to the view that it would be desirable, in order to
F avoid injustice, to decline to apply the rule in *The Siskina* [1979] AC 210 rigidly and to allow the appeal. I am persuaded by your Lordships, however, of the importance of maintaining the safeguards to defendants provided by the network of rules which the courts have developed in granting *Mareva* injunctions. I therefore must agree that, notwithstanding my reservations, the freezing order was wrongly made by Park J on 9 July 2004 and that it
G was proper to discharge it.

49 I also have reservations about the propriety of making an award of indemnity costs against the appellant. I find it hard to see any sustainable ground on which such an order should be made, which traditionally was restricted to marking the court's serious displeasure at the way in which the losing party has behaved or his case has been conducted : see *Cook on Costs 2006*, para 11.48. As Lord Scott indicates in para 40 of his opinion,
H however, indemnity costs now tend to be awarded in a broader range of cases : see, e g, *Reid Minty v Taylor* [2002] 1 WLR 2800. That said, I still find it difficult to discern any clearly defensible reason in the present case for making the order: if a party commences proceedings on a mistaken basis, an award of standard costs is ordinarily sufficient sanction. I agree with Lord

Scott, however, that this is peculiarly an area in which the principles should be developed and applied by the judges at first instance, with the oversight of the Court of Appeal, and that the House should not reverse a costs order without a strong reason in principle.

Appeal dismissed.
Order accordingly.
Question of costs in Court of Appeal and House of Lords adjourned for written submissions.

Solicitors: CMS Cameron McKenna LLP; Rawlinson Butler LLP, Crawley.

M G

House of Lords

*Regina *v* L

2007 Jan 15

Lord Bingham of Cornhill, Lord Carswell and Lord Mance

PETITION by the appellant for leave to appeal from the decision of the Court of Appeal (Criminal Division) [2006] EWCA Crim 1902; [2006] 1 WLR 3092

Leave to appeal was refused.

[COURT OF APPEAL]

HOOPER *v.* ROGERS

1974 May 1, 2; June 10

Russell, Stamp and Scarman L.JJ.

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

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.

On appeal by the defendant contending that the judge had no jurisdiction to grant a mandatory quia timet injunction:—

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).

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).

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.

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. *Tunnicliffe & 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.

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 H

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. *Tunnicliffe & 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?]

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.]

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.

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.

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.

In *Attorney-General* v. *Nottingham Corporation* [1904] 1 Ch. 673, which was a public nuisance case, there was no use of the word "imminent."

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.

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.

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.

Cur. adv. vult.

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

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, C 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 D 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.

It is, I apprehend, clear that in respect of the support of the farmhouse E 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 F 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 G 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.

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.

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.

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.

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

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 B 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 C 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 D 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 negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that E 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. F 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:

G "*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."

H 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."

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.

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.

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:

"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."

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."

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."

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.

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.

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.

Solicitors: *Boxall & Boxall for Blight, Broad & Skinnard, Callington; Peacock & Goddard for Peter, Peter & Sons, Bude.*

C. N.

Court of Appeal

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

[2019] EWCA Civ 515

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

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

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

On the appeal—

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

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

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

APPEAL from Morgan J

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

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

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

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

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

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

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

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

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

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

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

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

The claimants

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

The defendants

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

6 The second defendant is described as:

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

7 The third defendant is described as:

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

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

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

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

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

The judgment

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

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

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

13 The judge then commented, at para 21:

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

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

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

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

This appeal

17 Permission to appeal has been granted on three grounds:

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

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

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

Persons unknown: the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of the law to this case

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

Width and clarity of the injunctions granted by the judge

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

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

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

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

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

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

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

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

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

Geographical and temporal limits

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

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

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

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

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

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

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

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

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

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

Disposal

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

Conclusion

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

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

CCRTF 97/0179 CMS2

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
(HIS HONOUR JUDGE HALL)

Royal Courts of Justice
The Strand
London WC2

Date: Friday 20th March, 1998

B e f o r e:

LORD JUSTICE MILLETT
LORD JUSTICE WALLER
LORD JUSTICE CHADWICK

- - - - - -

JOHN LLOYD

Respondent

- v -

ELLEN JUNE SYMONDS
KEVIN ANDERSON
KARINA LUCAS

Appellants

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 421 4040
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- - - - - -

MISS C MCGAHEY (Instructed by Dennis Faulkner & Alsop, Northampton NN1 2DQ) appeared on behalf of the Appellants

MR M ZAMAN (Instructed by Messrs Tallents Godfrey & Co, Newark, NG24 1AQ) appeared on behalf of the Respondent

- - - - - -

J U D G M E N T (As approved by the Court)

LORD JUSTICE MILLETT: I will ask Lord Justice Chadwick to give the first judgment.

LORD JUSTICE CHADWICK: This is an appeal, brought with the leave of the judge, against an order made on 8th January 1997 by His Honour Judge Hall in the Newark County Court. By that order the judge granted injunctions against the defendants in respect of a nuisance arising out of the keeping or breeding of dogs at premises known as Firview, New Lane, Girton, Nottinghamshire. He also awarded damages to the plaintiff in the amount of £875 in respect of past nuisance from the same source. The plaintiff has cross-appealed, seeking an increase in the amount of the damages and a variation of the terms of the injunction granted in order to make it more restrictive.

The plaintiff, Mr Lloyd, is the owner and occupier of a dwelling house, land and poultry sheds at Oakfield, New Lane, Girton. He has lived there since 1988 with his wife and two children. He uses the lands and sheds for his business of rearing poultry. Oakfield adjoins Firview. Before the plaintiff moved to Oakfield the premises at Firview had long been used as boarding kennels for dogs; and that use continued for some years after his purchase. But, during the two or three years from 1992 to 1995, that use seems to have lapsed.

The first defendant, Mrs Symonds, purchased Firview in or about November 1995. She, and her co-defendants Kevin Anderson and Karina Lucas, went into occupation on 27th November 1995. They introduced a large number of dogs - said by the plaintiff to be between forty and fifty - onto the premises over the next few days. It is clear that the dogs made a great deal of noise. The plaintiff approached the Environmental Health Department of Newark and Sherwood District Council. The Council advised him to keep a record as to his complaints of noise; and this he did. That record covered the period 5th December 1995 to 16th June 1996 and was produced at the trial.

The Council set up recording equipment at the premises. On 15th February 1996 Mr Hutchinson, Team Leader Environmental Protection, wrote to Mrs Symonds in these terms:

"I am writing to inform you that, following complaints of excessive barking, etc, from the dogs at "Firview", monitoring of this noise has been carried out recently. The monitoring includes the tape recording of the noise in question, and although I am at present not satisfied of the existence of a Statutory Nuisance, the recordings do indicate that there is some basis for the complaints that have been received. Should the problem continue and the Council feels that the noise does constitute a Statutory Nuisance, it will have no choice but to serve upon you an Abatement Notice requiring steps to be taken to prevent excessive noise from the animals. Failure to comply with such a notice would be an offence which may result in prosecution. I would therefore advise you to take all practical steps to prevent the animals from making excessive noise, especially at night."

At about the same time, on 12th February 1996, Mrs Symonds had applied for licences under the Animals Boarding Act and the Breeding of Dogs Act 1973. On 15th March 1996 the District Council issued to Mrs Symonds a licence to keep a breeding establishment for dogs at Firview; but no boarding licence was issued. The breeding licence was to remain in force from 1st March until 31st December 1996. It was granted subject to conditions, which included the requirement that the number of bitches between eight months and eight years of age kept for breeding was not to exceed fifteen.

On 22nd April 1996 the District Council issued Abatement Notices under section 80 of the Environmental Protection Act 1990 in respect of a Statutory Nuisance arising from the prolonged and unrestrained barking of dogs at Firview. Separate notices were issued to each of Mrs Symonds, Mr Anderson and Miss Lucas. They were required to abate the nuisance within 21 days. The notices prohibited recurrence of the nuisance and for that purpose required Mrs Symonds and her co-defendants to take the steps set out in the schedule. Those were:

1. Provide constant and sufficient supervision of the dogs by person or persons capable of controlling the dogs.

2. Limit the number of dogs kept on the site to a number that is easily manageable.

3. Isolate any difficult dog or bitch in season in order to avoid causing undue distraction to other dogs.

4. Any other measures necessary to keep the dogs from being unreasonably noisy.

Following the service of the Abatement Notices Mr Hutchinson put Mrs Symonds in touch with Mrs Seabridge, a local kennel proprietor with some seventeen years' experience in that business. Mrs Seabridge advised certain steps that could be taken to reduce the noise. These included: (i) moving four kennels away from the boundary fence; (ii) reducing the number of dogs kept at Firview; (iii) the introduction of some background noise or music, provided by a radio; and (iv) the installation of an intercom or verbal alarm system.

The judge found as a fact that the noise arising from the defendants' use of Firview in keeping and breeding dogs did constitute an actionable nuisance during the period between 27th November 1995 and the end of May 1996. After referring to the Abatement Notices, he said this (transcript page 6F-7B):

> "Thus it was that in April a nuisance had been continuing from about 27th November. It was, however, diminishing as time went on and I find that as a fact. The plaintiff and his family were, therefore, subjected to sustained and prolonged noise nuisance from the activities carried out by the defendants from the land of the first defendant for many months. The noise greatly exceeded what was reasonable, even allowing for the fact that this was a rural location with other agricultural noises emanating from other establishments and also the fact that Firview had been previously used for purposes with the kennelling of dogs over many years, maybe in excess of 40. The complaints by the plaintiff and his family are justified both in terms of extent and duration."

After refering to observations in this court in Robinson v Kilvert [1889] 41 Ch 88, at pages 94 and 97, the judge directed himself, correctly, that if the barking of the dogs kept at Firview would not have been noxious *per se* the fact that the plaintiff carried on an especially delicate operation at Oakfield would not render it so. But he rejected the suggestion that the plaintiff's use of his own premises for the breeding of poultry chicks was a factor that made him unusually sensitive to noise. He said this (transcript page 8B-E):

> "The fact is, however, that the barking of the dogs was noxious for many months. I find that the defendants, and each of them, failed properly to control the dogs that were within Firview and, as I have said, it is no defence that the animals needed time to settle down following a move from Sussex. The barking and the disturbance went on for far too long to enable them to succeed in an argument that the nuisance was temporary only and did not amount to the tort. By reason of the lack of control I am satisfied that the plaintiff's enjoyment of his land was disturbed and that annoyance was caused to him and to his family in the exercise and enjoyment of his land."

Nevertheless, the judge was satisfied, on the evidence before him, that the nuisance had abated by late May 1996; that is to say had ceased before these proceedings were commenced. This appears from two passages in the judgment. First, at transcript page 8F-G:

> 'I find that the dogs had settled by about 28 days after the defendants had put in place the measures that they took following the service of the statutory nuisance notice but that, of course, is with the benefit of hindsight."

Secondly, at transcript page 9B-C:

> 'The fact is, however, that by about May 1996, with the benefit of hindsight, I find that the defendants had got their dogs under control even though there was some noise emanating if it reduced from the level of being a nuisance to being an inconvenience but not a nuisance in terms of the tort."

The judge's view that there had been an improvement following the service of the Abatement Notices receives support from a letter dated 2nd July 1996 from Mr Hutchinson to the defendants' solicitors. He wrote to confirm that:

> "... following the service of the Abatement Notice under S80 of the Environmental Protection Act 1990 I am of the opinion (from the limited evidence I possess) that there is less noise from the dogs at the above [premises] than previously.
>
> I suspect that the requirements of the notice may not have been fully met, but given the continuing efforts to reduce the number of dogs I feel that a serious attempt to comply has been made.
>
> While it is an offence not to comply with the requirements of an abatement notice, in practice proceedings to prosecute for non-compliance invariably boil down to whether a nuisance still exists; I am not certain whether or not this is so at present."

Mr Hutchinson's letter of 2nd July 1996 was written shortly after these proceedings had been commenced and an interlocutory injunction had been granted. The proceedings were commenced by the issue of a summons in the Newark County Court on 20th June 1996. The particulars of claim served with that

summons allege a continuing nuisance. The relief claimed is damages and an injunction to restrain the defendants from keeping any dogs at Firview so as to cause the plaintiff or any member of his family or household any nuisance arising from barking and whining of the dogs.

On 27th June 1996 the plaintiff applied for an interim injunction. The matter was heard by District Judge Cowling. He granted an injunction in substantially the terms sought in the summons, until trial or further order, restraining the three defendants from causing a nuisance. But he went on to order that the defendants should remove all dogs from Firview on or before 1st July 1996.

The district judge's order of 27th June 1996 was made on the basis of uncontradicted evidence contained in an affidavit sworn by the plaintiff on 20th June 1996. Exhibit "JL5" to that affidavit contains two copies of letters from the plaintiff's solicitors, dated respectively 23rd April and 7th June 1996, addressed to the defendants. As the affidavit and those letters make clear, the plaintiff's immediate concern was that he had a need to use a shed on his premises, adjacent to the common boundary, for the rearing of 1,400 day old turkey chicks; of which he was due to take delivery on 1st July 1996. The plaintiff explained in his affidavit that, if the dogs were not removed from Firview, he would be obliged to refuse delivery of the turker chicks with the result that he would be exposed to substantial claims for breach of contract and loss of profit.

Following the order of 26th June 1996 the defendants removed all their dogs from the premises at Firview. They were sent to boarding kennels around the country. That involved the defendants in considerable expense. The defendants decided to apply to vary or discharge the interim injunction. Affidavits were sworn by each of the defendants, the plaintiff, his wife and two of his neighbours (who supported the injunction), and by two officers of the District Council. The application to discharge came before Her Honour Judge Fisher on 26th July 1996. She varied the injunction granted on 27th June so as to permit the defendants to keep on the premises up to twenty dogs for showing purposes; but directed that twelve of those must be accommodated overnight within the residential part of the property and might only be outside

for feeding, grooming or exercise purposes. The defendants were also permitted to keep within the residential part of the property a Cairn Terrier and her litter and a Petite Bassett Griffin and her litter, either of which might be replaced by an Irish Terrier and her litter.

The order of 26th July 1996 led to an application to commit the defendants for breach of the injunctions which it imposed. Affidavits were filed on both sides during August and September. That application came before His Honour Judge Hall on 12th September 1996 and was dismissed. The judge took the opportunity on that occasion to visit the premises at New Lane and see the position for himself.

The position, therefore, when the action came for trial before His Honour Judge Hall on 6th and 7th January 1997 may be summarised as follows:

(1) The premises at Firview had had the benefit of a breeding licence, issued by the District Council, since 1st March 1996.

(2) The premises were the subject of an Abatement Notice, issued by the District Council on 22nd April 1996, which had not been appealed and which had not given rise to enforcement proceedings.

(3) The nuisance from dogs had, as the judge found as a fact, abated by the end of May 1996 -- accordingly, there was no current nuisance when these proceedings were commenced on 20th June 1996 and no continuing nuisance thereafter.

(4) The defendants had been required to remove their dogs from the premises by the interim injunction granted on 27th June 1996 and had done so -- thereby incurring loss or expense.

(5) Since 26th July 1996 the defendants had been permitted to keep up to twenty dogs on the

premises; but subject to the restrictions (a) that those dogs were for showing purposes only and (b) that twelve must be accommodated in the house.

(6) The judge had viewed the premises in September 1996, in connection with the application to commit for breach of the order of 26th July 1996, and must be taken to have satisfied himself on that occasion that there was then no current nuisance.

The judge found that there had been a nuisance from late November 1995 until the end of May 1996; but that it had ceased. In those circumstances the issues which the judge had to decide were (i) what damages should be awarded to the plaintiff in respect of the nuisance which had persisted from late November 1995 to late May 1996; (ii) should the defendants be restrained, for the future, from committing a nuisance which, on the judge's findings of fact, they had not been committing since the end of May 1996; and (iii) was this a case in which the defendants should recover damages under the plaintiff's cross-undertakings (expressed in the order of 26th July 1996 and to be implied in the order of 27th June 1996).

The judge dealt with the question of damages for nuisance on the following basis. He took "for pragmatic purposes" a cut-off point at 22nd May 1996 -- that being 175 days from the date when the defendants moved into Firview. He held that a daily rate of £10 was sufficient "to mark the defendants' actions in the matter". He then reduced the resulting figure (£10 x 175 = £1,750) by one half to reach an award of £875. He gave three reasons for that reduction: (i) that the plaintiff did not seek compromise or debate with his neighbours but chose to involve the local authority and solicitors without speaking to them; (ii) that the defendants sought to rectify the situation after service upon them of the Abatement Notice; and (iii) that the dog nuisance was diminishing in scope as time went on.

The defendants do not appeal against the award of damages for nuisance. But by a respondent's notice, the plaintiff seeks an order that that award be increased to £4,650 or such other sum as this court shall think fit.

The plaintiff criticises the judge's approach in three respects. First, it is said that the daily rate of £10 (£70 per week) is far too low; and that an appropriate rate would have been £150 per week as claimed by the plaintiff. The plaintiff's figure of £4,650 is computed on the basis of 31 weeks (from 27th November 1995 to 27th June 1996) at a rate of £150 per week. In the course of argument, the plaintiff's counsel submitted that that weekly rate should be increased from £150 to £210, that being £30 a day. The plaintiff relies on the dictum of Stephenson LJ in Bone v Seale [1975] 1 WLR 797 at page 803G, where an analogy was drawn between the loss of enjoyment of property as a result of some interference or nuisance by noise and losing an amenity as a result of personal injury. Counsel pointed out, correctly in my view, that damages for nuisance are not awarded to "mark the defendants' action in this matter" -- if and insofar as that phrase is to be regarded as an indication that the defendant should be punished -- but, rather, as compensation for the loss which the plaintiff has actually suffered.

Secondly, it is said that the plaintiff's damages should not have been reduced on the grounds that he did not seek compromise but chose to involve the local authority and the courts. It could not, or should not, be held that the plaintiff acted unreasonably in invoking the remedies which Parliament has provided or which the law affords.

Thirdly, it is said that the actions of the defendants in seeking to remedy the situation are, of themselves, irrelevant to questions of damages unless those actions do, in fact, result in an abatement.

In my view there is force in each of those contentions. I would, for my part, substitute an award of £3,000 in respect of the damages for nuisance -- that representing damages at the average rate of about £500 per month for the period of about six months during which the judge held that the nuisance continued. That average rate is intended to reflect the fact, as the judge held, that the nuisance was greater at the beginning of that period than at the end.

I turn then to the question whether the judge should have granted an injunction to restrain future nuisance.

The plaintiff challenges the judge's finding that the nuisance had ceased by the end of May 1996. That, as it seems to me, is a question of fact which the judge, having heard the oral evidence, listened to the tape recordings and himself viewed the property, was in the best position to decide. The evidence of Mr Hutchinson, the only independent witness -- contained in the witness statement which he signed on 13th August 1996 and which stood as his evidence-in-chief -- was to the effect that there had been little or no noise coming from Firview on the third occasion on which the recording equipment had been placed on the plaintiff's premises (25th to 29th May 1996) and that that was consistent with his own observations when he visited the property on 26th June 1996. It is also consistent with his letter of 2nd July 1996, to which I have already referred, and with the fact that no proceedings were taken by the District Council to enforce the Abatement Notices served on 22nd April. We have been taken carefully through the affidavits, the witness statements and the transcripts of oral evidence. It has been submitted that there were good reasons why the recording equipment did not pick up noise during the period of 25th to 29th May 1996.

Taking this material as a whole, it is plain that there was evidence which would have enabled the judge to reach the conclusion that the nuisance which he had found to exist at the time that the Abatement Notice was served in April 1996 had continued throughout May and June. But, equally plainly, there was some diminution in the level and frequency of the noise. The question whether the diminution was sufficient to take the noise below the level at which it was properly to be regarded as a nuisance in law was, essentially, a question of fact and degree. In weighing that question the judge had the substantial advantage -- which this court does not have -- of assessing the witnesses, hearing the tape recordings and seeing the premises. He reached a conclusion which cannot be rejected as perverse. For my part, I would not think it right to interfere with the judge's finding of fact that the nuisance had abated by the end of May 1996.

That being so, the judge had to decide whether to grant an injunction to restrain a threatened nuisance -- there being no nuisance current at the commencement of the proceedings or at the date of his order. He addressed the matter in the following passages of his judgment (transcript page 9H-10C):

> "Mrs Symonds has a licence to use the land for breeding up to fifteen bitches and she plans to board up to six dogs. Mr Anderson plans to operate a business from the premises of grooming and clipping dogs and the evidence is that he has received a grant in connection with that. Unless I prevent by injunction, therefore, it is likely that strange dogs will be introduced on to the premises with a degree of frequency and that at least was one of the causes of the problems in the past.
>
> To hold the balance between the legitimate business interests of the defendants and the quiet and peaceful enjoyment of the property by the plaintiff, an injunction is required regulating the use to which Firview is put in the future."

On that basis the judge decided that the injunction granted by Her Honour Judge Fisher on 26th July 1996 should be continued; but with the variation that the permitted number of dogs be increased from twenty to thirty. He relaxed the injunction in two further respects (a) to allow an additional two litters of puppies on condition that they and their dam be accommodated overnight within the house and (b) to permit Mr Anderson to have up to three dogs for the purposes of grooming and/or clipping on the premises between 9.00am and 5.00pm on any day. But, in addition to the specific restrictions as to numbers, the order of 8th January 1997 contains a general restriction against causing or permitting any nuisance arising out of the keeping or breeding of dogs at Firview or out of any activity connected with the grooming and/or clipping of dogs on those premises.

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 7th 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 20th 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 Corporation [1928] Ch 235 at page 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 Corporation [1904] 1 Ch 673 at page 677).

A fortiori, as it seems to me, in circumstances where the protection provided by Parliament under Part III of the Environmental Protection Act 1990 has been invoked and an Abatement Notice has been served prohibiting the recurrence of a nuisance. While I do not doubt the court's jurisdiction to intervene by way of injunction to restrain a Statutory Nuisance which is the subject of an Abatement Notice, it seems to me that that jurisdiction should be exercised with great caution -- particularly in circumstances where, on the evidence, there is no current breach of any prohibition or requirement in the Abatement Notice. Parliament has conferred on local authorities the power to decide what needs to be done in order to prevent the recurrence of a Statutory Nuisance (see section 80(1)(b) of the Act of 1990) and, as it seems to me, the courts should be slow to intervene unless satisfied by cogent evidence that those powers are not being exercised or are not proving effective.

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 22nd 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. For those reasons I would discharge the injunction which was granted on 7th January 1997.

On the basis that the judge found there was no current nuisance on 27th June 1996 -- when the district judge ordered the defendants to remove all the dogs from the premises at Firview

-- it is clear that that order was not well founded. It is clear that the basis upon which that order was made

-- namely, the sensitivity of the turkey poults due to arrive on 1st July 1996

-- was wrong. At the conclusion of the hearing before him the judge was asked to make an order that the plaintiff pay damages under the cross-undertaking implied in the order of 27th June 1996. He declined to do so. It is not easy to see from the transcript why he took that view.

It is important to bear in mind that the question for consideration on an application for payment under a cross-undertaking as to damages given at the time of the grant of an interlocutory injunction is not whether the judge who granted the injunction was right or wrong to do so on the material before him. That is a question which should be tested, if at all, by appealing that order. The question for the judge after trial is whether or not, in the light of the facts which have been investigated and determined at trial, the defendant has been liable to an interim restraint which would not have been imposed upon him if those facts had been established at the date of the interim order. An interim or interlocutory order is made in the knowledge that there is a risk of injustice. The risk arises because the judge at that stage cannot investigate the facts and does not know what they will turn out to be after a trial. It is to provide protection against that risk that the party seeking the interlocutory injunction is required to give a cross-undertaking in damages; so that if, after a trial, the trial judge is satisfied that, had the true facts been known at the date of the interim injunction, that injunction would not have been granted, he can compensate the defendant for having suffered a restraint to which he should not have been made subject. The cross-undertaking in damages is the price for the grant of the interim injunction; because it is the necessary safeguard against the potential injustice inherent in granting a restraint at a time when the full facts cannot be known.

In the present case it seems to me that the judge ought to have appreciated that if the facts as he found them to be -- namely that there was no nuisance current on 27th June 1996 -- had been known to the

court on that day no injunction (*a fortiori*, no injunction in that form) would then have been granted. Accordingly, as a matter of principle, the respondents ought to be compensated under the cross-undertaking for the cost of removing their animals for the month of July 1996.

We have been invited to take the course which was open to the judge, but which he did not take, of assessing the amount to be awarded under the cross-undertaking rather than to send the matter for an inquiry with the further expense and delay, and the further litigation between these neighbours, which would inevitably result. That is an invitation which, as it seems to me, we ought to accept.

On that basis of that invitation we assess the damages under the cross-undertaking at £2,400. We reach that figure in this way. We take the cost of housing, say, 35 adult dogs and their litters for the month of July at the amount claimed by the defendants, £4,800. But we think it right to deduct from that claim: (i) the costs which the defendants themselves would have had to bear if the dogs had remained at Firview during that month; and (ii) a discount to reflect the probability that the defendants' own contacts in the dog world would have led to a nominal or, perhaps, a reduced charge for the boarding of a substantial number of dogs over a period of as long as one month. Taking those two matters into account, we think it right to reduce the claim of £4,800 by fifty per cent to reach a figure of £2,400.

In relation to the period following the varied injunction on 26th July 1996 and until the trial in January 1997, we think that, in the circumstances of this case, no figure should be awarded as damages under the cross-undertaking. The defendants have not satisfied us that, but for the injunction, they could, lawfully, have kept more than the twenty-two dogs which they did keep at Firview during those five months without causing a nuisance. On this point the burden of proof is upon the defendants. It is for the defendants to establish that keeping more than the twenty-two dogs which they did keep would not have put them in breach of the Abatement Notice. The fact that the judge was not satisfied that it was necessary to restrict the number of dogs to less than thirty, is not material. This is an area in which certainty is impossible. The burden of satisfying the court on this point in the context of the claim under the cross-undertaking lies on the

defendants. We find it impossible to take the view that that burden has been or could be discharged.

The effect, therefore, is that the amount of £2,400 to be awarded to the defendants by way of damages under the cross-undertaking is to be set off against the £3,000 to be awarded to the plaintiff as damages for the nuisance between 27th November 1995 and the end of May 1996; leaving a net award to the plaintiff of £600.

LORD JUSTICE WALLER: I agree entirely with the judgment of my Lord, and would allow the appeal in the respects he has mentioned.

LORD JUSTICE MILLETT: I also agree.

ORDER: The award of damages of £875 to be set aside and an award of damages of £3,000 to be substituted. The injunction granted on 8th January 1997 to be discharged. Enforcement of the cross-undertaking in damages, given in the order of 27th June 1996, ordered. Damages assessed at £2,400. Damages to be set off against the £3,000 previously ordered, leaving a net sum of £600 payable by the defendants to the plaintiff.

Costs order below varied to order the plaintiff to pay the defendants' costs of the interlocutory hearings. Those costs to be set off against the plaintiff's costs of the action itself. All the costs below to be taxed on scale 2. No order for costs in this court. No direction that the sum of £2,400, which the plaintiff has been ordered to pay the defendant, should be set off against costs. Legal aid taxation.

Court of Appeal

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

[2022] EWCA Civ 13

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

Sir Geoffrey Vos MR, Lewison, Elisabeth Laing LJJ

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

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

On appeal by some of the local authorities—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jacobson v Frachon (1927) 138 LT 386, CA

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

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

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

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

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

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

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

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

The following additional cases were cited in argument:

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

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

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

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

A **APPEALS** from Nicklin J

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court took time for consideration.

13 January 2022. The following judgments were handed down. A

SIR GEOFFREY VOS MR

Introduction

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

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

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

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

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

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

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

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

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

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

E *The essential factual and procedural background*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The main authorities preceding the judge's decision

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

Bloomsbury: judgment 23 May 2003

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

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

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

South Cambridgeshire: judgment 17 September 2004 H

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

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

B *Gammell: judgment 31 October 2005*

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

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

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

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

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

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

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

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

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

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

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

D *Cameron: Judgment 20 February 2019*

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

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

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

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

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

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

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

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

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

Ineos: judgment 3 April 2019

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

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

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

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

Bromley: judgment 21 January 2020

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

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

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

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

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

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

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

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Cuadrilla: judgment 23 January 2020

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

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

Canada Goose: judgment 5 March 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reasons given by the judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction to the main issue

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

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

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

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

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

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

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

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

Para 89 of Canada Goose

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

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

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

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

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

Para 90 of Canada Goose

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

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

Para 91 of Canada Goose

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

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

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

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

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

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

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

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

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

Para 92 of Canada Goose

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

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

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

The judge's reasoning in this case

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

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

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

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

The doctrine of precedent H

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

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

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

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

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

Conclusion on the main issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

114 Section 187B provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

Notes

1. There were 38 local authorities before the judge.

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

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

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

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

LEWISON LJ

125 I agree.

ELISABETH LAING LJ

126 I also agree.

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

SUSAN DENNY, Barrister

Case No: B2/2011/0755

Neutral Citation Number: [2012] EWCA Civ 56
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CLERKENWELL AND SHOREDITCH COUNTY COURT
HIS HONOUR JUDGE MITCHELL
9EC02371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2012

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
and
LADY JUSTICE RAFFERTY

Between :

LONDON BOROUGH OF ISLINGTON	**Appellant/ Defendant**
- and -	
(1) MARGARET ELLIOTT **(2) PETER MORRIS**	**Respondents/ Claimants**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr S Butler (instructed by **Legal Services**) for the **Appellants**
Mr R. Duddridge (instructed by **Bishop & Sewell LLP**) for the **Respondents**

Hearing date : 5th December 2011

Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by the London Borough of Islington ("the Council") with the leave of the court against an order of His Honour Judge Mitchell made in the Clerkenwell and Shoreditch County Court on 14th February 2011. The judge ordered the Council, which was the defendant in the action, to pay to the claimants their costs of the claim up to 6th March 2009; one half of their costs from 7th March up to and including 20th March 2009; and the whole of their costs thereafter.

2. The appeal is therefore one against an order for costs but in substance it is a challenge to the way in which the judge assessed the claimants' prospects of success in relation to the grant of a *quia timet* injunction which they had sought in the proceedings in order to compel the Council to remove a number of Ash trees from the garden of a property at 47, Balfour Road, London N5 ("Number 47") of which the Council is the freehold owner. The basis of the claim was an allegation that the roots of the trees constituted an actual or potential nuisance to the claimants' adjoining property at 49 Balfour Road ("Number 49") but in its defence (served on 28th April 2009) the Council confirmed that a works order to remove the trees had been issued to its contractors on 10th December 2008 and on 23rd June 2009 the trees were actually removed.

3. The action continued only because the parties were unable to resolve their differences about costs and the judge had the unenviable task of having to try the action in order to decide what costs order to make. Although lamentable, this proved to be unavoidable and neither party to this appeal has suggested that the judge was wrong in principle to take this course as opposed to resolving the issue on a summary basis. The issue of principle which the judge had therefore to consider and which justified the grant of permission to appeal in this case is whether a claim to a *quia timet* injunction to prevent a nuisance can succeed when the alleged nuisance (in this case the tree roots) has at the date of the trial caused no physical damage to the claimants' property but is likely ultimately to do so unless prevented by an order of the court. In short, the question is how proximate and likely does the occurrence of physical damage have to be before the court will intervene.

The facts

4. Number 47 is owned by the Council and is let to tenants on short-term tenancies. The contemporary photographs show that the gardens were not well maintained and that a number of saplings and small trees had been allowed to grow unchecked. The judge found that there were six Ash trees in the rear garden and about three in the front. One of the Ash trees in the rear garden was about one metre from the boundary fence with number 49 and some two metres from the rear wall of that house. When a plan was prepared in October 2008 this tree was already four metres in height with a girth

of 150 mm. One of the Ash trees in the front garden was about four metres away from the front wall of Number 49; was four to five metres in height and had a girth of between 150 and 200 mm. All these trees were self-sown. It was also the view of the expert witnesses called to give evidence that Ash trees are unsuitable (due to their size and rate of growth) for planting in a small garden of this kind.

5. In May 2004 Ms Elliott wrote to the Council expressing concern that the trees growing in the garden of Number 47 might undermine the foundations of her house if allowed to grow unchecked. The Council appear to have written to its tenant about this but no further action was taken. In October 2004 Ms Elliott wrote again to complain that the trees had grown by several feet and were now obstructing the light to her first floor windows. This was followed by further correspondence in January and November 2005 all directed to the rate of growth of the trees. It was made clear to the Council that the tenants of Number 47 made minimal use of the garden and had taken no steps to cut back or remove the trees. It was therefore clear that the Council would have to take responsibility for this.

6. By November 2006 the position remained unchanged but on 13th November an officer in the Tenancy Management section wrote to the claimants' ward councillor saying that instructions had been given to deal with the problem but that, due to an oversight, nothing had been done. However, she assured the councillor that the matter would now be dealt with promptly.

7. Again this proved to be a false hope because by September 2007 no steps had been taken to reduce the size of the trees or to remove them. The claimants, who by now were understandably exasperated by the lack of progress, instructed solicitors (Messrs Bishops & Sewell LLP) and they wrote to the Council on 11th September 2007 about the problems emanating from Number 47. The first was water penetration which was thought to be due to a problem with the kitchen or a shower unit at Number 47. This is unconnected to the second problem which was the trees. They said in the letter that the overhanging branches were now blocking out the light to Number 49 and that the roots "may be causing damage to [the claimants'] property".

8. The Council was asked to take steps to remedy these problems failing which the claimants would have no alternative but to institute proceedings. This did provoke a response from the Council. An officer wrote on 28th September asking for more information about the water leak but said that the Council had no obligation to maintain the gardens on behalf of the tenants. It would, however, arrange for Greenspace (a division of the Council's Environmental and Conservation Department) to carry out an inspection of the overhanging branches to decide whether further action needed to be taken. This might, however, take some time due to lack of resources.

9. In relation to the tree roots, the letter stated that it would be necessary for root samples to be taken:

> "so it can conclusively be determined that the trees are in fact the cause of any damage ..... As your clients are making these claims then the onus is on them to provide any report".

10. It looks as if this letter may not have been received by the claimants' solicitors because they wrote again on 28th November repeating their complaints about the tree roots and saying that there were signs of cracking in the concrete patio at the rear of Number 49 which might be attributable to the tree roots. The Council replied on 17th December and explained that due to a change in the tenants of Number 47 and associated problems of access, an inspection by Greenspace would not take place until the New Year. It would, however, still be necessary for the root samples to be taken to establish any alleged encroachment by the trees. This would be a matter for the claimants to arrange.

11. In these circumstances, the claimants instructed Mr George Mathieson, a civil engineer, to inspect their property and report. He did so early in 2008 and wrote a letter of advice to the claimants dated 12th March 2008 setting out his preliminary findings. He explained that due to their high water demand, trees such as the Ash should not be planted within 15-20 m from the nearest house and should be regularly pruned. His letter went on:

> "While the Ash saplings in the garden bordering onto yours have not yet caused any damage to your property, they need to be dealt with as a matter of urgency so as to prevent them from causing inevitable damage in the short to medium term."

12. The claimants' solicitors wrote to the Council on 18th March 2008 saying that the damp problem was continuing and, that in relation to the trees, Mr Mathieson had advised that there was an urgent need to deal with the Ash saplings adjacent to Number 49. They asked for the work to be carried out in four weeks without the need for an application to be made for an injunction. The letter of advice from Mr Mathieson was forwarded to the Council on 7th April together with recommendations from a builder as to how to deal with the damp problem.

13. In the meantime, the Council had written to Bishop & Sewell on 3rd April stating that Greenspace had taken soil samples from the Ash tree near the fence and their comments were awaited. On 23rd April the Council wrote a further letter to the claimants' solicitors which indicated that they should direct their complaints about the trees to Greenspace who were responsible for deciding whether trees in the Borough should be lopped or removed. Accordingly on 1st May the solicitors did just that. They sent a copy of Mr Mathieson's letter to Greenspace and asked to be informed about the results of the soil samples taken. They also asked for an undertaking that the Ash trees would be removed and the other trees kept regularly pruned.

14. The reply from Mr James Chambers, the Council's Senior Tree Officer, was not encouraging and also disclosed a state of internal confusion about who (if anybody) had been instructed to deal with the tree issue on behalf of the Council. He said in his letter that he had no record of receiving any request to inspect the trees at Number 47 and did not intend to do so until the "required documents are received". But in relation to the complaint about the tree roots, he said this:

> "... I note you have also provided a copy of a letter from a 'George Mathieson Associates' offering some opinions on trees in the area. This letter does clearly state that there is no damage to no. 49 at this time.

> No tree removal will be undertaken in relation to Alleged Tree Root Damage (ATRD) claims unless and until detailed and extensive evidence that directly implicates a tree as a major causal factor in significant damage to a building, and where no other alternative remains.
>
> Trees will certainly not be removed on the grounds that they may hypothetically cause damage at some point in the future. Any necessary tree work can only be determined through a tree inspection, which you can request as mentioned above."

15. The claimants' solicitors responded on 2nd June saying that their client was frustrated by the lack of progress and that she reserved her right to issue proceedings for an injunction to compel the Council to abate the nuisance. They received a reply from the Council on 4th June saying that Greenspace were now arranging an inspection of the trees but that it would be for the claimants to provide the root samples in order to substantiate their claim that damage was being caused. In fact the statement in this letter about an inspection being arranged was incorrect. The Council's evidence at the trial in the form of a witness statement from Mr Chambers was that the Tree Service was first asked to inspect the trees at Number 47 in November 2008 and that a works order was issued to remove the saplings on 3rd December 2008. As mentioned earlier (due, it is said, to access difficulties), the work was not carried out until 23rd June 2009.

16. The claimants' position as of June 2008 was that they had reached something of an impasse. The Council's position (as communicated in the letter from Mr Chambers) was that the trees would not be removed unless and until they could be proved to be causing significant damage to Number 49. The claimants therefore sought further advice from Mr Mathieson. His recommendation was that the taking of soil samples would be expensive and was unnecessary because it was obvious that the trees were growing rapidly and would, if unchecked, inevitably lead to damage being caused to both properties. The trees should therefore be removed immediately and at relatively little cost instead of being allowed to grow and cause potentially extensive damage in the future which could only be remedied at considerable expense.

17. Accordingly Bishop & Sewell wrote to the Council on 26th June enclosing a copy of Mr Mathieson's recent letter of advice. The letter concluded by saying that:

> "In a final attempt to avoid the issue of court proceedings, our client requires that the trees in the front and rear gardens are properly lopped in accordance with our client's expert's report by close of business on Thursday 10 July 2008. If this is not done by this date, then our client will have no alternative but to make an application to the court to compel you to abate this nuisance".

18. The Council then wrote to Bishop & Sewell stating that a tree referral request had been sent to the Tree Service. As mentioned earlier, this was untrue but in November the request was made with the consequences I have outlined. Bishop & Sewell were not, however, informed of this. They instructed Mr Mathieson to produce a detailed report which could be used in court proceedings which he did based on inspections of

the property in February and September 2008. In his report dated 30th November 2008 he concluded that there was no evidence of actual root intrusion and damage in respect of the drains and foundations of Number 49 but that damage of this kind was in time inevitable absent the pruning and removal of the trees. He estimated that significant damage would probably begin to appear within about five years.

19. Between July 2008 and March 2009 there was no further correspondence between the parties about the possibility of the claimants seeking injunctive relief and had the Council communicated its intention to remove the trees that would have been the end of the matter. On 3rd March 2009 Bishop & Sewell wrote again to the Council but this letter does not refer to the issue about tree roots. It was all about the damp problem which they said had recurred and needed to be remedied failing which proceedings would be commenced. The Council replied to this letter on 16th March promising action but again there is no mention of the trees.

20. The position therefore is that there was no further communication between the parties on the issue of nuisance from trees after the correspondence in June 2008. The claimants had put the Council on notice that unless the trees were lopped or removed, proceedings for an injunction would be instituted and had imposed a deadline of 10th July. But this was allowed to pass without action being taken. The Council had subsequently decided to remove the trees but had not informed the claimants of this or carried out the work by the time that the proceedings were issued on 20th March 2009.

21. Had Bishop & Sewell taken the precaution of writing a formal letter before action to the Council before instituting the claim then it seems likely that they would have been told of what was planned. But they did not do that. The claim form was issued seeking damages and an injunction and the particulars of claim alleged that if the Ash trees were not appropriately maintained or cut back they threatened to cause damage to Number 49 by encroaching roots and the extraction of water from the foundations which was likely to be disruptive and expensive to repair.

22. In the defence served on 28th April 2009 the allegation that the Ash trees constituted an actual or potential nuisance was denied as was the claimants' entitlement to a *quia timet* injunction. But in paragraph 3 the Council pleaded that a works order had been issued on 10th December 2008 to remove the trees and that the work would be carried out within a reasonable period of time.

23. As already stated, the removal of the trees took place on 23rd June. On 12th August Bishop & Sewell proposed the making of a consent order in *Tomlin* form staying the proceedings on terms that the Council should carry out regular inspections of Number 47; should take any necessary steps to reduce the growth of any remaining trees; and should undertake to pay the reasonable costs of any repairs to Number 49 caused by past or future tree growth. The *Tomlin* order also provided for the Council to pay the costs of the action.

24. The action was stayed on 2nd September 2009 to allow for settlement but the Council declined to agree to the terms proposed. I should mention that at that stage the claimants' costs were stated to be some £24,251 which included an After the Event insurance premium of £7,875 and solicitors' profit costs of £9,550. The claimants modified their terms of settlement by offering simply to discontinue on the payment

by the Council of £22,000 towards their costs. But this was not acceptable and the action therefore proceeded to trial.

25. The judge heard expert evidence from Mr Mathieson and from Ms Fiona Critchley, an arboriculturalist instructed on behalf of the Council. They had met in the usual way before the trial and had reached agreement on a number of matters. Trees more than 10 metres from Number 49 were unlikely to have any significant effect on the building. The growth rate of the relevant trees and their rooting patterns could not be predicted. It was therefore impossible to say precisely how and when damage would occur. What they disagreed on was how imminent the risk of significant and serious damage was. Mr Mathieson (as foreshadowed in his reports) thought that the risk was impending and that such damage was likely to occur to the drainage system within 5 years. Ms Critchley considered that it was impossible to predict if or when the closest trees would cause damage or what its nature would be. The judge set out his conclusions on this issue in paragraphs 43-46 of his judgment:

> "43. I conclude from this evidence that there are a number of areas of uncertainty in this case; uncertainty about the nature of the soil (Is it gravel? Is it clay?); about the depth of the foundations; whether or not there are drains present in the backgarden under the patio and uncertainty about the rate of growth of the trees.
>
> 44. The evidence shows that the work could be carried out in early 2010 without great expense or effort. The evidence I have had from Mr. Chambers is that it would have cost £500 to cut down the 8 saplings and to treat them with poison. It would require much greater work and expense the larger the trees.
>
> 45. I am also satisfied that both experts were satisfied that there was a risk that trees 1 and 10 would penetrate drains and affect the foundations, but the effects could not be seen possibly because damage would not occur after some years - possibly three or five years or more. I would add this to the experts' conclusions. The uncertainties that I have listed could not be resolved without expense which was out of all proportion to the cost of the works (for example the drains under the patio, taking soil samples and so forth). I note that Mr. Chambers did not consider that it was necessary to take root samples before he cut down the Ash-saplings.
>
> 46. I also conclude that, unless cracking was caused in the patio, it was unlikely that more evidence of the risk increasing or becoming more imminent could be obtained before serious damage was done to the property."

26. The judge was obviously right to conclude that damage to Number 49 could well occur before there was any physical sign of it above ground level. He was also clearly right that the cost and trouble of removing the trees at an early stage would be considerably less than if they were allowed to grow unchecked for several more years. Any prudent landowner would therefore take the course recommended by

Mr Mathieson in this case. It would also have been no more than good neighbourliness for the Council to have recognised the concerns of the claimants at an early stage and that the problem caused by the Ash trees was due to the neglect of the gardens of Number 47 by the tenants of that property. The trees were self-sown and entirely unsuitable for the location where they had been allowed to grow. Even a properly cautious policy of preservation and environmental conservation should have recognised this.

27. But this appeal is not about the reasonableness of the Council's position at the time. As the judge himself recognised, damage is the essential component of any claim in nuisance and the claimants had no cause of action unless they could prove either that their property had already suffered physical damage due to the encroachment by the trees or that the prospect of such damage was sufficiently imminent and certain as to justify the grant of *quia timet* relief.

28. On the judge's findings, actual damage was not established and the success of the claim (and therefore the costs outcome) depended on the claimants' proving the existence of a real and substantial risk of damage of an imminent kind.

Quia timet relief

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 that:

> "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 7th 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 20th 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 Corporation [1928] Ch 235 at page 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 Corporation [1904] 1 Ch 673 at page 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 22nd 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."

32. In this case there is, I think, no real dispute that if the roots of the Ash tree had in time extended under the drains and foundations of Number 49, serious and substantial damage was likely to result. Nor would damages in those circumstances have been an adequate remedy. Had it been established that there was an imminent likelihood of such damage occurring, the court's equitable jurisdiction to prevent an apprehended infringement of property rights would undoubtedly be exercised so as to prevent the claimants from having to suffer the disruption which would be involved. Inevitably there will be cases where other discretionary considerations require to be taken into account. If the offending tree was particularly rare or valuable in terms of its appearance, one would expect the court to attempt to strike a balance which might involve less drastic action being taken than the complete removal of the tree. But this is not that kind of case. Here the determining issue was whether (absent an injunction) there was imminent danger of actual damage.

33. In *Hooper v Rogers* [1973] 1 Ch 43 the defendant had cut a track across a steep slope which provided the foundation of the plaintiff's farmhouse. The evidence was that this had exposed the slope to a process of soil erosion which would eventually undermine the farmhouse and cause it to collapse. The judge at first instance found that this constituted a real risk of damage and granted a mandatory injunction requiring the slope to be re-instated. In the Court of Appeal the grant of the injunction was challenged on the basis that the test of imminent danger set out by Pearson J in *Fletcher v Bealey* (supra) was not satisfied. Russell LJ (at p. 30) addressed that issue in these terms:

> "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.
>
> 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 farm-house, or that he was wrong in ordering damages in lieu of such an order."

34. The question therefore is one of assessing the likelihood of the damage occurring at all and (if that is established) the probable timescale. The judge's conclusions on those issues are set out in paragraphs 49-50 of his judgment:

> "49. Examining the matter in relation to the *quia timet* injunction, I am satisfied that there was a real likelihood of harm at some stage - that is a harm which could not sensibly be ignored. The likely extent of the harm would be damage to the drains resulting in seepage, possibly of sewage or other waste water, and/or the foundations including cracking of walls and settlement. Harm of either kind would raise concern about the other kind of harm. There would be the risk of increased insurance cover and difficulties, possibly, in selling the property. The costs or effort required by the defendant to remove the harm was minimal. There was no likelihood, in my judgment, of other methods of reducing the harm becoming available before the damage occurred. The same steps would be needed; the trees would have had to have been cut down. But I have to ask myself, however, would there be a need for an order? While there was no imminent harm in the sense of something happening within a three to five year period, there was a likelihood that in some years the work would needed to have been done to avoid damage. There was no reason for delaying the work. Delay would only increase costs.
>
> 50. Given the Local Authority's history of dealing with the claimants' reasonable complaints, I am not satisfied that they would have done the work without an order. It was reasonable, in my judgment, for the claimants to commence the action when they did rather than wait. As has been pointed out, it has taken two years for this case to come onto trial even after the claim was issued. I am satisfied therefore that, if the work had not been carried out, the claimants would have been successful in obtaining their injunction. Therefore, the general rule should apply in relation to costs."

35. Mr Butler, on behalf of the Council, submits that, on the basis of a finding that no damage was likely to be caused in less than 3 years, it could not be said that there was any imminent danger of such damage at the time when the injunction was granted. It was therefore premature. Mr Duddridge, for the claimants, relies on the judge's findings that damage to Number 49 by the trees was likely to occur. In these circumstances, the judge was entitled (as in *Hooper v Rogers*) to conclude that an actionable nuisance was inevitable and to require the trees to be removed at minimal cost and inconvenience to both parties.

36. The question whether this was an appropriate case for the grant of *quia timet* relief has, I think, to be considered in the light of all the relevant circumstances known at the trial and not merely by reference to the narrower question of whether the tree roots were likely to cause physical damage to Number 49 within a particular period of time. The wider consideration of relevant factors had, in my view, to take into account the issues of the relative cost of removing the trees (which the judge did consider) and also the likelihood of the potential source of nuisance being controlled by action taken by the Council in the intervening period of 3 years before any actual damage occurred.

37. In *Hooper v Rogers* the inevitability of subsidence attributable to the new track was such that nothing short of its removal would cure the problem. It was therefore realistic for the judge in that case to have taken the view that an injunction should be granted as the only means of preventing that risk from materialising. Questions of timing were less significant because the defendant landowner was not prepared to restore the slope underpinning the plaintiff's property unless compelled to do so by an order of the court.

38. But cases involving damage caused by trees are not necessarily so stark. Where, as in this case, the experts have identified an appreciable period of time before any actual damage is likely to occur, the judge must take into account the ability and willingness of the defendant to prevent such damage occurring by taking steps in the meantime to control the growth of the trees on his land. The claimant has to show that an injunction is necessary in order to prevent the occurrence of the nuisance. The defendant is entitled to rely on his own rights and obligations as an adjoining landowner to cure the problem and it ought therefore in principle to be only in cases where the risk of damage is so imminent and the intransigence of the defendant so obvious that the court should ordinarily be prepared to grant an injunction in order to prevent a nuisance which does not yet exist. Mandatory injunctions of this kind are not justified merely on the ground that if nothing is done a tree on adjoining land may at some point in the future begin to cause damage to the claimant's property.

39. Judge Mitchell expressed the view that the Council would not have done the work without an order and that the claimants would have obtained an injunction had the work not been carried out. The judge gives no reasons for this conclusion and it is difficult to reconcile that with his earlier finding of fact that on 10th December 2008 a works order was in fact signed for the removal of the trees. Nor was there any challenge to the pleading in the Council's defence that it intended to carry those works out.

40. In these circumstances, it was not open to the judge in my view to hold that the injunction was necessary in order to prevent the potential nuisance from becoming an actual one. Although the claimants had initially to face a combination of delay and misleading information from the Council, it had by December 2008 at the latest resolved to remedy the problem by removing the trees. There was therefore no necessity for the grant of *quia timet* relief at the trial and the plea that the Council intended to carry out the work was a complete answer to the claim. If the appropriate rule to apply was that costs should follow the event then the judge should have dismissed the claim with costs.

The costs order

41. The judge's order was split into three periods in order to incorporate a discount for the 14 day period between 3rd March 2009 when the letter was sent by the claimants' solicitors complaining about the leak and the issue of the claim form on 20th March. The judge explained the thinking behind his order as follows:

> "51. I also have regard to the defendants' litigation conduct. There has been a failure by the defendants over five years until November 2009, to do anything at all. Opportunities were missed when the property was vacant in 2006 and 2008. Assurances that the works would be done in 2006 were not met. Misleading or false information was provided in April 2008. In June 2008, even if the claimants are not entitled under the general rule to costs, in my judgment, the defendants' conduct was such as to lead to only one conclusion, namely that the claimants were acting reasonably in commencing their action. The defendant's did not act reasonably and they should pay the claimants' costs.
>
> 52. But that is subject to one proviso. Letters before action were written on 1st May 2008, 2nd June 2008 and 26th June 2008. Nothing was thereafter written until March 2009 - a considerable gap. Despite the lamentable history, in my judgment, it would have been reasonable to expect the claimants to send one further letter. That might have resulted in their being told the work was in hand and, therefore, the claim did not need to be issued. But, given the history, they might not have been told that. They must therefore bear some responsibility, but the greater responsibility by far is that of the defendants.
>
> 53. Therefore, I shall make an order that the defendants are to pay the costs up to and including 2nd March 2009 - that is 14 days before the claim commenced - but, thereafter, only one half of the costs between 2nd March 2009 and up to and including the issue of the claim. The half costs cover the 14 day period, when a letter before action should have been written and considered and is calculated to take into account the real possibility that the defendants would not have notified the claimants that there was no need to commence the action."

42. Because I consider that the judge was wrong in his assessment of whether an injunction was needed in this case to prevent the potential nuisance, it is for this court to re-consider how the discretion under CPR 44 should be exercised. Neither side wished the matter to be remitted to the County Court for that purpose.

43. The judge's alternative basis for his costs order was that the claimants had acted reasonably in commencing the action because assurances given much earlier that the

work would be done were not carried out and false and misleading information was given in 2008. The history does, however, have to be examined in more detail than that. The assurance given to the claimants' ward councillor in November 2006 was certainly not acted on but the Council's response to Bishop & Sewell's letter of 28th September 2007 was that it had no obligation to maintain the garden of Number 47. The most that was promised was an inspection by Greenspace. It was for the claimants to produce evidence of the incursion of tree roots.

44. Mr Mathieson was instructed for this purpose and produced the reports I have referred to but the Council's response to this was that any risk of damage was still some years away. The information about the date of inspections by Greenspace in 2008 was misleading but it did not initially affect the claimants because they assumed that the inspections were taking place. When the 10th July deadline passed it was reasonable for them to have assumed that nothing was about to be done but the decision to wait until March before issuing proceedings could also be taken as an indication that proceedings were still not in contemplation.

45. The gap in the correspondence between July 2008 and March 2009 covers the period in which the Council did finally inspect and decide to remove the trees. It had received the threat of proceedings in June 2008 but the decision to remove the trees (if carried out) really brought the possibility of a successful action for an injunction to an end.

46. It is misleading to regard the letter of 3rd March 2009 as the resumption of the earlier correspondence. It makes no mention of the tree problem but was directed solely to the continuing issue of the damp. The Council dealt with it on that basis. The first it knew of the proceedings was when it was served with the claim form. The judge was therefore right to take the absence of a further letter before action into account but was, I think, wrong merely to reduce the costs awarded to the claimants for the 14 days before the claim was commenced. Given that there had been no further correspondence in relation to the trees before June 2008, the claimants should have written a letter before action prior to the issue of the claim form to make it clear that they did intend to go ahead with the action. This would have led to their being informed about the works order and the proceedings could have been avoided.

47. But at the same time I recognise the uncertainty which may have been created by the promises of an inspection in 2008 followed by silence on the part of the Council as to whether it intended to carry out any work to the trees. Although this is likely to have been cleared up by the sending of a letter before action, some allowance should be made for the Council's own failure to respond substantively to the June 2008 letter once it had decided to remove the trees.

48. It seems to me therefore that the right order is that there should be no order for costs in relation to the period up to and including the service of the defence. From that moment on it was apparent that the claim must fail and the Council is entitled to its costs of the action after that date. Neither of the offers of settlement made by the claimants accurately reflects their position in the litigation.

Conclusion

49. I would therefore allow the appeal and make an order in the terms referred to above.

Lady Justice Rafferty:

50. I agree.

Lord Justice Longmore:

51. I also agree.

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 LJJ 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 LJJ 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

COMMERCIAL INJUNCTIONS

SEVENTH EDITION

STEVEN GEE QC
FOREWORD BY LORD COLLINS OF MAPESBURY

SWEET & MAXWELL
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in the foreign proceedings can result in refusal of an injunction,[234] because it involves interference with foreign proceedings at a more advanced stage than was appropriate or necessary. An objection to the foreign proceedings should be made and pursued promptly.

(vii) The certainty principle and an interim injunction

2-035 An injunction, whether interim or final, must be expressed in clear and precise terms so that a defendant knows exactly what he must not do or what he must do.[235] A court may refuse to make an injunction, as a matter of discretion, if it is not satisfied that the terms of the proposed injunction are sufficiently clear and unambiguous.[236] This is because a respondent risks committal for a breach of an injunction and it is not fair to the respondent for it to be subject to the risk of committal[237] where the injunction's terms are not sufficiently clear.

With an interim injunction, the claimant's rights have not yet been defined at trial. One way of dealing with this is to grant an interim injunction which is freestanding in the sense that it defines precisely what can and cannot be done, and is not linked to what are the claimant's claimed rights.[238] With a proprietary claim the injunction should make it clear on its face in unambiguous terms what assets are subject to the injunction,[239] so that the defendant can know precisely to what assets the prohibition applies. A possible procedure is to grant a widely formulated freezing injunction and an order under CPR 25.1(g) directing the defendant to provide information about the property or assets which are within the proprietary claim, with a view to granting a clearly worded freezing injunction restricted to particular specified assets.

Where the claimant is suing on a broad right such as a copyright or a patent, it can be difficult to foresee all the ways in which the defendant may subsequently go about infringing that right, and granting interim relief in such specific terms could or would deprive the claimant of effective interim protection. With a patent there is no difficulty in granting a final injunction in terms which restrain the defendant from infringing the patent[240] and, in principle, there should not be a difficulty with an interim injunction restraining acts which would infringe the claimant's claimed patent right.

It may be possible to grant effective relief in sufficiently precise terms to be

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[234] *Essar Shipping Ltd v Bank of China Ltd* [2015] EWHC 3266 (Comm) at [61] and [65] (there was no need to wait to make the application for the injunction based on a London arbitration clause until after a jurisdiction challenge in China had been resolved, no objective evidence that a jurisdiction challenge in China would be resolved speedily or had any real prospects of success, and there was delay which took the cargo claim outside the one year time bar).

[235] See Ch.4, para.4-001.

[236] *Vestey Foods UK Ltd v Adam Cox* [2018] EWHC 3466 (Ch) at [78]–[83]; *AAA v CCC* [2020] EWCA Civ 846.

[237] *P.A. Thomas & Co v Mould* [1968] 2 QB 913 at 922-923.

[238] *Staver Co Inc v Digitext Display Ltd* [1985] F.S.R. 512; *Video Arts Ltd v Paget Inc Ltd* [1986] F.S.R. 623.

[239] *Tajik Aluminium Plant v Ermatov (No.3)* [2006] EWHC 7 (Ch) at [14-15]; *Vestey Foods UK Ltd v Cox* [2018] EWHC 3466 (Ch) at [81]–[87].

[240] *Coflexip SA v Stolt Comex Seaway MS Ltd* [2001] 1 All E.R. 952 at [16]–[18], disapproving observations to the contrary at first instance reported at [1999] 2 All E.R. 593 at [22], and the form of injunction granted which was incorrect in ambit and "unclear".

enforceable by contempt proceedings, by restraining the defendant from acting in any way inconsistently with the rights asserted by the claimant in the proceedings.[241]

2-036 This is a broader restraint but gives rise to the possibility that if contempt proceedings are brought the court will find itself in the course of the motion trying out substantive issues in the underlying action.[242] Although the court will do this on a motion for contempt because it is necessary to uphold the rule of law and ensure that court orders are obeyed, it is suggested that it is preferable, if possible, to avoid this by formulating an interim injunction in terms which are independent of the width of the underlying rights claimed in the action.

In a patent action where the claimant is in the process of amending the claims of the patent upon which he sues[243] the court will not grant an interim injunction.[244] This is because the monopoly claimed by the patentee has not yet been defined. It would be unfair and oppressive to grant an injunction leaving its ambit to be defined through contempt proceedings.

(viii) The "Springboard" principle

2-037 Springboard relief is a remedy by injunction, directed to depriving a defendant of a competitive advantage obtained through actionable wrongdoing, which has given and is still giving, the defendant a head start over the claimant.[245] The claimant must establish wrongful conduct misusing information, resulting in a wrongfully obtained competitive advantage. Causation is a necessary ingredient. If there is no misuse and causation there is no unfair competitive advantage to be removed. Also damages for taking confidential information which is not used are likely to be only nominal.[246]

It is often used in cases where former employees are engaged in activities which compete with their former employer. The injunction is confined to where an unfair competitive advantage obtained by wrongdoing is still being enjoyed, and the duration of the injunction is limited to restraining enjoyment of it, whilst it lasts and no longer. The principle is not confined to cases of breach of confidence and when confidential information provides the competitive advantage.[247] For example it can be applied in cases of breach of contract or breach of fiduciary duty. The principle has been applied in the case of patent infringement to prevent the infringer getting a head start on the patentee through granting an injunction which applies even after expiry of the patent.[248]

In a confidential information case, a defendant may have obtained confidential

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241 *Spectravest Inc v Aperknit Ltd* [1988] F.S.R. 161 (injunction interpreted as restraining the defendant from infringing what the plaintiff claimed to be its copyright or from passing off).

242 *Spectravest Inc v Aperknit Ltd* [1988] F.S.R. 161; *Chanel Ltd FGM Cosmetics* [1981] F.S.R. 471; *Director General of Fair Trading v Tobyward Ltd* [1989] 1 W.L.R. 517 at 522H–524A; *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 A.L.R. 275 at 230–231.

243 The claimant can still seek an injunction in respect of a claim which he is not amending and which is prima facie valid: *Hoffman-La Roche & Co AG v Inter-Continental Pharmaceuticals Ltd* [1965] R.P.C. 226.

244 *Mölnlycke AB v Procter & Gamble* [1990] R.P.C. 487.

245 The principles are set out with supporting case law in *QBE Management Services (UK) Ltd v Dymoke* [2012] I.R.L.R. 458 at [239]–[247] which have been followed in *CEF Holdings Ltd v Mundey* [2012] F.S.R. 35; *First Rate Tax Ltd v Trading by Telephone Ltd* [2014] EWHC 983; *Create Financial Management LLP v Roger Lee* [2020] EWHC 1933 (QB) at [51].

246 *Marathon Asset Management LLP v Seddon* [2017] I.C.R. 791.

247 *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] I.R.L.R. 965; *CEF Holdings Ltd v Mundey* [2012] F.S.R. 35 at [242].

248 *Dyson Appliances Ltd v Hoover Ltd (No.2)* [2001] R.P.C. 27.

to carry on a business[288] and in *Ryan v Mutual Tontine Westminster Chambers Association*[289] the court decided not to order the landlord to employ a porter to provide various services because the court would not supervise whether the appointee performed those various duties properly, and damages were the appropriate remedy. It may be possible depending on the facts to grant a different remedy which will not involve the court in continuous supervision; for example, the court may be able to appoint a receiver to manage a business.

(8) QUIA TIMET INJUNCTIONS

2-045 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.[290] Before the Judicature Acts it was the sole preserve of the old High Court of Chancery to grant such an injunction where there had been no prior wrong.[291] Sir George Jessel MR said no jurisdiction of the old Court of Chancery was more valuable and no subject more frequently the cause for bills for injunction than to restrain threatened injury.[292] But the jurisdiction involves proof that unless the court intervenes by injunction there is a real risk that an actionable wrong will be committed[293]; that an injunction would do no harm is not a justification for granting it. Usually this will be by evidence that the defendant has threatened[294] to do the particular wrongful act: "no-one can obtain a quia timet order by merely saying 'Timeo'."[295]

The jurisdiction to act quia timet is considered in Ch.12, at paras 12-014 to 12-017.

There is no fixed or "absolute"[296] standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver

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288 *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1; *Dickson Property Management Services Pty Ltd v Centro Property Management (Vic) Pty Ltd* (2001) 180 A.L.R. 485 (injunction refused to enforce cleaning contract for a shopping centre which had over two years to run).

289 [1893] 1 Ch. 116 (where the appointed porter to a block of flats in fact acted as the chef to a local hotel or restaurant and at a "luncheon club"); contrast *Posner v Scott-Lewis* [1987] Ch. 25 at 33–37 (covenant to employ resident porter specifically enforced when capable of definition and not involving superintendence to an unacceptable degree), and see *Rainbow Estates Ltd v Tokenhold Ltd* [1998] Ch. 64 at 70G.

290 *Proctor v Bayley* (1889) 42 Ch. D. 390 at 398.

291 See Ch.1, para.1-003.

292 *Frearson v Loe* (1878) 9 Ch. D. 48 at 65.

293 *Coflexip SA v Stolt Comex Seaway MS Ltd* [1999] 2 All E.R. 593 at [7]–[10] making a general point about injunctions, not affected by [2001] 1 All E.R. 952 disapproving [22] and [23] which concerned the form of injunction in patent proceedings; *Gill v Flightwise Travel Service Ltd* [2003] EWHC 3082 at [32].

294 *Coflexip SA v Stolt Comex Seaway MS Ltd* [1999] 2 All E.R. 593 at [7]–[10] cites case law about insufficient evidence to justify granting an injunction because either there is no evidence of a threat or the threat has long since passed; *Kitzing v Fuller* [2016] EWHC 804 (Ch) at [32].

295 Literally "I fear". *Attorney-General for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] A.C. 999 at 1005; *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ at [40]–[41]; *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2012] F.S.R. 33 at [67] (claimant had not established any arguable case that the defendant had broken or intended to break or that there was a real risk that the defendant would break the contract).

296 *Hooper v Rogers* [1975] Ch. 43 at 50. See the cases cited by I.C.F. Spry, *The Principles of Equitable Remedies* (2001), pp.377–382 and 469. This is discussed in *Vastint Leeds BV v Persons unknown* [2019] 4 W.L.R. 2 at [26]–[39]. *London Borough of Islington v Margaret Elliott, Peter Morris* [2012] EWCA Civ 56 was a case of a potential nuisance involving tree roots in which the defendant local authority was willing to take steps to prevent any damage occurring. In that class of case there was

the likely consequences and the risk of wrongdoing, the more the court will be reluctant to consider the application as "premature".[297] But there must be at least some real risk of an actionable wrong.[298] If the court decides to grant a final injunction the width of that injunction is a matter for the court's discretion and can be tailored according to the circumstances.[299]

2-046 In cases where a neighbour is seeking quia timet relief requiring work to be done when there is no existing nuisance or other infringement of rights but on the ground that a wrong will be committed in the future unless affirmative steps are taken to avert it,[300] the position at the date of the hearing is that the defendant is not a wrongdoer. The jurisdiction is discretionary enabling the court to order steps to be taken for the purpose of avoiding the commission of any wrong and preventing any harm to the applicant. The court proceeds with caution before imposing a mandatory court order requiring expense to be incurred by a neighbour who is not a wrongdoer.

Whether a case is an appropriate one for the grant of quia timet relief has to be considered in the light of all the relevant circumstances known at the time of the hearing of an application for an interim injunction, or at the time of trial.[301] Factors include whether there is a threat of imminent wrongdoing, the seriousness of the damage which might be done imminently, whether the defendant is actively seeking to prevent wrongdoing[302] or is himself threatening to commit a wrong, and whether if damage were done, it would be rectifiable. The test is what is fair, and just in all the circumstances.

A case about controlling the growth of tree roots affecting a neighbour is different from quia timet relief granted in apprehension that a defendant may decide deliberately to do acts which if done would indisputably be a wrongdoing, and where the defendant has a choice whether to do them. An example is where a defendant has threatened to trespass on land. There are some trespasses where the court as a matter of discretion does not intervene by injunction and leaves the claimant to a remedy in damages at common law or under s.50 of the Senior Courts Act 1981. There are others where there is no justification or excuse for the trespass and the court will intervene by injunction to protect the proprietary rights of the claimant.[303] Examples would be demonstrators or paparazzi. Another category is where there is alleged fraud and trust assets belonging to the claimant may be lost unless an injunction is granted to preserve trust property. Although these are quia timet injunctions, the facts and the discretionary considerations which arise, the nature of the relief sought and its consequences, are different.

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a responsible defendant which was monitoring the position, there was no damage and there was no need for the court to intervene at the date of the hearing to prevent future damage.

297 *Hooper v Rogers* [1975] Ch. 43 at 50. The application was considered premature in *Attorney-General v Nottingham Corp* [1904] 1 Ch. 673 because there was insufficient evidence to show that when the smallpox hospital was erected near to homes this would constitute an actionable nuisance.

298 *Fletcher v Bealey* (1885) 28 Ch. D. 688.

299 *Microsoft Corp v Plato Technology Ltd* unreported 15 July 1999 CA (where the final relief in a trade mark and passing off action was limited by the words "which [the defendant] knows or ought upon reasonable enquiry to know are Infringing Products").

300 *Hooper v Rogers* [1975] Ch. 43 at 50.

301 *Proctor v Bayley* (1889) 42 Ch D 390 at 398 (injunction against infringement of a patent refused when the last infringement had been four years previously and there was no intention to infringe in the future).

302 *London Borough of Islington v Margaret Elliott, Peter Morris* [2012] EWCA Civ 56.

303 *Vastint Leeds BV v Persons unknown* [2018] EWHC 2456 (Ch). This case was decided before *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 W.L.R. 1471 and the passages at [21]–[24] and at [32] relate to seeking final relief against a person who cannot be identified and has not been served who is a person who can only be made subject to interim relief: see paras 2-071 to 2-076. below.

Where cases are brought against "Persons unknown" no final relief can be granted except against an identified individual who has been served with proceedings.[304]

2-047 There is also a distinction between an interim injunction which applies until judgment at trial and is not based on determined facts and substantive rights, and a final injunction which governs the future and is based upon facts and substantive rights, which have been judicially determined. Their purposes are different and the exercise of discretion must take this into account. On the application for an interim injunction normally the court applies the principles in *American Cyanamid*.[305]

At trial the facts and substantive rights have been decided. The court is not bound to grant an injunction quia timet to protect proprietary rights, and damages may be an adequate remedy.[306] This is particularly so where the defendant is not and has not been a wrongdoer and has not behaved unreasonably.[307] The court may grant declaratory relief. The court may leave the claimant to its remedy in damages and dismiss the action. The court may adjourn the trial on the question of an injunction, adjourning for a fixed period, or until the occurrence of a particular event or generally, and giving the claimant liberty to apply.

The discretionary factors will be weighed at the time of the hearing of the application for an interim injunction, or at the trial for a final injunction.

On the probability or risk of a wrongful act which must be shown there is not a single fixed test applicable to all cases. This is for good reason, cases are different. A court may restrain demonstrators or paparazzi from trespassing where there is a real risk of this, as opposed to a risk which is purely speculative or fanciful. A court proceeding with caution in a case between neighbours where there is a question of imposing expense may refuse relief unless it is clear that unless something is done a wrong will be committed and that damages will not be an adequate remedy.

2-048 If the defendant is willing to do what he reasonably can to avoid the wrong the court may decide that it would not be appropriate to grant the injunction.[308]

Where there is a real risk of trespassers relocating either on another part of the same site, or some other site of the claimant, an application can be made for a quia timet injunction. But depending on the circumstances an injunction may not be an effective remedy to clear land of a group of trespassers, and to prevent them relocating to the claimant's land. Where only one site is involved the court can simply grant a possession order in respect of part or the entirety of that site.[309] It was once thought to be the case that a possession order could be obtained in respect of other sites of the claimant, besides those where the trespassers were in possession, applying the same test as for a quia timet injunction.[310] However, the Supreme Court has held that a possession order is not available in respect of other sites belonging to the claimant; the court cannot make an order for the recovery of possession of the claimant's land where the claimant is still in possession and the defendant has no possession.[311] The claimant can apply for a quia timet injunction to prevent

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[304] Paragraph 2-074, below.
[305] Paragraph 2-020, above.
[306] See paras 2-026 to 2-028, above.
[307] *Redland Bricks Ltd v Morris* [1970] A.C.652 at 652.
[308] *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch. 436.
[309] *University of Essex v Djemal* [1980] 1 W.L.R. 1301.
[310] *Ministry of Agriculture, Fisheries & Food v Heyman* 59 P. & C.R. 48 at 50, per Saville J, approved in *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ. 200.
[311] *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 W.L.R. 2780.

1. - Nature of Injunctive Relief

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Section 1. - Introduction

1. - Nature of Injunctive Relief

18-001 An injunction is an order of the court directing a party to the proceedings to do or refrain from doing a specified act. It is granted in cases in which monetary compensation affords an inadequate remedy to an injured party. Thus in one old case the claimants had been annoyed by the daily ringing of a nearby church bell at 5am. The parson, churchwardens and others on behalf of the parish agreed to stop the ringing of the five o'clock bell during the lives of the claimants if they provided the church with a new cupola, clock and bell; and when the bell was rung in breach of this agreement, the court restrained it by injunction. [1]

Footnotes

1 *Martin v Nutkin (1724) 2 P. Wms. 266* (probably the last injunction granted by Lord Macclesfield LC before his disgrace).

End of Document

2. - Types of Injunction

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Chapter 18 - Injunction

Section 1. - Introduction

2. - Types of Injunction

(a) Perpetual or interlocutory.

18-002 A perpetual (or final) injunction can only be granted after the court has been able to adjudicate upon the matter. A perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because it will necessarily operate forever. For instance, a perpetual injunction may be granted so as to continue only during the currency of a lease. [2]

By contrast, an interlocutory (or interim) injunction is granted before the trial of an action; its object is to keep matters in status quo until the question at issue between the parties can be determined. Where the claimant seeks a final injunction, that fact may be sufficient to justify the grant of an interlocutory injunction until trial or sooner order. Interlocutory injunctions may also be granted as an aid to the proper determination of the case or as an aid to enforcement: in appropriate cases, such injunctions may be granted for the period between the trial of the action and completion of the enforcement process.

(b) Prohibitory or mandatory.

18-003 A prohibitory (or restrictive) injunction is an order which requires a person not to do some wrongful act. A mandatory injunction is an order which requires a person (i) not to continue some wrongful omission; or (ii) to undo the consequences of a wrongful act. Prohibitory injunctions are far more common than mandatory. Indeed, owing to doubts as to the jurisdiction to grant mandatory injunctions, until late in the nineteenth century all injunctions were collected in prohibitive form. [3] Thus a court which wished to secure the removal of buildings wrongfully erected formerly used to

order the defendant not to allow them to remain on the land, a form of order which seems strange in a jurisdiction which traditionally looks to the substance rather than the form. Now, however, a mandatory injunction is made in a positive form, ordering some act to be done. [4]

(c) Common or special.

18-004 Before 1875, the Court of Chancery might grant an injunction restraining a person from proceeding in the common law courts or from executing a judgment obtained there. [5] Such injunctions were known as common injunctions, and like all injunctions they were directed not to the court but to the parties to the proceedings, [6] in accordance with the principle that equity acts in personam. [7] An injunction granted to give effect to an equitable right, or to provide an additional remedy in aid of rights enforceable at common law, was known as a special injunction. With the fusion of the administration of law and equity, common injunctions were no longer required and were abolished. [8] As all injunctions are now technically "special", the terms have dropped out of use.

Footnotes

2 See *Moore v Ullcoats Mining Co Ltd [1908] 1 Ch. 575* at 585; *Jones v Chappell (1875) L.R. 20 Eq. 539* at 544 (weekly tenant).

3 See the convoluted order made by Lord Eldon LC in *Lane v Newdigate (1804) 10 Ves. 192* (and the astringent comments of Lord Brougham LC about the case in *Blakemore v The Glamorganshire Canal Navigation (1832) 1 Myl. & K. 154* at 183, 186); and see generally *Smith v Smith (1875) L.R. 20 Eq. 500* at 504.

4 *Jackson v Normanby Brick Co [1899] 1 Ch. 438*.

5 See para.1-009, for the struggle between the Chancellor and the common law courts over common injunctions.

6 See *Re Connolly Bros Ltd [1911] 1 Ch. 731*.

7 See para.5-032.

8 Supreme Court of Judicature (Consolidation) Act 1925 s.41, replacing Supreme Court of Judicature Act 1873 s.24(5), was repealed by Senior Courts Act 1981 s.151(4) and Sch.7, but was not re-enacted in that statute.

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3. - Jurisdiction

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Chapter 18 - Injunction

Section 1. - Introduction

3. - Jurisdiction

(a) Courts.

18-005 Despite early attempts,[9] the common law courts failed to add the injunction to their judicial armoury, so that the Chancellor had to come to the aid of those whose wrongs could not be adequately redressed by damages. This often necessitated concurrent proceedings: in the common law courts to establish the right, and in the Court of Chancery to obtain the remedy. The Common Law Procedure Act 1854[10] went some way towards meeting this defect by empowering the common law courts to grant injunctions in certain cases[11]; but in 1875 the situation was radically altered when the courts were amalgamated and the power to grant injunctions was conferred on all Divisions of the High Court.[12] But although it has been expressly enacted that interlocutory injunctions may be granted "in all cases in which it appears to the court to be just or convenient so to do",[13] and this rule extends to perpetual injunctions,[14] the principles on which the court acts have not been altered[15]; the claimant must still establish some legal or equitable right or interest before he can obtain an injunction.[16] However, in some instances, the requirement that a claimant have a legal or equitable interest in the claim has been widely interpreted.[17] Thus injunctions may be granted in aid of other orders of the court, such as for discovery.[18]

Further, a police officer has been granted an injunction to prevent the dissipation of identifiable money alleged to have been procured by fraud.[19] The basis is that the officer has a duty to recover stolen property.[20] Although there is no jurisdiction at common law to grant an injunction to the police freezing an accused person's assets not shown to be the subject of a crime as security for a possible compensation order,[21] the Proceeds of Crime Act 2002 does empower the courts to

grant "restraint orders",[22] in certain circumstances,[23] to prevent a person from dealing with any realisable property held by him.[24]

In actions within its jurisdiction a county court may also grant injunctions.[25] However, county courts may not generally grant freezing orders or search orders,[26] although the High Court may grant such injunctions in support of county court litigation.[27]

(b) Arbitrators.

18-006 The Arbitration Act 1996 gives arbitrators the power to award final injunctions[28] unless the parties agree otherwise.[29] However, the power of arbitration tribunals to award interim injunctions is not yet settled.[30] It has been suggested that the parties can only agree to empower arbitrators to award on a provisional basis any power which it could grant in a final award.[31] This may mean that arbitrators cannot grant freezing orders or search orders; it has been said that these "draconian powers are best left to be applied by the Courts".[32] Yet the better view may be that the parties are free to agree on the powers exercisable by the tribunal,[33] and may therefore consent to the tribunal's granting interim injunctions.[34] In any event, arbitration tribunals are unable to sanction the breach of an order with contempt of court; this remains within the exclusive power of the courts.

(c) Parties.

18-007 Injunctions operate in personam and are generally sought against a party to the proceedings. However, provided the defendant exists, it is not necessary that he be identified: an injunction can be awarded against persons unknown.[35] Similarly, an injunction may be granted against a representative of a group on behalf of all the members of that group.[36] It is also possible for the court to grant an injunction against the whole world.[37]

An injunction should not be ordered against a person incapable of understanding the order, or a minor who is too young for prison and has no money to pay a fine.[38] Nor may an injunction be granted against the Crown,[39] except to enforce directly effective European Community rights,[40] although an injunction may be granted against an officer of the Crown when sued in his personal, as opposed to official, capacity.[41]

Footnotes

9 See Pollock and Maitland's History of English Law, 2nd edn (1898) pp.595, 596. See also *Goodeson v Gallatin (1771) 2 Dick. 455*.

10 Common Law Procedure 1854 ss.79, 82.

11 Such as in order to restrain the publication of a libel, even though the Court of Chancery could not do likewise until the Judicature Act 1873. Since 1875, all divisions of the High Court have had jurisdiction to grant injunctions (even interim injunctions) restraining the publication of a libel: *Quartz Hill Consolidated Gold Mining Co v Beall (1882) 20 Ch. D. 501*.

12 See JA 1925 ss.37, 38, replacing JA 1873 s.24(1),(2). ss.37 and 38 were repealed by SCA 1981 s.151(4) and Sch.7, but were not replaced by that Act.

13 SCA 1981 s.37(1), replacing JA 1925 s.45(1), which itself replaced JA 1873 s.25(8).

14 *North London Railway v Great Northern Railway (1883) 11 Q.B.D. 30* at 32, 33; *Beddow v Beddow (1878) 9 Ch. D. 89* at 93.

15 *Day v Brownrigg (1878) 10 Ch. D. 294* at 307; *Fourie v Le Roux [2007] UKHL 1; [2007] 1 W.L.R. 320* at [36].

16 *Day v Brownrigg (1878) 10 Ch. D. 294*. See paras 18-011 et seq.

17 See recently *Cartier International AG v British Telecommunications Plc [2018] UKSC 28; [2018] 1 W.L.R. 3259*.

18 *Bayer AG v Winter [1986] 1 W.L.R. 497*. See too *Re Oriental Credit Ltd [1988] Ch. 204*; *Lexi Holdings Plc v Luqman [2008] EWHC 2908 (Ch)*.

19 *Chief Constable of Kent v V [1983] Q.B. 34*; and see *West Mercia Constabulary v Wagener [1982] 1 W.L.R. 127*.

20 See *Chief Constable of Hampshire v A Ltd [1985] Q.B. 132* at 136, 137, 139.

21 *Chief Constable of Hampshire v A Ltd [1985] Q.B. 132*; *Chief Constable of Leicestershire v M [1989] 1 W.L.R. 20*.

22 Proceeds of Crime Act 2002 s.41. See generally A. Mitchell, K. Talbot, and S. Taylor, Confiscation and the Proceeds of Crime (London: Sweet & Maxwell) (looseleaf).

23 POCA 2002 s.40. A restraint order may be granted as soon as a criminal investigation has commenced in England and Wales and there is reasonable cause to believe that the defendant has benefited from his criminal conduct: s.40(2).

24 For some guidance regarding the exercise of these powers, see POCA 2002 s.69. However, the 2002 Act does not give the court jurisdiction to make a restraint order in respect of property outside the jurisdiction: *King v Serious Fraud Office [2009] UKHL 17; [2009] 1 W.L.R. 718*.

25 See para.1-038.

26 County Court Remedies Regulations 1991 (SI 1991/1222), as amended by the County Court Remedies (Amendment) Regulations 1995 (SI 1995/206).

27 *Schmidt v Wong [2005] EWCA Civ 1506; [2006] 1 W.L.R. 561*.

28 Arbitration Act 1996 s.48(5)(a).

29 Arbitration Act 1996 s.48(2). Such an agreement would not preclude a party from seeking an injunction from the courts: *Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340; [2006] 2 Lloyd's Rep. 591*.

30 This matter was discussed in *Kastner v Jason [2004] EWCA Civ 1599; [2005] 1 Lloyd's Rep. 397* at [14]–[19].

31 See Arbitration Act 1996 s.39(1); *Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340; [2006] 2 Lloyd's Rep. 591*.

32 Departmental Advisory Committee on Arbitration Law, Report on The Arbitration Bill, February 1996 (chaired by Saville LJ) para. 201. See too M. Mustill and S. Boyd, Commercial Arbitration, Companion to the 2nd edn (London: LexisNexis, 2001) pp.315, 330–331.

33 Arbitration Act 1996 s.38(1).

34 See, e.g. S. Gee, Commercial Injunctions 6th edn (London: Sweet & Maxwell, 20016) paras 6.033–6.053.

35 *Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 W.L.R. 2780*. See also *South Cambridgeshire DC v Persons Unknown [2004] EWCA Civ 1280; [2004] 4 P.L.R. 88*; *Bloomsbury Publishing Plc v Newsgroup Newspapers Ltd [2003] EWHC 1087 (Ch); [2003] 1 W.L.R. 1633*; *Vastint Leeds B.V. v Persons Unknown [2018] EWHC 2456 (Ch)* at [19]–[25] (Marcus Smith J); *Boyd v Ineos Upstream Ltd [2019] EWCA Civ 515*; *J. Seymour, "Injunctions enjoining non-parties: distinction without difference?" (2007) 66 C.L.J. 605*. See too *Olympic Delivery Authority v Persons Unknown [2012] EWHC 1012 (Ch)*.

36 *Taff Vale Railway Co v Amalgamated Society of Railway Engineers [1901] A.C. 426*; *Michaels (Furriers) Ltd v Askew (1983) 127 S.J. 597*. However, such an injunction should not be granted if there is an apparent conflict of interest between members of the group: *UK Nirex Ltd v Barton, The Times, 14 October 1986*.

37 Or "contra mundum". See, e.g. *Venables v News Group Newspapers Ltd [2001] Fam. 430; [2001] 2 W.L.R. 1038*. See too *OPQ v BJM [2011] EWHC 1059 (QB); [2011] E.M.L.R. 23*.

38 *Wookey v Wookey [1991] 3 W.L.R. 135*.

39 Crown Proceedings Act 1947 s.21.

40 *R. v Secretary of State for Transport Ex p. Factortame (No.2) [1991] 1 A.C. 603*.

41 *M v Home Office [1994] 1 A.C. 377*.

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1. - The Circumstances in which Final Injunctions may be Granted

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Mainwork

Part 4 - Equitable Remedies

Chapter 18 - Injunction

Section 2. - Perpetual (or Final) Injunctions

1. - The Circumstances in which Final Injunctions may be Granted

18-008 The jurisdiction to grant an injunction is dependent upon the existence of a right, coupled with circumstances which make it equitable to make the order. These two elements of the action are considered in the following two sections of this chapter. [42]

(a) Locus standi.

18-009 A perpetual injunction is granted only at the instance of a person who has a right (including a statutory right [43]) which is justiciable before the court. [44] For these purposes, there will be a sufficient right (i) if the claimant has a present cause of action against the defendant; or (ii) if the claimant would have such a cause of action, were the defendant to act as he threatens to do; or (iii) if the defendant is behaving (or threatening to behave) in an unconscionable [45] manner. [46] Although it is not necessary for a claimant to wait until his rights have been interfered with before he can seek an injunction, the court should be satisfied that there is a real risk of future interference. It will not normally be equitable to grant relief unless there is such a risk.

A party will not have standing to bring a claim if he does not have "some property, right, or interest, in the subject matter of his complaint". [47] In *Day v Brownrigg* [48] the court refused to grant an injunction to prevent the defendant from calling his house by the same name as the claimant's house, although the parties lived next door to each other and the name had been used by the claimant for 60 years; there is no legal or equitable right to the exclusive use of the name of a private residence:

> "You must have in our law injury as well as damage. If a man erects a wall on his own property and thereby destroys the view from the house of the Plaintiff he may damage him to an enormous extent. He may destroy three-fourths of the value of the house, but still, if he has the right to erect the wall, the mere fact of thereby causing damage to the Plaintiff does not give the Plaintiff a right of action."[49]

So also, a reversioner can sue only if he can show that the trespass causes damage to his reversionary interest[50]; a public authority will not be restrained at the suit of a foreign supplier from pursuing a "Buy British" policy[51]; and a woman will not be restrained from undergoing a lawful abortion at the suit of her husband[52] or the putative father of the child she is carrying.[53]

Where special damage is an essential ingredient of the cause of action, as in the tort of slander of title, no injunction will be granted in the absence of proof that special damage has been suffered, or would be suffered unless an injunction be granted. Thus in *White v Mellin*,[54] the claimant was refused an injunction to restrain the defendant from affixing a label vaunting the superiority of his own goods when he retailed the claimant's goods. But in cases where the cause of action is perfect without proof of special damage it is sufficient for the claimant to establish his right and its infringement: he may obtain an injunction even though he has suffered no damage.[55] However, where the right is one cognisable only by ecclesiastical law, the court cannot grant an injunction to restrain a breach of it.[56]

(b) Prohibitory or mandatory injunctions.

18-010 In principle, the same general considerations apply whether the claimant seeks a prohibitory or mandatory injunction[57]; otherwise, a defendant who had committed a breach of his obligations would be better off than one who merely threatened to commit a breach. The mere fact that the injury has been completed before the action is commenced is no bar to the grant of a mandatory injunction.[58] It has been said that:

> "the grant of a mandatory injunction, is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course',"[59]

but this may be misleading: prohibitory injunctions are also discretionary, even if in some situations they are regularly granted.[60] The same discretionary factors apply for both prohibitory and mandatory injunctions, although those factors may carry different weight according to the type of injunction sought.[61] For example, a mandatory injunction may tend to cause greater hardship to the defendant than a prohibitory injunction,[62] and the court will be astute to defendants who

act unreasonably, and work deliberately quickly, in an attempt to present the claimant with a fait accompli prior to determination of the issue by the court: in such circumstances a mandatory injunction to restore the prior position will often be granted. [63]

Footnotes

42 See paras 18-011 to 18-026 (existence of a right), and 18-026 to 18-042 (equity to grant relief).

43 *Securities and Investment Board v Pantell SA [1989] 3 W.L.R. 698.*

44 *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA [1979] A.C. 210*; *Fourie v Le Roux [2007] UKHL 1; [2007] 1 W.L.R. 320.*

45 See *British Airways Board v Laker Airways Ltd [1985] A.C. 58* at 81.

46 *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] A.C. 24* at 40. The jurisdiction to restrain foreign proceedings (which is wider) is considered at para.18-092.

47 *Maxwell v Hogg (1867) 2 Ch. App. 307* at 311, per Turner LJ; and see *Emperor of Austria v Day (1861) 3 De G.F. & J. 217*. For recent discussion see *Matalia v Warwickshire CC [2017] EWCA Civ 991; [2017] E.C.C. 25.*

48 *Day v Brownrigg (1878) 10 Ch. D. 294*. And see *Street v Union Bank of Spain and England (1885) 30 Ch. D. 156* (identical telegraphic addresses).

49 *Day v Brownrigg (1878) 10 Ch. D. 294* at 304, per Jessel MR. cf. *Ingram v Morecraft (1863) 33 Beav. 49*. The proprietors of the Albert Hall failed to enjoin Mr Albert Edward Hall from using for his small orchestra in London the name "The Albert Hall Orchestra": *Corp of the Hall of Arts and Sciences v Hall (1934) 50 T.L.R. 518.*

50 *Mayfair Property Co v Johnston [1894] 1 Ch. 508*; *Jones v Llanrwst UDC [1911] 1 Ch. 393.*

51 *Honeywell Information Systems Ltd v Anglian Water Authority, The Times, 30 June 1976* (computer equipment).

52 *Paton v British Pregnancy Advisory Service Trustees [1979] Q.B. 276.*

53 *C v S [1988] Q.B. 135.*

54 *White v Mellin [1895] A.C. 154.*

55 *Jones v Llanrwst UDC [1911] 1 Ch. 393* at 402 (pollution of river); *Kemp v Sober (1851) Sim.(N.S.) 517* at 520.

56 *Attorney General v Dean and Chapter of Ripon Cathedral [1945] Ch. 239* (failure to hold "full choral services" in the cathedral). For recent consideration of the consistory court's jurisdiction to grant injunctions, see *Cooper v Dean and Chapter of York Minster [2016] E.C.C. Yor. 3; [2017] P.T.S.R. 225.*

57 *Davies v Gas Light and Coke Co [1909] 1 Ch. 248* at 259.

58 *Durell v Pritchard (1865) 1 Ch. App. 244.*

59 *Redland Bricks Ltd v Morris [1970] A.C. 652* at 665, per Lord Upjohn.

60 See paras 18-049 et seq.

61 Lord Hoffmann has said that "arguments over whether the injunction should be classified as prohibitive or mandatory are barren": *National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] UKPC 16; [2009] 1 W.L.R. 1405* at [20] (in the context of interlocutory injunctions; see too *Films Rover International v Cannon Film Sales Ltd [1987] 1 W.L.R. 670*).

62 For example, *Redland Bricks Ltd v Morris [1970] A.C. 652; [1969] 2 W.L.R. 1437*.

63 *Daniel v Ferguson [1891] 2 Ch. 27*; *Pugh v Howells (1948) 48 P.&C.R. 298*.

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2. - Rights which, if Infringed, may Justify the Grant of a Final Injunction

Snell's Equity 34th Ed.

Mainwork

Part 4 - Equitable Remedies

Chapter 18 - Injunction

Section 2. - Perpetual (or Final) Injunctions

2. - Rights which, if Infringed, may Justify the Grant of a Final Injunction

18-011 It is impossible to enumerate all the cases in which the remedy by way of injunction is available. It may be used to give effect to a right recognisable only in equity, such as to restrain breaches of trust. [64] More commonly it is used to aid a legal right, such as by restraining a tort or breach of contract. Sometimes it is used to restrain breaches of the criminal law. [65] Moreover, despite the abolition of the common injunction, it may still be used to restrain certain judicial proceedings. The following are some examples of the classes of case in which injunctions are granted.

(a) Real property rights.

(1) Trespass.

18-012 A landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended [66] trespass on his land even if the trespass will not harm him. [67] An injunction may also be granted against a defendant who disputes the claimant's title, e.g. where he entered and felled a tree and threatened to cut more. [68] But the court refused to enjoin some lepidopterists who committed a mere technical trespass without intending to infringe any rights of property and who desisted on request. [69] Moreover, the court is especially slow to grant an injunction which will exclude even an adult child from his parent's home, [70] but will do so in grave circumstances, such as where the child has assaulted the parent. [71]

(2) Nuisance.

18-013 Injunctions are often used in cases of private nuisance, thus obviating a multiplicity of suits for damages [72]:

> "Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance." [73]

An action to restrain a nuisance is usually brought by the person in occupation of the property affected; a person who has no right in the affected land may not sue in nuisance. [74] A reversioner can bring an action for damages or an injunction only if the nuisance causes a permanent injury to his reversion, [75] e.g. if it consists of a building obstructing an ancient light. [76]

It is also possible to obtain an injunction if there is a public nuisance, such as the obstruction or excessive user of a highway. [77] Although the usual remedy is by criminal proceedings by way of indictment to punish the offender, [78] a private individual who suffers particular damage from the nuisance may maintain an action in his own name for an injunction, [79] or an action may be brought by the Attorney General to redress the grievance by way of injunction. [80]

(3) Waste.

18-014 Waste consists of any act by a tenant for years or for life or pur autre vie which alters the nature of the land, whether for the better or the worse. An injunction will not be granted to restrain an alteration for the better, or ameliorative waste, such as the conversion of dilapidated barracks into dwelling-houses. [81] Nor will an injunction be granted to restrain merely permissive waste, that is, failure to do that which ought to be done, such as allowing buildings to fall into disrepair. [82]

The commission of voluntary waste, that is, acts of destruction in lands or buildings, such as the opening of mines or the cutting of timber, will be restrained [83] unless the instrument granting the tenant his interest exempts him from liability for waste. [84] The injunction may be obtained not only by the owner of the inheritance, but also by a remainderman with only a limited interest. [85]

Even where the tenant is made unimpeachable for waste at law, [86] equity will by injunction restrain acts of malicious or wanton destruction, known as equitable waste, such as dismantling the mansion house [87] or felling ornamental timber. [88] Further, although a tenant in tail after

possibility of issue extinct is not liable for waste at law, he will be restrained from committing equitable waste, [89] and so will a tenant in fee simple defeasible. [90] But a tenant in tail absolute will not, even if he is restrained by statute from barring the entail. [91]

(4) Covenants concerning land.

18-015 Normally no one except a party to a contract can sue or be sued on it. [92] But the burden or benefit of a covenant entered into between landlord and tenant may run with the land and with the reversion so that an assignee of the lease or of the reversion may sue or be sued on the covenant. [93] Moreover, negative (or "restrictive") covenants concerning land may, in some circumstances, be enforced by and against persons who are neither the original contracting parties nor connected by the relationship of landlord and tenant. [94] Prohibitory injunctions are frequently obtained for the purpose of enforcing restrictive covenants, the details of which lie outside the scope of this work. [95]

(b) Intellectual property rights.

18-016 Where a claimant proves that in the mind of the public some title or mode of presentation has become attached to his product, [96] and that the defendant is passing off his product in a form which deceives the public into thinking it is the claimant's product, [97] the claimant may obtain an injunction to restrain the passing off. [98] A particular instance of this class of action is where a manufacturer identifies his goods with a distinctive mark which acquires a public reputation. Here the Court of Chancery granted injunctions restraining an infringement on the ground that the manufacturer had acquired a right of property in the mark, recognisable in equity. [99] This remedy proved inadequate because of the difficulty in proving reputation, and accordingly in 1875 a register of trademarks was established. [100] Injunctions may be awarded to protect registered trade marks. [101] However, the old action for "passing-off" is still possible, [102] and retains considerable importance in cases where the mode of presentation is not registrable as a trade mark, or has not been registered. [103]

Injunctions are also commonly granted against infringers of patents, registered designs and copyrights. These branches of the law are now statutory. [104] Moreover, EU law requires that EU law injunctions are available against intermediaries whose services are used by a third party to infringe an intellectual property right. [105]

(c) Contractual rights.

(1) Relationship with specific performance.

18-017 The equitable jurisdiction to grant an injunction to restrain a breach of contract is closely allied to its jurisdiction to order specific performance of a contract; what is a defence to one type of remedy will often also be a defence to the other. [106] The natural method of enforcing a contract in equity is by specific performance if the contract is positive [107] and by injunction if it is negative. [108] Thus an injunction is the remedy for a breach of a valid covenant not to carry on a certain trade, [109] unless the conduct of the covenantee has disentitled him to that relief. [110] For further discussion of this distinction, see Ch.17.

(2) Nature of obligation.

18-018 A covenant may be negative in substance, though not in form. Thus if A agrees to take from B the whole of the electric energy required for his premises, B may obtain an injunction to prevent A from taking any electric energy from C; for in substance the agreement does not oblige A to take any electricity but merely not to take it from anyone but B. [111] Similarly, an injunction may be granted to enforce a "tied-house" covenant, whereby a publican agrees that a certain brewer shall have the exclusive right of supplying beer to the public house. [112]

An agreement may be in part negative and in part positive. Here the court may grant an injunction restraining a breach of the negative part [113] even if it would not decree specific performance of the positive part (e.g. as being an agreement for personal services [114]), and even if the claimant does not show that the breach will cause him damage. [115] Mere inconsistency with positive obligations is not enough; there must be some express or implied prohibition against doing the particular acts in question. [116] Even if there is an express negative term, no injunction will be granted if that term merely repeats in a negative form the whole of the positive obligation, instead of prohibiting particular acts. [117]

(3) Personal services.

18-019

Not every obligation in a contract for personal services (whether between employer and employee, manager and artiste, or otherwise) will be enforced by means of an injunction. Three kinds of case have to be considered:

First, no injunction will be granted if the contract is purely affirmative, as where a company's manager agrees to give the whole of his time to the company's business during a specified period. [118]

Secondly, no injunction will be granted to enforce a negative stipulation preventing the defendant from entering into any other employment during a specified period, for the effect would be to compel him either to carry out the contract or to remain idle. [119]

Thirdly, where the services involve some special skill or talent, the court will not enforce negative obligations (typically, not during a specified period to work in a defined activity otherwise than in association with the other party) if to do so would effectively compel the defendant to perform his positive obligations under the contract. Compulsion is a question to be decided on the facts of each case, with a realistic regard for the probable impact of an injunction on the need of the defendant to maintain the skill or talent. [120] The duration of the contract is a highly material consideration, for the longer the term for which the injunction is sought, the more readily will compulsion be inferred. For this purpose, the courts appear to draw the line between long-and short-term engagements at two years or thereabouts. [121] Other factors which may weigh against the grant of an injunction are: that the claimant's own obligations could not be enforced against him [122] (although want of mutuality by itself is unlikely to be decisive [123]); or that the claimant will give no assurance of his intention to perform his own obligations [124]; or that the contract involves obligations of mutual trust and confidence, especially where the defendant's trust in the claimant may have been betrayed or his confidence in him has genuinely gone. [125]

Legislation provides that a court will not grant an injunction restraining a breach, or threatened breach, of contract if that would compel an employee to do work for his employer. [126] This would unduly interfere with a person's liberty. In general, the converse is also true: an employer cannot, ultimately, be forced to employ someone. [127] However, where the relationship of mutual trust and confidence between the parties has survived, an injunction may be granted to maintain the employment relationship. [128]

(4) Partnership agreements.

18-020 In many cases the court will enforce by injunction the due observance of the terms of a partnership and of the duties which under the general law the partners owe to each other. For instance, an injunction may be granted to prevent one partner from excluding another from

taking part in the management of the partnership business, [129] a right to which he is entitled in the absence of any contrary agreement. [130] Such an injunction would, however, be refused to a partner who has been convicted of dishonesty. [131] A partner who becomes insane, [132] or commits a breach of the terms of partnership, [133] may be restrained from interfering in the business pending an action for dissolution.

An injunction may be granted to enforce a partner's right to inspect the partnership books, either personally or by a proper agent, [134] or to restrain the improper exercise of a power of expulsion. [135] And an injunction may be granted to prevent a partner from engaging in another business contrary to a clause in the partnership articles, or, if the business is a rival business, even though there be no such clause. [136]

(d) Confidence.

18-021 Breach of confidence is considered generally in Ch.9. It is clear that equity has an original and independent jurisdiction to grant an injunction to restrain a breach of confidence. An injunction may be granted even against a stranger who is "quite innocently and properly" in possession of information to which he is not entitled. [137] However, only the person to whom a duty of confidence is owed can restrain a breach of it, so that a person who contracts to prepare a confidential report for another cannot restrain its unauthorised publication. [138]

The doctrine operates independently of any contract, but doubtless it influences the obligations that will be implied in a contract. Thus one partner owes another a high duty of honesty and good faith, and so cannot use partnership papers and information for his own purposes without his partner's consent. [139] An ex-servant, too, may be required to deliver up lists of customers of his former master, [140] though he cannot be restrained from using memorised lists of customers or agents. [141] Yet he may be restrained from improperly using knowledge (even if merely memorised [142]) of any secret process acquired by him during the employment, [143] though this liability ends if the secret process is published, whether by the master, e.g. in a patent specification, [144] or by a third party. [145] Further, an ex-servant may be ordered to transfer to his master the benefit of his inventions if his master is contractually entitled to them. [146] A skilled worker may also be under an implied obligation not to work for a trade rival, so that even if there is no disclosure of confidential information, the rival may be restrained from procuring a breach of that obligation by offering him spare-time employment. [147]

Breach of confidence is increasingly used to protect expectations of privacy, [148] as guaranteed by the European Convention on Human Rights. [149] This right often competes with the right to freedom of expression [150]; the importance of allowing publication of material, even if it would breach

obligations of confidence, means that the court inevitably engages in a balancing exercise between these competing considerations. [151] Previously, where the publication of confidential material was in issue, the public interest overrode the duty of confidence only in exceptional circumstances, such as where a doctor engaged on behalf of a mental patient who had committed several offences of manslaughter made a report which was disclosed to the hospital where the patient was detained and to the Home Office. [152] Now the test employed by the courts is that of proportionality; in deciding whether restricting the right of freedom of expression satisfies the requirement of proportionality, a significant factor is the importance of upholding duties of confidence. [153]

This is considered in greater detail in the context of interim injunctions, below. [154]

(e) Membership of clubs and societies.

(1) Clubs.

18-022 An injunction may be granted to restrain the wrongful expulsion or exclusion of a member from a members' club; the court interferes to protect the member's proprietary interest in the assets of the club. [155] But an injunction will not be granted to restrain an expulsion where the member has no right of property [156]: the member's contractual right to enter the club is too personal to be specifically enforced, [157] and the effect of the expulsion on his character and position in society, [158] or on his right to play some game, [159] is not a sufficient foundation for an injunction.

(2) Trade or professional bodies.

18-023 Wrongful expulsion from societies which regulate the members of a trade or profession will be restrained by injunction, despite the absence of a proprietary interest in the member; the court here will specifically enforce the member's contract with his society. [160] Thus the courts may prevent expulsion from a friendly society, [161] a trade union, [162] or a professional institute. [163] The jurisdiction of the court over societies and unions cannot be ousted by their rules. [164]

(f) Proceedings in Parliament.

18-024 The courts may have jurisdiction to restrain a person from seeking a private Act of Parliament, or opposing the passage of such an Act, e.g. if he is bound by a contractual obligation not to

do so. However, public policy appears to require that the courts should not prevent Parliament from determining the question for itself, so that even if the jurisdiction exists, it is unlikely to be exercised. [165] Further, a Minister of the Crown, acting as such, cannot be ordered to withdraw draft subordinate legislation which has been presented to each House of Parliament for approval, [166] nor, after such approval, will he be restrained from presenting such legislation to the Privy Council for enactment. [167] But in the absence of any such considerations, there seems to be nothing to prevent the courts from restraining an authority, however distinguished, from improperly exercising a power to make delegated legislation. [168]

(g) Statutory Duties.

18-025 An injunction will not be granted merely [169] to compel the performance of positive statutory duties. [170] Further, where a statute imposes a new and particular negative duty and provides a remedy for its infringement, such as a fine, a person aggrieved by its breach is not entitled to enjoin the wrongdoer [171] unless property rights of his have been invaded. [172] There are, however, two ways in which breaches of statutory duty may be restrained by injunction, one developed judicially and the other of statutory origin. These will now be considered.

The Attorney General, [173] as the upholder of public rights, [174] may sue for an injunction if the statutory penalty is shown to be inadequate, [175] if irremediable damage is threatened, [176] or if the enforcement of the penalty would otherwise be too dilatory for the gravity of the case. [177] Such actions are often brought as "relator" actions, whereby the Attorney General sues "on the relation" (i.e. at the suggestion) of some person, who need not have any interest in the subject-matter of the action. [178] Thus an injunction was granted against an omnibus proprietor who had been refused a licence but nevertheless found it profitable to run his omnibuses and pay the prescribed fines almost daily [179]; and the same principle was applied where the somewhat cumbersome statutory machinery for enforcing town and country planning control proved ineffective. [180] Where, moreover, the statute merely re-enacts a liability existing at common law but provides a special form of remedy, the court may still restrain a breach by injunction unless the language of the statute necessarily excludes former remedies. [181] If the Attorney General refuses or delays lending his name to the proceedings, the complainant has no residual right to bring the action himself. [182]

Local authorities have by statute power to institute civil proceedings in their own name (i.e. without the intervention of the Attorney General) where they consider it expedient for the promotion or protection of the interests of the inhabitants of their area. [183] Thus injunctions have been granted at the instance of local authorities to restrain breaches of the laws relating to Sunday trading, [184] nuisances by noise, [185] town and country planning [186] and preservation of trees, [187] and they will

not be refused on the ground that proceedings in relation to the same matter are pending in other courts. [188] But, to obtain an injunction, the authority must show that the defendant is not merely breaking the law, but deliberately and flagrantly flouting it. [189]

Footnotes

64 See Ch.30.
65 See para.18-012.
66 On quia timet injunctions generally see para.18-029.
67 *Patel v WH Smith (Eziot) Ltd [1987] 1 W.L.R. 853.*
68 *Stanford v Hurlstone (1873) 9 Ch. App. 116.*
69 *Fielden v Cox (1906) 22 T.L.R. 411* (Rupert Brooke, who with three other defendants "went to catch a butterfly and caught a writ"; claimant awarded the 1s. damages paid into court and made to pay defendants' costs).
70 *Waterhouse v Waterhouse (1905) 94 L.T. 133.*
71 *Stevens v Stevens (1907) 24 T.L.R. 20*; *Egan v Egan [1975] Ch. 218.*
72 However, in *Coventry v Lawrence [2014] UKSC 13; [2014] A.C. 822* at [161] Lord Sumption thought that "[t]here is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests". The other members of the Supreme Court adopted a more conventional approach. See generally P. Davies "Injunction" in G. Virgo and S. Worthington (eds), Commercial Remedies: Resolving Controversies (CUP, 2017).
73 *Soltau v De Held (1851) 2 Sim. (N.S.) 133* at 151, per Kindersley VC.
74 *Malone v Laskey [1907] 2 K.B. 141*; *Hunter v Canary Wharf [1997] A.C. 655.*
75 *White v London General Omnibus Co [1914] W.N. 78.*
76 *Jones v Llanrwst UDC [1911] 1 Ch. 393* at 404. See too *Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch)*, although in that instance no injunction was granted: see paras 18-043 to 18-044.
77 *Attorney General v Brighton & Hove Co-operative Supply Assoc [1900] 1 Ch. 276*; *Attorney General v Scott [1905] 2 K.B. 160.* See too *City of London Corp v Samede [2012] EWHC 34 (QB)* (removal of "Occupy London" tents outside St Paul's Cathedral).
78 Normally under a statutory provision, but the common law offence of public nuisance continues to exist: *R. v Rimmington [2005] UKHL 63; [2006] 1 A.C. 459.*
79 *Lyon v Fishmongers' Co (1876) 1 App. Cas. 662*; *Vanderpant v Mayfair Hotel Co Ltd [1930] 1 Ch. 138*; *Boyce v Paddington BC [1903] 1 Ch. 109* at 114 (reversed: *[1903] 2 Ch. 556; restored: [1906] A.C. 1*).
80 See *Attorney General v Logan [1891] 2 Q.B. 100*; *Attorney General v Cockermouth Local Board (1874) L.R. 18 Eq. 172* at 176; *Attorney General v PYA Quarries Ltd [1957] 2 Q.B. 169.*

81 *Doherty v Allman (1878) 3 App. Cas. 709*. See also *Meux v Cobley [1892] 2 Ch. 253*.

82 *Powys v Blagrave (1854) 4 De G.M. & G. 448*.

83 See *Garth v Cotton (1753) 1 Dick. 183*.

84 See *Smythe v Smythe (1818) 2 Swans. 251*.

85 See *Garth v Cotton (1753) 1 Dick. 183* at 197.

86 See LPA 1925 s.135, re-enacting JA 1873 s.25(3).

87 *Vane v Lord Barnard (1716) 2 Vern. 738*.

88 *Micklethwait v Micklethwait (1857) 1 De G. & J. 504*; *Baker v Sebright (1879) 13 Ch. D. 179*; *Weld-Blundell v Wolseley [1903] 2 Ch. 664*.

89 *Abrahall v Bubb (1679) 2 Swans. 172*.

90 *Turner v Wright (1860) 2 De G.F. & J. 234*; *Re Hanbury [1913] 2 Ch. 357*.

91 *Attorney General v Duke of Marlborough (1818) 3 Madd. 498*.

92 See para.21-039.

93 In respect of leases which are "new tenancies" within the meaning of the Landlord and Tenant (Covenants) Act 1995, see ss.3 and 15 of that Act. Otherwise, see *Spencer's Case (1583) 5 Co. Rep. 16a* (assignment of term) and LPA 1925 ss.140, 142 (assignment of reversion).

94 *Tulk v Moxhay (1848) 2 Ph. 744*.

95 See S. Bridge, E. Cooke, and M. Dixon (eds) Megarry & Wade: The Law of Real Property 9th edn (London: Sweet & Maxwell, 2019) Ch.32.

96 See *Licensed Victuallers' Newspaper Co v Bingham (1888) 38 Ch. D. 139*.

97 See *Borthwick v The Evening Below (1888) 37 Ch. D. 449*.

98 The classic statement of principle is in the speech of Lord Parker of Waddington in *AG Spalding & Bros v AW Gamage Ltd (1915) 32 R.P.C. 273* at 283. See too the speeches of Lord Diplock and Lord Fraser of Tullybelton in *Warnink (Erven) BV v J Townend & Sons Mull Ltd [1979] A.C. 731* at 742 and 755, 756 respectively.

99 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd (1863) 4 De G.J. & S. 137 (affirmed 11 H.L.C. 523)*, where on the facts an injunction was refused.

100 Trade Marks Registration Act 1875; see now Trade Marks Act 1994.

101 Trade Marks Act 1994 s.14.

102 Trade Marks Act 1994 s.2.

103 The standard work on trade marks and passing off is Kerly's Law of Trade Marks, 16th edn (London: Sweet & Maxwell, 2017).

104 Patents Act 1949; Patents Act 1977; Registered Designs Act 1949; Copyright, Designs and Patents Act 1988; Patents Act 2004. The standard works are Terrell's Law of Patents, 18th edn (London: Sweet & Maxwell, 2016) and Copinger and Skone James' Copyright, 17th edn (London: Sweet & Maxwell, 2016).

105 *L'Oréal SA v eBay International AG Case C-324/09 [2012] All E.R. (EC) 501*; *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH Case C-314/12 [2014] E.C.D.R. 12*. See too, e.g. *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd [2012] EWHC 268 (Ch); [2012] 3 C.M.L.R. 14*; *Twentieth Century Fox Film Corp v Newzbin Ltd [2010] EWHC 608 (Ch); [2010] E.C.C. 13*. For further discussion in the context of "blocking injunctions"

see *Cartier International AG v British Telecommunications Plc [2018] UKSC 28; [2018] 1 W.L.R. 3259*.

106 See *Lumley v Ravenscroft [1895] 1 Q.B. 683* at 685.

107 But see paras 18-035 et seq. for mandatory injunctions to enforce contractual obligations.

108 See *Doherty v Allman (1878) 3 App. Cas 709* at 720; para.18-035.

109 See *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] A.C. 535*.

110 *General Billposting Co Ltd v Atkinson [1909] A.C. 118*; *Measures Bros Ltd v Measures [1910] 2 Ch. 248*.

111 *Metropolitan Electric Supply Co Ltd v Ginder [1901] 2 Ch. 799*.

112 *Can v Tourle (1869) L.R. 4 Ch. App. 654*.

113 *Lumley v Wagner (1852) 1 De G.M. & G. 604*; *Warner Brothers Pictures Inc v Nelson [1937] 1 K.B. 209*. It is for this reason that the court may restrain the owner of a ship from acting inconsistently with its commitments under a time charter, even though the charter would not be specifically performed: see *Lady Navigation Inc v Lauritzencool AB [2005] EWCA Civ 579; [2005] 1 W.L.R. 3686* at [8]–[20]; explaining *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] 2 A.C. 694; [1983] 3 W.L.R. 203*.

114 See para.17-012.

115 *Marco Productions Ltd v Pagola [1945] K.B. 111*.

116 *Bower v Bantam Investments Ltd [1972] 1 W.L.R. 1120*. But see *Sky Petroleum Ltd v VIP Ltd [1974] 1 W.L.R. 576* (injunction restraining seller from withholding supplies).

117 *Chapman v Westerby [1913] W.N. 277*.

118 *Whitwood Chemical Co v Hardman [1891] 2 Ch. 416*; *Mortimer v Beckett [1920] 1 Ch. 571*.

119 *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler [1926] Ch. 609*; *Provident Financial Group and Whitegates Estate Agency v Hayward [1989] 3 All E.R. 298; [1989] I.C.R. 160*.

120 *Warren v Mendy [1989] 1 W.L.R. 853* at 867 cf. *Araci v Fallon [2011] EWCA Civ 668*. See too *Sunrise Brokers LLP v Rodgers [2014] EWCA Civ 1373; [2015] I.C.R. 272*.

121 *Warren v Mendy [1989] 1 W.L.R. 853* at 865, 866. See *Lumley v Wagner (1852) 1 De G.M. & G. 604* (three months: injunction granted); *Page One Records Ltd v Britton [1968] 1 W.L.R. 157* ("The Troggs" pop group; five years: injunction refused); *Warren v Mendy* above (two years: injunction refused); *Araci v Fallon [2011] EWCA Civ 668* (one year: injunction granted). *Warner Brothers Pictures Inc v Nelson [1937] 1 K.B. 309* (Bette Davis) awarded an injunction for up to three years, although this was doubted in *Warren v Mendy* at 865. The position is otherwise where the contract is not for personal services but is, rather, a commercial arrangement which involves the employment of unnamed individuals: *Lady Navigation Inc v Lauritzencool AB [2005] EWCA Civ 579; [2005] 1 W.L.R. 3686*.

122 *Page One Records Ltd v Britton [1965] 1 W.L.R. 157*, see para.17-024, for mutuality in specific performance.

123 *Warren v Mendy [1989] 1 W.L.R. 853* at 866.

124 *Chappell v Times Newspapers Ltd [1975] 1 W.L.R. 482*.

125 *Warren v Mendy [1989] 1 W.L.R. 853* at 866, 867. Similarly, a court is unlikely to grant a mandatory injunction to force a company to hire another person: *Woods Building Services v Milton Keynes Council [2015] EWHC 2172 (TCC)*.

126 Trade Union and Labour Relations (Consolidation) Act 1992 s.236.
127 Employment Rights Act 1996 s.117.
128 *Hill v CA Parsons Ltd [1972] 1 Ch. 305*; *Irani v Southampton and South West Hampshire HA [1985] I.C.R. 590*. See also para.17-013.
129 *Hall v Hall (1850) 12 Beav. 414*.
130 Partnership Act 1890 s.24(5).
131 *Carmichael v Evans [1904] 1 Ch. 486* (interlocutory injunction). An appeal was compromised, the expelled partner acquiring the business: *[1904] W.N. 47*.
132 *J v S [1894] 3 Ch. 72*.
133 See *Green v Howell [1910] 1 Ch. 495*.
134 *Bevan v Webb [1901] 2 Ch. 59*; Partnership Act 1890 s.24(9).
135 *Hall v Hall (1850) 12 Beav. 414* (injunction granted: further proceedings: *(1850) 3 Mac. & G. 79* (see at 84); *(1855) 20 Beav. 139*); *Carmichael v Evans [1904] 1 Ch. 486* (injunction refused); and see *Blisset v Daniel (1853) 10 Hare 493*.
136 *England v Curling (1844) 8 Beav. 129*.
137 *Rex Co v Muirhead (1926) 136 L.T. 568* at 573, per Clauson J; *Printers & Finishers Ltd v Holloway [1965] 1 W.L.R. 1* at 7; and see *Mayall v Higby (1862) 10 W.R. 631*.
138 *Fraser v Evans [1969] 1 Q.B. 349*.
139 *Floydd v Cheney [1970] Ch. 602*.
140 *Robb v Green [1895] 2 Q.B. 315*; *Measures Bros v Measures [1910] 1 Ch. 336* (affirmed on another point *[1910] 2 Ch. 248*).
141 *Baker v Gibbons [1972] 1 W.L.R. 693*.
142 See *Printers & Finishers Ltd v Holloway [1965] 1 W.L.R. 1*.
143 *Amber Size & Chemical Co Ltd v Menzel [1913] 2 Ch. 239*.
144 *O Mustad & Son v S Allcock & Co Ltd (1928) [1963] 3 All E.R. 416*.
145 See *Att Gen v Guardian Newspapers Ltd (No.2) [1990] A.C. 109* at 285; disapproving *Cranleigh Precision Engineering Ltd v Bryant [1965] 1 W.L.R. 1293*; and *Speed Seal Products Ltd v Paddington [1985] 1 W.L.R. 1327*.
146 *Triplex Safety Glass Co v Scorah [1938] Ch. 211*; *British Celanese Ltd v Moncrieff [1948] Ch. 564*; and see *Sterling Engineering Co Ltd v Patchett [1955] A.C. 534*.
147 *Hivac Ltd v Park Royal Scientific Instruments Ltd [1946] Ch. 169*; see *O. Kahn-Freund (1946) 9 M.L.R. 145*.
148 e.g. *Campbell v MGN [2004] UKHL 22; [2004] 2 A.C. 457*; *McKennitt v Ash [2006] EWCA Civ 1714; [2008] Q.B. 73*.
149 ECHR art.8.
150 ECHR art.10. The importance of freedom of expression in the context of interim injunctions is considered in para.18-062.
151 *London Regional Transport v Mayor of London [2001] EWCA Civ 1491; [2003] E.M.L.R. 4*; *Campbell v MGN [2004] UKHL 22; [2004] 2 A.C. 457*; *HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776; [2007] 2 All E.R. 139*; *McKennitt v Ash [2006] EWCA Civ 1714; [2008] Q.B. 73*. See too *PJS V News Group Newspapers Ltd [2016] UKSC 26; [2016] 2 W.L.R. 1253*, in which the Supreme Court held that an injunction might be

granted to restrain an intrusive domestic media storm, even though the relevant information might be found on the internet by those who look for it. See too Ch.9. For recent discussion see, e.g. *ERY v Associated Newspapers Ltd [2016] EWHC 2760 (QB); [2017] E.M.L.R. 9*; *ZXC v Bloomberg LP [2017] EWHC 328 (QB); [2017] E.M.L.R. 21*.

152 *W v Egdell [1990] 2 W.L.R. 471*. See too *Fraser v Evans [1969] 1 Q.B. 349* at 362; *Hubbard v Vosper [1972] 2 Q.B. 84*; *Lion Laboratories Ltd v Evans [1985] Q.B. 526*. Compare e.g. *X v Y [1988] 2 All E.R. 648* (publication of the names of doctors suffering from AIDS restrained).

153 *McKennitt v Ash [2006] EWCA Civ 1714; [2008] Q.B. 73*.

154 See para.18-062. See too I. Goldrein, Privacy Injunctions and the Media (Oxford: Hart, 2012).

155 *Baird v Wells (1890) 44 Ch. D. 661* at 675; *D'Arcy v Adamson (1913) 29 T.L.R. 367*; but see *Woodford v Smith [1970] 1 W.L.R. 806* (ratepayers' association with small assets).

156 *Baird v Wells (1890) 44 Ch. D. 661*.

157 *Lee v The Showmen's Guild of Great Britain [1952] 2 Q.B. 329* at 342.

158 *Baird v Wells (1890) 44 Ch. D. 661* at 677.

159 *Rowe v Hewin (1906) 12 O.L.R. 13*.

160 See *Lee v The Showmen's Guild of Great Britain [1952] 2 Q.B. 329* at 341, 343.

161 *Andrews v Mitchell [1905] A.C. 78*.

162 *Osborne v Amalgamated Society of Railway Servants [1911] 1 Ch. 540*; *Amalgamated Society of Carpenters v Braithwaite [1922] 2 A.C. 440*; *Lee v The Showmen's Guild of Great Britain [1952] 2 Q.B. 329*.

163 *Law v Chartered Institute of Patent Agents [1919] 2 Ch. 276*; *Thompson v New South Wales Branch of the British Medical Association [1924] A.C. 764* at 778.

164 *Leigh v National Union of Railwaymen [1970] Ch. 326*.

165 See *Bilston Corp v Wolverhampton Corp [1942] Ch. 391*; *Ware v Grand Junction Water Works Co (1831) 2 Russ. & M. 470*; *Holdsworth (1943) 59 L.Q.R. 2*; *G. Sawer (1944) 60 L.Q.R. 83*; *Z. Cowen (1955) 71 L.Q.R. 336*. No reliance can be placed on the assertion in the headnote to *McHenry v Lewis (1822) 22 Ch. D. 397* of a jurisdiction to "restrain vexatious and oppressive legislation".

166 *Merricks v Heathcote-Amory [1955] Ch. 567*.

167 *Harper v Home Secretary [1955] Ch. 238*.

168 See *Bates v Lord Hailsham of St Marylebone [1972] 1 W.L.R. 1373* (no impropriety: injunction refused).

169 See *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] Ch. 149*.

170 *Glossop v Heston and Isleworth Local Board (1879) 12 Ch. D. 102*; *Attorney General v Clerkenwell Vestry [1891] 3 Ch. 527*.

171 *Institute of Patent Agents v Lockwood [1894] A.C. 347*; *Devonport Corp v Tozer [1903] 1 Ch. 759*; *Thorne v BBC [1967] 1 W.L.R. 1104* (Race Relations Act 1965); *Gouriet v Attorney General [1978] A.C. 628*; *Ex p. Island Records Ltd [1978] Ch. 122*; *Ashby v Ebdon [1985] Ch. 394*; *CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] Ch. 61, affirmed [1988] A.C. 1013*.

172 *Cooper v Whittingham (1880) 15 Ch. D. 501*; *Stevens v Chown [1901] 1 Ch. 894*.

173 And see para.18-013.

174 See *Attorney General v Harris [1961] 1 Q.B. 74* (two Manchester flower sellers with 237 convictions between them).

175 *Attorney General v Ashborne Recreation Ground Co [1903] 1 Ch. 101*; *Attorney General v Sharp [1931] 1 Ch. 121*. For binding over as an alternative remedy, see *(1961) 77 L.Q.R. 26*.

176 *Attorney General v Melville Construction Co Ltd (1968) 20 P. & C.R. 131* (felling protected trees: interlocutory injunction).

177 *Attorney General v Chaudry [1971] 1 W.L.R. 1614* (fire risk in hotel).

178 *Attorney General v Crayford UDC [1962] Ch. 575* at 585, 586.

179 *Attorney General v Sharp [1931] 1 Ch. 121*.

180 *Attorney General v Bastow [1957] 1 Q.B. 514*; *Attorney General v Smith [1958] 2 Q.B. 173*; *Attorney General v Morris (1973) 227 E.G. 991*. And see *Attorney General v Wellingborough UDC (1974) 72 L.G.R. 507* (Rivers (Prevention of Pollution) Act 1951).

181 *Stevens v Chown [1901] 1 Ch. 894* (not a relator action).

182 *Gouriet v Attorney General [1978] A.C. 628*; disapproving *Attorney General ex rel McWhirter v Independent Broadcasting Authority [1973] Q.B. 629* at 649. See generally *D. Feldman (1979) 42 M.L.R. 369*.

183 Local Government Act 1972 s.222. The court's jurisdiction under this section is limited, and does not extend to every order that might be intended to prevent a continuation of a breach of the criminal law: *Worcester CC v Tongue [2004] EWCA Civ 140*.

184 *Stafford BC v Elkenford Ltd [1977] 1 W.L.R. 324*; *Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] A.C. 754*.

185 *Hammersmith LBC v Magnum Automated Forecourts Ltd [1978] 1 W.L.R. 50*.

186 *Westminster City Council v Jones (1981) 80 L.G.R. 241*. See too *Newham LBC v Ali [2014] EWCA Civ 676; [2014] 1 W.L.R. 2743*.

187 *Kent CC v Batchelor (No.2) [1979] 1 W.L.R. 213* (motion to discharge injunction).

188 *Stafford BC v Elkenford Ltd [1977] 1 W.L.R. 324* (appeal pending against conviction), *Hammersmith LBC v Magnum Automated Forecourts Ltd [1978] 1 W.L.R. 50* (appeal pending against abatement notice).

189 *Stafford BC v Elkenford Ltd [1977] 1 W.L.R. 324* at 330; *Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] A.C. 754* at 767, 776.

End of Document

3. - The Equity to Grant Injunctive Relief

Snell's Equity 34th Ed.

Mainwork

Part 4 - Equitable Remedies

Chapter 18 - Injunction

Section 2. - Perpetual (or Final) Injunctions

3. - The Equity to Grant Injunctive Relief

18-026 An injunction may be granted even though the claimant's rights have not yet been interfered with, but it is not sufficient for the claimant merely to assert those rights. Three conditions must be satisfied. First, there must be a present need for the grant of an injunction: either because a wrong will commence or continue, or because the consequences of a past interference are such that the defendant should be required to carry out remedial or precautionary works. Secondly, an injunction will be refused if damages would be an adequate remedy. Thirdly, the remedy being discretionary, the defendant may avoid the grant of an injunction if able to establish an equitable defence. A defendant may raise a number of considerations why an injunction should be refused, even though those considerations would not amount to a defence at law (so that the defendant may still be liable in damages to the claimant).

(a) The risk of future interference with the claimant's rights.

18-027 It will not be appropriate to grant injunctive relief unless the court is satisfied that there is an appreciable risk that (absent an injunction) the defendant will interfere with the claimant's rights [190] in the future: whether by leaving undone those things which ought to be done, or by doing those things which ought not to be done.

(1) The relevance of past interference.

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. [191] Where there

has been an infringement, but the infringement has been interrupted prior to trial, the reason for the interruption will be relevant when considering the risk that the infringement will be resumed. However, there are limited circumstances in which an injunction will be refused on the grounds that it is unnecessary.

If the injury complained of has ceased before trial [192] or is merely temporary, [193] and there is no intention of renewing it, [194] the court may refuse an injunction. [195] But an injunction was granted where, after proceedings were commenced, the injury had ceased because of the financial difficulties and resulting voluntary liquidation of the defendant company. [196]

If the defendant gives an undertaking to the court to abstain from the acts of which the claimant complains, [197] or even to give sufficient notice before attempting to act, [198] an injunction may be refused. Such an undertaking is equivalent to an injunction, and a breach may be punished in the same way as a breach of an injunction. [199]

An injunction may also be refused where the claimant has a remedy available in his own hands, e.g. by refusing to supply goods to defendants who were dealing with them in breach of contract. [200]

(2) Claimant's rights not yet interfered with.

18-029 Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened [201]; for "preventing justice excelleth punishing justice". [202] This class of action, known as quia timet, has long been established, [203] but the claimant must establish a strong case; "no one can obtain a quia timet order by merely saying '*Timeo*'". [204] He must prove that there is an imminent [205] danger [206] of very substantial damage, [207] or further damage, [208] e.g. by showing that the threatened act "is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence". [209] The court applies 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?". [210]

A quia timet injunction may be granted to restrain an anticipated breach of statutory duty. [211] The court has also refused to grant an injunction against a corporation which wished to erect a smallpox hospital within 50 feet of dwelling-houses as there was no proof of "actual and real danger—a strong probability, almost amounting to moral certainty, that if the hospital be

established, it will be an actionable nuisance".[212] Similarly, an injunction may be refused if the defendant is a responsible body which offers an assurance to make every effort to suppress the threatened nuisance.[213] But in *Emperor of Austria v Day*,[214] the manufacture of a spurious issue of foreign banknotes was restrained, as likely to cause damage to the property of the foreign sovereign and his subjects.[215] Again, where a claimant was entitled to repair water-pipes of his which ran through land adjoining his estate, he obtained an injunction to restrain his neighbour from building a house over the pipes,[216] and the sureties to an administration bond are entitled to restrain the administrator from distributing the estate without providing for a contingent liability.[217]

(b) Remedial or preventative works.

18-030 The grant of mandatory injunctive relief is not confined to requiring future performance of the defendant's obligations. In an appropriate case, a defendant may be required to undo a past wrongful act, or to carry out works which ameliorate the consequences of a past wrongful act.

(1) Remedial works.

18-031 The grant of a mandatory injunction is always discretionary.[218] Important factors include the extent of the damage which would accrue to the claimant if relief is withheld,[219] the cost to the defendant if it is granted,[220] and the conduct of the defendant in rushing on with building works after notice of the claimant's objections.[221] Accordingly, if a restrictive covenant has been broken knowingly and after notice from the claimant, the general rule is that a mandatory injunction will be granted to restore the status quo.[222] The fact that an interim injunction was refused, or perhaps not even sought, does not necessarily preclude a claimant from obtaining a final mandatory injunction.[223]

Thus, an injunction was granted where the defendant built a skylight obstructing the access of light to the claimant's skylight and on the facts the damage to the claimant was great but the inconvenience to the defendant insignificant,[224] and where a defendant built a fence which needed to be removed in order to allow the claimants to make use of their right of way.[225] Further, to avoid the risk of serious consequences for a number of people the court has ordered the removal of houses wrongfully built over water mains, despite the grave loss to the defendants.[226] But a mandatory injunction was refused where, in breach of covenant, a frosted window was let into a wall overlooking the claimant's premises, the claimant suffering

no damage,[227] and where a coal shed had been demolished between trial refusing an injunction and successful appeal.[228]

In some cases, the act of which the claimant complains may be the making of a transaction: e.g. the making of a contract, or the completion of a lease or other conveyance. In such a case it is not sufficient to show that the defendant should not have entered into the transaction: the unmaking of the transaction will require the co-operation of third parties (normally the other parties to the transaction) and an injunction will not lie unless the claimant can show that all relevant parties acted wrongfully in making the transaction.[229]

(2) Preventative works.

18-032 There is a special application of the quia timet principle in relation to mandatory injunctions. This occurs where the claimant has been fully recompensed for the damage already suffered but alleges that there is a risk that further damage may occur, as where the defendant has carried on operations on his land which imperil the stability of his neighbour's land. In such cases the court may order preventive works. The general principles governing the grant of the remedy are as follows[230]:

(i)The claimant must show a very strong probability that grave damage will accrue to him in the future. The jurisdiction is exercised sparingly and with caution, but in a proper case unhesitatingly.

(ii)It must be shown that if such grave damage happens an award of damages will not be a sufficient or adequate remedy.

(iii)Where a future apprehended wrong is in issue, the cost of the necessary works is an element to be taken into account as follows:

(a)where the defendant has acted wantonly and quite unreasonably, and against the claimant's objections, he may be ordered to restore the status quo even if the expense is out of all proportion to the advantage accruing to the claimant; and

(b)where the defendant has acted reasonably but wrongly, the heavy cost may be a reason for withholding an injunction; no legal wrong for which the claimant will be unrecompensed may occur, and if it does, he may then sue in respect of it.

(iv)The order must define with precision, in fact and in law, what the defendant has to do.

(c) The adequacy of damages.

18-033

> "The very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy." [231]

Historic wrongs will normally be adequately compensated in damages, and it follows that no injunction will be granted where an illegal act has been done in the past but there is no intention of repeating it, [232] or no scope for repeating it. [233]

(1) The general rule.

18-034 An injunction will normally be refused if future injury can be adequately compensated by money, [234] unless an award of damages would be useless (e.g. because the defendant is a pauper). [235] Whether damages would be an adequate remedy is normally a question of fact: but many wrongs, such as continuing nuisances [236] or infringements of trade marks, [237] by their nature demand more adequate relief than money. [238]

The fact that the claimant has suffered very small or merely nominal damage will not disentitle him to an injunction. [239] If the law were otherwise, the claimant might be left to bring action after action to recover damages, [240] and one man might be enabled to use the land of another (e.g. by laying pipes under it [241] or taking water from it [242] or placing scaffolding upon it [243]) without his consent and without making proper payments of rent or other sums. [244] Indeed, that the damage is trifling may be "the very reason why an injunction should be granted". [245] It is, however, a circumstance to be taken into account, [246] e.g. where the claimant has merely suffered trespasses by the public which do not injure him. [247] Furthermore, the court may award damages in lieu of an injunction. [248]

(2) Breaches of contract.

18-035 A party to a contract has a right to its performance and not merely to compensation for breach, [249] and hence an injunction will be granted to restrain breaches of negative contracts [250] almost as of right. [251] In *Doherty v Allman*, [252] Lord Cairns LC said:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the

> sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, [253] or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

Thus a purchaser who covenants not to carry on any trade, business or calling in the premises can be restrained by the vendor from opening a school there, even though the vendor would sustain no damage. [254]

Even where the cause of action is founded upon a negative obligation imposed by contract, there may be cases where the inadequacy of damages will not be assumed. It is doubtful whether the court will automatically grant an injunction where there is no privity of contract, [255] for example against successors in title of land burdened by restrictive covenants, who are bound only in equity: in such a case the adequacy of damages may fall to be considered. If the parties have specified a sum as liquidated damages [256] for breach of a negative contract, the claimant cannot both recover the sum and claim an injunction. [257] A clause limiting damages for breach of contract does not preclude the granting of an injunction, which may be awarded where a court decides that the recoverable damages would not be an adequate remedy to reflect the substantial justice of the situation. [258]

(d) The discretion to refuse relief.

18-036 The jurisdiction of the court to grant an injunction is discretionary. Yet "the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of Equity"; it must be exercised judicially according to the rules which have been established by precedent. [259] All such precedents are cases on the exercise of a discretion, so that none is binding: the most they demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. [260] But as a general rule a party who establishes his right and its violation will be entitled to an injunction, [261] although exceptions are more likely where mandatory relief is sought. [262] Thus, it is no defence to an action for an injunction that compliance will be inconvenient and expensive, as where a river is being polluted by the outfall from large sewers. [263] The severity of the rule that a defendant must find his own way out of the difficulty, whatever the cost, is frequently mitigated by not immediately imposing the injunction, or by suspending its operation. [264] It is also possible for the court to award damages in substitution for the injunction. [265]

(1) Specific performance by the back door.

18-037 In some cases, the grant of an injunction may be tantamount to the grant of decree of specific performance: in such cases, relief will be refused if specific performance would also be refused. Thus, a mandatory injunction will not be granted to compel a person to carry on a business, e.g. to enforce a covenant in a lease requiring the tenant to keep the demised premises open as a supermarket.[266]

(2) Order ineffective.

18-038 The court will not make:

> "an idle and ineffectual order. The simplest illustration of this is the case of cutting down timber. It would be idle when the trees have been cut down to make an order not to allow the trees to remain prostrate, and all that can be done in such a case is to leave the parties to their remedy for damages."[267]

Although "[t]he court should ordinarily be slow to make an order which it would not … be willing, if need be, to enforce by imprisonment", it remains true that an "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate".[268] An injunction may still be granted, despite an order for sequestration or imprisonment being unlikely, if the court takes the view that an injunction may still have a useful deterrent effect.[269]

(3) Inequitable conduct by the claimant.

18-039 He who comes into equity must come with clean hands.[270] Thus a trader whose trademark makes untrue representations to the public cannot protect it by injunction,[271] though mere collateral misrepresentations, e.g. in advertisements, are no bar.[272]

An injunction may be refused if the claimants have misled the defendant and the court[273]; if they are seeking to protect not their own rights, but a monopoly they have purported to confer on others[274]; if they are seeking the return of property which they had been holding contrary to statute[275]; if they have behaved in a petty-minded way[276]; or if they have treated

the case as a matter for monetary compensation.[277] Further, an injunction will be refused to a contracting party who fails to perform his part of the contract[278] or refuses to give the court an assurance that he will do so in future.[279] On the other hand, an injunction will not be refused merely on the ground that the claimant could not be compelled specifically to perform his part of the contract,[280] or that the defendant's conduct, although reprehensible, is not sufficiently connected to the claim under consideration.[281] Nor will an injunction be refused simply because the breaches of covenant committed by the claimant are only trifling,[282] or because the claimant failed to obtain interim relief.[283]

(4) Hardship.

18-040 Although questions of hardship are of importance at the interlocutory stage, they are of much less importance for final injunctions, since it will necessarily have been found that the defendant has breached the rights of the claimant, or would breach the claimant's right were he to act in the manner feared. Thus the fact that an injunction would pose considerable difficulties to the defendant is not a reason to refuse equitable relief.[284] However, it may be relevant when deciding whether to award damages in substitution for an injunction.[285]

(5) Laches and acquiescence.

18-041 A claim to an injunction may also be barred by the claimant's acquiescence[286] or laches.[287] Acquiescence primarily means conduct from which it can be inferred that a party has waived his rights.[288] Mere inactivity is insufficient, for "quiescence is not acquiescence".[289] The test for acquiescence appears to be the same whether the right protected is legal or equitable[290]; it is established by showing that it has become unconscionable on the part of the owner of the right to press for its enforcement.[291] On this ground an injunction to restrain the use of a house as a shop was refused on proof that the claimant had himself bought goods there[292]; but acquiescence in a small breach will not bar proceedings to restrain a wider breach.[293] Lapse of time is an important element in considering whether there has been acquiescence,[294] but there may be acquiescence even without any delay. Moreover, lapse of time or laches may exist as a defence even in circumstances not amounting to acquiescence, e.g. where the defendant's witnesses have died. The areas of acquiescence and laches thus overlap, yet neither is wholly included in the other.[295]

(6) Public interest.

18-042 The court may consider it inappropriate to grant an injunction to protect a private right if there is a competing public interest which would favour refusing injunctive relief. This is particularly important in the context of nuisance. Generally, however, a vague advantage to the wider public should not prevail over specific private rights.[296] Thus, despite an injunction being refused where this would have had the effect of preventing the public from enjoying games of cricket,[297] this decision has since been doubted,[298] and an injunction granted even where this would prevent the public from enjoying boat races[299] or motor racing.[300] It may be that, in the context of nuisance, the public interest may be relevant to the principle of "reasonable user", but not a defence to the nuisance itself.[301] However, in exceptional cases the public interest may be so overwhelmingly strong that an injunction should be refused and a claimant limited to an action in damages, as was the case where an injunction would have interfered with the defence of the realm.[302]

Footnotes

190 The claimant must be entitled to a civil remedy; if a statute only provides for a criminal sanction, it is a question of construction whether the claimant is able to apply for injunctive relief: *Di Marco v Morshead Mansions Ltd [2014] EWCA Civ 96; [2014] 1 W.L.R. 1799* (no power to grant a mandatory injunction to require a landlord to comply with its obligations under the Landlord and Tenant Act 1985 s.21 and s.22).

191 *Proctor v Bayley (1889) 42 Ch. D. 390* at 399, 400.

192 *Barber v Penley [1893] 2 Ch. 447* (crowds waiting to see Charley's Aunt, eventually regulated by police); *Proctor v Bayley (1889) 42 Ch. D. 390*.

193 *Leader v Moody (1875) L.R. 20 Eq. 145* (breach of covenant for quiet enjoyment).

194 *Fielden v Cox (1906) 22 T.L.R. 411*; *Wilcox v Steel [1904] 1 Ch. 212*.

195 And see para.18-012.

196 *Dean and Chapter of Chester v Smelting Corp Ltd (1901) 85 L.T. 67*.

197 *Jenkins v Hope [1896] 1 Ch. 278*.

198 *Lord Cowley v Byas (1877) 5 Ch. D. 944*; *Smith v Baxter [1900] 2 Ch. 138*.

199 See *Neath Canal Co v Ynisarwed Resolven Colliery Co (1875) 10 Ch. App. 450*; *Biba Ltd v Stratford Investments Ltd [1973] Ch. 281; [1972] 3 W.L.R. 902*.

200 *Elliman Sons & Co v Carrington & Son Ltd [1901] 2 Ch. 275*.

201 See *Lord Cowley v Byas (1877) 5 Ch. D. 944*.

202 2 Co.Inst. 299, cited in *Graigola Merthyr Co Ltd v Swansea Corp [1928] Ch. 235 at 242 (affirmed [1929] A.C. 344)*.

203 *Attorney General v Long Eaton UDC [1915] 1 Ch. 124* at 127. See Holdsworth, *H.E.L.*, Vol.2 p.344 fn.6, for remedies quia timet at common law.

204 *Attorney General for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd [1919] A.C. 999* at 1005, per Lord Dunedin.

205 See *Hooper v Rogers [1975] Ch. 43* at 49 (damages in lieu of quia timet mandatory injunction). See too *Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515*. For critical discussion, see *J. Murphy "Rethinking Injunctions in Tort Law" (2007) 27 O.J.L.S. 509*.

206 See *Celsteel Ltd v Alton House Holdings Ltd [1986] 1 W.L.R. 512* (no threat established).

207 *Fletcher v Bealey (1885) 28 Ch. D. 688*.

208 See *Redland Bricks Ltd v Morris [1970] A.C. 652* at 665.

209 *Crowder v Tinkler (1816) 19 Ves. 617* at 622, per Lord Eldon LC. See also *Pattison v Gilford (1874) L.R. 18 Eq. 259*; *Medcalf v R Strawbridge Ltd [1937] 2 K.B. 102* at 111.

210 *Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch)* at [31] (Marcus Smith J).

211 *Attorney General v Wellingborough UDC (1974) 72 L.G.R. 507*.

212 *Attorney General v Nottingham Corp [1904] 1 Ch. 673* at 677; citing Fitzgibbon LJ in *Attorney General v Rathmines & Pembroke Joint Hospital Board [1904] 1 I.R. 161* at 171; see also *Attorney General v Manchester Corp [1893] 2 Ch. 87*; *Earl of Ripon v Hobart (1834) 3 My. & K. 169*.

213 *Bridlington Relay Ltd v Yorkshire Electricity Board [1965] Ch. 436* (interference with television).

214 *Emperor of Austria v Day (1861) 3 De G.F. & J. 217*.

215 See the explanation in *RCA Corp v Pollard [1983] Ch. 135* at 144, 151, 152; *Kingdom of Spain v Christie, Manson & Woods Ltd [1986] 1 W.L.R. 1120*; *Associated Newspapers Group Plc v Insert Media Ltd [1988] 1 W.L.R. 509* at 512, 513; and see *CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] Ch. 61 at 71, 72] 83, 84 (affirmed [1988] A.C. 1013)*.

216 *Goodhart v Hyett (1883) 25 Ch. D. 182*. See also *Jackson v Cator (1800) 5 Ves. 688*; *Hodges v London Trams Omnibus Co (1883) 12 Q.B.D. 105*.

217 *Re Anderson-Berry [1928] Ch. 290*; and see para.45-017.

218 *Sharp v Harrison [1922] 1 Ch. 502* at 512; *Shepherd Homes Ltd v Sandham (No.1) [1971] Ch. 340*; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 W.L.R. 798*; *Wakeham v Wood (1982) 43 P. & C.R. 40* at 45, 46; disapproving dictum in *Achilli v Tovell [1927] 2 Ch. 243* at [47]. See para.18-010.

219 *Durell v Pritchard (1865) 1 Ch. App. 244* at 250; *Price v Hilditch [1930] 1 Ch. 500*.

220 See *Shepherd Homes Ltd v Sandham (No.1) [1971] Ch. 340* at 351; but see *Charrington v Simons & Co Ltd [1971] 1 W.L.R. 598* at 603.

221 *Bickmore v Dimmer [1903] 1 Ch. 158* at 168; *Price v Hilditch [1930] 1 Ch. 500* at 509, 510; *Mathias v Davis [1970] E.G.D. 370; 114 S.J. 268*; but see *Isenberg v East India House Estate Trading Co Ltd (1863) 3 De G.J. & S. 263* at 273, 274.

222 *Wakeham v Wood (1982) 43 P. & C.R. 40*.

223 *Mortimer v Bailey [2004] EWCA Civ 1514; [2005] B.L.R. 85*. See too *Hruk II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch)*.

224 *McManus v Cooke (1887) 35 Ch. D. 681*; and see *Smith v Smith (1875) L.R. 20 Eq. 500*; *Attorney General v Parish [1913] 2 Ch. 444*; *Allport v The Securities Co Ltd (1895) 72 L.T. 533*; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd [1957] 2 Q.B. 334*.

225 *Higson v Guenault [2014] EWCA Civ 703*.

226 *Abingdon Corp v James [1940] Ch. 287*.

227 *Sharp v Harrison [1922] 1 Ch. 502*.

228 *Wright v Macadam [1949] 2 K.B. 744* at 755.

229 See *Hemingway Securities Ltd v Dunraven Ltd [1995] 1 E.G.L.R. 61* (surrender of sublease required, where the grantor had acted in breach of covenant and the grantee had committed the tort of inducing a breach of contract). See also *Crestfort Ltd v Tesco Stores Ltd [2005] EWHC 805 (Ch); [2005] L. & T.R. 20* at 57 and 69–70.

230 *Redland Bricks Ltd v Morris [1970] A.C. 652* at 665, 666.

231 *London and Blackwall Ry v Cross (1886) 31 Ch. D. 354* at 369, per Lindley LJ (a comma after "wrongs" in the original has been deleted as obscuring the sense).

232 See paras 18-027 et seq.

233 *Desk Advertising Co Ltd v Societe Civile De Participations Du Group ST Dupont (1973) 117 S.J. 483*.

234 *Wood v Sutcliffe (1851) 2 Sim. (N.S.) 163*; *Garden Cottage Foods Ltd v Milk Marketing Board [1984] A.C. 130*.

235 *Hodgson v Duce (1856) 2 Jur. (N.S.) 1014*.

236 *Martin v Nutkin (1725) 2 P.Wms. 266*; para.18-001. And see *Pride of Derby and Derbyshire Angling Assoc Ltd v British Celanese Ltd [1953] Ch. 149* at 181.

237 See para.18-016.

238 See *Lumley v Wagner (1852) 1 De G.M. & G. 604* at 616.

239 *Rochdale Canal Co v King (No.1) (1851) 2 Sim. (N.S.) 78*; *Wood v Sutcliffe (1851) 2 Sim. (N.S.) 163* (where, however, injunctions were refused on the ground of acquiescence; see para.18-041); *Goodson v Richardson (1874) 9 Ch. App. 221*; *Marriott v East Grinstead Gas and Water Co [1909] 1 Ch. 70*; *Woollerton & Wilson Ltd v Richard Costain Ltd [1970] 1 W.L.R. 411* (crane jib in airspace).

240 See *Wood v Sutcliffe (1851) 2 Sim. (N.S.) 163* at 165.

241 *Goodson v Richardson (1874) 9 Ch. App. 221*.

242 *Rochdale Canal Co v King (1851) 2 Sim. (N.S.) 78*.

243 *John Trenberth Ltd v National Westminster Bank Ltd (1979) 39 P. & C. R. 104*.

244 See *Cooper v Crabtree (1882) 20 Ch. D. 589* at 592.

245 *John Trenberth Ltd v National Westminster Bank Ltd (1979) 39 P. & C. R. 104* at 107, per Walton J.

246 See *Elmhirst v Spencer (1849) 2 Mac. & G. 45*; *Doherty v Allman (1878) 3 App. Cas. 709* (ameliorating waste); *Armstrong v Sheppard & Short Ltd [1959] 2 Q.B. 384*.

247 *Behrens v Richards [1905] 2 Ch. 614*; and see *Llandudno UDC v Woods [1899] 2 Ch. 705* (no injunction to restrain sermons on foreshore at Llandudno).

248 See paras 18-043 to 18-044.

249 *Lumley v Wagner (1852) 1 De. G.M. & G. 604* at 619; *National Provincial Bank of England v Marshall (1888) 40 Ch. D. 112*. cf. *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies (1927) Ltd [1938] A.C. 624*.

250 *Lumley v Wagner (1852) 1 De. G.M. & G. 604*; see para.18-019. For the enforcement of positive contractual obligations, see Ch.17.

251 In the context of claims by an employer to enforce an employee's negative covenant, see, e.g. *Dyson v Pellerey [2016] EWCA Civ 87; [2016] I.C.R. 688*. Quaere whether the court is bound to grant an injunction to restrain the ultra vires acts of a local authority: *Attorney General v Crayford UDC [1962] Ch. 575* at 585.

252 *Doherty v Allman (1878) 3 App. Cas. 709* at 720; and see at 729, 730. Yet specific performance is itself a discretionary remedy; see para.17-004. For negative contracts, see paras 18-036 et seq.

253 See *Jenkins v Jackson (1888) 40 Ch. D. 71* at 77; *Texaco Ltd v Mulberry Filling Station Ltd [1972] 1 W.L.R. 814* at 830.

254 *Kemp v Sober (1851) 1 Sim. (N.S.) 517*; and see *Lord Manners v Johnston (1875) 1 Ch. D. 673*.

255 *Kelly v Barrett [1924] 2 Ch. 379* at 397 (left open by CA; at 404, 411, 412); *Osborne v Bradley [1903] 2 Ch. 446* at 451. Contrast *Achilli v Tovea [1927] 2 Ch. 243* at 247; *Richards v Revitt (1877) 7 Ch. D. 224*.

256 See Ch.13.

257 *Sainter v Ferguson (1849) 1 Mac. & G. 286*. cf. *Aspden v Seddon (1875) 10 Ch. App. 394*.

258 *AB v CD [2014] EWCA Civ 229; [2014] 3 All E.R. 667*; *Bath and North East Somerset DC v Mowlem Plc [2004] EWCA Civ 115; [2004] B.L.R. 153*.

259 *Doherty v Allman (1878) 3 App. Cas. 709* at 728, 729, per Lord Blackburn.

260 *Jaggard v Sawyer [1995] 1 W.L.R. 269* at 288 (Millett LJ).

261 *Fullwood v Fullwood (1878) 9 Ch. D. 176*; *Imperial Gas Light and Coke Co v Broadbent (1859) 7 H.L.C. 600* at 612.

262 See, e.g. *Harold Stephen & Co Ltd v Post Office [1977] 1 W.L.R. 1172*, where a mandatory injunction was refused to compel the Post Office to deliver mail during an industrial dispute with its staff (interlocutory application).

263 *Attorney General v Colney Hatch Lunatic Asylum (1868) 4 Ch. App. 146*; and see *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd [1953] Ch. 149*. But see *Barber v Penley [1893] 2 Ch. 447* at 460, 461.

264 See para.18-096.

265 See paras 18-043 to 18-044.

266 *Co-operative Insurance v Argyll Stores [1998] A.C. 1*. See further Ch.17.

267 *Attorney General v Colney Hatch Lunatic Asylum (1868) 4 Ch. App. 146* at 154, per Lord Hatherley LC.

268 *South Bucks DC v Porter [2003] UKHL 26; [2003] 2 A.C. 558* at [32], per Lord Bingham.

269 *Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 W.L.R. 2780* at [79]–[84].

270 See para.5-010. For a recent example of "unclean hands" contributing to a refusal to grant an anti-suit injunction, see *Royal Bank of Scotland Plc v Highland Financial Partners LP*

[2013] EWCA Civ 328; [2013] 1 C.L.C. 596. See too *Boreh v Djibouti [2015] EWHC 769 (Comm); [2015] 3 All E.R. 577*.

271 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd (1863) 4 De G.J. & S. 137; affirmed, 11 H.L.C. 523*.

272 *Ford v Foster (1872) 7 Ch. App. 611*; and see *JH Coles Proprietary Ltd v Need [1934] A.C. 82*.

273 *Armstrong v Sheppard & Short Ltd [1959] 2 Q.B. 384*. See also *J Willis & Son v Willis [1986] 1 E.G.L.R. 62*; *Gonthier v Orange Contract Scaffolding Ltd [2003] EWCA Civ 873*; *Richardson v Blackmore [2005] EWCA Civ 1356; [2006] B.C.C. 276*.

274 *Corp of London v Lyons, Son & Co (Fruit Brokers) Ltd [1936] Ch. 78*.

275 *Malone v Metropolitan Police Commissioner [1980] Q.B. 49* (exchange control).

276 *Tollemache & Cobbold Breweries Ltd v Reynolds (1983) 268 E.G. 52* at 56.

277 *Wood v Sutcliffe (1851) 2 Sim. (N.S.) 163*; *Ormerod v Todmorden Joint Stock Mill Co Ltd (1883) 11 Q.B.D. 155* at 162; *Aspden v Seddon (1875) 10 Ch. App. 394*; *Blue Town Investments Ltd v Higgs and Hill Plc [1990] 1 W.L.R. 696* (claim to injunction struck out).

278 *Measures Bros Ltd v Measures [1910] 2 Ch. 248*; *General Billposting Co Ltd v Atkinson [1909] A.C. 118*.

279 *Chappell v Times Newspapers Ltd [1975] 1 W.L.R. 482*.

280 *James Jones & Sons Ltd v Earl of Tankerville [1909] 2 Ch. 440*; but see *Page One Records Ltd v Britton [1968] 1 W.L.R. 157*; para.18-019.

281 The misconduct must have "an immediate and necessary relation to the equity sued for": *Dering v Earl of Winchelsea (1787) 1 Cox 318* at 319–320, per Eyre CB; *Moody v Cox [1917] 2 Ch. 71* at 87; *Memory Corp Plc v Sidhu [2000] 1 W.L.R. 1443* at 1457. Conduct in the course of litigation which has no bearing on the substantive rights of the parties will not have the necessary degree of connection: *Fiona Trust & Holding Corp v Privalov [2008] EWHC 1748 (Comm); [2008] 2 P. & C.R. DG21*.

282 *Western v MacDermott (1866) 2 Ch. App. 72*; *Besant v Wood (1879) 12 Ch. D. 605*.

283 *Mortimer v Bailey [2004] EWCA Civ 1514; [2005] B.L.R. 85*.

284 *Pride of Derby and Derbyshire Angling Assoc Ltd v British Celanese Ltd [1953] Ch. 149*.

285 See paras 18-043 to 18-044.

286 *Parrott v Palmer (1834) 3 My & K. 632* at 640; *Blue Town Investments Ltd v Higgs and Hill Plc [1990] 1 W.L.R. 696*.

287 See para.5-011.

288 See *Duke of Leeds v Earl of Amherst (1846) 2 Ph. 117* at 123.

289 *Lamare v Dixon (1873) L.R. 6 H.L. 414* at 422, per Lord Chelmsford.

290 *Gafford v Graham [1999] 41 E.G. 157*; disproving *Shaw v Applegate [1977] 1 W.L.R. 970* at 979.

291 *Shaw v Applegate [1977] 1 W.L.R. 970*. For two examples, where the question of conscionability was considered on the facts, see *Gafford v Graham [1999] 3 E.G.L.R. 75* (acquiescence); and *Harris v Williams-Wynne [2006] EWCA Civ 104; [2006] 2 P. & C.R. 27* (no acquiescence): the distinction between the facts of the two cases is usefully identified in *Harris* at [36]–[39] (Chadwick LJ).

292 *Sayers v Collyer (1884) 28 Ch. D. 103*.

293 *Richards v Revitt (1877) 7 Ch. D. 224*. cf. *McKinnon Industries Ltd v Walker [1951] W.N. 401* (acquiescence during war).

294 See e.g. *Rundell v Murray (1821) Jac. 311*.

295 See the discussion in *Lester v Woodgate [2010] EWCA Civ 199; [2010] 2 P. & C.R. DG14*.

296 See, e.g. *Attorney General v Birmingham BC (1858) 4 K. & J. 528*; *Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287*; *Kennaway v Thompson [1981] Q.B. 88*.

297 *Miller v Jackson [1977] Q.B. 966* (although note the dissent of Geoffrey Lane LJ).

298 For example, *Kennaway v Thompson [1981] Q.B. 88* (relying on *Shelfer [1895] 1 Ch. 287*).

299 *Kennaway v Thompson [1981] Q.B. 88*.

300 *Watson v Croft Promo-Sport [2009] EWCA Civ 15; [2009] 3 All E.R. 249*.

301 *Dennis v Ministry of Defence [2003] EWHC 793 (QB); [2003] Env L.R. 34*; for further discussion see *Coventry v Lawrence [2014] UKSC 13; [2014] A.C. 822*.

302 *Dennis v Ministry of Defence [2003] EWHC 793 (QB); [2003] Env L.R. 34* (training of Harrier fighter pilots at RAF Wittering).

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4. - Damages in Substitution for (or Addition to) Injunction

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Mainwork

Part 4 - Equitable Remedies

Chapter 18 - Injunction

Section 2. - Perpetual (or Final) Injunctions

4. - Damages in Substitution for (or Addition to) Injunction

18-043 The Court of Chancery originally had no power to award damages, though where the defendant had made a profit out of his wrongful act, it might decree an account.[303] The Chancery Amendment Act 1858 (more commonly called Lord Cairns' Act), however, authorised the court, if it thought fit, in all cases in which it had jurisdiction to grant an injunction or to order specific performance,[304] to award damages to the injured party, "either in addition to or in substitution for" the other relief.[305] Although the Act has been repealed, the jurisdiction under it is still preserved.[306]

18-044 When deciding whether or not to award damages in substitution for an injunction, courts have traditionally tended to rely upon the "working rule" of AL Smith LJ in *Shelfer v City of London Electric Lighting Co.*[307] His Lordship suggested that (1) if the injury to the plaintiff's legal rights is small[308]; (2) is capable of being estimated in money; (3) can be adequately compensated by a small money payment[309]; (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given.[310] All four criteria must be satisfied before damages will be awarded in lieu on an injunction,[311] although the fourth factor concerning oppression has been described as the "key question"[312]; it is important that the test of oppression should not slide into a general balance of convenience test.[313]

The *Shelfer* guidelines have, however, sometimes been considered to be inappropriate,[314] particularly where the claimant's real interest in his rights is monetary only, and he only seeks an injunction in order to secure a negotiating advantage over the defendant.[315] Even in such circumstances the *Shelfer* principles may still apply, so that where an injunction may be awarded,[316] the presumption is that damages should not be substituted.[317] The courts are wary of wrongdoers being able to buy a licence for their wrong from unwilling victims.[318] Considerations concerning human rights may also be of importance, since on one view awarding damages

instead of an injunction is tantamount to expropriating a right from the claimant.[319] Using the *Shelfer* guidelines, the public interest will rarely require a court to award damages in lieu of an injunction,[320] although it might be taken into account in "a marginal case where the damage to the claimant is minimal".[321]

However, this traditional understanding of the law[322] may no longer be appropriate. In *Coventry v Lawrence*,[323] the Supreme Court signalled a move away from the *Shelfer* guidelines on the basis that they were "out-dated"[324] and that the broad discretion of the court in this area should not be restricted by a mechanical test. It may therefore be expected that courts will show a greater willingness to take into account the public interest, and that a broader approach will generally be taken by the courts when deciding whether or not to award damages in lieu of an injunction, even if the defendant still bears a "legal burden" to show why an injunction should not be granted.[325] But even within a wider approach, the factors raised in *Shelfer* are likely to remain relevant as the courts attempt to determine the correct test to apply when considering whether there should be an injunction or damages in lieu.[326]

Footnotes

303 See paras 20-003 et seq. For the view that the Court of Chancery did have power to award damages in certain isolated cases see *McDermott (1992) 109 L.Q.R. 652.*

304 See paras 20-058 to 20-063.

305 s.2. See *J. A. Jolowicz [1975] C.L.J. 224 (general)*; *P. H. Pettit [1977] C.L.J. 369 (county court)*.

306 See SCA 1981 s.50; also *Leeds Industrial Co-operative Society Ltd v Slack [1924] A.C. 851*; *Sayers v Collyer (1884) 28 Ch. D. 103*; and see *Re R. [1906] 1 Ch. 730* at 735, 739. For questions of quantification, see para.20-063.

307 *Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287 CA.*

308 Note that some of the awards made have not been small: e.g. *Lane v O'Brien Homes [2004] EWHC 303 (QB)* (£150,000 in lieu of an injunction for breach of covenant).

309 Although it should be noted that the fact that a defendant is willing to accept damages should not necessarily lead to an injunction: e.g. *Watson v Croft Promo-Sport Ltd [2009] EWCA Civ 15; [2009] 3 All E.R. 249* at [48].

310 *Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287 CA* at 322–3.

311 *Jacklin v The Chief Constable of West Yorkshire [2007] EWCA Civ 181*; *Hruk II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch)*.

312 *Site Developments (Ferndown) Ltd v Barratt Homes Ltd [2007] EWHC 415 (Ch)* at [64]; *HTC Corp v Nokia Corp [2013] EWHC 3778 (Pat); [2014] Bus. L.R. 217* at [55].

313 *Jaggard v Sawyer [1995] 1 W.L.R. 269* at 283, per Sir Thomas Bingham MR.

314 Particularly in the context of rights to light: *Fishenden v Higgs and Hill Ltd (1935) 153 L.T. 128 CA*, although compare *Slack v Leeds Industrial Co-operative Society Ltd [1924] 2 Ch. 475 CA*.

315 *Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch); [2005] 1 E.G.L.R. 65* at 70–80.

316 And damages are not an adequate remedy: see para.18-001.

317 See, e.g. *Regan v Paul Properties Ltd [2006] EWCA Civ 1391; [2007] Ch. 135*; *Watson v Croft Promo-Sport [2009] EWCA Civ 15; [2009] 3 All E.R. 249*.

318 e.g. *Shelfer [1895] 1 Ch. 287 CA*, Lindley LJ at 315–6.

319 See in particular art.1 of Protocol 1 of the ECHR. In *Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch); [2005] 1 E.G.L.R. 65*, Peter Smith J heard full argument on A1P1 but did not need to decide the point: [49]. In *Site Developments (Ferndown) Ltd v Barratt Homes Ltd [2007] EWHC 415 (Ch)*, concerning an injunction to protect a restrictive covenant, Richard Arnold QC expressed the view that A1P1 would not have been contravened, but did not have to decide on the facts. The reasoning of the judge appears to rely upon the finding that there was no expropriation.

320 *Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287 CA*, see para.18–042.

321 *Watson v Croft Promo-Sport [2009] EWCA Civ 15; [2009] 3 All E.R. 249* at [51].

322 The preceding paragraph was cited with approval by Morgan J in *Loveluck-Edwards v Ideal Developments Ltd [2012] EWHC 716 (Ch); [2012] 2 P. & C.R. DG2* at [114].

323 *Coventry v Lawrence [2014] UKSC 13; [2014] A.C. 822*.

324 It should be noted that the "working rule" of *Shelfer [1895] 1 Ch. 287 CA* is not necessarily exhaustive, and there may be other situations in which damages may be awarded in lieu of an injunction, e.g. *Jaggard v Sawyer [1995] 1 W.L.R. 269*, 287, per Millett LJ.

325 *Coventry v Lawrence [2014] UKSC 13; [2014] A.C. 822* at [121] (Lord Neuberger).

326 See, e.g. *Higson v Guenault [2014] EWCA Civ 703* [51] (Aikens LJ). For further discussion see, e.g. *Prophet Plc v Huggett [2014] EWHC 615 (Ch); [2014] I.R.L.R. 618* at [26]–[28] (not considered on appeal: *[2014] EWCA Civ 1013; [2014] I.R.L.R. 797*); *Comic Enterprise Ltd v Twentieth Century Fox Film Corp [2014] EWHC 2286 (Ch); [2014] E.T.M.R. 51*; *Kerry Ingredients (UK) Ltd v Bakkavor Group Ltd [2016] EWHC 2448 (Ch)* at [74]ff; *Ottercroft Ltd v Scandia Care Ltd [2016] EWCA Civ 867*; *Apexmaster Ltd v URC Thames North Trust [2018] 2 WLUK 584* [71]–[83]; *Business Mortgage Finance 6 Plc v Greencoat Investments Ltd [2019] EWHC 2128 (Ch)* [96]–[102].

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1. - Introduction

Snell's Equity 34th Ed.

Mainwork

Part 4 - Equitable Remedies

Chapter 18 - Injunction

Section 3. - Interim Injunctions

1. - Introduction

18-045 Interim injunctions can be granted prior to final resolution of the dispute. In some cases there may be no interlocutory stage since it will be possible for the court to grant a final injunction without the need for a full trial: either because the claimant's right to injunctive relief is admitted or (more likely) because the issues in dispute are capable of being determined on a summary basis under CPR Pt 24. In the remainder, however, a trial will be required; in such cases, although the proverbial delays of Lord Eldon's chancellorship no longer exist, there is still an inevitable lapse of time between the commencement of an action and the trial. In the meantime, it may be appropriate to grant the claimant injunctive relief[327] which will normally operate until the trial or sooner order. This is achieved by the grant of an interim injunction.

The function of an interim injunction has been said to be to maintain the status quo,[328] or to facilitate the administration of justice at the trial.[329] A claimant who has been refused an injunction until trial may, if he wishes to appeal against the refusal, be granted an injunction pending the hearing of his appeal.[330]

Footnotes

327 An order for possession cannot be granted as interlocutory relief: *Manchester Corp v Connolly [1970] Ch. 470.*

328 *Jones v Pacaya Rubber and Produce Co Ltd [1911] 1 K.B. 455* at 457. See para.18-054.

329 *Smith v Peters (1875) L.R. 20 Eq. 511* at 513.

330 *Erinford Properties Ltd v Cheshire CC [1974] Ch. 261*; *Orion Property Trust Ltd v Du Cane Court Ltd [1962] 1 W.L.R. 1085.*

End of Document

PART 24

SUMMARY JUDGMENT

Contents

Editorial introduction

24.0.1 The rules in this Part provide a procedure by which the court may carry out part of its duty of active case management, the summary disposal of issues which do not need full investigation and trial (r.1.4(2)(c)). The issues disposed of may arise in claims (including claims under the alternative procedure for claims under Pt 8), counterclaims, third party proceedings or similar proceedings.

There is a substantial overlap between Pt 24 and r.3.4 (Power to strike out a statement of case). As with Pt 24 the court's powers under r.3.4 may be exercised on the application of a party or on the court's own initiative. Rule 3.4(2)(a) and (b) cover the strike out of claims or defences which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence. For a more detailed discussion of the extent to which r.3.4 overlaps with Pt 24 see the commentary to r.3.4.

In certain types of case, proceedings which are akin to summary judgment proceedings are *provided automatically as a filter* so as to ensure that only those cases which have a real prospect of defence go forward to trial (the Show Cause procedure under Practice Direction 3D supplementing Pt 3 (Mesothelioma Claims) as to which, see para.3DPD.6.2, above; and the first hearing under Pt 55 (Possession Claims) as to which, see para.55.8.1, below and *Forcelux Ltd v Binnie* [2009] EWCA Civ 854; [2009] 5 Costs L.R. 825; [2010] H.L.R. 20, noted in para.3.1.17.2, above).

Related sources

24.0.2
- Rule 3.3 (Court's power to make order of its own initiative).
- Rule 3.4 (Power to strike out a statement of case).
- Practice Direction 23A (Applications) (see para.23APD.1, above)
- Practice *Direction 24 (Summary disposal of claims)* (see para.24PD.1, below)

Forms

24.0.3
- **N244** Application notice
- **No.44** Judgment for claimant
- **No.44A** *Judgment for defendant*
- **No.44B** Order refusing judgment and giving directions as to future conduct
- **No.44C** Order under Pt 24 (imposing condition)
- **No.44D** Order under Pt 24 (for assessment of a solicitor's bill)
- **PF11** Application for Pt 24 judgment

Scope of this Part[1]

24.1 **24.1 This Part sets out a procedure by which the court may decide a claim or a particular issue without a trial.**

(Part 53 makes special provision about summary disposal of defamation claims in accordance with the Defamation Act 1996.)

"a claim or a particular issue"

24.1.1 These words are not defined in the rules. The word "claim" when used as a noun in other rules usually refers to the whole of a case in question (see, for example, r.8.1 and r.26.2). However, in some rules the word is used to refer to separate causes of action raised in the case in question (see, for example, r.7.3). On the assumption that the usual meaning of "claim" applies in Pt 24, an ap-

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

plication for summary judgment which relates to only one of several causes of action raised in a case could be characterised as an application concerning "a particular issue".

"Issue" does not mean any factual or legal issue that would need to be decided at trial to resolve a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial, it is not suitable for determination. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early: see *Vardy v Rooney* [2021] EWHC 1888 (QB), [75]–[78] (Steyn J) and *Anan Kasei Co Ltd v Neo Chemicals and Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch) (*Anan Kasei*) (Fancourt J) at [82].

Defamation claims 24.1.2

Rule 53.2 provides for applications for summary disposal under ss.8 and 9 of the Defamation Act 1996. Rule 53.2 applies Pt 24 with variations. The Defamation Act 1996 permits the court to give summary judgment in any defamation claim: it may dismiss the claimant's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried (s.8(2)); it may give judgment for the claimant and grant them summary relief (as defined in s.9) if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried (s.8(3)).

Grounds for summary judgment[1]

24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if— 24.2

(a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(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.

(Rule 3.4 makes provision for the court to strike out(GL) a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim.)

Rule 24.2: Effect of rule 24.2.1

The provisions of r.24.2 are supplemented by Practice Direction (The Summary Disposal of Claims) (see para.24PD.1 below).

"on the whole of a claim or on a particular issue" 24.2.2

See the commentary to r.24.1.

In *Abaidildinov v Amin* [2020] EWHC 2192 (Ch) the court (Judge Robin Vos) considered the proper approach to deciding whether summary judgment should be granted where the relief sought was a declaration. The court could give summary judgment where the defendant had no real prospect of successfully defending the claim or issue: "claim or issue" in CPR r.24.2(a)(ii) referred to the underlying facts or matters which were the subject of the declaration. However once it was shown that the defendant had no real prospect of showing that those matters were wrong, the court should exercise its discretion as to whether to make the declaration in the normal way, not by reference to the summary judgment test.

When determining a summary judgment application, a judge is not obliged to give declarations on related or sub-issues if not granting the application even if he/she is of the view that a party does not have a realistic prospect of success on that issue, *Executive Authority for Air Cargo and Special Flights v Prime Education Ltd* [2021] EWHC 206 (QB) (Saini J). Whether the judge decides to make such a declaration on the sub-issue or simply leaves the issue for the trial judge will be a fact-specific case management decision to be undertaken following assessment as an exercise of discretion in accordance with the overriding objective.

"no real prospect of succeeding/successfully defending" 24.2.3

The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

[1] Amended by the Civil Procedure (Amendment No.3) Rules 2000 (SI 2000/1317).

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

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

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

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

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

In respect of points of law and of construction the notion of "shortness" does not appear to relate to the length of the document to be construed or the length of the material passage in that document but may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider: see the comments of Chief Master Marsh in *Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd* [2021] EWHC 863 (Ch). He further commented that there was an overlap between the idea of a point of construction not being "short" and the second limb of CPR r.24.2: there may be some points that the court is capable of grappling with that, nevertheless, due to the context in which they arise or other factors, are best left to be dealt with at a trial.

In some cases the disputed issues are such that their conclusion by settlement or trial largely depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after the exchange of the experts' reports and, in most cases, after the experts have discussed the case and produced a joint statement (*Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB), a clinical negligence claim).

In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J held as follows:

> "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."

"no other compelling reason [for] a trial"

24.2.4 In *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] B.L.R. 522; (2000) 2 T.C.L.R. 308; 73 Con. L.R. 135 Buxton LJ ruled that the fact that the claimant company was in liquidation was a compelling reason to refuse summary judgment where there were latent claims and cross-claims between the parties.

In *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715; [2015] C.P. Rep 41; [2015] B.L.R. 544,

summary judgment for the claimant against the first defendant was held to be inappropriate where similar issues remained to be determined at a trial as between the first defendant and other parties. In all the circumstances that constituted a "compelling reason" not to enter summary judgment.

In *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098, the Court of Appeal upheld a refusal to rule upon a short point of construction of the terms of an insurance contract where those terms were said to be standard terms which were widely used in the insurance market.

Pre-CPR, the following circumstances were held to afford "some other reason for trial": where the claimant's case appears to be "devious and crafty" and not "plain and straightforward" (*Miles v Bull (No. 1)* [1969] 1 Q.B. 258; [1968] 3 All E.R. 632); where the defendant is an executor or administrator who can raise facts by reference to the existence or absence of letters, accounts or such like of the deceased which make it reasonable to require full investigation (*Harrison v Bottenheim* (1878) 26 W.R. 362) where the claimant's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity (per Cairns LJ in *Bank fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages* [1971] 1 W.L.R. 149 at 158; [1971] 1 All E.R. 541 at 548). However, in 2015, a somewhat different view was expressed by the Court of Appeal. In *Berntsen v Tait* [2015] EWCA Civ 1001 the lower court's decision to summarily dismiss a claim was upheld; the lower court had been right to conclude that the claimants had no real prospects of success; thus there was no point in letting this case proceed to trial even though the underlying facts raised matters of considerable concern as to the lending practice of banks.

Some caution is needed, however, in considering the pre-CPR cases because the terms of RSC Ord.14 were not the same as CPR r.24.2. Under the RSC the emphasis was different. The court was required to consider whether there was "an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial". In *Miles v Bull (No. 1)* [1969] 1 Q.B. 258; [1968] 3 W.L.R. 1090 Megarry J observed that the second part of the rule was very wide. Notably in the CPR the word "compelling" has been added. In *Commerz Real Investmentgesellschaft MBH* (see above) Senior Master March doubted whether the authorities dealing with RSC Ord.14 were a reliable guide to the proper approach to the application of the second limb of CPR r.24.2, bearing in mind the significant difference between the two rules and the requirements of the overriding objective. He commented:

> "It seems to me that adding the word 'compelling' was clearly intended to limit the very wide discretion under the RSC. The basis upon which Megarry J decided *Miles v Bull* chimes, for example, with the principle to be derived from the decision of the Court of Appeal in *Royal Brompton v Hammond (No5)* [2001] EWCA Civ 550 in relation to the first limb of CPR rule 24.2 that the court should consider the evidence which can reasonably be expected to be available at trial and the lack of it. On the other hand, the need for a trial in order that judgment is obtained in the full light of publicity is unlikely to be a compelling reason to refuse summary judgment when the rule is construed by reference to the Overriding Objective and bearing in mind that the hearing of an application under CPR rule 24.2 will invariably take place in open court."

In cases of libel, slander, malicious prosecution or false imprisonment the respondent may have a right to trial by jury (see SCA 1981 s.69 and CCA 1984 s.66; see Vol.2, paras 9A-256 and 9A-546, respectively). This right is not a matter of mere procedure and therefore the CPR cannot and does not override it (*Safeway Stores Plc v Tate* [2001] Q.B. 1120; [2001] 4 All E.R. 193, CA). Although summary judgment may be appropriate on issues of law, these statutory provisions entitle a respondent to have material issues of fact decided by a jury. In *Safeway*, the claim never reached trial by jury: the Court of Appeal declined to anticipate the possibility that the verdict of a jury might be perverse and such that it could be reversed on appeal. Contrast *Alexander v Arts Council* [2001] 1 W.L.R. 1840, CA, a libel claim that did proceed to trial by jury. In *Alexander* the grant of summary judgment made by the trial judge in favour of the defendant was upheld by the Court of Appeal; the claimant's case depended upon a finding that publications had been made maliciously and the evidence in support of the claim, taken at its highest, was such that a jury properly directed could not properly find in favour of the claimant. Summary judgment in such circumstances "was not, as was suggested in *Safeway v Tate*, speculating that the jury *might* reach a perverse decision; rather that the only jury decision capable of supporting the case in question would be bound to be set aside on appeal" (per May LJ at para.38).

Burdens of proof

In *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] EWCA Civ 472, it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of the Practice Direction supplementing Pt 24; the applicant must (a) identify concisely any point of law or provision in a document on which they rely, and/or (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial. 24.2.5

If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r.24.2 ("no real prospect ... no other reason ...") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without analysis everything said by a party in his statements before the court (*ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] C.P. Rep. 51 at [10]). In evaluating the prospects of success of a claim or defence judges are not required to abandon their critical faculties (*Calland v Financial Conduct Authority* [2015] EWCA Civ 192 at [29]). However, the proper disposal of an issue under Pt 24 does not involve the judge in conducting a mini-trial (*Swain v Hillman* [2001] 1 All E.R. 91). Therefore, the court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it (*Fashion Gossip Ltd v Esprit Telecoms UK Ltd* 27 July 2000, unrep., CA; cf. *Day v RAC Motoring Services Ltd* [1999] 1 All E.R. 1007, per Ward LJ at 1013 propounding the adoption of a negative test on applications to set aside default judgments). When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented; on an application for summary judgment the court should also consider the evidence that could reasonably be expected to be available at trial (*Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550, CA).

On the question whether the proof of a conviction under s.11 of the Civil Evidence Act 1968 amounts to evidence of the commission of the crime it deals with, or whether s.11 merely reverses the burden of proof as to whether a crime was committed, see the considered review of case-law made by Spencer J, ruling upon an application for permission to appeal: *CXX v DXX* [2012] EWHC 1535 (QB); (2012) 162 N.L.J. 806; as to the status of judgments granting or refusing permission to appeal, see *Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001, paras 6.1 and 6.2, noted in Vol.2 para.12-55.

Effect of a set off or counterclaim

24.2.6 A claimant may be prevented from obtaining summary judgment, in whole or in part, if the defendant can show that he intends to raise a set off or counterclaim which raises a triable issue, i.e. has some prospect of succeeding (*AIS Pipework Ltd v Saxlund International Ltd* [2017] EWHC 1523 (TCC)). As to the meaning of the term "set off" see r.16.6 and the commentary thereto. As to the meaning of the term "counterclaim" see the Glossary and r.20.2 and the commentary thereto.

In some cases a set off will not prevent the claimant obtaining a summary judgment which is enforceable immediately (see para.16.6.2, "Effect of a contractual "no set off" clause", above, and para.24.2.7, "No set off in action on dishonoured bill or cheque", below). Those cases apart, if the facts relied upon by the defendant amount to a set off, the claimant may obtain summary judgment only to the extent that the value of his claim overtops the value of the set off. If the claim value is the same as or lower than the alleged value of the set off, the claimant's application for summary judgment will be dismissed (*Addax Bank BSC v Wellesley Partners LLP* [2010] EWHC 1904 (QB)).

If the defendant raises a triable counterclaim which cannot be deployed as a set off, the court may grant summary judgment to the claimant but with a stay of enforcement pending the trial of the counterclaim (*Morgan & Son Ltd v S Martin Johnson & Co* [1949] 1 K.B. 107 CA; and see *Rainford House Ltd (In Administrative Receivership) v Cadogan Ltd* [2001] B.L.R 416; [2001] N.P.C. 39). If the claim value overtops the alleged value of the counterclaim, the stay of enforcement may be made conditional upon the defendant paying the difference by a specified date. Alternatively, the stay of enforcement may be limited to the alleged value of the counterclaim.

No set off in action on dishonoured bill or cheque

24.2.7 In proceedings on a dishonoured bill of exchange, or cheque or promissory note save in exceptional circumstances or upon strong grounds (per Stephen J in *Newman v Lever* (1887) 4 T.L.R. 91) a defendant is not allowed to set up a set off or counterclaim for damages for breach of some other contract or the commission of a tort, and the claimant is entitled to judgment for the amount of their claim without a stay of execution (*Brown Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep. 668, CA, *James Lamont & Co Ltd v Hylands Ltd* [1950] 1 K.B. 585, CA, *Montebianco Industrie Tessili SpA v Carlyle Mills (London) Ltd* [1981] 1 Lloyd's Rep. 509, CA). This is also the case where the counterclaim is connected with or arises out of the contract in respect of which the bill, cheque or note was given, and whether or not the proceedings were between the immediate parties to the bill (*Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 W.L.R. 713; [1977] 2 All E.R. 463, HL). The principle is that a bill, cheque or note is given and taken in payment as cash, and not as merely a given right of action for the creditor to litigate a counterclaim (see *Jackson v Murphy* (1887) 4 T.L.R. 92).

Per Lord Denning MR in *Fielding & Platt Ltd v Selim Najjar* [1969] 1 W.L.R. 357 at 361; [1969] 2 All E.R. 150 at 152, CA:

"We have repeatedly said in this court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary".

Per Lord Wilberforce in *Nova (Jersey) Knit* at 721:

"[A seller] may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments ... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law ... does not allow cross claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made."

In *Esso Petroleum Co Ltd v Milton* [1997] 1 W.L.R. 938; [1997] 2 All E.R. 593, CA the rule precluded a defence of set off to direct debit mandates which were treated as equivalent to cheques.

Types of proceedings in which summary judgment is available[1]

24.3—(1) The court may give summary judgment against a claimant in any type of proceedings. 24.3

(2) The court may give summary judgment against a defendant in any type of proceedings except proceedings for possession of residential premises against—

(a) a mortgagor; or

(b) a tenant or a person holding over after the end of the tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988.

"any type of proceedings"

It is important to note that there are no restrictions on applications for summary judgment against claimants and r.24.3(2)(a) does not restrict applications for summary judgment for possession against any tenant of residential premises, only those tenants whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988. Moreover, in any cases which do fall within the exceptions mentioned in r.24.3(2)(a) or (b), an order akin to summary judgment may be obtained against the defendant under r.3.4. In *Shephard v Wheeler* [2000] W.T.L.R. 1175 an application for summary judgment under Pt 24 was made by a claimant in contentious probate proceedings; summary judgment not being available in such proceedings at that time the court treated the application as an application to strike out the defence under r.3.4 and granted that application. 24.3.1

Rule 53.2(3) provides a further exception to Pt 24: an application for summary judgment under Pt 24 may not be made if (a) an application has been made for summary disposal under ss.8 and 9 of the Defamation Act 1996 and that application has not been disposed of; or, (b) summary relief under s.9 has been granted on an application for summary disposal under the Defamation Act 1996.

There is no prohibition on summary judgment against the Crown but the earliest date upon which a summary judgment application can be made against the Crown is deferred under r.24.4(1A).

Where it is appropriate, the court may treat an application to strike out under r.3.4(2)(a), or an appeal from a refusal to strike out under that provision, as if it was were an application for summary judgment under r.24.2 (*Taylor v Midland Bank Trust Co Ltd (No.2)* [2002] W.T.L.R. 95; (1999-2000) 2 I.T.E.L.R. 439, CA; *S v Gloucestershire CC* [2000] 3 All E.R. 346, CA, at p.372 per May LJ).

On a claim for an unspecified amount of damages ("unliquidated damages") the court has no power to give summary judgment for an indefinable part of those damages even where it is certain that some substantial sum is due (*Associated Bulk Carriers Ltd v Koch Shipping Inc* [1978] 2 All E.R. 254, CA, *Sinclair Investment Holdings SA v Cushnie* [2006] EWHC 219 (Ch) at [55]). Instead, the proper course is for a claimant to apply for summary judgment for damages to be assessed and to seek an interim payment of damages. The two applications can, in general, conveniently be made and dealt with together (as to interim payments see para.25.7.1 below).

The prohibition in proceedings for admiralty claims in rem preventing summary judgment being given against a defendant has been removed from 1 October 2021 by the Civil Procedure (Amendment No.4) Rules 2021 (SI 2021/855).

Accounts and inquiries

Paragraph 6 of PD 24 (see para.24PD.6) confirms that an order directing any necessary accounts or inquiries may be obtained by way of an application under Pt 24 and cross-refers to certain further provisions concerning such orders set out in PD 40A (see para.40APD.1). Paragraph 6 is 24.3.2

[1] Amended by the Civil Procedure (Amendment) Rules 1999 (SI 1999/1008), the Civil Procedure (Amendment No.4) Rules 2000 (SI 2000/2092) and the Civil Procedure (Amendment No.4) Rules 2021 (SI 2021/855).

limited to claims brought by claim form but see further "Counterclaims, third party proceedings and other similar claims" below.

Specific performance

24.3.3 Paragraph 7 of the Practice Direction supplementing Pt 24 (see para.24PD.7) provides for summary judgment applications in respect of the remedy of specific performance and similar remedies in cases in which in the High Court were formerly governed by RSC Ord.86 rr.1 and 2. The paragraph modifies the provisions otherwise applicable as to the earliest time for application, the documentation to be served with the application notice and the time for service of that documentation (see further "Earliest time for applications in certain specific performance cases", "Evidence in support of the application" and "Timetable for Evidence", under r.24.4).

Paragraph 7 is limited to claims brought by claim form but see further "Counterclaims, third party proceedings and other similar claims" below.

Counterclaims, third party proceedings and other similar claims

24.3.4 Counterclaims, third party proceedings and other similar claims are referred to collectively in these rules as "Pt 20 claims" (see r.20.2). Part 24 applies to Pt 20 claims as if they were claims (see r.20.3).

Adjudication decisions in favour of a company in liquidation

24.3.5 Following the decision of the Supreme Court in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25; [2020] Bus. L.R. 1140 Fraser J listed the principles the court would take into account on an application for summary judgment on an adjudication decision in favour of a company in liquidation as follows:

(1) whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it;

(2) whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute;

(3) whether there are other defences available to the defendant that were not deployed in the adjudication;

(4) whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available; and

(5) whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

(See *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2020] EWHC 2451 (TCC); [2020] B.L.R. 671.)

Alternative procedure for claims

24.3.6 Part 8 provides an alternative procedure for claims which largely reproduces the procedure applicable to cases commenced under the previous rules by originating summons or by originating application. There is no restriction on applications under Pt 24 in cases in which the claimant uses the Pt 8 procedure. However, that procedure is itself intended to provide a simple and expeditious means of determining cases.

Who may apply

24.3.7 CPR Pt 24 does not require that the person applying for summary judgment is the defendant against whom substantive relief was being claimed: see *Changizi v Changizi* [2021] EWHC 1659 (Ch) in which the executors of a will had standing to apply for the summary dismissal or striking out of a claim brought against them even where they were merely nominal defendants to a derivative claim brought on behalf of the estate.

Procedure[1]

24.4 **24.4—(1) A claimant may not apply for summary judgment until the defendant against whom the application is made has filed—**

(a) an acknowledgment of service; or

(b) a defence,

unless—

(i) the court gives permission; or

(ii) a practice direction provides otherwise.

(Rule 10.3 sets out the period for filing an acknowledgment of service and rule 15.4 the period for filing a defence.)

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) and the Civil Procedure (Amendment No.3) Rules 2005 (SI 2005/2292).

(1A) In civil proceedings against the Crown, as defined in rule 66.1(2), a claimant may not apply for summary judgment until after expiry of the period for filing a defence specified in rule 15.4.

(2) If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing.

(3) Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of—

(a) the date fixed for the hearing; and

(b) the issues which it is proposed that the court will decide at the hearing.

(4) A practice direction may provide for a different period of notice to be given.

(Part 23 contains the general rules about how to make an application.)

(Rule 3.3 applies where the court exercises its powers of its own initiative.)

Ideal time for application

24.4.1

A party intending to apply for summary judgment should do so before or when filing their directions questionnaire (as to which, see r.26.3). If they do so, the court will not usually allocate the claim to a track before the hearing of the application. Where a party files a directions questionnaire stating that they intend to apply for summary judgment but have not done so, the case will usually be listed for an allocation hearing (as to which, see r.26.5). The application for summary judgment may be heard at that allocation hearing if the application notice has been issued and served in sufficient time (see generally, PD 26 para.5.2 (at para.26PD.5, below)).

The question whether summary judgment should be granted may be raised at trial (e.g. *Evans v James* [1999] EWCA Civ 1759 (judgment for the claimant) and *Alexander v Arts Council of Wales* [2001] EWCA Civ 514 (judgment for the defendant). As to the interrelationship between summary judgment and submissions of no case to answer see *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794.

Effect on time for service of defence

24.4.2

If a claimant applies for summary judgment before a defendant against whom the application is made has filed a defence, that defendant need not file a defence before the hearing (r.24.4(2)).

If a defendant applies for summary judgment the claimant cannot obtain a default judgment before that application has been disposed of (r.12.3(3)).

Earliest time for application: general rules

24.4.3

Unless a practice direction provides otherwise a claimant cannot validly apply for summary judgment until:

(1) the defendant against whom the application is made has filed an acknowledgment of service (as to which, see Pt 10); or

(2) the defendant against whom the application is made has filed a defence (as to which, see Pt 15); or

(3) the court gives permission (r.24.4(1)); for a case example see *Phillips v Avena* [2005] EWHC 3333 (Ch)).

Rule 24.4(1A) modifies the position in civil proceedings against the Crown; a claimant cannot apply for summary judgment against the Crown until the expiry of the period for filing a defence even if the Crown files an acknowledgment of service or a defence before then.

The time limits for filing an acknowledgment of service and a defence both run from the date of service of the claimant's particulars of claim (see rr.10.3 and 15.4, respectively). It therefore follows that a claimant cannot validly apply for summary judgment before serving their particulars of claim unless the court gives permission under (3) above.

If, after service of the particulars of claim, no acknowledgment of service or defence is filed the claimant should, before seeking the court's permission under (3) above, consider whether they can obtain a default judgment (as to which see Pt 12).

A defendant can apply for summary judgment in their favour on the claimant's claim at any time after the proceedings have been commenced. There is no requirement for them to file an acknowledgment of service or a defence before doing so.

The rules make no special provision as to the earliest time for applications in respect of counterclaims, third party proceedings or other additional claims (as to which, see Pt 20). Presumably the earliest time to apply in such claims is after the counterclaim or other additional claim has been served (see r.20.10 and *Tablet Investments (Guernsey) Ltd v Brahma Finance (BVI) Ltd* 7 October 2016, unrep. (Freedman QC, sitting as a High Court Judge (Ch)).

Earliest time for application in certain specific performance cases

24.4.4 In specific performance cases and similar cases which fall within the limits of para.7 of the Practice Direction supplementing Pt 24 (see para.24PD.7 below), a claimant may apply for summary judgment at any time after the claim form has been served, whether or not the defendant has acknowledged service of the claim form, whether or not the time for acknowledging service has expired and whether or not any particulars of claim have been served.

Earliest time for application in defamation claims

24.4.5 Applications for summary disposal under s.8 of the Defamation Act 1996 may be made by either party at any time after the service of particulars of claim, whether or not the defendant has acknowledged service of the claim form or has served the defence and whether or not the time for acknowledging service has expired (Practice Direction Supplementing Pt 53 para.5.2 (see para.53xPD.3+ below)).

Earliest time for application where Part 8 procedure used

24.4.6 The earliest time for an application for summary judgment by a claimant who has used the alternative procedure for claims set out in Pt 8 differs from the general rules set out above because:

(1) the claimant is not required to file particulars of claim (see r.8.9);
(2) the defendant is not required to file a defence (see r.8.9); and
(3) if the defendant fails to acknowledge service of the claim form the claimant cannot obtain a default judgment (r.12.2(b)).

Therefore, a claimant seeking summary judgment where the Pt 8 procedure has been used must either await the filing of an acknowledgment of service or seek the court's permission to apply (see r.24.4(1)).

Hearings concerning summary judgment fixed of the court's own initiative

24.4.7 Part of the court's duty of active case management is the summary disposal of issues which do not need full investigation and trial (r.1.4(2)(c)). Its case management powers include power to make orders, including orders under Pt 24 of its own initiative (see generally r.3.3).

Paragraph 5.4 of the Practice Direction supplementing Pt 26 (see para.26PD.5 below) makes specific provision for cases in which the court wishes to consider whether, before allocating a case to a track, whether any claim or issue in that case should be summarily disposed of. In such cases, the court will fix a hearing and give the parties notice of the issues which it is proposed that the court will decide or, alternatively, the court will make an order directing a party to take the steps described in the order within a stated time and specifying the consequences of not taking those steps.

Minimum period of notice of hearing

24.4.8 The minimum period of notice to be given to the respondent (or to the parties where the hearing is fixed of the court's own initiative) is 14 days (r.24.4(3)). For precise details as to the calculation of that time period see r.2.8 and the commentary thereto. The court has power to abridge the minimum period of notice, which power it should exercise where to do so would give effect to the overriding objective of dealing with a case justly whilst saving expense and court resources (*Serene Construction Ltd v Barclays Bank Plc* [2016] EWCA Civ 1379, upholding a refusal to grant more than a brief adjournment of the defendants' summary judgment application; although formal notice of it had not been served 14 days before the hearing (as required by r.24.4(3)(a)) the claimant had received informal notice several weeks earlier).

In certain specific performance cases the minimum period of notice of the application and evidence is only four days before the hearing (see Practice Direction supplementing Pt 24 para.7.3, para.24PD.7 below).

Contents of an application notice

24.4.9 An applicant may use Practice Form **N244** suitably completed so as to:

(1) comply with the formal requirements set out in para.2.1 of the Practice Direction supplementing Pt 23 (see para.23APD.2 below);
(2) state that it is an application for summary judgment made under Pt 24 (see para.2(2) of the Practice Direction supplementing Pt 24 at para.24PD.2 below);
(3) state what order the applicant is seeking and, briefly, why they are seeking that order (see r.23.6);
(4) (a) identify in the application notice or the evidence contained or referred to in it concisely any point of law or provision in a document on which the applicant relies; and/or
(b) state in the application notice or the evidence contained or referred to in it that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case (of (a) or (b)) the applicant is required to state that the applicant knows of no other reason why the disposal of the claim or issue should await trial (see para.2(3) of the Practice Direction supplementing Pt 24 at para.24PD.2 below);

(5) identify the written evidence on which the applicant relies, unless no evidence is relied on or the application notice itself contains all such evidence (see para.2(4) of the Practice Direction supplementing Pt 24 (at para.24PD.2 below)); and

(6) draw the attention of the respondent to r.24.5(1) (see para.2(5) of the Practice Direction supplementing Pt 24 (at para.24PD.2 below)). The Practice Direction supplementing Pt 4 (see para.4PD.2) lists two forms of application: **PF11** (for Part 24 judgment, whole claim) and **PF12** (for Part 24 judgment, one or some of several claims).

As to the importance of the requirements set out in para.2 of the Practice Direction supplementing CPR Pt 24, Floyd LJ said in *Price v Flitcraft Ltd* [2020] EWCA Civ 850 at [86]:

"The application for summary judgment made by Supawall did not comply with the mandatory procedural requirements for such applications. With respect to the Recorder, these procedural safeguards in the rule and practice direction are not 'formal requirements' or 'formalities' if by that it is intended to detract from their critical importance for ensuring a fair hearing of the application. The requirement to state in the application notice (or in the evidence contained or referred to in it) that it is made because the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one. It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise."

If the application is intended to be made to a judge other than a Master or district judge the application notice should so state (para.2.6 of the Practice Direction supplementing Pt 23 at para.23APD.2 below). The hearing of a summary judgment application will normally take place before a Master or district judge but:

(a) the Master or district judge may direct that the application be heard by a High Court judge (if the case is in the High Court) or a circuit judge (if the case is in a county court) (see para.3 of the Practice Direction supplementing Pt 24 at para.24PD.3 below);

(b) the jurisdiction of Masters and district judges to grant injunctions is limited.

In specific performance cases and similar cases which fall within the limits of para.7 of the Practice Direction supplementing Pt 24 (see para.24PD.7 below), the application notice must have attached to it the text of the order sought by the claimant (see para.7.2).

Evidence in support of the application

24.4.10 An applicant cannot rely upon oral evidence unless the court so permits (r.32.6). Instead they may rely upon written evidence set out in their claim form, statement of case, or application notice or in a witness statement. Each item of written evidence relied on must contain a statement of truth (as to which, see further the Practice Direction supplementing Pt 22 (see para.22PD.1) and the Practice Direction supplementing Pt 8 para.5.2 (see para.8APD.5). An applicant may also rely upon affidavit evidence if they so wish. However, if they do so, they may not recover any additional costs thereby incurred unless the court orders otherwise (r.32.15 and as to affidavits generally, rr.32.16 and 32.17 and the Practice Direction which supplements Pt 32 at para.32PD.1 below).

Evidence relied on which is not set out in the application notice itself must be served with the application notice (unless already served) and must also be filed (Practice Direction supplementing Pt 23, paras 9.3 and 9.6, respectively (see para.23APD.9 below)).

Paragraph 2(3) of the Practice Direction supplementing Pt 24 (see para.24PD.2 below) provides that the application notice or the evidence contained or referred to in it or served with it must:

(a) identify concisely any point of law or provision in a document on which the applicant relies; and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates,

and in either case must state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

Effect of non-compliance with the requirements of rules and Practice Directions

24.4.11 The court has general power to rectify matters where there has been an error of procedure such as defects or omissions in the documents supporting an application or a failure to serve documents within the time limits applicable (see r.3.10 and the commentary thereto).

Evidence for the purposes of a summary judgment hearing

24.5—(1) If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must— **24.5**

(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.

(2) If the applicant wishes to rely on written evidence in reply, he must—

(a) file the written evidence; and

(b) serve a copy on the respondent,

at least 3 days before the summary judgment hearing.

(3) Where a summary judgment hearing is fixed by the court of its own initiative—

(a) any party who wishes to rely on written evidence at the hearing must—

(i) file the written evidence; and

(ii) unless the court orders otherwise, serve copies on every other party to the proceedings,

at least 7 days before the date of the hearing;

(b) any party who wishes to rely on written evidence at the hearing in reply to any other party's written evidence must—

(i) file the written evidence in reply; and

(ii) unless the court orders otherwise serve copies on every other party to the proceedings,

at least 3 days before the date of the hearing.

(4) This rule does not require written evidence—

(a) to be filed if it has already been filed; or

(b) to be served on a party on whom it has already been served.

Evidence in support of the application

24.5.1 See the annotation under this heading in the commentary to r.24.4.

Evidence in response and further evidence in reply

24.5.2 Given the burdens of proof in summary judgment applications (see "Burdens of proof" under r.24.2), the evidence in response to an application should contain:

(1) if the respondent is the defendant, evidence of facts justifying any reason relied on showing why the claim or issue should be dealt with at trial;

(2) if the respondent is the claimant, evidence of facts showing a case which, if unanswered, would entitle them to judgment on the relevant claim or issue.

If the respondent files and serves written evidence the applicant may, if they wish, rely on written evidence in reply. There is no requirement for evidence in reply to be identified in the application notice (Practice Direction supplementing Pt 24, para.2(4) at para.24PD.2 below).

No party can rely upon oral evidence unless the court so permits (r.32.6). Instead, a party may rely on written evidence set out in their statement of case (if any) or in a witness statement. Each item of written evidence relied on must contain a statement of truth (as to which, see further Pt 22 and the Practice Direction supplementing it at para.22PD.1). A party may also rely upon affidavit evidence if they so wish. However, if they do so they may not recover any additional costs thereby incurred unless the court orders otherwise (r.32.15 and, as to affidavits generally, see rr.32.16 and 32.17 and the Practice Direction which supplements Pt 32 at para.32PD.1 below).

Timetable for serving evidence

24.5.3 Unless the summary judgment hearing was fixed by the court of its own initiative:

(1) the evidence in support of the application must either be contained in the application notice itself or must be served with the application notice (unless already served) (Practice Direction supplementing Pt 23 para.9.3 (see para.23APD.9). The evidence in support must also be filed (Practice Direction supplementing Pt 23 para.9.6 (see para.23APD.9));

(2) evidence in response to the application must be filed and served on every other party to the application at least seven days before the hearing (r.24.5(1));

(3) evidence in reply must be filed and served on the respondent at least three days before the hearing (r.24.5(2)).

Where a summary judgment hearing is fixed by the court of its own initiative:

(1) any party who wishes to rely on written evidence at the hearing must file and serve it on every other party to the proceedings at least seven days before the date of the hearing (r.24.5(3)(a));

(2) any party who wishes to rely on written evidence at the hearing in reply to any other party's written evidence must file and (unless the court otherwise orders) serve it on every other party to the proceedings at least three days before the date of the hearing (r.24.5(3)(b)).

In specific performance cases and similar cases which fall within the limits of para.7 of the Practice Direction supplementing Pt 24 (see para.24PD.7 below), the claimant must file and serve on every other party to the application any written evidence they wish to rely on at least four days before the hearing and r.24.5 does not apply (para.7.3).

As to the effect of late service of evidence and other failures to comply with the requirements of the rules or Practice Directions, see r.3.10 and the commentary thereto.

Court's powers when it determines a summary judgment application

24.6 When the court determines a summary judgment application it may— 24.6

(a) give directions as to the filing and service of a defence;

(b) give further directions about the management of the case.

(Rule 3.1(3) provides that the court may attach conditions when it makes an order.)

The court's approach

The court's approach to the question whether or not to grant summary judgment is described in para.24.2.4 above. **24.6.1**

Orders which the court may make

The orders which the court may make on an application under Pt 24 include: **24.6.2**

(a) judgment on the claim or on an issue therein;
(b) the striking out or dismissal of the claim;
(c) the dismissal of the application;
(d) a conditional order; and
(e) an order dealing with costs.

(See paras 5 and 9 of the Practice Direction supplementing Pt 24 (paras 24PD.5 and 24PD.9 below); a marginal note to para.5 states that the court will not follow its former practice of granting leave to a defendant to defend a claim, whether conditionally or unconditionally.)

Judgment on the claim or on an issue therein

The judgment given may be the grant of remedies sought, an order for damages to be assessed or an order amounting to declaratory relief finally determining a preliminary issue in the proceedings in favour of the claimant or defendant (see further, the commentary to r.24.1). **24.6.3**

In some cases the court will give judgment with a stay of enforcement. Where the claimant has succeeded on their claim but the defendant has shown a plausible counterclaim of a value which equals or exceeds the claim the court may stay enforcement on the claim until after the trial of the counterclaim (see further para.24.2.6 "Effect of a set off or counterclaim", above).

On a claim by a solicitor against their former client for non-payment of costs, the court may, if there is no real prospect of defending the claim, give summary judgment for a sum to be determined by means of a detailed assessment. For the form of order see **PF15** listed in the Practice Direction supplementing Pt 4. Such an order can be made even if the former client has lost the opportunity to apply for a detailed assessment of the solicitor's bill under Pt III of the Solicitors Act 1974 (*Thomas Watts & Co v Smith* [1998] 2 Costs L.R. 59, CA; *Turner & Co v Palomo SA* [2000] 1 W.L.R. 37). If, in addition to challenging items in the bill, the defendant also counterclaims for negligence, an order in Form **PF15** can be made with a stay of proceedings after the detailed assessment pending the determination of the counterclaim.

The striking out or dismissal of the claim

This order will be made in favour of the defendant if the court is satisfied that the claimant's claim is unwinnable. **24.6.4**

The dismissal of the application

This order will be made if the court is not satisfied that the respondent's case has no real prospect of success or if the court is not satisfied that there is no other reason why the case or issue should be disposed of at a trial. **24.6.5**

A conditional order

This order will be made if it appears to the court that, in respect of some claim or defence or issue, it is possible that the claim, defence or issue may succeed but it is improbable that it will do so (see para.4.4 of the Practice Direction supplementing Pt 24 at para.24PD.1 below). **24.6.6**

Paragraph 5.2 of the Practice Direction supplementing Pt 24 (see para.24PD.1 below) defines a conditional order as an order which requires a party:

"(a) to pay a sum of money into court; or
(b) to take a specified step in relation to his claim or defence as the case may be, and which provides that the party's claim will be dismissed or his statement of case will be struck out if he does not comply."

The court's jurisdiction to make a conditional order stems from r.3.1(3) (*Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119; [2016] 1 W.L.R. 3598). The scope and effect of r.3.1(3) was explained by the Court of Appeal in *Huscroft v P & O Ferries Ltd (Practice Note)* [2010] EWCA Civ 1483; [2011] 1 W.L.R. 939, CA, a judgment subsequently cited with approval in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2017] UKSC 16; [2017] 1 W.L.R 970, at [44] (and see further, para.3.1.14, above). In *Huscroft* it was held that, before exercising the power, the court should identify the purpose of imposing a condition and should satisfy itself that the condition it

has in mind represents a proportionate and effective means of achieving that purpose, having regard to the order to which it is to be attached. In summary judgment applications against a defendant the purpose of making a conditional order requiring payment in to court is usually to provide security in respect of a particularly weak defence.

Conditional orders for payment into court or security for costs

24.6.7 In *Gama Aviation (UK) v Taverelas Petroleum Trading DMCC* [2019] EWCA Civ 119 the Court of Appeal held that the following five principles applied when considering whether a conditional order for payment into court or security for costs should be made on an application for summary judgment:

1. In a case where the defendant has a real prospect of successfully defending the claim, the court must not impose a condition requiring payment into court or the provision of security with which it is likely to be impossible for the defendant to comply.
2. The burden is on the defendant to establish on the balance of probabilities that it would be unable to comply with a condition requiring payment into court or the provision of equivalent security.
3. In order to discharge that burden a defendant must show, not only that it does not itself have the necessary funds, but that no such funds would be made available to it, whether (in the case of a corporate defendant) by its owner or (in any case) by some other closely associated person.
4. Despite the fact that the Rules expressly contemplate the possibility of a payment condition being imposed, it is not incumbent on a defendant to a summary judgment application to adduce evidence about the resources available to it, at any rate in a case where no prior notice has been given that the claimant will be seeking a conditional order.
5. The court's power to make a conditional order on a summary judgment application is not limited to a case where it is improbable that the defence will succeed. Such an order may be appropriate in other circumstances, for example (and without being exhaustive) if there is a history of failures to comply with orders of the court or there is a real doubt whether the party in question is conducting the litigation in good faith. However, the court needs to exercise caution before making a conditional order requiring a defendant who may have a good defence to provide security for all or most of the sum claimed as a condition of being allowed to defend.

In considering whether the burden imposed under the third principle has been discharged, the Court held that it is important in the case of a corporate defendant to keep well in mind that the question is not whether the company's shareholders can raise the money but whether the defendant company has established that funds to make the payment will not be made available to it by its beneficial owners. As to the kind of evidence which the court would expect to receive when a company seeks to discharge this burden Longmore L.J, cited Lord Wilson in *Goldtrail v Travel Ltd v Aylin* [2010] UKSC 57 at [24]:

> "In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

A conditional order requiring a claimant to give security for a defendant's costs can also be made where, had the defendant applied under Pt 25 (Section II) in addition to or instead of his application under Pt 24, his application for security under Pt 25 (Section II) would have been successful (*Allen v Bloomsbury Publishing Plc* [2011] EWHC 770 (Ch); [2011] F.S.R. 222).

In *Homebase Ltd v LSS Services Ltd* [2004] EWHC 3182, Ch. C alleged that D owed him fees for D's occupation of certain premises as a licensee. By witness statement, D alleged that no such fees were payable because of an oral agreement to that effect which had been expressly made by C and D. C denied that any such agreement had been made and sought summary judgment. Peter Smith J held that, although the evidence relied on by D was not incredible, sufficient doubts as to it had been raised to justify the making of a conditional order requiring D to pay into court the whole sum claimed by C.

In *Abbot Investments (North Africa) Ltd v Nestoil Ltd* [2017] EWHC 119 (Comm), a claim under a guarantee which was disputed on the basis of fraudulent misrepresentation, the court dismissed an application for summary judgment but nevertheless made a conditional order requiring the defendant to pay almost 100% of the amount claimed into court: Teare J ruled that, whilst it was possible that it might succeed, the defence raised was particularly weak and very vulnerable to attack and there was evidence that the defendant would be able to pay US $2 million into court (see further as to this aspect of that case, *Goldtrail Travel Ltd v Aydin* [2017] UKSC 57; [2017] 1 W.L.R. 3014 noted in para.3.1.14, above).

A conditional order requiring a respondent to make a payment of money into court puts the applicant into the position of a secured creditor up to the value of that payment if the applicant's case is subsequently proved or conceded (*Halvanon Insurance Co Ltd v Central Reinsurance Corp* [1988] 1 W.L.R. 1122, approved in *Crumpler v Candey Ltd* [2018] EWCA Civ 2256).

In *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119; [2016] 1 W.L.R. 3598, summary

judgment had been sought in respect of a loan agreement; the defendants, challenging the validity of that agreement, sought an order for rescission which, if granted, would inevitably be on terms that they must refund to the claimants the original sums borrowed. In those circumstances the Court of Appeal held that the lower court could have made a conditional order even though the defendant's case for rescission could not be said to have been improbable. The Court of Appeal held that paragraphs 4 and 5 of Practice Direction 24 are not exhaustive of the court's options as to the orders it may make on an application for summary judgment; the relevant power to impose conditions, as to payments into court or otherwise, is not found in Pt 24, but is contained in r.3.1(3) (referred to in the parenthesis following r.24.6). See further para.3.1.4 above.

An order dealing with costs

24.6.8 The court may make an order for costs, for example, an order for fixed costs (as to which see Pt 45) or an order for costs, to be assessed by way of summary assessment or detailed assessment (as to which, see r.44.1).

Fixed costs may be applicable where the only claim in the proceedings is a claim for a specified sum of money or a claim to which Practice Direction 7B applies (Consumer Credit Act claims) and where, in either case, the value of the claim exceeds £25.

Where the court makes an order on an application under Pt 24 which does not mention costs, no party is entitled to costs relating to that order (r.44.10(1)).

Setting aside order for summary judgment

24.6.9 The orders the court may make on an application for summary judgment include: (1) judgment on the claim, (2) the striking out or dismissal of the claim, (3) the dismissal of the application, (4) a conditional order (Practice Direction (The Summary Disposal of Claims), para.5.1; see para.24PD.5 below). Where the applicant or any respondent to an application for summary judgment fails to attend the hearing of the application, the court may proceed in their absence. Where, in the absence of the applicant or any respondent, an order is made at the hearing, r.23.11 would appear to have the effect of enabling the court on the application of the absent party (or of its own initiative) to re-list the application for further consideration. However if, at the hearing of the application, the court gives summary judgment against the absent party, the question which then arises is whether that party may apply to the court to have the judgment set aside or varied. Under the former summary judgment rules contained in the RSC (and applied in county courts by operation of CCR Ord.9 r.14(5)), it was expressly provided that any judgment given against a party who did not appear at the hearing of an application for summary judgment could be set aside or varied by the court on such terms as it thought just (RSC Ord.14 r.11, see also RSC Ord.86 r.7). The purpose of this rule was to reverse the effect of the decision of the Court of Appeal in *Spira v Spira* [1939] 3 All E.R. 924, CA, and to remove the anomaly that, although every other judgment (including a judgment at trial) given in the absence of a defendant could be set aside (at least in certain circumstances), a summary judgment could not, though it could be made the subject of an appeal. CPR Pt 24 contains no such express provision and the omission is not made good by CPR r.39.3(3), as it is confined to the setting aside of a judgment given at trial in the absence of a party (see further para.39.3.8 below). Further, the matter is not dealt with by r.23.11, which is confined to orders made on applications (including, as suggested above, orders made on summary judgment applications other than summary judgment, e.g. conditional orders.) However, it seems to be readily assumed that the position is retrieved by Practice Direction (Summary Disposal of Claims), para.8.1 which states that, if an order for summary judgment under Pt 24 is made against a respondent who does not appear at the hearing of the application, the respondent may apply "for the order to be set aside or varied" (see para.24PD.8 below). In this context "order" includes judgment on the claim (ibid., para.5.1(1)). On the hearing of an application the court "may make such order as it thinks just" (ibid., para.8.2). It is not always easy to tell whether particular paragraphs in practice directions supplementing CPR rules are attempting (1) merely to narrate what the rules they are supplementing say, or (2) to put an authoritative gloss on those rules. In *Tubelike Ltd v Visitjourneys.com Ltd* [2016] EWHC 43 (Ch) (Chief Master Marsh), it was stated that, although the matter is not entirely free from doubt, para.8.1 of Practice Direction 24 is intended to supplement the rules in Part 24 and to give the court a power it would not otherwise have if an order is made in the absence of a party (para.20).

Other CPR provisions permitting applications to set aside or vary judgments given in the applicant's absence set out the criteria which the court must apply (e.g., r.3.6(2) (application must be made promptly) and r.39.3(5) (application must be made promptly, good reason shown for absence and reasonable prospects of success) and see also the *Denton* criteria in applications under r.3.9 and r.13.3). Practice Direction 24 does not provide any guidance about the criteria the court should apply in applications under para 8.1. In *Tubelike Ltd v Visitjourneys.com Ltd* (see above), Chief Master Marsh considered that an application under para.8.1 was analogous to an application under r.39.3 (failure to attend the trial) and so had regard to the r.39.3(5) factors (summarised above) "without being a slave to the requirements of that rule" and to the provisions of the overriding objective (r.1.1, above).

See further paras 3.1.17.2 (above) and 39.3.8 and 40.9.2 (below).

Case management

24.6.10 Where the court dismisses the application or makes an order that does not completely dispose of the claim, the court will give case management directions as to the future conduct of the case

(para.10 of the Practice Direction supplementing Pt 24 (see para.24PD.10 below)). *Tubelike Ltd* was cited with approval in *Phonographic Performance Ltd v Balgun* [2018] EWHC 1327 but only in the context of an application for permission to appeal; as to the prohibition on the citation of judgments given on such applications, see Practice Direction (Citation of Authorities) para.6.1 (set out in para.39MPD.2, below).

Special provision is made for a case in which an order is made for an amount of damages or interest to be decided by the court or for the taking of an account or the making of an inquiry as to any sum due or any similar order (other than certain orders for the assessment of costs). In order to deal with such cases para.12 of the Practice Direction supplementing Pt 26 (see para.26PD.12 below) provides (amongst other things) that the court may:

(a) give directions for the assessment;

(b) make the assessment immediately (if the claimant's evidence for that assessment has been served on the defendant at least 3 days in advance of the hearing);

(c) allocate the claim to the small claims track (if the financial value of the claim is within the scope of that track).

PRACTICE DIRECTION 24—THE SUMMARY DISPOSAL OF CLAIMS

This Practice Direction supplements CPR Part 24

Applications for summary judgment under Part 24

24PD.1

1.1 Attention is drawn to Part 24 itself and to—
Part 3, in particular rule 3.1(3) and (5),
Part 22,
Part 23, in particular rule 23.6,
Part 32, in particular rule 32.6(2).

1.2 In this Practice Direction, where the context so admits, the word "claim" includes—
(1) a part of a claim, and
(2) an issue on which the claim in whole or part depends.

1.3 An application for summary judgment under rule 24.2 may be based on—
(1) a point of law (including a question of construction of a document),
(2) the evidence which can reasonably be expected to be available at trial or the lack of it, or
(3) a combination of these.

1.4 Rule 24.4(1) deals with the stage in the proceedings at which an application under Part 24 can be made (but see paragraph 7.1 below).

Procedure for making an application

24PD.2

2(1) Attention is drawn to rules 24.4(3) and 23.6.

(2) The application notice must include a statement that it is an application for summary judgment made under Part 24.

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

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

(4) Unless the application notice itself contains all the evidence (if any) on which the applicant relies, the application notice should identify the written evidence on which the applicant relies. This does not affect the applicant's right to file further evidence under rule 24.5(2).

(5) The application notice should draw the attention of the respondent to rule 24.5(1).

(6) Where the claimant has failed to comply with Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol, an action for summary judgment will not normally be entertained before the defence has been filed or, alternatively, the time for doing so has expired.

The hearing

24PD.3

3(1) The hearing of the application will normally take place before a Master or a District Judge.

(2) The Master or District Judge may direct that the application be heard by a High Court Judge (if the case is in the High Court) or a Circuit Judge (if the case is in the County Court).

The Court's approach

24PD.4 **4** Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.

Orders the Court may make

24PD.5 **5.1** The orders the court may make on an application under Part 24 include—

(1) judgment on the claim,
(2) the striking out or dismissal of the claim,
(3) the dismissal of the application,
(4) a conditional order.

5.2 A conditional order is an order which requires a party—

(1) to pay a sum of money into court, or
(2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply.

(Note—the court will not follow its former practice of granting leave to a defendant to defend a claim, whether conditionally or unconditionally.)

Accounts and inquiries

24PD.6 **6** If a remedy sought by a claimant in his claim form includes, or necessarily involves, taking an account or making an inquiry, an application can be made under Part 24 by any party to the proceedings for an order directing any necessary accounts or inquiries to be taken or made.

(Practice Direction 40A contains further provisions as to orders for accounts and inquiries.)

Specific performance

24PD.7 **7.1**(1) If a remedy sought by a claimant in his claim form includes a claim—

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease or tenancy of any property, with or without an alternative claim for damages, or
(b) for rescission of such an agreement, or
(c) for the forfeiture or return of any deposit made under such an agreement,

the claimant may apply under Part 24 for judgment.

(2) The claimant may do so at any time after the claim form has been served, whether or not the defendant has acknowledged service of the claim form, whether or not the time for acknowledging service has expired and whether or not any particulars of claim have been served.

7.2 The application notice by which an application under paragraph 7.1 is made must have attached to it the text of the order sought by the claimant.

7.3 The application notice and a copy of every affidavit or witness statement in support and of any exhibit referred to therein must be served on the defendant not less than 4 days before the hearing of the application.

(Note—the 4 days replaces for these applications the 14 days specified in rule 24.4(3). Rule 24.5 cannot, therefore, apply.)

(This paragraph replaces RSC Order 86, rules 1 and 2 but applies to County Court proceedings as well as to High Court proceedings.)

Setting aside order for summary judgment

24PD.8

8.1 If an order for summary judgment is made against a respondent who does not appear at the hearing of the application, the respondent may apply for the order to be set aside or varied (see also rule 23.11).

8.2 On the hearing of an application under paragraph 8.1 the court may make such order as it thinks just.

Costs

24PD.9

9.1 Attention is drawn to Part 45 (Fixed Costs).

9.2 Attention is drawn to Practice Directions 44 to 48 on costs and in particular to Subsections 8 and 9 of Practice Direction 44, which relate to the court's power to make a summary assessment of costs.

9.3 Attention is also drawn to rule 44.10(1) which provides that if an order does not mention costs no party is entitled to costs relating to that order.

Case management

24PD.10

10 Where the court dismisses the application or makes an order that does not completely dispose of the claim, the court will give case management directions as to the future conduct of the case.

INJUNCTIONS

14TH EDITION

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CHAPTER 1

Introduction

1 DEFINITION, CLASSIFICATION AND EFFECT

1-01 An injunction is an order of a court requiring a party either to do a specific act or acts (a *mandatory* or positive injunction) or to refrain from doing a specific act or acts (a *prohibitory* or negative injunction).

Injunctions may be further classified according to the period of time for which the order is to remain in force. A *final* or *perpetual* injunction is a final judgment, and for that reason is usually only granted (except by consent of the defendant) after a trial on the merits. An *interim* injunction, by contrast, is a provisional measure taken at an earlier stage in the proceedings, before the court has had an opportunity to hear and weigh fully the evidence on both sides.

An injunction may be granted even though the claimant's legal rights have not as yet been infringed; in such a case the claimant is described as having obtained the injunction quia timet—"because he fears"—that wrong will be done to him if the order is not made. In *Redland Bricks Ltd v Morris* [1970] A.C. 652, Lord Upjohn said at 664G:

> "[T]o prevent the jurisdiction of the courts being stultified equity has invented the quia timet action, that is an action for an injunction to prevent an apprehended legal wrong, though none has occurred at present."

It may be noted at this stage that mandatory injunctions (see para.2-20) are less common than the prohibitory type and are likely, all things being equal, to be more drastic in their effect. A mandatory injunction is seldom granted as an interim measure (though see para.3-35 and following). Courts prefer to hear full evidence on both sides before attempting to compel positive action.

1-02 An injunction carries the sanction of contempt of court if it is disobeyed (see para.9-01 and following). It must therefore always be expressed with precision and clarity. As it was put in a Scottish case in 1874, cited by Lord Hope in *Attorney General v Punch Ltd* [2003] 1 A.C. 1046, "if an injunction is to be granted at all, it must be in terms so plain that he who runs may read". In *O (A Child) v Rhodes* [2016] A.C. 219 the Supreme Court held that an injunction granted by the Court of Appeal prohibiting the publication by the appellant of "graphic accounts" of the abuse he suffered as a child infringed this basic rule (see per Lady Hale at [79] and Lord Neuberger at [98]-[100]).

Once an injunction is granted or undertaking given, it remains in force and must be obeyed until it is discharged by the court, however stale the litigation (*Isaacs v Robertson* [1985] A.C. 97), and even if the order should not have been made in the first place (*Johnson v Walton* [1990] 1 F.L.R 350; *M v Home Office* [1994] 1 A.C. 377).

2 REQUIREMENT OF A SUBSTANTIVE CLAIM

1-03 The injunction is an equitable remedy and originally could only be granted by the High Court of Chancery. Nowadays both the High Court (all divisions) and the County Court have a broad discretionary jurisdiction, by virtue of s.37(1) of the Senior Courts Act 1981 (formerly the Supreme Court Act 1981) and s.38 of the County Courts Act 1984 respectively, to grant an interim or final injunction "in all cases in which it appears to the court to be just and convenient to do so". The order may be made unconditionally or on such terms and conditions as the court thinks just (Senior Courts Act 1981 s.37(2)).

Strictly, as Lord Scott explained in *Fourie v Le Roux* [2007] 1 W.L.R. 320 at [46]: "The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the [Senior Courts] Act 1981 and its statutory predecessors. It derives from the pre- Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) powers of the Chancery courts, and other courts, to grant injunctions (see section 16 of the 1873 Act and section 19(2)(b) of the 1981 Act)."

1-04 There is one overriding requirement: the applicant must normally have a cause of action in law entitling him to substantive relief. An injunction is not a cause of action (like a tort or a breach of contract) but a remedy (like damages). "[Injunctions] are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign" (Lord Bingham in *Fourie* at [2]). For example, the law does not recognise a right of exclusive property in the name of a house (*Day v Brownrigg* (1878) 10 Ch. D. 294) nor of a political party (*Kean v McGivan* [1982] F.S.R. 119). Neither does it recognise a right of exclusive property in the names of people; a peer failed to obtain an injunction restraining his ex-wife, after her remarriage, from continuing to call herself "Countess Cowley" (*Cowley (Earl) v Cowley (Countess)* [1901] A.C. 450). A private citizen cannot obtain an injunction to prevent the commission of a criminal offence unless he can prove that he personally has suffered or will suffer damage amounting to an actionable tort as a result (*Gouriet v Union of Post Office Workers* [1978] A.C. 435; see also paras 4-43 to 4-44). An individual cannot obtain an injunction restraining the BBC from broadcasting anti-German programmes (*Thorne v BBC* [1967] 1 W.L.R. 1104). In each case there is *no cause of action*.

Lord Diplock's statement in *The Siskina* [1979] A.C. 210 at 254 that a right to obtain an interim injunction is "dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff" has long caused controversy. A majority of the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 held that in referring to a "pre-existing cause of action", Lord Diplock did not mean to suggest that the conduct giving rise to a cause of action must already have occurred, as he specifically contemplated a "threatened" invasion of a right. In a freezing injunction the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected (*Mercedes Benz AG v Leiduck* [1996] A.C. 284). Lord Leggat in *Broad Idea* said that there was no justification for requiring that a right to sue for damages must already have accrued before the injunction can be granted. What matters is whether there is a sufficient likelihood that a judgment will be obtained and that it will be rendered ineffective unless the court grants an injunction. He (in the majority) held that the reasoning in *The Siskina* had impeded the development of the common law and that its constraints on the power to grant interim injunctions were undesirable and legally unsound. The minority agreed in the result but held that it was unneces-

sary and undesirable to overturn the long-standing principles expressed in *The Siskina* when the law had evolved around and past them.

1-05 There have long been exceptions to the cause of action rule: they include applications to restrain the institution of proceedings in the High Court or overseas courts and, pursuant to the Civil Jurisdiction and Judgments Acts 1982 and 1991 and Orders in Council made under the 1982 Act, applications when there is litigation between the parties in the courts of another country (see paras 4-54 and 7-47 and following). An injunction can be granted even if a cause of action (in its strict sense) does not yet exist, if it is nevertheless possible to issue a contribution notice. If a co-defendant is entitled to issue and serve a contribution notice, he has a cause of action for so doing. In a proper case a freezing injunction can be issued in support of a valid contribution notice (*Kazakhstan Kagazy plc v Zhunus* [2017] 1 W.L.R. 1360). Injunctions without a cause of action may be possible against a non-party with documents who is caught up in the wrongdoing (*Abela v Baadarani (No.2)* [2017] EWHC 269 (Ch), [2018] 1 W.L.R. 89).

An interim injunction must be ancillary to a substantive claim made in the action, but it need not be in a form which could be granted after final judgment. For example, in *Fresh Fruit Wales Ltd v Halbert, The Times*, 29 January 1991, the claimants claimed delivery up of 22 rugby season tickets. At a trial, they would either succeed entirely or fail entirely. The Court of Appeal held that s.37(1) conferred a discretion on the court to grant an interim injunction ordering delivery up of half the tickets (though such an order was in fact refused).

A party seeking a permanent injunction must claim it in his pleadings; an interim injunction may be granted even though the equivalent final order has not been specifically claimed (CPR r.25.1(4)).

1-06 In *Re Channel Four Television Co Ltd* [1988] C.L.Y 2864, the Court of Appeal, Criminal Division, made an order on an application by the Attorney General prohibiting a television re-enactment of an appeal from being broadcast until after judgment in the appeal. This was said to derive from the inherent power of a superior court of record to grant an injunction to protect its own process.

In the *parens patriae* jurisdiction exercised by the Family Division of the High Court over children or patients with a mental disability, the concept of a substantive cause of action is wide, but not infinite. In *Re V (A Minor) (Injunction: Jurisdiction)* [1997] 2 F.C.R. 195, Johnson J had held that both a declaration and an injunction could be granted in favour of a man approaching his 18th birthday, mentally competent but with severe physical disabilities, who sought to restrain his parents (whether before or after he reached the age of 18) from interfering with his right to choose where he was to live and with whom he was to associate. Both the injunction and the declaration were set aside; the Court of Appeal held that there was no evidence of the parents seeking to interfere with V's legal rights and, in the absence of an issue affecting his legal rights, no order could be made. Contrast this with *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam. 1, where the Court of Appeal upheld an interim injunction granted by Hale J to a woman caring for an elderly patient who had suffered a severe stroke, to prevent his relatives from removing him from the jurisdiction until the court could make a declaration as to what course of treatment was in his best interests.

In *Broadmoor Special Hospital Authority v Robinson* [2000] Q.B. 775, the defendant, an inmate at Broadmoor who had been convicted of manslaughter, wrote a book identifying other patients and discussing their mental states. The Court of Appeal held by a majority that a public body required to exercise a statutory responsibility in the public interest could, in the absence of an implication to the contrary in the statute, apply to the court to prevent interference with the

performance of those responsibilities; it held unanimously, however, that the hospital authority could not bring proceedings to protect other patients' rights to confidence or privacy (such claims had to be in the patients' names), nor to prevent distress to victims' families, and that therefore an injunction had rightly been refused on the facts. The dissenting judgment of Morritt LJ on the jurisdiction point is powerfully argued.

1-07 In *Governor and Company of the Bank of Scotland v A* [2001] 1 W.L.R. 751, a bank, faced with a difficulty caused by the legislation on money laundering, applied for an injunction against itself prohibiting it from making payments from a customer's accounts. The Court of Appeal held that it was impossible to envisage circumstances in which it would be appropriate to grant an injunction against the only party seeking relief. (An interim declaration under CPR r.25.1(1)(b) might be appropriate: see para.5-29).

In *Maclaine Watson & Co v ITC (No.2)* [1989] Ch. 286, the Court of Appeal was faced with the problem of how to compel a judgment debtor (the International Tin Council), which was an unincorporated association, to disclose its UK assets, since the usual powers under rules of court to examine a judgment debtor did not apply. It held that the court had power under s.37(1) of the Senior Courts Act 1981 to grant a mandatory injunction ordering such disclosure, on either of two bases. First, the defendants' failure to meet the money judgment in favour of the claimants was a breach of their obligations to the claimants and thus an invasion of the claimants' legal rights. Secondly, it was also a failure to comply with an order of the court, and there was power under s.37(1) to make any ancillary order, including a mandatory order, to ensure the effectiveness of any other order made by the court. This second point in particular is of great importance. See also *Re Oriental Credit Ltd* [1988] Ch. 204, where Harman J granted an injunction under s.37(1) restraining a company director from leaving the country until he had complied with a registrar's order to attend for oral examination. However, in *B v B (Injunction: Jurisdiction)* [1998] 1 W.L.R. 329, Wilson J held that an injunction cannot be granted to compel a party against whom an order for costs has been made (or money judgment given) to remain in this country until the sum due has been paid.

3 "JUST AND CONVENIENT"

1-08 The words "just and convenient" in s.37(1) of the Senior Courts Act 1981 re-enact similar provisions in statutes of 1873 and 1925. This expression must be taken to mean "just, as well as convenient" (*Day v Brownrigg* (1878) 10 Ch. D. 294). It is not a licence for a judge to grant an injunction whenever he dislikes what the defendant is doing—that would be palm tree justice.

In *South Carolina Insurance Co v Assurantie Maatschappij* [1987] A.C. 24, a majority of the House of Lords stated that the power of the High Court to grant injunctions under s.37(1) "has been circumscribed by judicial authority dating back many years", and that it is limited (with the exception of injunctions to restrain proceedings overseas) to two situations:

(a) where one party to an action can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former, for the enforcement of which the latter is amenable to the jurisdiction of the court;
(b) where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.

1-09 In *Pickering v Liverpool Daily Post* [1991] 2 A.C. 370, the House of Lords