Authorities Bundle Index

Case No		**(1) QB-2021-003576 (2) QB-2021-003626 and (3) QB-2021-003737**
Applicants		**NATIONAL HIGHWAYS LIMITED**
Defendant(s)		**(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 138 OTHERS**
Hearing date		**24 April 2023**
Party filing this document		**Claimant**

AUTHORITIES

Neutral Citation Number: [2023] EWHC 402 (KB)

Case No: KB-2022-003542

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before :

MR JUSTICE CAVANAGH

- -

Between :

TRANSPORT FOR LONDON	**Claimant**
- and -	
LEE AND OTHERS	**Defendant**

- -
- -

Andrew Fraser-Urquhart KC (instructed by **TfL**) for the **Claimant**
Oliver Brady (named Defendant) attended. No attendance or representation for the other **Defendants**

Hearing date: 24 February 2023

- -

Approved Judgment

MR JUSTICE CAVANAGH :

1. On 31 October 2022, Freedman J granted an interim injunction that had been applied for by the claimant, TFL, against 168 named defendants and against persons unknown. The defendants are supporters of, and activists connected with, Just Stop Oil ("JSO"). The injunction prevents the blocking, for the purpose of protests, of the roads/locations currently specified in Annex 2 to that injunction and to the Claim Form in these proceedings. There are approximately 23 of these. These are referred to as "the JSO Roads". The JSO Roads are strategically important roads in London which form an important part of the TfL Strategic Road Network ("the GLA Roads"). GLA Roads are, very broadly speaking, the most important roads in Greater London, carrying a third of London's traffic despite comprising only 5% of its road network length.

2. A large proportion of those protests have involved protesters blocking roads by sitting down in the road and often gluing themselves to its surface and/or locking themselves to each other to make their removal more time consuming. In more recent times, groups of protesters have walked or marched in the roadway at a very slow pace, thereby impeding traffic.

3. The injunction granted by Freedman J continued an injunction which had been granted, without notice, by Yip J, on 18 October 2022. The period covered by Yip J's injunction expired on 23.59 on 27 October 2022. Freedman J heard argument from the claimant's counsel on that day and then continued the injunction for a short time until the return date of 31 October 2022. As I have said, he handed down his ruling on 31 October 2022. The order was sealed on 4 November 2022.

4. The injunction that was granted by Freedman J expires on 23.59 on 28 February 2023.

5. By an application notice dated 1 February 2023, the claimant seeks three further orders. These are that:

   i) There be an extension of the injunction order, until trial or further order or with a backstop of 23.59 on 24 February 2024. The claimant also seeks orders for alternative service and third party disclosure;

   ii) That there be an expedited trial, with a time estimate of 2 days; and

   iii) That there be an Order under CPR r31.22 to use in this Claim any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in Claim No. QB-2021-003841 and Claim No. QB-2021-004122. And to use in those other Claims any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in this Claim. These claims are similar proceedings brought by the claimant against supporters of Insulate Britain, an organisation with similar aims to JSO.

6. None of the Defendants has entered an appearance or attended the hearing before Freedman J. Only one of the Defendants has attended today, Mr Oliver Brady, though the named defendants were served notice of the hearing, using the means provided for in Freedman J's judgment. Specifically, on 14-15 February 2023, the claimant's solicitor sent via post to each named defendant a letter containing the details of this

hearing and stating that the claimant would provide upon request further evidence or other documents filed in these proceedings. That letter was accompanied by the N244 application notice for these applications and the draft Interim JSO Injunction Order including annexes. These documents were also all sent to JSO via email.

7. The claimant is represented before me, as it was before Freedman J, by Mr Andrew Fraser-Urquhart KC and Mr Charles Forrest. I am grateful to them for their assistance. As I have said, Mr Brady has attended the hearing today and I invited him to make submissions. It became clear that the main reason for his attendance, to his credit, is that he did not want the court to think that he was showing disrespect to the court by his non-attendance. He also explained that he had been arrested for actions which he says were outside the prohibited area. He says that he was told yesterday that the police will not take action against him in criminal proceedings. He is concerned that the civil proceedings will continue. He also gave me some explanation of the motivation behind the protests. As for those matters, I must stress that I am not dealing today with the question whether Mr Brady should be personally liable, or whether there should be a final remedy against him. That is a matter for another time and does not affect the question whether there should be a continuation of the injunction. As for the reasons for the protest, that is not a matter upon which the court should comment.

8. I have been provided with a witness statement of Mr Abbey Ameen, the defendant's solicitor, and with a number of other documents. I should add that one key document was not filed with the court. This was the written judgment of Freedman J, which is reported at [2022] EWHC 3102 (KB), in which he considered and dealt with most of the same issues that I am required to deal with, on much of the same evidence. I did not understand why this was not drawn to my attention specifically and filed with the court well in advance of this hearing. However, Mr Fraser-Urquhart KC provided an explanation, which was that the claimant's legal team was unaware that a written copy of the judgment had been published. Fortunately, I located the judgment of my own motion and read it at an early stage of my preparation for this hearing.

9. The factual allegations on the basis of which the injunction is sought, as they stood at 31 October 2022, are very fully set out by Freedman J in his judgment dated 31 October 2022. I will not repeat the summary of the facts which Freedman J has already given in that judgment beyond noting that Freedman J said this following:

    i) JSO is a group which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. It lends its name to a wider coalition - the JSO coalition - whose demands are (i) no new oil, (ii) tax big polluters and billionaires, (iii) energy for all, (iv) insulate our homes and (v) cheap public transport. J SO have stated that unless the government agrees to do what it requires, it will be forced to intervene and will take direct action, which it has now sought to do on a large number of occasions.

    ii) There is an intersection between the groups Insulate Britain, JSO and Extinction Rebellion. Since September 2021, the courts have granted a number of other injunctions, similar in form to the injunction granted by Freedman J in these proceedings, against members and supporters of those organisations. These were obtained at the behest of other bodies, including National Highways Limited and HS2 Ltd. Many of the same named defendants appear in a number

of the cases. In October and November 2021, the claimant was granted two urgent without notice interim injunctions against certain named defendants and persons unknown in connection with Insulate Britain protests which involved Insulate Britain protesters sitting down in and blocking GLA Roads. There is a large overlap between the defendants named in the TFL Insulate Britain injunctions and the defendants in this case;

iii) JSO protests have, until recently, largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. The intention is thereby to prevent traffic from proceeding along the highway or to disrupt traffic. The effect has been to cause traffic jams and significant tailing back of traffic.

iv) It is said on behalf of the claimant that JSO's actions have been deliberately to block the highway and cause disturbance, rather than that being an incidental result of their protesting. It is also claimed that the protests have been disruptive and are capable of giving rise to putting the lives of those protesting and people driving on the roads at risk, in particular on the movement of emergency service vehicles. There is also the risk that other motorists and users of the highway, antagonised by the methods of JSO, will engage in violence in the context of their ordinary lives being disrupted. It is submitted that the protests have also caused economic harm, serious nuisance and a great deal of cost to the police and other public bodies, including local authorities, National Highways and the CPS.

v) As of 26 October 2022, 1,900 arrests had been made of JSO protesters since 1 April 2022. 585 of those arrests were made between 1 and 26 October 2022.

vi) Protesters have breached interim injunctions on multiple occasions and there have been committal proceedings.

vii) On 4 May, 9 May and 12 May 2022, JSO declared both Birmingham Crown Court and the prison at which its protesters have been held to be sites of civil resistance. Various instances are referred to of protests both around the court and in prisons.

viii) There were protests daily by JSO between 1 October and 31 October 2022., During that period, there were, on a daily basis, large scale protests at key areas of largely the central London road system; and

ix) On many occasions, JSO have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London continued, even after interim injunctions were made and served.

10. All of the same points were made in the evidence before me, contained in Mr Ameen's seventh statement. Indeed, this was an updated version of the statement that was before Freedman J. Mr Ameen's statement also provided evidence, in an appendix, about the strategic importance of the JSO roads, explaining both the damage which has been caused and/or might further be caused by protesters blocking them and therefore also

their attraction to protesters who have sought or who might further seek to cause maximum disruption through their protests in pursuit of their demands.

11. I will now summarise events and developments since Freedman J handed down his judgment. The information upon which this summary is based comes from the seventh witness statement of the claimant's solicitor, Mr Abbey Ameen.

12. The claimant accepts that JSO activity involving blocking roads in London has slowed down somewhat since its peak in October 2022. The claimant believes that the injunction granted by Freedman J and other similar such interim injunctions have had the effect of pausing and/or reducing such protests. The claimant's evidence is also that a factor which temporarily pauses or reduces the intensity of such protests is the cold weather from around mid-December to around the end of March. Experience has shown that the absence of, or reduction in, protests during this period should not be interpreted as a sign that the protesters have stopped for good. Furthermore, the claimant says that the public statements made on behalf of JSO make clear that JSO has no intention of bringing its campaign of protests to an end. At paragraph 50 of his witness statement, Mr Ameen referred to 12 specific occasions, in which JSO (now also the JSO Coalition) and/or its individual protesters have said that they will not cease their deliberatively disruptive protests until their demands are met. For example, on 16 October 2022, in a response directed to the Home Secretary, JSO stated "We will not be intimidated by changes to the law, we will not be stopped by injunctions sought to silence nonviolent people. These are irrelevant when set against mass starvation, slaughter, the loss of our rights, freedoms and communities." On 1 November 2022, JSO stated that it would temporarily pause its disruptive protests to give the government time to reflect on JSO demands. But JSO said that if it did not receive a response by the end of 4 November indicating compliance with its demands then it would escalate its legal disruption against what it called a treasonous government. In late December 2022, JSO stated that it will continue its deliberately disruptive protests notwithstanding Extinction Rebellion saying on 31 December 2022 that it will be temporarily ceasing theirs.

13. There have, in fact, been a considerable number of JSO protests since Freedman J granted his injunction. There have been the following:

    i) On 7 November 2022, JSO started 4 days of protest on the M25. JSO protesters (including one named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries in at least 6 locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. JSO stated that it would continue to protest on the M25 and urged National Highways Limited to implement a 30mph speed limit on the whole M25.

    ii) On 8 November 2022, around 15 JSO protesters (including a named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

    iii) On 9 November 2022, around 10 JSO protesters, along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. The disruption resulted in two lorries colliding and a police officer, who had been

trying to set up a roadblock, being injured when he was thrown from his motorcycle.

iv) On 10 November 2022, JSO protesters (including a named defendant in the TfL JSO Claim), along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

v) On 11 November 2022, JSO said it was ceasing its protests on the M25 to give the government time to reflect on JSO's demands. In the 4 days of protest on the M25, 65 JSO protesters were arrested, 31 of whom were remanded in custody including 13 named defendants in the TfL JSO Claim. In combination with the 5 JSO protesters already in prison this meant on 11 November 2022 there were 36 JSO protesters in prison. Another 6 of the named defendants in the TFL JSO claim were also involved in the JSO M25 protests.

vi) On 14 November 2022, JSO protesters threw orange paint over the Silver Fin building which is the headquarters of Barclays Bank in Aberdeen. This was expressly in connection with a national day of action by Extinction Rebellion aimed at Barclays, with over 100 of the banks' offices and branches targeted with paint, posters, fake oil and crime scene tape.

vii) On 28 November 2022, JSO began a new tactic of slowly marching on roads in London in order to disrupt and delay traffic without necessarily bringing it to an absolute stop. 13 JSO protesters walked onto the road at Shepherds Bush Green and proceeded to march slowly in the road, causing traffic delays. Two were arrested for obstruction of the highway, albeit the Police have since stated on 6 December 2022 that this new tactic makes arrest and prosecution less likely because the protesters have been small in number and traffic is able to move around them.

viii) Also on 28 November 2022, similar JSO 'slow march' protest action was taken at Aldwych delaying motor traffic.

ix) On 30 November 2022, 10 JSO protesters walked onto Aldersgate Street in the City of London and proceeded to march slowly along London Wall, causing traffic delays. The march continued on major roads through the City, followed by at least 7 police vehicles and up to 20 police officers, but there were no arrests.

x) Also on 30 November 2022, similar JSO 'slow march' protest action was taken on Upper Street and Holloway Road near Highbury and Islington station, delaying motor traffic.

xi) On 3 December 2022, 4 JSO protesters occupied beds and sofas in Harrods Department Store.

xii) On 6 December 2022, around 15 JSO protesters walked onto the road at Bricklayers Arms roundabout in South London and proceeded to march slowly along the Old Kent Road, causing delays to motor traffic. The march continued

through South London, followed by at least 3 police vehicles and up to 10 police officers.

xiii) Also on 6 December 2022, similar JSO 'slow march' protest action took place at Bank junction in the City, delaying motor traffic.

xiv) On 8 December 2022, and including in response to the recent government decision to consent to a new coalmine at Whitehaven in Cumbria, around 15 JSO protesters walked onto Whitechapel Road, East London and proceeded to march slowly east and then west causing delays to traffic. The march continued on Commercial Road.

xv) On 12 December 2022, around 20 JSO protesters (including one of the named defendants in the TfL JSO Claim) walked onto the A24 near Clapham South and proceeded to march slowly Northwards, delaying traffic. They continued along Clapham High Street accompanied by around 7 police officers.

xvi) Also on 12 December 2022, similar JSO protest action was taken in Camden Town, delaying motor traffic.

xvii) On 14 December 2022, 17 JSO supporters (including one named defendant in the TfL JSO Claim) walked onto Green Lanes, Finsbury Park, and proceeded to march slowly northwards accompanied by around 7 police officers, delaying traffic. This protest reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 minutes.

xviii) Also on 14 December 2022, similar JSO protest action was taken in Camden Town.

xix) On 19 January 2023, JSO undertook a 'slow march' protest in Sheffield which delayed traffic an led the police to have to close a road.

xx) On 28 January 2023, JSO protesters (including one named defendant in the TfL JSO Claim) undertook a 'slow march' protest on a road(s) in Manchester causing traffic delays. JSO stated that further such protest action would take place across in the North in the coming months.

xxi) On 11 February 2023, JSO protesters undertook a 'slow march' protest in Islington starting outside Pentonville Prison, delaying motor traffic, and

xxii) On 18 February 2023, in total over 120 JSO protesters (including two named defendants in the TfL JSO Claim) undertook a 'slow march' protest in Liverpool, Norwich, and Brighton, delaying motor traffic and causing tailbacks through those city centres.

Expedited trial

14. It is convenient first to consider whether there should be an expedited trial, because that will affect the likely length of a further extension to the interim injunction.

15. The principles applicable to an application for expedition are set out in the claimant's skeleton argument. They were summarised by Lord Neuberger in **WL Gore and**

Associates GmbH v Geox SPA [2008] EWCA Civ 622. There are four factors to be considered:

i) Whether good reason for expedition has been shown;

ii) Whether expedition would be contrary to the good administration of justice. Good administration of justice involves both:

iii) Consideration of the interests of the various parties involved in the specific case and the efficient disposal of their various competing claims.

iv) Consideration of the interests of those parties not before the court; other litigants who would be prejudiced if the specific claim was given expedited treatment in preference to theirs. (**The Rangers Football Club PLC (In Administration) v Collyer Bristow LLP and others** [2012] EWHC 1427 (Ch));

v) Whether expedition would prejudice the other parties in the specific case; and

vi) Whether there were any special factors involved.

16. In my judgment, all of these factors point in favour of an expedited trial. It is in the public interest for a trial to take place, leading to determination as to whether a final injunction should be granted, as soon as possible, given the importance of this case to the claimant, to the general public and, indeed, to the defendants, who face the risk of committal for contempt if they breach the injunction. The defendants are not prejudiced, since they have not entered an appearance or, with one exception, taken part in the proceedings in any way.

17. The only countervailing factor is that which applies in any case in which expedition is ordered, namely that other cases will go further back in the queue, but I am satisfied that the importance of this case outweighs that factor. In any event, if a final disposition of this case takes place, it will, overall, free up court resources as there will no longer be any need for there to be regular applications to extend the interim injunction.

18. I am, therefore, prepared to order expedition, for a 2 day trial. It will be for the claimant to make arrangements to obtain a listing appointment. However, I have made enquiries myself with KB listing and I am told that a 2 day listing can be accommodated in May to July 2023. This means that, if I grant a further extension to the injunction, it is likely to last for between 2 and 4 months, approximately.

19. It is necessary for directions to be given for the trial. These can be more limited than normal, since the Defendants are not participating.

Should the interim injunction be extended?

20. There are a wide range of considerations that the court must take into account when deciding whether to extend the injunction. I will identify them in a moment. I have carefully considered and taken into account each one. However, there is no need to set out my reasoning on the issues in full detail in this judgment, because they have each been set out and considered in detail in the judgment of Mr Justice Freedman. I am in complete agreement with the reasoning and conclusions of Mr Justice Freedman in his judgment of 31 October 2022, to the clarity of which I pay tribute. This means that I

agree that, on the evidence before him on that date, Mr Justice Freedman was right to grant an extension to the injunction which was originally granted by Mrs Justice Yip, for the reasons that he gave. The relief sought by the claimant in the extension to the injunction is, apart from duration, materially identical to the relief obtained on the 31 October 2022. The real issue before me, therefore, is whether the evidence of events that have taken place since 31 October 2022 provides grounds for declining to extend the injunction on materially identical terms.

21. The answer is that there are no such grounds. The activities of JSO have continued, albeit with a change of tactics, and in my judgment the justification for interim injunctive relief to restrain unlawful activities on the JSO roads is as great as it has ever been.

22. It is true that the protests are less frequent than before the end of October 2022, but there has been no change to JSO's position that it will continue its protests indefinitely, and there have been a substantial number of protests on the roads in London since that time, including one in February 2023. The reduction in protest may be the result of a tactical decision, or it may be a result of the Winter weather, or it may be the result in part of some reduction in appetite because of the earlier injunctive relief, or a combination of all of these things, but in any event the evidence that protests will take place unless restrained by injunctive relief is as strong now as it was before Freedman J. The mere fact that some people have chosen to act in breach of the injunctions is not, of course, a reason for declining to grant a continuation (**South Buckingham DC v Porter** [2003] 2 AC 558; [2003] UKHL 26 at paragraph 32).

23. There has been additional evidence of harm, cost and disruption. Mr Ameen said the following in his witness statement:

> "As a result of a JSO protest on the M25 on 9 November 2022 two lorries collided and a police officer who had been trying to set up a roadblock was injured when he was thrown from his motorcycle. In early December 2022 a JSO protester stepped out on the road in front of a moving lorry which had to come to a sudden halt to avoid hitting him as he back-pedalled to avoid it . They have also caused a risk of violence between protesters and ordinary users of the highway, particularly in the removal of protesters from the highway and indeed force has been used to do this in both Insulate Britain and JSO protests. The force used between protesters and users of the highway seems to be particularly common in London, probably because other users of the highway are more willing to intervene on smaller London roads than strategic roads such as the M25.
>
> The protests have also caused considerable economic harm, serious nuisance, and a great cost to the police and to other public bodies such as NHL, TfL, local authorities, and the CPS. JSO protests have caused fuel shortages in petrol stations around the Midlands and south-east England and, as of 11 May 2022, had cost the police alone £5.9m in just a few months . On 5 February 2023 it was reported that, in just 9 weeks in the autumn of 2022, the JSO protests cost the Metropolitan Police alone £7.5m.

> The protests also cause significant but less measurable harm, such as members of the public missing or being significantly delayed for weddings, funerals, flights for holidays or work, important business meetings, important medical appointments etc. A man missed his father's funeral due to the JSO protests in November 2022 and, as I have said, a JSO protest on 14 December 2022 reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 mins."

24. Similarly, there have been no new developments that alter the position in relation to the other considerations that the Court must take into account from that which obtained before Freedman J. There are only two other changes of significance.

25. The first is that the tactics appear to have changed, in that protesters are generally taking part in slow marches, rather than sitting down to block the road, as before. Mr Fraser-Urquhart KC has made clear that his client does not intend that the order covers this type of activity, though he leaves open the possibility that an application might be made in the future. The fact that the tactics of JSO have changed for a while, however, does not mean that the risk of a return to the type of action which previously took place, and which was the subject of Freedman J's injunction, has evaporated. However, I have proposed that a form of words be added to the order, making it clear that "For the avoidance of doubt this wording [the wording in paragraph 5 of the injunction] does not apply to the practice of slow marching on the road.". I should add that this means that I do not need to consider whether the recent tactic of slow marching changes the outcome of the balancing exercise which the court must undertake to determine whether the extension of the injunction would infringe the defendants' rights under Articles 10 and 11 of the European Convention on Human Rights. I make clear that I make no observation, one way or another, on this issue.

26. The other change is the obvious one that the duration of the interim injunctive relief will be extended. However, this is only likely to be for 2-4 months, before the trial of the action, and this is not, in my view, a reason to refrain from granting injunctive relief.

27. For the sake of good order, I list the considerations that I have taken into account, though as I have said, I will not set out my reasoning in full detail, as, in relation to each consideration it is exactly the same as the reasoning that was set out by Mr Justice Freedman in his judgment.

28. The considerations are:

    i) Whether the named Defendants have been properly identified, on a proper evidential basis. I am satisfied that they have been, for the reasons given by Freedman J, and in light of the evidence that I have seen;

    ii) Applying the well-known test in **American Cyanamid v Ethicon** [1975] AC 396, whether there is a serious issue to be tried. For the reasons given by Freedman J, which echo the reasoning of Bennathan J in **National Highways Ltd v Persons Unknown and Ors** [2022] EWHC 1105 (QB), at paragraph 37, I am satisfied that there is. There is a serious issue to be tried as to whether the defendants are committing trespass, and private and public nuisance on the roads;

iii) Whether damages are an adequate remedy. They are plainly not. I agree with what was said in this regard in the claimants' skeleton argument, namely that damages would not prevent any further protests because the claimant cannot claim damages for others' loss, and that loss would in any case be impossible to quantify, and in any case the Defendants would not have enough money to pay it. The protests have had a very wide-ranging impact on London given the central role which GLA Roads have for the city. Given London's status as the national centre for commerce/business, politics/government, law, culture and creativity etc., they have also indirectly had an impact on the rest of the country. Impact assessments also cannot measure impacts which are of fundamental importance to those making their journey, e.g. attending hospital appointments, funerals, weddings, important business meetings etc. The claimant has offered a cross-undertaking as to damages, in the highly unlikely event that it might be necessary to rely upon it;

iv) Whether injunctive relief should be refused because this is in the form of a quia timet injunction, or because an injunction would infringe the rights of the defendants under Article 10 and Article 11 of the European Convention on Human Rights. I have taken into account that this is a quia timet injunction. For the reasons given by Freedman J, I do not think that this is a reason to refrain from granting relief. I have conducted the balancing exercise required by the impact of the injunctive relief upon the defendants' rights under Article 10 and Article 11 of the European Convention on Human Rights. In this regard, I have taken account of the guidance of the Supreme Court in **DPP v Ziegler** [2022] AC 408 and the observations made by Lord Neuberger in **Samede** [2012] PTSR 1624. In my judgment, the outcome of the balancing exercise in relation to the defendants' art 10 and 11 Rights remains the same as it was when Freedman J considered the matter, namely that it is not a good ground for declining to grant injunctive relief. Undertaking the same balancing exercise as was undertaken by Freedman J at paragraphs 41-61 of his judgment, I come to the same conclusion as he did. Balancing the relevant considerations, I have come to the view, as he did, that the injunction strikes a fair balance between the rights of individual protestors and the general interest of the community, including the rights of others.

v) Whether the balance of convenience is in favour of continuing the relief. I agree with Freedman J that there is a strong likelihood that the defendants will imminently act to infringe the claimant's rights and that they will cause serious disruption to the claimant and the public. The injunctions are limited to key roads and road junctions. On the evidence before me, the harm would be (and is intended to be) grave and irreparable as well as very widespread. The protesters either give no warning of their protests, or rarely give sufficient details about their nature/location for the claimant to react effectively. Protests also frequently change and move on the day itself, partly in response to policing and other crowd management;

vi) Finally, the effect of section 12 of the Human Rights Act 1998. I agree with what was said by Freedman J on this matter.

29. The order that is sought applies to persons unknown in addition to the named defendants. The claimant says that this is necessary because it is not considered that

the list of named defendants represents the entirety of those engaged in the JSO Protests, and so it remains necessary to identify the category of persons unknown as additional defendants. Freedman J considered whether it was appropriate to include persons unknown amongst the category of defendants at paragraphs 83-93 of his judgment, and addressed the test set out by the Court of Appeal in **Canada Goose v Persons Unknown** [2020] 1 WLR 2802; [2020] EWCA Civ 303. I agree entirely with Freedman J's reasoning and conclusion and so I agree that it is appropriate for the relief to extend to persons unknown. No good purpose would be served by me simply repeating in this judgment what Freedman J said in this part of his judgment, and so I will not do so.

30. For these reasons, I will extend the injunctive relief until trial or further order.

Alternative service

31. I am satisfied that the claimant has made out grounds for the continuation of alternative service under CPR r6.15 and r6.27 of all documents in this Claim, including the sealed interim injunction order as extended, thereby also dispensing with personal service for the purposes of CPR r81.4(2)(c)-(d). I will therefore permit alternative service in the terms of the draft TfL Interim JSO Injunction Order.

32. The reasons for alternative service are set out in paragraph 19 of Mr Ameen's witness statement. Similar orders have been made in other cases of a like nature. Alternative service is necessary for the relief to be effective. Moreover, as Mr Ameen points out, the Defendants already have a great deal of constructive knowledge that the TfL Interim JSO Injunction may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Limited, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc. shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests on JSO roads in London is unaware that injunctive relief has been granted by the courts. An order for alternative service has already been made in identical terms in this litigation, by Freedman J. For these reasons, I do not consider that it is necessary to adopt the step adopted by Bennathan J in the **NHL v Persons Unknown** case of directing that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the relevant organisation's website did not constitute service. However, Mr Fraser-Urquhart KC has said that in practice the claimant adopts and will continue the practice of not commencing committal proceedings against a person unknown unless that person has previously been arrested and has been served with the order.

Third party disclosure

33. The Claimant seeks, in the terms of the draft TfL Interim JSO Injunction Order, continuation of the provision for third party disclosure of information from the Metropolitan Police under CPR r31.17. That information is a) the names and addresses of those who have been arrested in the course of, or as a result of, any JSO protests on the JSO Roads; and b) evidence relating to any potential breach of the TfL Interim JSO Injunction.

34. The Metropolitan Police does not object to such an order, though it requires an order from the court before it will give such disclosure. An order to this effect was granted by Freedman J in the 31 October 2022 order. Similar orders have frequently been made in other cases such as this.

35. Once again, I agree with Freedman J's reasoning on this issue, at paragraphs 94-96 of his judgment, which I will not repeat. The conditions for the making of an order under CPR 31.17 have been met. The relevant circumstances have not changed since Freedman J made his ruling. For the reasons given in those paragraphs of his judgment, I grant this order.

The application for an Order under CPR r31.22

36. This was not a matter that was dealt with at the hearing before Freedman J, though the point was raised by Freedman J.

37. CPR r31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."

38. The law relating to this is helpfully summarised in the claimant's skeleton argument.

39. This rule applies to protect not just documents themselves but also their contents i.e. the information derived from them (**IG Index Plc v Cloete** [2013] EWHC 3789 (QB) at §31).

40. The Court's power under this rule is a general discretion to be exercised in the interests of justice and having regard to all the circumstances in the case. Good reason has to be shown (but this does not mean that the grant of permission is rare or exceptional if a proper purpose is shown) and the Court has to be satisfied there is no injustice to the party compelled to give disclosure (**Gilani v Saddiq** [2018] EWHC 3084 (Ch) at §21).

41. Documents read by a judge out of court before the hearing on which the judge based their decision and to which they made compendious reference in their judgment were documents referred to at a hearing held in public for the purposes of CPR r31.22(1)(a) (**SmithKline Beecham Biologicals SA v Connaught Laboratories Inc** [2000] FSR 1), as was a document mentioned briefly in oral evidence and exhibited to a witness statement which was before the judge (**NAB v Serco Ltd** [2014] EWHC 1225 (QB) at §27).

42. A Court may grant prospective or retrospective permission and in the case of the latter an important consideration would be whether permission would have been prospectively granted (**The ECU Group Plc v HSBC Bank plc** [2018] EWHC 3045 (Comm))

43. The trigger for the application in the present case is that the claimant has three ongoing Claims: this claim involving JSO, and the two TfL Insulate Britain Claims.

44. Under third-party disclosure Orders made in all of those Claims, the Police have disclosed to the Claimant the names and addresses of protesters who have been arrested for protests on certain roads. This disclosure has been in the form of names and other details (e.g. address, location and date of protest) contained in an excel spreadsheet, or that type of information sent in the body of an email which has then been copied and pasted into such a spreadsheet by the Claimant's lawyers. The disclosure also consists of Body Worn Video footage and arrest notes relating to potential breaches of the TfL Interim JSO Injunction and TfL Interim Insulate Britain Injunctions. I have seen these spreadsheets.

45. Against that background, the Claimant seeks an Order under CPR 31.22(1)(b) for documents, or at least information contained within them, disclosed in the Insulate Britain Claims to be able to be used in the JSO Claim, and vice versa.

46. Mr Fraser-Urquhart KC said that, arguably, such an Order is unnecessary as the material has been seen by the judge outside the hearing and referred to during the hearing. Nevertheless, the Claimant seeks permission from the Court to secure the basis for using such documents/information in all its Claims against these protesters. He said that the reason why permission should be granted is so that the Court can see all the protest activity undertaken by each named defendant, whether for JSO or Insulate Britain. This will help the court to determine whether a final injunction should be granted and against whom. It is also appropriate given the lack of distinction between the two groups: they are in coalition with each other including having joint aims, their protest methods such as sitting down in the road are the same, and there is a large overlap in who protests on each of their behalf.

47. 48. Mr Fraser-Urquhart KC further submitted that granting permission would not cause injustice to the Metropolitan Police who do not object to the proposed use of the disclosed material. It would not result in more of each named defendant's personal data being published and in any case each named defendant's address is redacted in any published document.

48. I agree that, in the interests of justice and having regard to all the circumstances in the case, this order should be made, for the reasons given by Mr Fraser-Urquhart KC.

Conclusion

49. For these relatively brief reasons, I order expedition of the trial of this action, grant the extension of the interim injunction until trial or further order, in the terms sought, and make the other orders sought by the claimant.

Neutral Citation Number: [2023] EWCA Civ 182

Case No: CA-2022-001066

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2023

Before :

DAME VICTORIA SHARP PRESIDENT OF THE KING'S BENCH DIVISION
SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE LEWISON

- -

Between :

NATIONAL HIGHWAYS LIMITED	**Appellant**
- and -	
(1)PERSONS UNKNOWN	**Respondent**
(2)ALEXANDER RODGER AND 132 OTHERS	

- -
- -

Myriam Stacey KC, Admas Habteslasie and Michael Fry (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr David Crawford and Mr Matthew Tulley, two of the named Respondents, addressed the Court on behalf of the 109 named Respondents

Hearing dates : 16 February 2023

Approved Judgment

- - - - - - - - - - - - - - -

Sir Julian Flaux C:

Introduction

1. This is the judgment of the Court. The appellant, National Highways Limited ("NHL") appeals, with the permission of Whipple LJ, against various paragraphs of the Orders of Bennathan J dated 9 and 12 May 2022. By those Orders, the judge dismissed in part the application of NHL for summary judgment ("the SJ Application") by which NHL sought a final anticipatory or *quia timet* injunction (i) against 133 named defendants who were Insulate Britain ("IB") protesters who had been arrested by the police at various demonstrations on motorways and other roads and (ii) against persons unknown. The judge granted a final injunction against 24 of the 133 named defendants, consisting of those who had been found to be in contempt of Court but otherwise refused to grant a final injunction, although he did grant an anticipatory injunction on an interim basis against the remaining 109 named defendants and against persons unknown on essentially the same terms as the final injunction.

Factual and procedural background

2. NHL is the highways authority for the Strategic Road Network ("SRN") pursuant to section 1A of the Highways Act 1980 and has the physical extent of the highway vested in it. NHL commenced three sets of proceedings in response to a series of protests organised by IB which began on 13 September 2021 in and around London and south-east England. The protests involved protesters blocking highways forming part of the SRN, normally by sitting down on the road surface or gluing themselves to the road surface. The protests created a serious risk of danger and caused serious disruption to the public using the SRN and more generally.

3. NHL made urgent applications for interim injunctions to restrain the conduct of the protesters:

   (1) In QB-2021-003576, Lavender J granted an interim injunction on 21 September 2021 in relation to the M25;

   (2) In QB-2021-3626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent;

   (3) In QB-2021-3737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.

   (4) On the return date of 12 October 2021, the three injunctions were continued until trial or further order and the claims were ordered to proceed together.

4. Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur a number of disclosure orders were made, providing for Chief Constables of the relevant police forces to disclose to NHL the identity of those arrested during the course of the protests, together with material relating

to possible breaches of the injunctions. On 1 October 2021, May J ordered that 113 people arrested for participation in the protests be added as named defendants. NHL continued to add further named defendants as protests continued. In October and November 2021 the claims were served on named defendants. No named defendants have been added since November 2021.

5. On 22 October 2021, NHL filed Consolidated Particulars of Claim in the three actions. The case was pleaded on the basis that the conduct of the protesters constituted (1) trespass; (2) private nuisance; and/or (3) public nuisance. The pleading described the protests that had already taken place and contended that they exceeded the rights of the public to use the highway and that the obstruction and disruption caused by the protests was a trespass on the SRN which endangered the life, health, property or comfort of the public and/or obstructed the public in the exercise of their rights. [18] and [19] of the pleading set out the basis for the anticipatory injunction sought: "there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the Roads" and referred to open expressions of intention by the defendants to continue to cause obstruction to the SRN, unless restrained. Although a claim for damages was made in the pleading, that has not been pursued by NHL.

6. On the same day as the pleading was filed, NHL made its first contempt application in relation to breaches of the M25 Injunction, given that notwithstanding the injunction, blocking and disruption of the M25 by IB protesters was continuing. This was determined on 17 November 2021. Two further contempt applications in relation to breaches of the M25 injunction were made on 19 November 2021 and 17 December 2021, determined on 15 December 2021 and 2 February 2022 respectively. 24 of the 133 defendants (to whom we will refer as "the contemnor defendants") were found to have been in contempt of court.

7. On 23 November 2021, defences were served on behalf of three of the named defendants. Mr Horton and Mr Sabitsky stated in identical terms that they had never trespassed on the SRN and had no intention of doing so. Proceedings against them were discontinued. Mr Tulley admitted being involved in protests on the M25 on three days in September 2021. He asserted that he was not involved in the IB protests covered by the injunctions but admitted being involved in IB protests not covered by the injunctions. He has remained a defendant. No other defences have been served and up to and including the hearing before the judge there was no engagement with the proceedings and no statements that the other defendants were not intending to continue the protests.

8. On 24 March 2022, NHL issued the SJ Application in the interests of finality. Although it would have been entitled to apply for default judgment against all the remaining named defendants other than Mr Tulley, it was explained in the witness statement in support of the SJ Application of Ms Laura Higson, an associate at DLA Piper UK LLP, NHL's solicitors, that this procedure was adopted to afford the defendants the opportunity to engage with the merits of the claim. The SJ Application was served on the named defendants, but as already indicated, they chose not to serve defences or otherwise engage with the merits of the claim.

9. Ms Higson's witness statement sets out details of the protests which had already occurred and the risk of future protests including quoting an IB press release of 7 February 2022 on its website which stated:

> *"We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.*
>
> *Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it.*
>
> *We haven't gone away. We're just getting started."*

Ms Myriam Stacey KC on behalf of NHL explained that it was because of this two to three year time frame that the draft order served with the SJ Application sought a final injunction until a date in April 2025.

10. Ms Higson also quoted another IB press release dated 15 February 2022 stating that it had joined Just Stop Oil. She referred to a presentation by Roger Hallam, a leading figure within both organisations, who said: *"Thousands of people will be going onto the streets and onto the motorways to the oil refineries and they will be sitting down."*

11. She referred to the disclosure orders and to the fact that each of the named defendants had been arrested on suspicion of conduct which constituted a trespass and/or nuisance on the roads subject to the interim injunctions. In 28 sub-paragraphs of [51] of the statement she set out details of all the arrests between 13 September and 2 November 2021. At [60] she summarised the evidence before the Court and at [61] said that on the basis of that evidence, there was a real and imminent risk of further unlawful acts of trespass and nuisance on the parts of the SRN covered by the interim injunctions and that risk was unlikely to abate in the near or medium future. The Court was accordingly invited to accede to the SJ Application.

12. The SJ Application was heard by the judge on 4 and 5 May 2022.

The judgment below

13. Having set out the background to the claims, the judge referred to the SJ Application at [4]. He evidently considered summary judgment a distinct process from the grant of a final injunction, since at [4] of the judgment he says that the application for a final injunction is being made "in addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at [24] to [36] then with the injunction at [37] to [49] of the judgment.

14. It is also evident both from what the judge said in the course of argument and in the summary judgment section of the judgment that he considered that summary judgment could not be granted unless NHL could establish tortious liability of the named defendants in respect of the protests which had taken place in the past. At [25] the judge said that an injunction was a remedy, not a cause of action, then at [26] that summary judgment under CPR Part 24 was available for a cause of action not a remedy. He then identified the causes of action pleaded by NHL as trespass, public nuisance and private nuisance.

15. Having summarised the law on those torts, he then found at [32] that, in relation to the 24 contemnor defendants, there was sufficient evidence to give summary judgment under Part 24 against them based on the judgments of the Divisional Court finding them in contempt. The factual summaries in those cases gave sufficient details for the judge to conclude that there was no realistic basis to believe there would be any issue if there were to be a trial.

16. However, at [33] the judge said that the position of the 109 other named defendants was different. He said the only evidence against them was in the 28 sub-paragraphs of [51] of Ms Higson's witness statement, the first two of which he then quoted. He said at [34] that at no point did she identify which defendant was arrested on what date or give details of the activities which led to the arrest. He noted that Ms Stacey KC relied upon the fact that apart from the three defences we have mentioned above, none of the defendants had served a defence to the claim.

17. At [35] he concluded, in relation to the question whether NHL had shown that there was no real prospect of a successful defence to the claims by the 109 named defendants, that NHL's evidence was "manifestly inadequate" for a number of reasons. The first was, so the judge said:

> "I would have to be satisfied in each case. As a matter of common sense, it is highly likely that many of the defendants *have* committed the 3 torts alleged but I am not able to take a broad brush approach that "*lumps together*" all 109 in a case where I am dealing with important and fundamental rights."

The judge then went on to cite examples of individual defendants who had been arrested, but in relation to whom it transpired that they had not committed any of the torts. He concluded at [36] that the consequence of his decision was that he had been persuaded to grant both a final injunction in respect of the 24 contemnor defendants and an interim injunction in respect of the 109 and the unknown defendants.

18. The judge then turned to the question of injunction. At [37] he cited the test for the grant of an interim injunction in *American Cyanamid*. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

> "…the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk

> and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy."

19. At [38] the judge adopted the summary of Marcus Smith J in *Vastint Leeds BV v Persons Unknown ("Vastint")* [2018] EWHC 2456 (Ch); [2019] 4 WLR 2 as to the effect of Court of Appeal decisions on anticipatory injunctions. He said there were two questions he had to address:

> "(1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?
>
> (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*."

20. Counsel who appeared before the judge for various environmental campaigners who were not IB protesters pointed out that the protests described by NHL were all in 2021 and had not been repeated at that stage in May 2022. The judge said at [39] that was a fair point but was outweighed by some of the public declarations made by IB. The judge said:

> "Once a movement vows "to cause more chaos across the country in the coming weeks" and threatens "a fusion of other large-scale blockade-style actions you have seen in the past", the Claimant must be entitled to seek the Court's protection without waiting for major roads to be blocked. In my view the scale of the protests being discussed, and those that have already occurred, are sufficient to meet the heightened test of harm so "grave and irreparable" that damages would be an inadequate remedy."

21. At [40] the judge concluded that the criteria in section 12 of the Human Rights Act 1998 were satisfied and did not prevent the grant of an injunction. At [41] the judge cited two Court of Appeal cases dealing with injunctions against persons unknown, *Ineos Upstream Ltd v Persons Unknown ("Ineos")* [2019] EWCA Civ 515; [2019] 4 WLR 100 and *Canada Goose Retail Ltd v Persons Unknown* [2020] EWCA Civ 202; [2020] 1 WLR 2802. He summarised the combined effect of those cases as being:

> "(1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
>
> (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
>
> (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that,

> there is no other proportionate means of protecting the claimant's rights [*Canada Goose*]."

22. The judge then referred to cases where the balance between the competing rights of protesters and others have been considered, starting with *DPP v Jones* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act came into force and has to be read with a degree of caution in the light of *DPP v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the District Judge dismissing the prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *DPP v Cuciurean* [2022] EWHC 736 (Admin) saying at [44]:

> "The limits to *Ziegler* were made clear in *DPP v Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as Article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under Article 1 of Protocol 1 ["*A1P1*"], by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway."

23. It is worth noting at this point that, under regulation 15 of The Motorways Traffic (England and Wales) Regulations 1982, pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey KC to that provision, it was not relied upon by NHL either before the judge or before this Court.

24. The judge cited *City of London Corporation v Samede* [2012] PTSR 1624 where Lord Neuberger MR said that political and economic views were at the top end of the scale in terms of views whose expression the European Convention on Human Rights is invoked to protect. At [48] he said, in drawing together the various legal threads:

> "…in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*DPP v Jones* and *DPP v Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the Claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protestors to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*NHL v Heyatawin*]."

25. At [49], in balancing the competing interests, he said:

> "The general character of the views held by IB protestors are properly described as "*political and economic*" and as such are at the "*top end of the scale*", as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protestors themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson's statement, above. Judging the future risks of protests against IB's past conduct I approved the terms of the draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads."

The ground of appeal

26. NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show on the balance of probabilities that all defendants had actually already committed the torts in question.

The submissions

27. Ms Stacey KC submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* at [34(1)]. This form of injunction was granted when the claimant's rights were threatened, but for whatever reason the claimant's cause of action was not complete: per Marcus Smith J in *Vastint* at [31(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."

28. The court's jurisdiction to grant *quia timet* or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint* at [27]. Ms Stacey

KC referred to the two stage test for considering whether to grant a *quia timet* injunction set out by Marcus Smith J in *Vastint* adopted by the judge in the present case and which we quoted at [19] above. In relation to the first stage, whether there is a strong possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey KC drew attention to the factors identified by Marcus Smith J at [31(4)], in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public such as missing a hospital appointment or a funeral or having an accident.

29. In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey KC submitted that, whilst the law had been in a state of flux, the decision of the Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown ("Barking")* [2022] EWCA Civ 13; [2022] 2 WLR 946 represents the law as it currently stands. In that case, this Court held that there was power under section 37 of the Senior Courts Act 1981 to grant a final injunction against persons who were unknown and unidentified, so-called "newcomers". This Court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose*.

30. The Supreme Court heard the appeal from the decision of the Court of Appeal in *Barking* on 8 and 9 February 2023 and judgment is reserved. In answer to the question from the Court as to what would happen if we follow the decision of the Court of Appeal in *Barking* and the Supreme Court concludes that the Court of Appeal decision was wrong, Ms Stacey KC pointed out that the terms of the order for an injunction (whether the final or interim form) provided for a review hearing before the High Court in April 2023 to determine whether the injunction should be discharged in whole or in part.

31. She asked this Court to note that the judge had dealt with the conditions to be satisfied in granting an injunction against persons unknown at [41] of his judgment and that there was no issue that the conditions were met. The judge had been referred to the decision of the Court of Appeal in *Barking* and no part of his judgment was founded on the notion that it was wrongly decided.

32. In relation to summary judgment under CPR Part 24, Ms Stacey KC submitted that there was no suggestion in CPR Part 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at 24.2.3 of Civil Procedure. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ Application.

33. Ms Stacey KC also relied upon the statement by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) also cited at 24.2.3:

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

34. Ms Stacey KC relied upon CPR Part 24.5 which refers to the requirement that, if a respondent to a summary judgment application wishes to rely on written evidence, he should file and serve such evidence. She submitted that there was a process and an expectation that a respondent who wishes to oppose a summary judgment application should put in evidence. Other than the three defendants who served defences, the named defendants in the present case had not put in any evidence or defence, either formally or informally, and had not otherwise engaged with the Court process. The judge had erroneously dismissed this failure to serve defences and evidence as irrelevant to the SJ Application. Ms Stacey KC submitted that the fact that the named defendants had an opportunity to file a defence and did not do so was self-evidently a factor to be weighed in the assessment of the issue which the judge had to decide on the SJ Application, which was whether on the evidence, the defendants had no real prospect of successfully defending the claim for a final precautionary injunction. She submitted that there was no real prospect of any defence succeeding and no reasonable basis to expect that any further evidence would be forthcoming at trial.

35. At the hearing of the appeal, some 20 of the named defendants attended Court. Three of those were contemnor defendants against whom the judge granted a final injunction and in respect of whom there was no appeal before the Court. The other 17 were some of the 109 defendants. One of them, David Crawford, was deputed to address the Court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

36. The difficulty which the named defendants face is that none of their points was made before the judge, because they simply failed to engage in the proceedings. In relation to the test for the grant of an anticipatory injunction, the judge considered the evidence which was before him and concluded that there was a real and imminent risk of the torts of trespass and nuisance being committed so as to justify the grant of the injunction against the 109 named defendants, albeit on an interim basis. There was and is no cross-appeal by the defendants against

any part of the judgment dealing with the grant of an injunction. The matters which Mr Crawford and Mr Tulley put forward cannot be relied upon before this Court as a basis for challenging the judge's conclusion as to real and imminent risk and as to the appropriateness of granting an injunction.

Discussion

37. Although the judge did correctly identify the test for the grant of an anticipatory injunction in [38] of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that, before summary judgment for a final anticipatory injunction could be granted, NHL had to demonstrate in relation to each defendant that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.

38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at [31(1)] the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.

39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at [31(2)] quoted at [27] above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding at [35] of the judgment that he could not grant summary judgment for a final anticipatory injunction against any named defendant, unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.

40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR Part 24.2, namely whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial.

41. It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see [35(5)] of the judgment), the defendants' general attitude was of disinterest in Court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel*. If the judge had applied the right test under CPR 24.2 and had had proper regard to CPR 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that accordingly, NHL was entitled to a final injunction against those defendants.

42. Although *Barking* was cited to the judge and he refers to it at [36] of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged, it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

43. The only aspect of the final and interim injunctions granted by the judge and the final injunctions sought by NHL which caused us any concern is the reference in [10.1] and [11.1] of the Injunction Order dated 12 May 2022 to "tunnelling within 25m of the Roads". We are not aware of any such tunnelling having occurred or having been threatened by the IB protesters and Ms Stacey KC was not able to identify any such threats. In the circumstances, it seems to us that these words should be expunged from the injunctions granted by the judge and from the final injunction which we will grant. Subject to that one point, the appeal is allowed.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
[2022] EWHC 3102 (KB)

No. KB-2022-003542

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 31 October 2022

Before:

MR JUSTICE FREEDMAN

B E T W E E N :

TRANSPORT FOR LONDON — Claimant

- and -

ALYSON LEE & 62 Ors. — Defendants

MR A. FRASER-URQUHART KC and MR C. FORREST KC appeared on behalf of the Claimant.

THE DEFENDANTS did not appear and were not represented.

J U D G M E N T

MR JUSTICE FREEDMAN:

I Introduction

1 This is the return day of an application for an injunction arising out of protests by individuals on behalf of or in association with, or said to be under the instruction or direction of, or using the name of "Just Stop Oil". The application came before the court for an injunction on an application for an interim injunction order without notice before Yip J on the afternoon of 17 October 2022 and in the morning of 18 October 2022, when Yip J made an order.

2 The claimant in this action is Transport for London. It has appeared through Mr Fraser-Urquhart KC and Mr Forrest of counsel. The injunctions ordered by Yip J were until 23:59 on the return date of 27 October 2022 and the injunction would continue in force in the event that the return date was adjourned to another date.

3 I heard the matter on 27 October 2022 and required further time to consider the matter, particularly in the light of information that was provided in the course of the hearing for the first time, and the matter was then adjourned to today, 31 October 2022. There was an order that was then made saying that the injunction was continuing in force because the return date was adjourned, but that in any event the injunction was continued on the same terms as had been ordered by Yip J.

4 There are two orders which are sought today. The first order is the extension of the order made by Yip J on 18 October 2022 against the 62 named defendants and persons unknown. The second is an order to add additional parties and to order that there be six additional roads or locations in addition to the 17 existing roads or locations identified in the order of Yip J.

5 The claim and the interim injunction granted by Yip J arose from protests of Just Stop Oil protesters, which have been occurring frequently since March 2022 and which have intensified and been happening every day since 1 October 2022. A large proportion of those protests have involved protesters blocking roads by sitting down in the road and often gluing themselves to its surface and/or locking themselves to each other to make their removal more time consuming. Since 1 October 2022, that protest activity has largely focused on roads in London, often strategically important roads in Central London.

6 On many occasions, Just Stop Oil have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London have continued, even after interim injunctions have been made and served.

II The Parties

7 The claimant is a statutory body created by the Greater London Authority Act 1999. It is the traffic authority for what have been referred to as "GLA Roads", which form an important part of the TFL strategic road network. They are said to be the most important roads in Greater London, carrying a third of London's traffic despite comprising only 5% of the road network.

8 It is the traffic authority for GLA Roads pursuant to section 121A(1)(a) of the Road Traffic Regulation Act 1984. Under section (1)(2A) of the Highways Act 1980, it is also the highway authority for GLA Roads. Under section 263 of the Highways Act 1980, the GLA Roads, as highways maintainable at public expense, vest in the claimant and highway authority. In its capacity as highway and traffic authority, the claimant regulates how the public uses highways and is responsible for traffic signs, traffic control systems, road safety and traffic reduction. Under section 130 of the Highways Act 1980, it is the duty of the claimant:

> *"... to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority ..."*

9 This includes a duty to prevent "the stopping up or obstruction of" those highways. The claimant is also under a duty, under section 16 of the Traffic Management Act 2004, to manage its road network with a view to "securing the expeditious movement of traffic", which includes:

> *"the avoidance, elimination or reduction of road congestion or other disruption to the movement of traffic on their road network or a road network for which another authority is the traffic authority;"*

10 The claimant makes this claim pursuant to its duties under section 130 of the Highways Act 1980 (power to take legal proceedings as part of performing the duty to assert and protect the rights of the public to use and enjoy the highway) and on the basis that the conduct of the defendants in participating in the Just Stop Oil protest constitutes (i) trespass, (ii) private nuisance and/or (iii) public nuisance.

11 The 62 existing defendants have been identified from the website of Just Stop Oil and also from the media, where they have acted as spokespersons for Just Stop Oil. Some of the defendants have been identified from proceedings where there are committal orders against them. Those defendants have then been cross-checked against defendants identified in related proceedings against a related group called "Insulate Britain". If the persons identified in this way are also people who have been named as defendants in the Insulate Britain cases, they have been included within the 62 defendants. If they have not been defendants named in those cases, they have been excluded.

12 When the matter was before Yip J, she said that she had had some concern in relation to the named defendants, that the evidence did not disclose the source of the identity of the defendants. As a result of that, the claimant by its counsel undertook that there would be provided a proper evidential basis for identifying each and every named defendant. The judge asked for further evidence to be filed with the court to confirm that there was an evidential basis for naming the defendants. In the recitals to the order of Yip J, it was provided, among other things, as follows:

> *"And upon the claimant undertaking to identify and name defendants and apply to add them as named defendants to this order as soon as reasonably practicable."*

13 Following the undertaking that had been given about verifying the information relating to the identity of these defendants, there was evidence that was placed before the court in the form of the second witness statement of Mr Abbey Ameen, dated 18 October 2022, dealing with the evidential basis for pursuing each of the named defendants.

14 The order made by Yip J on 18 October 2022 contained an injunction until the return date, preventing the named defendants and persons unknown from deliberately undertaking the following activities:

> *"(a) blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or along or off the Roads, for the purpose of protesting;*
>
> *(b) blocking, slowing down, obstructing or otherwise interfering with access to or from the Roads for the purpose of protesting, which has the effect of slowing down or otherwise interfering with the flow of traffic onto or along or off the Roads;*
>
> *(c) causing, assisting or encouraging any other person to do any act prohibited by (8) of the above;*
>
> *(d) continuing any act prohibited by (a)-(c) above."*

It was also provided at paragraph 4 as follows:

> *4. The activities prohibited by paragraphs 3a-b include, but are not limited to, the following when done for the purpose of protesting and with the deliberate effect of blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or along or off the Roads:*
>
> *a Affixing themselves ("locking on") to any other person or object on the Roads or to the surface of the Roads*
>
> *b. Erecting any structure on the Roads.*
>
> *c. Tunnelling in the vicinity of the Roads.*
>
> *d. Abandoning any vehicle or item on the Roads with the intention of causing an obstruction.*
>
> *e. Causing damage to the surface of or to any apparatus on or around the Roads or any structure supporting the Roads including but not limited to painting, damaging by fire, or affixing any item or structure thereto.*

III Disclosure

15 At paragraph 9 of the order a disclosure order was made, pursuant to the provisions of CPR 31.17, against the Metropolitan Police to provide information about arrests made of protesters whose names had not previously been disclosed and information which they had relating to any breach or potential breaches of the interim injunction or predecessors. The full terms of paragraph 9 are as follows:

> *"9 The Claimant is granted a disclosure order under CPR r31.17 in the following terms:*
>
> *a the Metropolitan Police shall by 20 October 2022 disclose to the Claimant the name and address of any person whose name has not previously been disclosed who has been arrested by one of their officers in the course of, or as a result of, any protests on the Roads which have been carried out on behalf of, in association with, under the instruction or direction of, or using the name of, Just Stop Oil;*
>
> *b the Metropolitan Police shall disclose to the Claimant as soon as reasonably practicable all arrest notes, body cam footage and/or other photographic material not previously disclosed relating to any breach or potential breach of this Interim Injunction or its predecessors in this claim;*
>
> *c the disclosure duties in sub-paragraphs a.-b. on the Metropolitan Police.*

16 On the basis of the information which has been provided, pursuant to paragraph 9(a), the claimant seeks to add additional defendants to this action, comprising, in total, 121 additional defendants, all of whom have been identified, it is said, by the Metropolitan Police. I shall return to that later in the judgment.

17 The order made by Yip J identified what was called "key areas". Reference to "the roads" meant the roads identified in either description and plans annexed to the order, including any furniture, central reservations and any apparatus relating to those roads. There were annexed to the- order 17 such key areas. In this application on the return day, there are identified a further 6 key areas, which the claimant say should be added to the order within the definition of "Roads" or locations to be protected. This would bring the number of roads protected under the injunction to 23. This is based on additional roads or locations where protests have taken place.

IV Background

18 There has been prepared for this hearing the fourth witness statement of Mr Abbey Ameen, which provides a summary of the history of this matter and of the matters which the claimant says have led to this application. In particular, he refers to the history of injunctions being granted over the last year or so in order to deal with protests. At paragraph 11, he refers to the following:

(a) in September and October 2021, National Highways Limited ("NHL") was granted four urgent without notice interim injunctions against certain

named defendants and persons unknown in connection with the Insulate Britain protests, particularly over a large area including the M25. The first of its interim injunctions and underlying claim have been discontinued, but its other three are still being pursued to final relief;

(b) In October/November 2021, the claimant was granted two urgent without notice interim injunctions against certain named defendants and persons unknown in connection with the Insulate Britain protests, which also took the form of protests involving sitting down in strategically important roads in London, such as GLA Roads. Injunctions were granted to protect around 35 roads or locations, which have been extended on notice on a number of occasions since then. The most recent of those, prior to the application before Yip J, was on 11 October 2022, when claims involving Insulate Britain were ordered to be expedited;

(c) In Spring 2022, local authorities and energy companies were granted at least two urgent without notice interim injunctions against certain named defendants and persons unknown in connection with Just Stop Oil protests, which mostly were related to oil terminals in Essex and north Warwickshire;

(d) a number of without notice interim injunctions have been granted to HS2 Limited, seeking to protect the HS2 railway route. On 20 October 2022, an interim injunction was granted by Knowles J in respect of the whole nationwide HS2 railway route.

19 Just Stop Oil is a group which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. It has and lends its name to a wider coalition - the Just Stop Oil coalition - whose demands are (i) no new oil, (ii) tax big polluters and billionaires, (iii) energy for all, (iv) insulate our homes and (v) cheap public transport. Just Stop Oil have stated that unless the government agrees to do what it requires, it will be forced to intervene and will take direct action, which it has now sought to do on a large number of occasions.

20 There is an intersection between the groups Insulate Britain, Just Stop Oil and Extinction Rebellion. An organiser and spokesperson for Just Stop Oil, who is the 51st named defendant in the Just Stop Oil claim, described the intersection as "… a Venn diagram". Just Stop Oil was formed in December 2021 in order to rejuvenate and refocus the overall campaign. Individuals who were formerly Insulate Britain spokespersons have become spokespersons for Just Stop Oil. There is a high proportion of overlap between supporters of Insulate Britain and those taking part in Just Stop Oil.

21 On 15 February 2022, Insulate Britain joined the Just Stop Oil coalition. On Insulate Britain's website homepage, it was stated prominently that "We all want to just stop oil". Insulate Britain is an environmental activist group which takes direct protest action in furtherance of two demands, namely:

> *"(i) That the UK government immediately promises to fully fund and take responsibility for the insulation of all social housing in Britain by 2025.*

> *(ii) That the UK government immediately promises to produce within four months a legally binding national plan to fully fund and take responsibility for the full low-energy and low-carbon whole-house retrofit … of all homes in Britain by 2030".*

22 Insulate Britain was founded by six members of Extinction Rebellion, which describes itself as "an international movement that uses non-violent civil disobedience in an attempt to halt mass extinction and minimise the risk of social collapse" through *inter alia* reducing greenhouse gas emissions to net zero by 2025. It has engaged in protests on, amongst other places, public highways. There is some overlap between Insulate Britain and Extinction Rebellion.

23 Just Stop Oil protests have largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. The intention is thereby to prevent traffic from proceeding along the highway or to disrupt traffic. The effect has been to cause traffic jams and significant tailing back of traffic.

24 It is said on behalf of the claimant that Just Stop Oil's actions have been deliberately to block the highway and cause disturbance, rather than that being an incidental result of their protesting. It is also claimed that the protests have been disruptive and are capable of giving rise to putting the lives of those protesting and people driving on the roads at risk, in particular on the movement of emergency service vehicles. There is also the risk that other motorists and users of the highway, antagonised by the methods of Just Stop Oil, will engage in violence in the context of their ordinary lives being disrupted. It is submitted that the protests have also caused economic harm, serious nuisance and a great deal of cost to the police and other public bodies, including local authorities, National Highways and the CPS.

25 Reference is made at paragraph 24 of the witness statement of Mr Ameen to statements made by protesters on many occasions that they will not cease their protest until their demands are met. The statements since 1 October 2022 have been accompanied by the following statement:

> *"We will not be intimidated by changes to the law. We will not be stopped by private injunctions sought to silence peaceful people. Our supporters understand that these are irrelevant when set against mass starvation, slaughter, the loss of our rights, freedoms and communities."*

26 On 16 October 2022, Just Stop Oil is reported as saying:

> *"We will not be intimidated by changes to the law. We will not be stopped by injunctions sought to silence non-violent people. These are irrelevant when set against mass starvation, slaughter, the loss of our rights, freedoms and communities."*

27 The witness statement of Mr Ameen at paragraph 25 provides some headlines of the activities that have taken place, including:

(1) As of 26 October 2022, 1,900 arrests have been made of Just Stop Oil protesters since 1 April 2022. As of 26 October 2022, 585 of those arrests have come since 1 October 2022.

(2) Protesters have breached interim injunctions on multiple occasions and there have been committal proceedings.

(3) On 4 May, 9 May and 12 May 2022, Just Stop Oil declared both Birmingham Crown Court and the prison at which its protesters have been held to be sites of civil resistance. Various instances are referred to of protests both around the court and in prisons.

(4) In Mr Ameen's witness statement, from paragraph 26 onwards, there is a factual summary of the Just Stop Oil protests, including protests at film awards, at sporting events, at critical oil terminals and on tankers and there are details provided in relation to these protests as to the alleged disruption that took place and applications before the court for interim injunctions.

28. That is then the background to the intensification of activity from 1 October 2022. That is described, in particular, at paragraph 62 to 87 of Mr Ameen's fourth witness statement which is set out in an annex hereto headed Mr. Ameen's fourth witness statement.

29. This describes on a daily basis large scale protests at key areas of largely the central London road system. This formed the background to the application that was made before Yip J, to which I have referred. Despite that order having been made the protests continued in additional sites, it appears that protests are continuing.

V The Law

30. This being an application for an interlocutory injunction, the claimant must, first of all, satisfy the test in *American Cyanamide Co. v Ethicon Ltd* [1975] AC 396: in any application under section 37 of the Senior Courts Act 1981 there has to be a serious issue to be tried. The claimant says that the allegations of the torts of trespass and private and public nuisance on the roads which have been the subject of protests of Just Stop Oil do give rise to a serious issue to be tried.

31. The actions carried out and those threatened do amount to a strong basis for an action for trespass and private and public nuisance. That was found to be the case on different evidence by Bennathan J in the case of *National Highways Ltd v Persons Unknown & Ors* [2022] EWHC 1105 (QB) at paragraph 37 and I find here that there is a serious issue to be tried.

32. As regards obstruction of the highway for the purposes of public nuisance, this is described in **Halsbury's Laws**, 5th Ed. (2012) at paragraph 325, quoted by Bennathan J at paragraph 30 of his judgment, where there is referred to the following propositions:

> *"(1) whether an obstruction amounts to a nuisance is a question of fact;*
>
> *(2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;*

(3) generally, it is a nuisance to interfere with any part of the highway; and

(4) it is not a defence to show that although the act complained of is a nuisance with regard to the highway it is in other respects beneficial to the public."

33. It is useful here also to refer to the judgment of Lavender J in *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB) where he said the following at paragraphs 26-27:

> *"26. It is not, of course, for the claimant to prove its case on an application for an interim injunction. According to the principles established in American Cyanamid Co v Ethicon Ltd [1975] AC 396 (which Morgan J held in paragraph 91 of his judgment in Ineos Upstream v Persons Unknown [2017] EWHC 2945 (Ch) apply to an application for an interim quia timet injunction), it is sufficient for the claimant to show that there is at least a serious issue to be tried. However, I bear in mind that section 12(4) of the Human Rights Act 1998 requires that the court must have particular regard to the importance of the Convention right to freedom of expression if the court is considering whether to grant any relief which, if granted, might affect the exercise of that right.*
>
> *27. Not every protest on a highway constitutes a trespass. That was decided by a majority of the House of Lords in DPP v Jones [1999] 2 AC 240. More recently, in DPP v Ziegler [2021] 3 WLR 179, the Supreme Court has considered the extent to which a protest which involved obstructing the highway may be lawful by reasons of articles 10 and 11 of the European Convention on Human Rights."*

34. The consideration of the apprehended torts, by reference to the European Convention on Human Rights and to Articles 10 and 11, requires citation of the Articles. Article 10 is about freedom of expression and Article 11 is about freedom of assembly and association. They read as follows:

> *"**ARTICLE 10***
> ***Freedom of expression***
>
> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

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

ARTICLE 11
Freedom of assembly and association

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."*

35. In the *Ziegler* case, Lords Hamblen and Stephens JSC agreed, at paragraph 58 of their judgment, with the Divisional Court that the issues which arose under Articles 10 and 11 required consideration of the following five 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 set out in paragraph 2 of Article 10 or Article 11, for example, protection of the rights of others?

(5) If so, is the interference "necessary in a democratic society" to achieve that legitimate aim?

36. In the case of *National Highways Ltd v Persons Unknown*, Lavender J, at paragraph 31, answered the first four questions as follows:

'(1) By participating in the Insulate Britain protests, the defendants are exercising their rights to freedom of

expression and freedom of assembly in articles 10 and 11.

(2) The application for, and the grant of, an injunction to prevent the defendants continuing with the Insulate Britain protests on the SRN is an interference with those rights by a public authority.

(3) That interference is "prescribed by law", namely section 37 of the Senior Courts Act 1981 and the cases which have decided how the discretion to grant an interim quia timet injunction should be exercised, together with section 130 of the Highways Act 1980.

(4) The interference is also in pursuit of a legitimate aim, namely the protection of the rights of other road users and the promotion of safety on the SRN.'

37. The question then turned to whether the interference was necessary in a democratic society to achieve that legitimate aim. As Lords Hamblen and Stephens JSC said at paragraph 58 about that fifth question, it is:

> *'... whether the interference with either right [Articles 10 and 11] 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.'*

38. At paragraph 59, they said:

> *"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."*

39. As in the case of *Ziegler* at paragraph 69, I shall assume, for the purpose of this judgment, that the actions of the protesters do not take themselves outside the protection of Articles 10 and 11. As was stated in *Ziegler* at paragraphs 69-70:

> *'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 ... 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".'*

40. In evaluating proportionality, there has been repeated reference (including in *Ziegler* at paragraph 72) to the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corporation v Samede* [2012] PTSR 1624. At paragraph 72 in *Ziegler*, that was quoted in the following way:

'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 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 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.'

VI The application of the law to the instant case as regards continuing the injunctions against the existing parties.

41. I now turn to the question of the application of these matters relating to the balancing exercise and the question as to whether the injunction sought is necessary in a democractic society to achieve a legitimate aim. In my judgment, it is strongly arguable that the making or extending of the interim Just Stop Oil injunction strikes a fair balance between the rights of the individual and the general interest of the community, including the rights of others.

42. In coming to this conclusion, I have had regard to the non-exhaustive list of factors referred to by Lord Neuberger and in the *Ziegler* case per Lord Hamblen and Lord Stephens JSC and Lady Arden, especially at paragraphs 59-61, 70-78, 81-86 and 116.

43. First, there is a strongly arguable case that the protests have caused substantial and unreasonable interference to the rights of others, including the claimant as owner and members of the public. They are disruptive of business and personal lives of people. They, thereby, are likely to cause economic harm and, no doubt, other important but less tangible harm; for example, people missing or being delayed for important occasions and appointments, such as funerals or weddings or business meetings. This is evidenced by the level of public complaint captured at the scene by videos and expressed afterwards directly and reportedly through various media. These are indicative of the substantial disruption which has been caused by the Just Stop Oil protests.

44. Second, the protests are capable of causing risk to life to protesters or to other users of the highway and to those in or waiting for emergency vehicles, particularly on the way to hospital.

45. Third, there is evidence that it is to be inferred that considerable police time and diversion of finite resources has been involved; that is, not only to the police, but also the highway authorities and those involved in the administration of justice.

46. Fourth, Just Stop Oil's actions and their statements show that their intention has been to block the highway and cause disturbance, rather than that being an incidental result of their protesting. Physical conduct purposely obstructing traffic in the ordinary course of life in order to disrupt seriously the activities carried out by others requires careful determination in determining necessity and proportionality (see *Ziegler* at paragraph 67). If the obstruction which has been caused, almost exclusively to ordinary people using the highway, has mostly not been targeted at the apparent object of the protest, which was the government, the protest has not been significantly linked, symbolically or otherwise, to the locations in which they have taken place, except possibly the protest in Parliament Square.

47. Sixth, the strategic nature of the Roads means that for those people in proximity to the protest there is no alternative route at all and for those who have more notice and who are able to use an alternative route, it is often unsatisfactory by itself, or for the level of re-routed traffic. Indeed, that is why the Roads have been targeted by Just Stop Oil.

48. Seventh, although the degree of the physical occupation of the GLA Roads and the other roads in question has been quite limited, there has been caused congestion which has interfered with the rights of other users over the length of the GLA Roads and often others in the vicinity as traffic has had to be rerouted.

49. Eighth, the evidence is that there has been no prior notification to or cooperation with the police, even once it became clear that the protests were proving highly contentious with the potential for disorder, albeit not directly by the protesters themselves, due to their indiscriminate effects. That is apparent from the witness statement of Mr Ameen, to which I have referred. The locations have mostly not been those where it was expected that there would be police in anticipation of the protest. On the contrary, the Just Stop Oil protesters have not publicised the protests in order to avoid police and to cause disruption.

50. Ninth, the protests and resulting disruption are sometimes during the morning rush hour. Even if it is for a short time, at that point in the day that can lead to very large numbers of people being inconvenienced (see *Ziegler* at paragraph 72, 81(iv) and 83-84).

51. Tenth, the continuation of the protests would breach domestic law by reason of being a private or public nuisance, including the offence of public nuisance under section 78 of the Police, Crime, Sentencing and Courts Act 2022 and/or trespass and/or the offence under section 137 of the Highways Act 1980 (wilful obstruction).

52. Having said all of that, this is a balancing exercise and it is necessary to consider the factors the other way. Although this matter is on notice as regards the first 62 defendants, there is no evidence from the defendants and they have not attended court in order to put their case.

53. By reference to previous cases, I say the following regarding the cause and the motives of demonstrators. This has been commented on in cases. Whilst it is not for the court to venture views on the substance of the protest, Lord Neuberger in the *Samede* case said at paragraph 41:

> *"...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 ..."*

54. Lord Neuberger went on to say the following:

> *"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."*

55. However, Lord Neuberger went on to say that it would be unhelpful and inappropriate to express agreement or disagreement with the views of the defendants or otherwise evaluate them. The Strasbourg Court has said in *Kuznetsov v Russia* [2008] ECHR 1170:

> *"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."*

VII Discussion and balancing exercise

56. I have, therefore, taken into account the general character of the views whose expression the Convention has been invoked to protect and the important issues which are behind the protests. However, I have undertaken the balancing exercise. I have looked at the four questions identified in paragraph 64 of the Divisional Court's judgment in *Ziegler*, which were identified by Lavender J at paragraph 32 of his judgment in *National Highways v Persons Unknown*. I have considered the way in which Lavender J applied those matters in paragraph 40 of his judgment.

57. I have come to the following conclusions. First, the named defendants are obstructing a road network which is important both for very many individuals and for the economy of England and Wales. In that context, it is strongly arguable that the aim pursued by the claimant is sufficiently important to justify interference with a fundamental right. I base that conclusion primarily on the considerable disruption caused by the protests. There is also to be taken into account the risk to safety, in the manner that I have described.

58. Second, I also accept that it is strongly arguable that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow road users to make use of the road system, which is their right. Prohibiting and blocking those road users exercising their right is directly connected to that aim.

59. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The claimant is suing to enforce the rights of others and so could not claim damages for their loss. The loss caused by the protests would be difficult, if not impossible, to quantify. The protesters may well be unable to pay substantial damages. The threat of having to pay damages does not appear, in the circumstances, to be likely to have any deterrent effect. It might be said that prosecutions for the offence of obstructing the highway or the other matters to which I have referred would be a sufficient response to the protests. However, that possibility does not seem to have disrupted the protests. Indeed, people have been willing to give up their liberty.

60. I have taken into account all of the factors which I have identified in this judgment. Particularly, I have done a balancing exercise between the ten points that were referred to above and the rights of freedom of expression and rights of assembly of the defendants. Taking account of everything that I have identified, I have come to the view, on the balance of convenience, that the injunction granted by Yip J, and to be continued today, strikes a fair balance between the rights of the individual protesters and the general interest of the community, including the rights of others.

61. As to this, I take into account the following. The injunction only prohibits the defendants from protesting in a particular way. There are many other ways of protesting. I have already noted that, unlike the protest in *Ziegler*, the protests in this case are not directed at a specific location which is the subject of the protest. On the other hand, the protests have caused repeated, prolonged and serious disruption to the activities of many individuals and businesses and have done so on roads which are particularly important to the population and economy of this country. The protesters choose where to protest, but they deprive other road users of any choice to avoid the protests and to avoid being held up for long periods of time with all of the personal or economic consequences which may follow.

62. Looking at the same matters, in terms of *American Cyanamid* principles, I am satisfied that there is a serious issue to be tried: whether the protests of Just Stop Oil involved the commission of torts of trespass and nuisance.

63. Indeed, I consider also that damages are not an adequate remedy for either party. The reasons are that damages are impossible to quantify if damages are suffered to a large extent by people other than members of the public. It is doubtful if the defendants would have adequate resources for the kind of damages that might have arisen in the course of this case. From the position of the claimant, it would be difficult to quantify the loss to the defendants. From the position of the defendants, it would be difficult to quantify the loss to them from their protest being restricted.

64. For these reasons, I have therefore considered the matter on the basis of the balance of convenience. The balance of convenience strongly favours the continuation of the injunction. In my judgment, the factors that are advanced by the claimant outweigh the factors of the defendants.

65. In this context, there are certain other considerations that need to be taken into account. The first arises from paragraph 38 of the judgment of Bennathan J in *National Highways v Persons Unknown*. That is that the injunctions sought are, in part, about anticipatory injunctions. In that connection, Bennathan J referred to the

summary of Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), summarising "the effect of 2 decisions of the Court of Appeal on this topic". The questions which are to be addressed are:

> '(1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?
>
> (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*.'

66. To the extent that this injunction is in relation to anticipated future conduct and does not arise out of conduct having taken place thus far, I am satisfied that both of those tests are satisfied. There is, by reference to the conduct and association of the defendants and the matters which are referred to, particularly in the annex to the second witness statement of Mr Ameen, as well as the fact that they were defendants in the Insulate Britain case, a strong possibility that the defendants will imminently act to infringe the rights which the claimant seeks to protect in this action. Further, in my judgment, the harm would be so "grave and irreparable" that damages would be an inadequate remedy, having regard to the matters to which I have made reference.

67. There is a strong likelihood that the defendants will imminently act to infringe the claimant's rights and that they will, having regard to the actions that have repeatedly and deliberately and over a long period taken place to cause disruption to the claimant and the public. I particularly have regard to the repeated statements that they will continue to protest until the demands are met.

68. I must also consider the effect of section 12 of the Human Rights Act 1998, in connection with an interim injunction, against the background of Convention rights. That reads as follows:

> *'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).'

69. As regards the first 62 named defendants, they have been notified either directly or by way of alternative service in respect of the injunctions. A question arises as to whether this injunction amounts to an injunction restraining publication before trial. If it does then the court has to be satisfied that the claimant would be likely to establish that publication should not be allowed. I do not have to consider whether section 12(3) does or does not apply. There is some learning to the effect that it does not apply, as protests of this nature do not fall within the definition of "publication" (see *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB) at 66-76).

70. However, if it does apply, in my judgment, the claimant is likely to succeed on the basis of the number and nature of previous protests and the recent and continuing public commitment by Just Stop Oil to continue unless its demands are met. As is apparent from the evidence, various High Court judges have, on a number of occasions, found this satisfied and I find it satisfied in this case.

VIII The application to add further defendants

71. I then turn to the application to add the 121 defendants. As regards the 121 defendants, this application has taken place without notice to them. The application is for them to be added to the action. The way in which that arises is described in the fourth witness statement of Mr Ameen at paragraph 7(d), where he stated the following:

> *"The claimant's application to add 121 further named defendants to this claim and to the TFL interim JSO injunction - see the draft order and its annex 1 and annex 1 to the draft interim injunction (new names to be added are highlighted in yellow in both). These are people whose names and addresses have been disclosed to the claimant by the Met Police following them protesting on JSO roads protected by the TFL interim JSO injunction (verified by the relevant police sergeant who reviewed body worn video footage of the arrest to confirm). Disclosure occurred during the disclosure provision in the TFL interim JSO injunction, which was included in order to facilitate the naming of defendants and the enforcement of that injunction."*

72. These additional defendants, who have not yet been named, are defendants who have been identified, pursuant to the order of Yip J to which I made reference, at paragraph 9(a) of the order. Information was provided by the Metropolitan Police that each of them had been arrested by one of their officers in the course of or as a result of any protests on the roads carried out on behalf of, in association with, under the instruction or direction of, or using the name of "Just Stop Oil". The part of the witness statement to which I have just referred of Mr Ameen said that their names and addresses have been verified by the relevant police sergeant who reviewed the body worn video footage of the arrest.

73. On this basis, the claimant says that all the matters that can be established against the first 62 defendants are established against the other 121 defendants. The court was concerned about this based simply upon that assertion of the police. It is to be noted that the supporting information under paragraph 9(b) has not yet been made available by the police to the claimant and so there is not the underlying evidence, for example, about the body worn footage that has been inspected or that has been provided to the claimant but where the claimant not yet had the opportunity to scrutinise it.

74. In the light of that, the court had a concern about extending the injunction to the 121 people and, as a result of that, further information was to be provided to the court. The court will require that this further information be the subject of an additional witness statement to confirm these matters. There has been provided to the court a schedule in respect of the additional 121 defendants, which contains, in respect of each of them (save for an exception to which I shall refer) their name, their date of birth, the date of their arrest, the place of their arrest and the offence for which they were arrested.

75. It is possible that information tallies with the evidence to which I have made reference at paragraphs 6287 of Mr Ameen's fourth witness statement, which is in the annex to this judgment, describing the incidents that have taken place since the beginning of October 2022. Thus, for example, the intended 63rd defendant and many defendants below are said to have been involved in obstructing the highway at Millbank on 5 October 2022. That corresponds with the event in paragraph 65 of Mr Ameen's fourth witness statement in respect of 30 Just Stop Oil protesters who sat down on approach roads to Lambeth Bridge.

76. The matters then can be traced to these paragraphs of the witness statement, with an exception. The exception relates to the various protesters who are named in the schedule as having been arrested for obstructing the highway on 8 October 2022 at Westminster Bridge. They comprise 15 of the defendants where it is necessary to check whether they are properly named. It is possible that they were in a further incident which has been omitted from the witness statement of the claimant.

77. Another area where there has not been a complete tallying of the information is that the last defendant in this list comprising about 17 defendants identified with a demonstration location at Brompton Road, but there is no reference there to the offence for which they were arrested, or to the date. However, at paragraph 81 of the witness statement, there is a reference to an incident on 20 October 2022 where 20 Just Stop Oil supporters blocked Knightsbridge by sitting down in the road. The likelihood there is that Brompton Road will correspond with paragraph 81.

78. Mr Fraser-Urquhart KC submitted that the way in which additional defendants had been inserted in the past had been in the way in which is sought in this case. There had been an injunction at the without notice stage. There had been a third party disclosure order under CPR 31.17. The police had identified the names and addresses of people who had been arrested and, on that basis, on the return day the court had made the order which it did. He invited me to follow that precedent which had been established in a number of cases.

79. In my judgment, the position now is stronger still, because in addition to having the information about the arrests having taken place, this court has the dates and places of the arrests. In large part it has been able, save as I have indicated, to tally the schedule to the evidence of Mr Ameen and, in my judgment, based upon all of that, the court has sufficient information at this stage on which to make the same findings as regards the case against the 121 defendants (save for 15 of the protesters) as it made in respect of the case against the first 62 defendants, such as to justify the grant of an interim injunction.

80. There are certain protections that are available. The first protection is that the claimants have given an undertaking that, following observations on the court's part, on Thursday, 27 October 2022, in the following terms, the claimant undertakes to scrutinise, as soon as is reasonably practicable after disclosure, the materials referred to in paragraph 10(b) of the order, in order to ascertain whether any individual whose identity has been disclosed to it, pursuant to paragraph 10(a), should properly be or remain a named defendant in this matter. It should also be drafted in a way that will seek to require that the claimant double checks that the Brompton Road matter does indeed tally and that the Westminster Bridge protest appears to have been omitted, and further evidence in relation to confirm the position about that should be provided. All of that should be in the form of undertakings to the court.

81. The other protection is that, in the event that any defendant wants to apply to discharge or vary the order, that they are able to do so. If it were the case that there had been some misunderstanding, which there does not appear to be, but if there had been some misunderstanding then the defendants will be able to exercise that liberty to apply if, indeed, the claimant insisted that they remained within the action.

82. For those reasons, I accept that there is a clearly arguable case against the additional 121 defendants, subject to the checks being made in respect of the 15 protesters involved in respect of Westminster Bridge on 8 October 2022 where further checks are being carried out. It is important to add the additional defendants for another reason and that is that the courts take the view that naming defendants helps to ensure fairness in the proceedings and uphold the authority of the court. That is regarded as preferable to relying solely on persons unknown, so that the defendants know that they are enjoined from acting in the way in which is set out in the injunction. Persons unknown should be a backstop for those who really cannot be identified at the time of the court order. [Reference is made to the Postscript at the end of the judgment showing that the further checks required led to the discovery that the 15 protesters were not Just Stop Oil or protesting for a related movement, as a result of which the application and injunctions were no longer pursued against them.]

IX Persons unknown

83. That then takes the court to a consideration about persons unknown. The injunction is, in addition to the claim against the 62 existing defendants and the additional 121 defendants, there is a claim against persons unknown. It is not considered that the list represents the entirety of those engaged in the Just Stop Oil protests. It is submitted that it remains necessary to identify the category of persons unknown as additional defendants. Indeed, it appears that, if there are demonstrations continuing to take place, that the likelihood is that there may be people not within the 183 people identified to date.

84. The relevant law is to be seen in *LB Barking & Dagenham and Ors v Persons Unknown* [2022] EWCA Civ 13 at para. 56. The Court of Appeal in *Canada Goose v Persons Unknown* [2021] WLR 2802 set out the following at para. 82:

> *"Building on Cameron and the Ineos requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases like the present one:*
>
> *(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".*

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

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

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

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

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

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

85. Applying that to the facts of this case and using the subparagraph numbering, in respect of requirement (1), to the extent that it has been possible to identify defendants, those defendants have been identified in these proceedings. In respect of those defendants which have not yet been identified, the claimant has undertaken to seek out, identify and name them as soon as reasonably practicable.

86. In respect of requirement (2), the identification of persons unknown meets the requirements of (2). It is sufficiently precise to identify the relevant defendants as it targets their conduct. The course of conduct has been ongoing for a number of months. It identifies the persons unknown through the express link with Just Stop

Oil and it applies to anyone protesting on its behalf, in association with it, under its instruction or direction, or using its name.

87. As regards paragraph (3), I have dealt with the *quia timet* relief, the anticipatory nature of the relief and that has been considered above and it is met in the circumstances of this case.

88. As to (4), this is satisfied because those subject to the interim Just Stop Oil injunction are those falling within the definition of the persons unknown from time to time.

89. As regards (5), in the case of trespass and nuisance of the kind and the conduct in this case, the concern is not acute in this case. It involves interference with the free passage of the public along the highway by land.

90. As regards (6), the prohibited conduct and description of the persons unknown is of non-technical language and it is clear in its scope and application and it has been used by other High Court judges in the cases to which I have referred.

91. As regards (7), the geographical limit required in (7) is met in this case and is justified by the history of protesting on GLA Roads and their targeting of the most important strategic roads for the purpose of causing disruption.

92. I am, therefore, satisfied that the order against persons unknown is justified.

93. As regards alternative service, the claimant seeks the continuation of the order for alternative means of service. The reasons for this are set out in the witness statement of Mr Ameen at paragraphs 89-91. Such an order has been granted in other interim injunctions, albeit in different terms. For the reasons set out in paragraph 90(b)-(d), the application for an alternative service order is justified, having regard also to the provisions of CPR 6.15 and 6.27. There is good reason to authorise service in this way.

X Third party disclosure

94. Finally, there is the question of third party disclosure and a disclosure order under CPR 31.17 in respect of information held by the Metropolitan Police. The claimant seeks continuation of the provisions for third party disclosure of information from the Metropolitan Police. The Metropolitan Police will not provide such information voluntarily, but does not oppose the making of such an order in this claim. CPR 31.17 provides a general power for the court to order a non-party to disclose information into the proceedings. Although it is established that such orders are the exception and not the rule (see *Frankson & Ors v SSHD* [2003] EWCA Civ 655 at 25), the court retains a wide discretion to make such an order in appropriate cases.

95. The essence of the test that disclosure is necessary in order to dispose fairly of the claim, or to save costs, is capable of being fulfilled in many different circumstances. The court can approach the issue effectively with a view to ensuring that litigation is not hampered by a lack of disclosure. Such disclosure may engage the Article 8 rights of individuals. However, any interference with that right can be justified for the protection of rights and freedoms of others. Although there are occasions where the court should consider inviting submissions on behalf of interested third parties,

this is much more likely where an order is being sought for the provision of detailed documents or records, as opposed to, for instance, simply asking for disclosure of a name and address.

96. This is an order that has been made throughout the history of these demonstrations and, in my judgment, the pre-conditions for an order under CPR 31.17(3) exist in this case. They include the following:

(1) The name and address of the people concerned are likely to support the case of the claimant or adversely affect the case of one of the other parties to the proceedings. Being able to identify who the people are who have been acting in the way complained of is a central facet of the interim relief that the court has already granted. Evidence of breach will go to upholding the Just Stop Oil injunction.

(2) Disclosure is necessary in order to dispose fairly of the claim or to save costs, because (a) without the names and addresses the claimant cannot enforce the Just Stop Oil injunction without significant impediments; and (b) the claimant needs the names and addresses in order to make good an undertaking it has given to the court to add defendants as named defendants wherever possible.

(3) Identifying the protesters will allow them to defend their position in the proceedings and it increases the fairness of the proceedings to have named defendants as far as possible.

(4) The Metropolitan Police have stated to the claimant that it will only disclose the requested information pursuant to a court order and they do not oppose the grant of the making of that order.

(5) The disruption to the public and the risks involved mean that it is proportionate to order third party disclosure.

(6) It is much more desirable for the evidence gathering to be undertaken by the police, rather than for third parties such as inquiry agents to interfere during the demonstrations in order to obtain such evidence.

97. For all these reasons, and subject to the undertakings and the other matters to which I have referred in this judgment, the injunctions sought are granted. A question arises that I will hear counsel about, about the duration of the injunctions and about how the actions will be progressed.

XI Postscript

98. Before the order was entered, and following the inquiries required in this judgment and further evidence lodged with the Court, it was ascertained that 15 of the proposed additional defendants who were said to have been arrested on Westminster Bridge on 8 October 2022 had in fact been arrested in connection with Animal Rights and not in connection with Just Stop Oil or related protest movements. Accordingly, the application to join these persons as additional defendants and as named persons to the injunctions was abandoned.

ANNEX

MR AMEEN'S FOURTH WITNESS STATEMENT
PARAS. 62-87: Protests 1–26 October 2022

62. On 1 October 2022, Just Stop Oil protesters (as part of the Just Stop Oil Coalition) formed part of a group of thousands of protesters who marched to Westminster where they blocked Waterloo Bridge, Westminster Bridge, Lambeth Bridge, and Vauxhall Bridge, by sitting down on the road at those locations[1].

63. On 2 October 2022, hundreds of Just Stop Oil protesters blocked Waterloo Bridge by sitting in the road[2].

64. On 4 October 2022, around 60 Just Stop Oil protesters blocked Parliament Square by sitting in the road on all four side of it[3].

65. On 5 October 2022, around 30 Just Stop Oil protesters sat down on the approach roads to Lambeth Bridge[4].

66. On 6 October 2022, around 35 Just Stop Oil protesters blocked roads near Trafalgar Square by sitting down in them and gluing themselves to the road surface[5].

67. On 7 October 2022, around 25 Just Stop Oil protesters blocked two roads leading to Vauxhall Bridge by sitting down on them and gluing themselves to the road surface.[6]. Also two Just Stop Oil protesters threw paint on the outside walls of HMP Altcourse where two other such protesters are imprisoned (see below)[7].

68. On 8 October 2022, around 40 Just Stop Oil protesters blocked Edgware Road, Gloucester Place and Station Approach adjacent to the A501 by sitting in the roads, resulting in severe disruption on Marylebone Road[8].

69. On 9 October 2022, around 45 Just Stop Oil protesters established, by sitting down in the road with many of them gluing themselves to the road, four roadblocks near Piccadilly Circus stopping traffic in all directions[9].

70. On 10 October 2022, 30 Just Stop Oil protesters blocked The Mall near Buckingham Palace by sitting down in the road[10].

71. On 11 October 2022, 32 Just Stop Oil protesters established 3 roadblocks on Knightsbridge and Brompton Road stopping traffic in both directions by sitting down in the road and with some gluing themselves to the road surface[11].

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[1] https://juststopoil.org/2022/10/01/we-can-win-thousands-of-people-block-4-london-bridges-to-demand-an-end-to-the-cost-of-living-and-climate-crisis/
[2] https://juststopoil.org/2022/10/02/just-stop-oil-supporters-block-waterloo-bridge-for-a-second-day/
[3] https://juststopoil.org/2022/10/04/just-stop-oil-supporters-block-parliament-square-on-fourth-day-of-action-to-demand-no-new-oil-and-gas/
[4] https://juststopoil.org/2022/10/05/just-stop-oil-supporters-block-lambeth-bridge-on-fifth-day-of-action-to-demand-no-new-oil-and-gas/
[5] https://juststopoil.org/2022/10/06/just-stop-oil-supporters-block-roads-around-trafalgar-square-in-sixth-day-of-resistance/
[6] https://juststopoil.org/2022/10/07/just-stop-oil-supporters-block-roads-around-westminster-for-7th-day-to-demand-no-new-oil-and-gas/
[7] https://juststopoil.org/2022/10/07/civil-resistance-at-hmp-altcourse-as-just-stop-oil-supporter-faces-more-than-6-months-in-prison-without-trial/
[8] https://juststopoil.org/2022/10/08/just-stop-oil-supporters-joined-by-animal-rebellion-on-8th-day-of-disruption-in-london/
[9] https://juststopoil.org/2022/10/09/just-stop-oil-supporters-block-piccadilly-circus-on-9th-day-of-disruption-in-london/
[10] https://juststopoil.org/2022/10/10/just-stop-oil-supporters-block-the-mall-on-10th-day-of-disruption-in-london/
[11] https://juststopoil.org/2022/10/11/just-stop-oil-supporters-target-knightsbridge-on-11th-day-of-disruption-in-london/

72. On 12 October 2022, 9 Just Stop Oil protesters established a roadblock on the Horseguards Road entrance to Downing Street by sitting in the road and gluing themselves to the road surface[12].

73. On 13 October 2022, 26 Just Stop Oil protesters established a series of roadblock on the roads adjoining St. George's Circus in Southwark by sitting down in the road and with some gluing themselves to the road surface[13].

74. On 14 October 2022, 31 Just Stop Oil protesters established a roadblock in front of New Scotland Yard, by sitting in the road and gluing themselves to the road surface. One protester also sprayed (using a fire extinguisher) with orange paint the whole surface of the iconic rotating triangular Metropolitan Police sign[14]. Also on 14 October 2022, 2 Just Stop Oil protesters threw soup over Vincent Van Gogh's world-famous *Sunflowers* painting (estimated value of $84.2m) at the National Gallery, Trafalgar Square[15], before then gluing their hands to the wall beneath it[16]. The incident caused minor damage to the frame but the painting, covered by glass, was undamaged[17].

75. On 15 October 2022, 29 Just Stop Oil protesters established a roadblock on Shoreditch High Street at the junction of Great Eastern Street, by sitting in the road and gluing themselves to the road surface[18].

76. On 16 October 2022, 14 Just Stop Oil supporters blocked Park Lane by sitting down in the road, with some gluing themselves to the road surface and others glued themselves together. Shortly afterwards, one protester sprayed (in a fire extinguisher) orange paint over a nearby Aston Martin car showroom on Park Lane[19].

77. On 17 October 2022, 2 Just Stop Oil supporters climbed to the top of the Queen Elizabeth II Bridge (i.e. up its 84 metre masts) forcing police to close the bridge[20]. They remained hanging from the top of the bridge for 37 hours, meaning it had to be closed to the public and traffic for all that time[21]. They were brought down by the emergency services who had to risk their own safety doing so. Also on 17 October 2022, Just Stop Oil protesters sat down in and blocked Victoria Road outside of Department for Business, Energy and Industrial Strategy and they also sprayed soup of that Department's building[22].

78. Also on 17 October 2022, there was a hearing before Yip J to hear TfL's urgent without notice application for the TfL Interim JSO Injunction against proposed named defendants and persons unknown defined with reference to Just Stop Oil. Mrs Justice Yip had not had a sufficient opportunity to read the papers in support of the application and therefore the hearing was adjourned to the following morning for a remote hearing. On 18 October 2022, following a remote hearing, Yip J made the TfL Interim JSO Injunction against 62 Named

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[12] https://juststopoil.org/2022/10/12/just-stop-oil-supporters-target-downing-street-on-12th-day-of-disruption-in-london/
[13] https://juststopoil.org/2022/10/13/just-stop-oil-supporters-block-south-london-roundabout-on-13th-day-of-disruption-in-the-capital/
[14] https://juststopoil.org/2022/10/14/just-stop-oil-supporters-block-road-and-spray-paint-sign-at-new-scotland-yard-on-14th-day-of-disruption-in-the-capital/
[15] https://juststopoil.org/2022/10/14/just-stop-oil-supporters-throw-soup-over-van-goghs-sunflowers-to-demand-no-new-oil-and-gas/
[16] https://news.sky.com/story/two-women-charged-after-soup-thrown-over-van-goghs-sunflowers-painting-12720894
[17] https://news.sky.com/story/two-women-charged-after-soup-thrown-over-van-goghs-sunflowers-painting-12720894
[18] https://juststopoil.org/2022/10/15/just-stop-oil-supporters-block-roads-on-shoreditch-high-street-and-are-glued-to-the-tarmac-on-the-15th-day-of-disruption-in-the-capital/
[19] https://juststopoil.org/2022/10/16/day-16-just-stop-oil-supporters-defy-home-secretary-by-blocking-park-lane-and-spray-painting-an-upmarket-car-showroom/
[20] https://juststopoil.org/2022/10/17/day-17-just-stop-oil-supporters-defy-gravity-by-climbing-the-qe2-bridge-forcing-police-to-close-the-bridge/
[21] https://juststopoil.org/2022/10/19/day-19-just-stop-oil-blocks-a4-cromwell-road-bringing-traffic-to-a-standstill/
[22] https://juststopoil.org/2022/10/17/day-17-just-stop-oil-supporters-throw-soup-over-government-building-while-inviting-home-secretary-to-talk/

Defendants for whom there was an evidential foundation of having protested on behalf of Just Stop Oil.

79. Also on 18 October 2022, 30 Just Stop Oil supporters blocked the A4 Talgarth Road near Barons Court tube station by sitting down in the road, with some gluing themselves to the road surface and others 'locked themselves on' to each other.[23]

80. On 19 October 2022, 25 Just Stop Oil supporters (including proposed Named Defendants 158 and 167 in the Just Stop Oil Claim) blocked the A4 on the Cromwell Road at the junction with Exhibition Road, in central London, by sitting down in the road, with some gluing themselves to the road surface and others 'locked themselves on' to each other.[24]

81. On 20 October 2022, 20 Just Stop Oil supporters blocked Knightsbridge by sitting down in the road, with some gluing themselves to the road surface and others 'locked themselves on' to each other. Two supporters also sprayed (using a fire extinguisher) the windows and facade of Harrods department store with orange paint.[25]

82. On 21 October 2022, 22 Just Stop Oil supporters (including proposed Named Defendant 151 in the JSO Claim) blocked the junction of High Holborn and Kingsway by sitting down in the road, with some gluing themselves to the road surface.[26]

83. On 22 October 2022, 20 Just Stop Oil supporters blocked Upper Street next to Islington Green by sitting down in the road, with some gluing themselves to the road surface and others 'locked themselves on' to each other.[27]

84. On 23 October 2022, 4 Just Stop Oil supporters (including proposed Named Defendant 119 in the JSO Claim) blocked Abbey Road, London. They re-created the iconic Beatles' Abbey Road album cover by posing on the zebra crossing, read out a statement, and then glued themselves to the crossing. They also provided a weblink so people could watch the roadblock live online[28]

85. On 24 October 2022, 2 Just Stop Oil supporters covered the waxwork model of King Charles III at Madame Tussauds with chocolate cake[29].

86. On 25 October 2022, 6 Just Stop Oil supporters blocked Horseferry Road at the junction with Tufton Street, by sitting down in the road, with some also gluing themselves to the road surface while others locked themselves together. Two Just Stop Oil supporters also, using a fire extinguisher, sprayed orange paint on the outside of 55 Tufton Street which is the headquarters of the Global Warming Policy Foundation, and what Just Stop Oil calls *"other fossil fuel lobby groups"*[30].

87. On 26 October 2022, Just Stop Oil supporters, using a fire extinguisher, sprayed orange paint on the outside of numerous high end car-dealerships (including HR Owen Bugatti, Jack Barclay Bentley, Bentley Motor Cars London and Ferrari Mayfair) in Berkeley Square[31].

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[23] https://juststopoil.org/2022/10/18/day-18-just-stop-oil-blocks-the-a4-talgarth-road-to-demand-an-end-to-new-oil-and-gas/
[24] https://juststopoil.org/2022/10/19/day-19-just-stop-oil-blocks-a4-cromwell-road-bringing-traffic-to-a-standstill/
[25] https://juststopoil.org/2022/10/20/just-stop-oil-blocks-knightsbridge-and-spray-paints-harrods-on-20th-day-of-action-in-the-capital/
[26] https://juststopoil.org/2022/10/21/day-21-just-stop-oil-blocks-key-road-junction-at-holborn-to-demand-no-new-oil-and-gas/
[27] https://juststopoil.org/2022/10/22/day-22-just-stop-oil-blocks-roads-in-islington-to-demand-no-new-oil-and-gas/
[28] https://juststopoil.org/2022/10/23/day-23-just-stop-oil-block-road-at-famous-abbey-road-crossing/
[29] https://juststopoil.org/2022/10/24/day-24-just-stop-oil-cakes-the-king/
[30] https://juststopoil.org/2022/10/25/day-25-just-stop-oil-sprays-fossil-fuel-lobby-hq-with-orange-paint/
[31] https://juststopoil.org/2022/10/26/day-26-just-stop-oil-sprays-high-end-car-dealers-with-orange-paint/

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Mr Justice Freedman
2 December 2022

Neutral Citation Number: **[2022] EWHC 3497 (KB)**

Case No: KB-2022-004333

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
London WC2A 2LL

21/11/2022

Before:

MR. JUSTICE SOOLE

- -

Between:

NATIONAL HIGHWAYS LIMITED

Claimant

- and -

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT ON, OVER, UNDER OR ADJACENT TO A STRUCTURE ON THE M25 MOTORWAY
(2) AARON GUNNING AND 64 OTHERS

Defendants

- -
- -

Mr Michael Fry and Mr Michael Feeney for the **Claimant**
The Defendants did not appear and were not represented

- -

JUDGMENT

- -

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MR JUSTICE SOOLE:

1. This is the return date of an application by the Claimant (NHL) for injunctive relief against protesters, organised by or linked to a protest group called Just Stop Oil (JSO), to prevent unlawful trespass on various structures, notably gantries, on the M25 motorway. NHL is the owner and entitled to possession of those structures and the claim is framed in the tort of trespass.

2. On Saturday 5 November 2022 NHL applied without formal application or notice to the urgent applications judge, Chamberlain J, for such relief. The judge granted that relief until 23.59 hours on 10 December 2022 but in the usual way the order required an early return date for a hearing on notice. The order identified that return date as 21 November, i.e. today.

3. The injunction was against two Defendants, identified respectively as Just Stop Oil and as Persons Unknown entering or remaining without the consent of the Claimant on, over, under or adjacent to a structure on the M25 motorway.

4. The injunction was in terms that the Defendants and each of them were forbidden from (a) entering or remaining upon or affixing themselves or any object to any Structure on the M25 Motorway; or (b) causing, assisting, facilitating or encouraging any other person to enter or remain upon or affix themselves or any object to any Structure on the M25 motorway. "Structure" was defined to mean "any gantries, traffic tunnels, traffic bridges and other highway structures whether over, under or adjacent to the M25 Motorway, together with all supporting infrastructure, including all fences and barriers, road traffic signs, road traffic signals, road lighting, communications installations, technology systems, police observation points/park up points and to which the general public has no right of access". Those final words are of particular importance.

5. Amongst other ancillary provisions, the Order permitted alternative service on the Defendants pursuant to CPR 6.27. This included emailing a copy to two email addresses of JSO and providing a direct link to the Order on the National Highways Injunctions website: para.6. By para.7, such service was "good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with".

6. The Order also provided for third party disclosure pursuant to CPR 31.17, namely that Chief Constables for listed police forces must disclose to the Claimant "all of the names and addresses of any person who has been arrested by one of their officers in the course of, or as a result of, protests on the M25 motorway; and all arrest notes, body camera footage and/or all other photographic material relating to possible breaches of this Order."

7. NHL's undertakings recorded in the recital to the Order included undertakings "to file a claim by Wednesday 9 November at 5pm" and "to identify and name Persons Unknown and to apply to add them as named Defendants to the proceedings as soon as reasonably practicable".

8. On 9 November NHL issued a Claim Form against the two Defendants. The "brief details of claim" on the face of that form seek "Possession of the Land, to which the Claimants have an immediate right, known as the M25 Motorway..." and a range of

details as to what that motorway includes. It continues "This claim does not involve possession of a house, demotion of a tenancy or the suspension of a right to buy".

9. The original without notice application was supported by a witness statement of Mr. Sean Foster Martell dated 5 November 2022. He is the Head of Service Delivery at NHL. His second witness statement dated 17 November 2022 exhibits emails from NHL's solicitors, DLA Piper UK LLP (DLA), dated 5 and 7 November 2022, respectively serving unsealed and sealed copies of the Order of Chamberlain J in accordance with its terms and also identifies detailed steps taken on 5 and 6 November by DLA to comply with the other modes of service. Certificates of service have been filed with the Court.

10. Mr. Martell also states that following confirmation of the hearing date from the Court on 15 November, DLA filed an application notice on that date. That application notice seeks the following order: "The Court is asked to list this matter for a return date hearing pursuant to paragraph 15 of the order of Chamberlain J dated 5 November 2022."

11. Mr. Martell states that by email on 15 November DLA had taken steps to notify the Defendants of the return date by email and on 16 November to serve the sealed application notice for this hearing and a copy of the Court's email confirming the hearing date on the Defendants both by email and post. In any event, leaving aside that evidence, the return date was identified in the Order of Chamberlain J which was duly served by the permitted mode of alternative service.

12. NHL appears today by Counsel Mr. Michael Fry and Mr. Michael Feeney. On the other side, there has been no presence or representation. However, shortly after the hearing began, Mr. Jack Whitby came into court. He is a journalist who was arrested at the M25 but subsequently released. He attended because of the information in one or other of the forms served that NHL was seeking to add 66 named Defendants, including him. As I shall detail later, it is said that those proposed additional Defendants were all people who were arrested, almost all in the events of 7-10 November that I shall describe, and for earlier events in July 2022.

13. However a letter dated 8 November 2022 from Spring Films Limited to the Court, handed up by Mr. Whitby, states: "This is to confirm that Mr. Jack Whitby is working in association with Spring Films Limited on a documentary film about climate change activists. Mr. Whitby is the director of this film project." The letter is signed by the Chief Creative Officer of Spring Films Limited, Dr André Singer OBE. Thus it became apparent that Mr. Whitby was in no way involved in unlawful activity.

14. Having heard and read that information, Mr. Fry inevitably made clear that NHL would not be seeking to add him as a Defendant. Accordingly I was able to reassure him that no such order would be made against him. He had acted entirely properly. Mr Whitby then left the court.

15. The issues for consideration today comprise both substantive and procedural questions. Before I turn to those, I set out a brief background, which is taken from the witness statements of Mr. Martell.

16. Between 13 September and 2 November 2021 protesters associated with the environmental activist group Insulate Britain sought to block and disrupt traffic on

various roads within the Strategic Road Network which is owned and operated by NHL. These in particular included the M25 and resulted in the grant of injunctions and subsequent applications for contempt. By Order of Bennathan J made on 9 May 2022 three sets of different proceedings were joined together and both interim and some final injunctions granted until 9 May 2023.

17. In the meantime, in April 2022 activists associated with JSO targeted various oil facilities in various forms of protest. In consequence injunctions were granted.

18. On 20 July 2022 JSO's protests took place in three separate locations on the M25. Five protesters climbed up and fixed themselves to overhead gantries between junctions 10 and 11, 14 and 15 and 30 and 31. A press release by JSO on 20 July declared the M25 "a site of civil resistance". The resulting closures of the motorway and delays to traffic and members of the public are very well known and are set out in detail in the witness statement.

19. When protesters scale gantries, that inevitably requires the road to be shut down and specialist police officers to be brought in to remove the protesters. In some cases protesters used climbing equipment to circumvent the locking of ladders to gantries.

20. Further acts of disruption to the M25 were carried out by activists associated with JSO on 24 August 2022. On 17 October 2022 protesters climbed the suspension cables at the QE2 bridge at the Dartford Crossing on the M25 and suspended a large JSO banner between the cables. The two protesters also suspended themselves, each in a small hammock, at a height of approximately 200 feet above the carriageway. The police had to close both carriageways of the bridge. The protesters did not cooperate with the police and remained at height until 16.00 hours on 18 October 2022. The protest caused delays from 3.53 a.m. on 17 October until 21.54 on 18 October.

21. On 20 October 2022 NHL received intelligence from the National Police Coordination Centre (NPoCC) of plans by JSO to disrupt the motorway network on 7-10 November, including by scaling motorway gantries. A press release on the JSO website on 1 November 2022 included: "from today Just Stop Oil will pause its campaign of civil resistance. We are giving time to those in the government who are in touch with reality to consider their responsibilities to the country at this time. If, as we sadly expect, we receive no response from ministers to our demand by the end of Friday 4th November, we will escalate our legal disruption against this treasonous government." This was further confirmed by videos obtained of a Microsoft Teams meeting between the members of JSO on 2 November 2022.

22. In consequence NHL on 5 November 2022 made the urgent application for precautionary injunctions which resulted in the Order of Chamberlain J. The distinctive feature of this application, and in consequence today's return date application, is that the underlying cause of action is framed in trespass alone and to the Structures in particular.

23. As noted above, the Order was served by the permitted means of alternative service.

24. On the evening of 6 November 2022 JSO sent an email from one of the two identified email addresses to NHL stating that from 7.30 a.m. on 7 November 2022 its supporters would be taking action on the M25 and asking NHL to implement a 30 mph speed limit

on the whole of that motorway. Similar emails were sent to NHL on the evenings of 7, 8 and 9 November.

25. On 7 November JSO protesters disrupted the M25 at 12 different locations by climbing onto the overhead gantries during Monday morning rush hour. This resulted in full and partial closures in each direction and 16 arrests. A statement on the JSO website that evening said that the campaign of civil resistance on the M25 would continue in the coming days and asked everyone who was planning to use it from 7 am the following morning to be prepared for closures and severe delay to their journeys or to make alternative plans.

26. On 8 November JSO protesters disrupted the M25 at 11 locations by climbing onto the overhead gantries during rush hour, again causing full and partial closures in each direction. Both tunnels of the Dartford Crossing had to be closed. The police made 14 arrests.

27. On 9 November protesters returned to the M25 for a third day, again disrupting traffic in multiple locations by climbing the overhead gantries. Eleven arrests were made. On this occasion they were joined by supporters of a group known as Animal Rebellion who had issued a statement that they were standing in solidarity with JSO in joining in the disruption of traffic on the M25. On the same day (9 November) DLA sent the Order of Chamberlain J by email to all the 11 addresses publicised on Animal Rebellion's website.

28. On 10 November Animal Rebellion issued a statement that it was committed to supporting JSO in its actions. On the same day protesters linked with both JSO and Animal Rebellion again climbed gantries on the M25 with familiar consequences. 11 arrests were made.

29. On 11 November JSO released a statement that: "From today, Just Stop Oil will halt its campaign of civil resistance on the M25. We are giving time to those in Government who are in touch with reality to consider their responsibilities to this country at this time" and "Under British law, people in this country have a right to cause disruption to prevent greater harm – we will not stand by."

30. Both in light of the terms of that statement and other evidence set out in Mr. Martell's witness statement, NHL believe that there is a very real and significant risk that supporters of JSO and Animal Rebellion and other individuals will recommence similar actions on the M25. Mr. Martell's witness statement sets out examples of the effect of the disruption on members of the public in their daily lives, the dangers to health and safety of motorists and police - and indeed the protesters - and the increasing concern that members of the public may, despite police warnings not to do so, take the law into their own hands.

31. The law of both interim and final injunctions against 'persons unknown' (and in particular protesters) has been much debated in a range of recent authorities now too well known to require yet another recitation. I adopt with gratitude the compendious survey of the relevant principles in the recent judgment (20 September 2022) of Julian Knowles J in *High Speed Two (HS2) Limited and the Secretary of State for Transport v Four Categories of Persons Unknown* [2022] EWHC 2360 (KB).

32. For the moment I leave aside the important issues of procedure which arise and focus on the substantive merits of the application for the injunctive relief which is sought. I conclude:

    i) NHL is the owner and entitled to possession of the identified Structures. The cause of action is framed in trespass alone. Those protesters who climb onto the gantries or any other such structures do so without the consent of NHL and are trespassers.

    ii) A protester's rights under Articles 10 (freedom of expression) and 11 (freedom of assembly), even if engaged, will not justify continued trespass on private land or public land to which the public generally does not have a right of access: *HS2* at [81] citing the relevant authorities and their references to the landowner's rights both at common law and under Article 1 of the First Protocol (A1P1).

    iii) In consequence, NHL satisfy both the *American Cyanimid* first requirement of a serious issue to be tried and the higher threshold provision of s.12(3) Human Rights Act 1998 (HRA) which requires, in respect of Article 10, that "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." It is evidently more likely than not that NHL would obtain an injunction preventing trespass at trial.

    iv) I am also satisfied that s.12(2) HRA is met in that NHL has taken all reasonable steps to notify the Defendants of this application for injunctive relief, namely by the various forms of alternative service of the Order of Chamberlain J and the further notification of today's hearing.

    v) Damages will plainly not be an adequate remedy in the circumstances which the evidence describes.

    vi) The balance of convenience undoubtedly lies in favour of the grant of injunctive relief to prevent further such trespass. At the stage of the application on 5 November, NHL was seeking a precautionary injunction and thus had to establish there was an imminent and real risk of harm: *HS2* at [99]-[101]. Given the immediately preceding statement made on behalf of JSO (in addition to the earlier activity) there was ample evidence to that effect. At the present stage, the reason for injunction is only fortified by the trespasses on Structures which occurred on 7-10 November. As to the 11 November statement of a 'pause', its very language only confirms the prospect that such activities, including trespass on the Structures, are likely to resume.

33. In all, and leaving aside any procedural issues, in my judgment the case for interim injunctive relief is overwhelming.

34. As to the terms of the injunction, I turn to the relevant *Canada Goose* guidelines: see *HS2* at [104]. For this purpose, I need only deal with guidelines 2, 5, 6 and 7. As to guideline 2, I am satisfied that the Persons Unknown are sufficiently defined by reference to their unlawful conduct, i.e. trespass on the Structures, in the Claim Form and existing and proposed Orders. As to guideline 5, the prohibited acts correspond to the threatened tort.

35. As to guideline 6, I am satisfied that the terms of the injunction are sufficiently clear and precise as to enable persons potentially affected to know what they must do. I raised a particular query with Mr. Fry as to the definition of 'Structure' in the existing and proposed Order. Following discussion, I am satisfied that sufficient clarity is achieved in particular by the closing words in the definition, namely "and to which the general public has no right of access". This is consistent with the whole purpose of the Claimant's application that it should be framed in trespass and focused on those parts which are open only to NHL and those who come there with their consent.

36. As to guideline 7, I am satisfied that the geographical and temporal limits are both clear and reasonable in all the circumstances. As to the latter, I consider that the period of one year is reasonable.

37. I turn to the procedural issues. The first concerns the issue and service of a Claim Form. Service of the Claim Form is the act by which a defendant is subjected to the court's jurisdiction in civil proceedings in England and Wales. Whilst the court may grant interim relief against a defendant before the Claim Form has been served (and in cases of particular urgency as here, even before the Claim Form has been issued) that is an emergency jurisdiction which is "both provisional and strictly conditional": *LB Barking and Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) per Nicklin J at [31] citing *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471.

38. This statement of general principle is not disturbed by the subsequent decision of the Court of Appeal in *LB Barking and Dagenham* which allowed an appeal on other issues. The underlying reason for the principle is that a person cannot be made subject to the jurisdiction of the court without having notice of the proceedings: *HS2* at [143] citing *Cameron*. In the context of 'newcomers' to claims against Persons Unknown, there is an allied principle derived from *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 at [32].

39. In the case of a fluctuating group of protesters, including newcomers who enter after the date of issue of proceedings, there is obvious difficulty in effecting service of the Claim Form by the primary method sanctioned by the rules, namely personal service in accordance with CPR 6.5. If so, it becomes necessary to consider the alternative service provisions in CPR 6.15. In the urgent circumstances of the without notice hearing on 5 November, the relevant undertaking was limited to issue of a Claim Form. The draft order for today's hearing contained no provision for the service of the Claim Form.

40. As to the content of the Claim Form which has been issued, this correctly uses the form for a Part 7 claim but its contents are expressed in the language of a claim for possession of the whole M25 motorway under CPR 55; see also the supporting witness statement of Petra Billing, a solicitor at DLA, dated 9 November 2022. The problems in a claim for possession of the whole of the M35 are obvious, not least in the event of enforcement proceedings: see *Secretary of State for Environment, Food and Rural Affairs v Meier* [2009] UKSC 11. As Mr. Fry accepted in argument, and consistently with the injunctive relief which is sought, the Claim Form needs amendment in order to advance the true claim, which is for injunctive relief in the tort of trespass. The existing Claim Form does refer to the tort of trespass.

41. A further question arises as to the legal status of JSO; and also of Animal Rebellion, which NHL seeks to add as a Defendant to the claim. On the available information, I am not satisfied that JSO can properly remain a Defendant nor that Animal Rebellion could be joined. In each case it would be necessary to demonstrate that in each case those names reflected either a corporate personality or an unincorporated association. As Mr. Fry realistically accepted, the evidence does not satisfy either at this stage.

42. As to alternative service of the Claim Form on Persons Unknown, NHL has to satisfy the requirements of CPR 6.15. This 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."

43. I am satisfied that there is good reason to permit alternative service of the Claim Form on the identified category of Persons Unknown by the means identified in the Order of Chamberlain J, but also supplemented by the proposed alternative service through Animal Rebellion. By reference to the like provisions of CPR 6.27 I reach the same conclusion in respect of service of the proposed further Order.

44. As to the requirements of CPR 6.15, as Mr. Fry again accepted in argument, the proposed order would need revision so as to ensure that it complies with 6.15(4)(a), (b) and (c)(i). The underlying point is that an injunction is not a free-floating matter independent of the underlying claim. The underlying claim has to proceed in the usual way.

45. I now turn to the question of the informal application to add Defendants to the existing Claim Form and in the proposed order. Pursuant to para.8 of the Order of Chamberlain J, NHL has effected personal service thereof on 51 named individuals. These are 51 of the 62 people who have been arrested in the course of the protest activities commencing 7 November 2022. Most have been served at police stations whilst in custody. In some instances this has been achieved at their homes where they had been released on bail. It has not been possible to serve the others because of a number of factors, namely (i) some of the Defendants were released on bail before NHL's agents were able to attend the police station and either they were unable to provide an address to the police on their arrest because they are of no fixed abode or had given an address at which they no longer reside; (ii) some of the Defendants appeared in court and were remanded to custody and service is dependent upon NHL's agents being able to ascertain which prisons they have been sent to; and (iii) on occasions, the Courts were unwilling to allow the agents access to the Defendants.

46. In addition NHL wishes to add a further 4 named individuals who have protested on M25 structures in and since July 2022. All these names are set out in a schedule. The addresses have been provided to the Court but would not, as under the existing Order, appear in any order.

47. NHL seeks permission for alternative service of any order on these named individuals. There is no formal application to do so. In any event, there is a primary question of joinder of additional defendants to the Claim Form. As to that, the Claim Form has not yet been served on anyone. Accordingly, as Mr. Fry acknowledged in argument, NHL does not need permission to do so: see CPR 19.4(1)). However, on the available information and for the reasons already given, that does not allow NHL to join JSO or Animal Rebellion as Defendants.

48. Mr. Martell's second witness statement sets out NHL's reasons for the grant of permission for alternative service of what would be an amended Claim Form and the proposed order. These are:

    i) The time and cost which personal service involves NHL;

    ii) its experience that individual protesters generally do not engage with the proceedings and either ignore or refuse to accept service of documents;

    iii) given the wide publicity, people (especially protesters) being aware of the 'Structures' injunction of Chamberlain J;

    iv) in other proceedings, numerous complaints have been made by defendants about the volume of papers served on them;

    v) the likelihood that these protesters, as climate activists, would prefer not to receive hard copy documents;

    vi) the protesters being said to be 'technologically savvy' and operating modern smartphones;

vii) the evidence from the videos that activists do not stay at their home addresses before carrying out direct action but relocate to safe houses for preparation and training.

49. I am not persuaded by these arguments; and particularly in the context of (a) orders which can give rise to application for committal for contempt and (b) where the starting point in such applications is that the injunction must have been served personally: *MBR Acres Ltd v Maher* [2022] EWHC 1123 (QB) per Nicklin J.

50. In my judgment points (i), (iii), (iv), (v) and (vi) provide no sufficient reason, individually or collectively, for departure from the primary method of service. As to (ii), and as Mr. Fry realistically accepted in argument and depending on the particular facts and circumstances, conduct of ignoring or refusing to accept service of documents may still permit a conclusion that there has been personal service: see e.g. the cases considered in the White Book at para.6.5.1.

51. As to point (vii), if any difficulties arise they can be dealt individually with applications for alternative service. Putting the matter more broadly, I am not persuaded that the size of the pool of identified defendants in itself justifies a general departure from the primary method of service. This would of course fall to be reconsidered if the evidence in a particular case demonstrated an attempt to avoid service.

52. The final matter which I have to deal with is third party disclosure under CPR 31.17. I have already referred to the order that was made by Chamberlain J. That was supported by an email of consent dated 4 November 2022 from the National Police Coordination Centre (NPoCC). In the course of the discussion before Chamberlain J, the judge referred to the possibility that individual Chief Constables might take a different view in particular circumstances. His Order accordingly makes the usual provision for any party affected by the order to apply to set aside or vary it. For the purpose of today's hearing, there is an email of consent in similar terms from the NPoCC dated 16 November 2022.

53. Having considered the background to this matter and the questions that it raises, the terms of CPR 31.17 and the emails of consent from the NPoCC, I am content to make that order once more. Once again, there will be the ability for any party affected to apply to set aside or vary it.

54. It follows from all this, as Mr. Fry inevitably accepted, that NHL will need to amend the existing Claim Form and to revise its draft proposed order. In this judgment, I have set out the principles upon which that will be based. It follows that I will not make any further order today but will ask Counsel to forward the proposed revisions to my clerk for my consideration. In the event that I am satisfied with the final terms, the matter can be concluded without a further hearing. If I consider that a further hearing is necessary, that will have to be listed and then duly notified to the Defendants.

55. As to costs, I agree with the proposal in the draft order that these should be reserved.

Neutral Citation Number: [2022] EWHC 2360 (KB)

Case No: QB-2022-BHM-000044

IN THE HIGH COURT OF JUSTICE
KINGS'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 20/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

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

- and –

FOUR CATEGORIES OF PERSONS UNKNOWN

-and-

ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS

Defendants

- -
- -

Richard Kimblin KC, Michael Fry, Sioned Davies and Jonathan Welch (instructed by **DLA Piper UK LLP**) for the **Claimants**

Tim Moloney KC and Owen Greenhall (instructed by **Robert Lizar Solicitors**) for the **Sixth Named Defendant (James Knaggs)**

A number of Defendants appeared in person and/or filed written submissions

Hearing dates: **26-27 May 2022**

- -

APPROVED JUDGMENT

Mr Justice Julian Knowles:

Introduction

1. If and when it is completed HS2 will be a high speed railway line between London and the North of England, via the Midlands. Parts of it are already under construction. The First Claimant in this case, High Speed Two (HS2) Limited, is the company responsible for constructing HS2. It is funded by grant-in-aid from the Government (ie, sums of money provided to it by the Government in support of its objectives).

2. To avoid confusion, in this judgment I will refer to the railway line itself as HS2, and separately to the First Claimant as the company carrying out its construction. The Second Claimant is responsible for the successful delivery of the HS2 Scheme.

3. This is an application by the Claimants, by way of Claim Form and Application Notice dated 25 March 2022, for injunctive relief to restrain what they say are unlawful protests against the building of HS2 which have hindered its construction. They say those protesting have committed trespass and nuisance.

4. There is a dedicated website in relation to this application where the relevant files can be accessed: https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings. I will refer to this as 'the Website'.

5. Specifically, the Claimants seek: (a) an injunction, including an anticipatory injunction, to protect HS2 from unlawful and disruptive protests; (b) an order for alternative service; and (c) the discharge of previous injunctions (as set out in the Amended Particulars of Claim (APOC) at [7]). The latter two matters are contained in the Amended Draft Injunction Order of 6 May 2022 at Bundle B, B049.

6. There are four categories of unnamed defendant (see Appendix 1 to this judgment). There are also a large number of named defendants.

7. The Claimants have made clear that any Defendant who enters into suitable undertakings will be removed from the scope of the injunction (if granted). The named Defendants to whom this application relates has been in a state of flux. The Claimants must, upon receipt of this judgment, in the event I grant an injunction, produce a clear list of those Defendants (to be contained in a Schedule to it) to whom it, and those to whom it does not apply (whether because they have entered into undertakings, or for any other reason).

8. The Application Notice seeks an interim injunction ('… Interim injunctive relief against the Defendants at Cash's Pit, and the HS2 Land …). However, Mr Kimblin KC, as I understood him, said that what he was seeking was a final injunction.

9. I note the discussion in *London Borough of Barking and Dagenham v Persons Unknown* [2022] 2 WLR 946, [89], that there may be little difference between the two sorts of injunction in the unknown protester context. However, in this case there are named Defendants. Some of them may wish to dispute the case against them. Mr Moloney on behalf of D6 (who has filed a Defence) objected to a final injunction. I cannot, in these circumstances, grant a final injunction. There may have to be a trial. Any injunction that I grant must therefore be an interim injunction. The Claimant's draft injunction provides for a long-stop date of 31 May 2023 and also provides for annual reviews in May.

10. The papers in this case are extremely voluminous and run to many thousands of pages. D36, Mark Keir, alone filed circa 3000 pages of evidence. There are a number of witness statements and exhibits on behalf of the Claimants. The Claimants provided me with an Administrative Note shortly before the hearing. I also had two Skeleton Arguments from the Claimants (one on legal principles, and one on the merits of their application); and a Skeleton Argument from Mr Moloney KC and Mr Greenhall on behalf of D6, James Knaggs. There were then post-hearing written submissions from the Claimants and on behalf of Mr Knaggs. There are also written submissions from a large number of defendants and also others. These are summarised in Appendix 2 to this judgment. A considerable bundle of authorities was filed. All of this has taken time to consider.

11. The suggested application on behalf of D6 to cross-examine two of the Claimants' witnesses was not, in the end, pursued. I grant any necessary permission to rely on documents and evidence, even if served out of time.

12. The land over which the injunction is sought is very extensive. In effect, the Claimants seek an injunction over the whole of the proposed HS2 route, and other land which I will describe later. I will refer to the land collectively as the HS2 Land. The injunction would prevent the defendants from: entering or remaining upon HS2 Land; obstructing or otherwise interfering with vehicles accessing it or leaving it; interfering with any fence or gate at its perimeter.

13. The Application Notice also related to a discrete parcel of land known as Cash's Pit, in Staffordshire. Cotter J granted a possession order and an injunction in respect of that land on 11 April 2022, on the Claimants' application, and adjourned off the other application, which is now before me.

Democracy and opposition to HS2

14. It must be understood at the outset that I am not concerned with the rights or wrongs of HS2. I am not holding a public inquiry. It is obviously a project about which people hold sincere views. It is not for me to agree or disagree with these. But I should make clear that I am not being 'weaponised' against protest, as at least one person said at the hearing. My task is solely to decide whether the Claimants are properly entitled to the injunction they seek, in accordance with the law, the evidence, and the submissions which were made to me.

15. It should also be understood that the injunction that is sought will not prohibit lawful protest. That is made clear in the recitals in the draft injunction:

> "UPON the Claimants' application by an Application Notice dated 25 March 2022
>
> …
>
> AND UPON the Claimants confirming that this Order is not intended to prohibit lawful protest which does not involve trespass upon the HS2 Land and does not block, slow down, obstruct or otherwise interfere with the Claimants' access to or egress from the HS2 Land."

16. HS2 is the culmination of a democratic process. In other words, it is being built under specific powers granted by Parliament. As would be expected in relation to such a major national infrastructure project, the scheme was preceded by extensive consultation, and it then received detailed consideration in Parliament. As early as 2009, the Government published a paper, 'Britain's Transport Infrastructure: High Speed Two'. The process which followed thereafter is described in the first witness statement of Julie Dilcock (Dilcock 1), [11] et seq. She is the First Claimant's Litigation Counsel (Land and Property). She has made four witness statements (Dilcock 1, 2, 3 and 4.)

17. The HS2 Bills which Parliament passed into law were hybrid Bills. These are proposed laws which affect the public in general, but particularly affect certain groups of people. Hybrid Bills go through a longer Parliamentary process than purely Public Bills (ie, in simple terms, Bills which affect all of the public equally). Those particularly affected by hybrid Bills may submit petitions to Parliament, and may state their case before a Parliamentary Select Committee as part of the legislative process.

18. HS2 is in two parts: Phase 1, from London to the West Midlands, and Phase 2a, from the West Midlands – Crewe.

19. Parliament voted to proceed with HS2 via, in particular, the High Speed Rail (London - West Midlands) Act 2017 (the Phase One Act) and the High Speed Rail (West Midlands - Crewe) Act 2021 (the Phase 2a Act) (together, the HS2 Acts). There is also a lot of subordinate legislation.

20. Many petitions were submitted in relation to HS2 during the legislative process. For example, in *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch), [16]-[18], the evidence filed on behalf of the Claimants in relation to the Phase One Act was that:

> "… the Bill which became the Act was a hybrid Bill and, as such, subject to a petitioning process following its deposit with Parliament. In total [the Claimants' witness] says 3,408 petitions were lodged against the Bill and its additional provisions, 2,586 in the Commons and 822 in the Lords and select committees were established in each House to consider these petitions.
>
> 17. She says the government was able to satisfy a significant number of petitioners without the need for a hearing before the committees. In some cases in the Commons this involved making changes to the project to reduce impacts or enhance local mitigation measures and many of these were included in one of the additional provisions to the Bill deposited during the Commons select committee stage.
>
> 18. Of the 822 petitions submitted to the House of Lords select committee, the locus of 278 petitions was successfully challenged. Of the remaining 544 petitions, the select committee heard 314 petitions in formal session with the remainder withdrawing, or choosing not to appear before the select committee, mainly as a result of successful prior negotiation with the Claimants."

21. In his submissions of 16 May 2022, Mr Keir said at [5] that HS2 was a project which 'the people of the country do not want but over which we have been roundly ignored by Parliament'. In light of the above, I cannot agree. 'What the public wants', is reflected in what Parliament decided. That is democracy. Those who were against HS2 were not ignored during the legislative process. People could petition directly to express their views, and thousands did so. Their views were considered. Parliament then took its decision to approve HS2 knowing that many would disagree with it. It follows, it seems to me, that the primary remedy for those who do not want HS2 is to elect MPs who will cancel it. (In fact, whilst not directly relevant to the matter before me, I understand that the original planned leg of the route towards Leeds/York from the Midlands has now been abandoned).

22. All of this is, I hope, consistent with what the Divisional Court said in *DPP v Cuciurean* [2022] EWHC 736 (Admin). That concerned a criminal conviction under s 68 of the Criminal Justice and Public Order Act 1994 (aggravated trespass) arising out of a protest against HS2. Lord Burnett of Maldon CJ said at [84]:

> "… Those lawful activities in this case [viz, the building of HS2] had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest. One object of section 68 is to discourage disruption of the kind committed by the respondent, which, according to the will of Parliament, is against the public interest … The Strasbourg Court has often observed that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the Common Law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament."

23. The Government's website on HS2 says this:

> "Our vision is for HS2 to be a catalyst for growth across Britain. HS2 will be the backbone of Britain's rail network. It will better connect the country's major cities and economic hubs. It will help deliver a stronger, more balanced economy better able to compete on the global stage. It will open up local and regional markets. It will attract investment and improve job opportunities for hundreds of thousands of people across the whole country."

See: https://www.gov.uk/government/organisations/high-speed-two limited/about

24. As I have said, many people do not agree, and think that HS2 will cause irremediable damage to swathes of the countryside – including many areas of natural beauty and ancient woodlands - and that it will be bad for the environment in general. There have been many protests against it, and it has generated much litigation in the form, in particular, of applications by the Claimants and others for injunctions to restrain groups of persons (many of whom are unknown) from engaging in activities which were

interfering with HS2's construction: see eg*, Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch); *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown (Cubbington and Crackley)* [2020] EWHC 671 (Ch); *Ackroyd and others v High Speed (HS2) Limited and another* [2020] EWHC 1460 (QB); *London Borough of Hillingdon v Persons Unknown* [2020] EWHC 2153 (QB); *R (Maxey) v High Speed 2 (HS2) Limited and others* [2021] EWHC 246 (Admin).

25. These earlier decisions contain a great deal of information about HS2 and the protests against it. I do not need to repeat all of the detail in this judgment: the reader is referred to them. As I have said, the Claimants' draft order proposes the discharge of these earlier injunctions as they will be otiose if the present application is granted as it will encompass the relevant areas of land.

26. Richard Jordan is the First Claimant's Interim Quality and Assurance Director and was formerly its Chief Security and Resilience Officer. In that role, he was responsible for the delivery of corporate security support to the First Claimant in line with its security strategy, and the provision of advice on all security related matters. In his witness statement of 23 March 2022 (Jordan 1) he described the nature of the protests against HS2. I will return to his evidence later.

The Claimants' land rights

27. Parliament has given the Claimants a number of powers over land for the purposes of constructing HS2.

28. Dilcock 1, [14]-[16], explains that on 24 February 2017 the First Claimant was appointed as nominated undertaker pursuant to s 45 of the Phase One Act by way of the High Speed Rail (London-West Midlands) (Nomination) Order 2017 (SI 2017/184).

29. Section 4(1) of the Phase One Act gives the First Claimant power to acquire so much of the land within the Phase One Act limits as may be required for Phase One purposes. The First Claimant may acquire rights over land by way of General Vesting Declaration (GVD) or the Notice to Treat (NTT) or Notice of Entry (NoE) procedures.

30. Section 15 and Sch 16 of the Phase One Act give the First Claimant the power to take temporary possession of land within the Phase One Act limits for Phase One purposes. So, for example, [1] of Sch 16 provides:

> "(1) The nominated undertaker may enter upon and take possession of the land specified in the table in Part 4 of this Schedule -
>
> (a) for the purpose specified in relation to the land in column (3) of the table in connection with the authorised works specified in column (4) of the table,
>
> (b) for the purpose of constructing such works as are mentioned in column (5) of the table in relation to the land, or
>
> (c) otherwise for Phase One purposes.

> (2) The nominated undertaker may (subject to paragraph 2(1)) enter upon and take possession of any other land within the Act limits for Phase One purposes.
>
> (3) The reference in sub-paragraph (1)(a) to the authorised works specified in column (4) of the table includes a reference to any works which are necessary or expedient for the purposes of or in connection with those works."

31. 'Phase One purposes' is defined in s 67 and 'Act limits' is defined in s 68. The table mentioned in [1(1)(a)] is very detailed and specifies precisely the land affected, and the works that are permitted.

32. In relation to Phase 2a, on 12 February 2021 the First Claimant was appointed as nominated undertaker pursuant to s 42 of the Phase 2a Act by way of the High Speed Rail (West Midlands - Crewe) (Nomination) Order 2021 (SI 2021/148).

33. Section 4(1) of the Phase 2a Act gives the First Claimant power to acquire so much of the land within the Phase 2a Act limits as may be required for Phase 2a purposes. Again, the First Claimant may acquire land rights by way of the GVD, NTT and NoE procedures.

34. Section 13 and Sch 15 of the Phase 2a Act give the First Claimant the power to take temporary possession of land within the Phase 2a Act limits for Phase 2a purposes. Paragraph 1 of Sch 15 is broadly analogous to [1] of Sch 16 to the Phase One Act that I set out earlier.

35. It is not necessary for me to go much further into all the technicalities surrounding these provisions. Suffice it to say that the Claimants have been given extremely wide powers to obtain land, or take possession of it, or the right to immediate possession, even where they do not acquire freehold or leasehold title to the land in question. In short, if they need access to land in order to construct or maintain HS2 as provided for in the HS2 Acts then, one way or another, they have the powers to do so providing that they follow the prescribed procedures.

36. So for example, [4(1) and (2)] of Sch 16 to the Phase 1 Act provide:

> "(1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.
>
> (2) The nominated undertaker may not, without the agreement of the owners of the land, remain in possession of land under paragraph 1(1) or (2) after the end of the period of one year beginning with the date of completion of the work for which temporary possession of the land was taken."

37. The Claimants have produced plans showing the HS2 Land coloured pink and green. These span several hundred pages and can be viewed electronically on the Website. There have been two versions: the HS2 Land Plans, and the Revised HS2 Land Plans.

38. In their original form, the HS2 Land Plans were exhibited as Ex JAD1 to Dilcock 1 and explained at [29]-[33] of that statement. In simple terms, the (then) colours reflected the various forms of title or right to possession which the First Claimant has in respect of the land in question:

> "29. The First or the Second Claimant are the owner of the land coloured pink on the HS2 Land Plans, with either freehold or leasehold title (the "Pink Land"). The Claimants' ownership of much of the Pink Land is registered at HM Land Registry, but the registration of some acquisitions has yet to be completed. The basis of the Claimants' title is explained in the spreadsheets named "Table 1" and "Table 3" at JAD2. Table 1 reflects land that has been acquired by the GVD process and Table 3 reflects land that has been acquired by other means. A further table ("Table 2") has been included to assist with cross referencing GVD numbers with title numbers. Where the Claimants' acquisition has not yet been registered with the Land Registry, the most common basis of the Claimants' title is by way of executed GVDs under Section 4 of the HS2 Acts, with the vesting date having passed.
>
> 30. Some of the land included in the Pink Land comprises property that the Claimants have let or underlet to third parties. At the present time, the constraints of the First Claimant's GIS data do not allow for that land to be extracted from the overall landholding. The Claimants are of the view that this should not present an issue for the present application as the tenants of that land (and their invitees) are persons on the land with the consent of the Claimants.
>
> 31. The Claimants' interest in the Pink Land excludes any rights of the public that remain over public highways and other public rights of way and the proposed draft order deals with this point. The Claimant's interest in the Pink Land also excludes the rights of statutory undertakers over the land and the proposed draft order also deals with this point.
>
> 32. The First Claimant is the owner of leasehold title to the land coloured blue on the HS2 Land Plans (the "Blue Land"), which has been acquired by entering into leases voluntarily, mostly for land outside of the limits of the land over which compulsory powers of acquisition extend under the HS2 Acts. The details of the leases under which the Blue Land is held are in Table 3.
>
> 33. The First Claimant has served the requisite notices under the HS2 Acts and is entitled to temporary possession of that part of the HS2 Land coloured green on the HS2 Land Plans ("the Green Land") pursuant to section 15 and Schedule 16 of the Phase One Act and section 13 and Schedule 15 of the Phase 2a Act. A

> spreadsheet setting out the details of the notices served and the dates on which the First Claimant was entitled to take possession pursuant to those notices is at Table 4 of JAD2."

39. The plans were then revised, as Ms Dilcock explains in Dilcock 3 at [39]. Hence, my calling them the Revised HS2 Land Plans. There is now just pink and green land.

40. The land coloured pink is owned by the First or Second Claimants with either freehold or leasehold title. The land coloured green is land over which they have temporary possession (or the immediate right to possession) under the statutory powers I have mentioned. Land which has been let to third parties has been removed from the scope of the pink land (see Dilcock 3, [39]).

41. Ms Dilcock has produced voluminous spreadsheets as Ex JAD2 setting out the bases of the Claimants' right to possession of the HS2 Land.

42. Ms Dilcock gives some further helpful detail about the statutory provisions in Dilcock 3, [28] et seq. At [31]-[34] she said:

> "31. As explained by Mr Justice Holland QC at paragraphs 30 to 32 of the 2019 *Harvil Rd Judgment* (*SSfT and High Speed Two (HS2) Limited -v- Persons Unknown* [2019] EWHC 1437 (Ch)), the First Claimant is entitled to possession of land under these provisions provided that it has followed the process set down in Schedules 15 and 16 respectively, which requires the First Claimant to serve not less than 28 days' notice to the owners and occupiers of the land. As was found in all of the above cases, this gives the First Claimant the right to bring possession proceedings and trespass proceedings in respect of the land and to seek an injunction protecting its right to possession against those who would trespass on the land.
>
> 32. For completeness and as it was raised for discussion at the hearing on 11.04.2022, the HS2 Acts import the provisions of section 13 of the Compulsory Purchase Act 1965 on confer the right on the First Claimant to issue a warrant to a High Court Enforcement Officer empowering the Officer to deliver possession of land the First Claimant in circumstances where, having served the requisite notice there is a refusal to give up possession of the land or such a refusal is apprehended. That procedure is limited to the point at which the First Claimant first goes to take possession of the land in question (it is not available in circumstances where possession has been secured by the First Claimant and trespassers subsequently enter onto the land). The process does not require the involvement of the Court. The availability of that process to the First Claimant does not preclude the First Claimant from seeking an order for possession from the Court, as has been found in all of the above mentioned cases.

> 33. Invoking the temporary possession procedure gives the First Claimant a better right to possession of the land than anyone else – even the landowner. The First Claimant does not take ownership of the land under this process, nor does it step into the shoes of the landowner. It does not become bound by any contractual arrangements that the landowner may have entered into in respect of the land and is entitled to possession as against everyone. The HS2 Acts contain provisions for the payment of compensation by the First Claimant for the exercise of this power.
>
> 34. The power to take temporary possession is not unique to the HS2 Acts and is found across compulsory purchase - see for example the Crossrail Act 2008, Transport and Works Act Orders and Development Consent Orders. It is also set to be even more widely applicable when Chapter 1 of the Neighbourhood Planning Act 2017 is brought into force."

43. Ms Dilcock goes on to explain that:

> "35. …the First Claimant is entitled to take possession of temporary possession land following the above procedure and in doing so to exclude the landowner from that land until such time as the First Claimant is ready to or obliged under the provisions of the HS2 Acts to hand it back. If a landowner were to enter onto land held by the First Claimant under temporary possession without the First Claimant's consent, that landowner would be trespassing."

44. In addition to the powers of acquisition and temporary possession under the Phase One Act and the Phase 2a Act, some of the HS2 Land has been acquired by the First Claimant under the statutory blight regime pursuant to Chapter II of the Town and Country Planning Act 1990. The First Claimant has acquired other parts of the HS2 Land via transactions under the various discretionary HS2 Schemes set up by the Government to assist property owners affected by the HS2 Scheme.

45. Further parts of the HS2 Land have been acquired from landowners by consent and without the need to exercise powers. There are no limits on the interests in land which the First Claimant may acquire by agreement. Among the land held by the First Claimant under a lease are its registered offices in Birmingham and London (at Euston), both of which it says have been subject to trespass and (in the case of Euston) criminal damage by activists opposed to the HS2 Scheme.. The incident of trespass and criminal damage at Euston on 6 May 2021 is described in more detail in Jordan 1**,** [29.3.2].

46. I am satisfied, as previous judges have been satisfied, that the Claimants do have the powers they assert they have over the land in question, and that are either in lawful occupation or possession of that land, or have the immediate right to possession (without more, the appropriate statutory notices having been served). I reject any submissions to the contrary.

47. One of the points taken by D6 is that because the Claimants are not in actual possession of some of the green land, they are not entitled to a precautionary injunction in relation

to that land, and this application is therefore, in effect, premature. I will return to this later.

The Claimants' case

48. The Claimants' action is for trespass and nuisance. They say that pursuant to their statutory powers they have possession of, or the right to immediate possession of, the HS2 Land and therefore have better title than the protesters. Their case is that the protests against HS2 involve unlawful trespass on the HS2 Land; disruption of works on the HS2 Land; and disruption of the use of roads in the vicinity of the HS2 Land, causing inconvenience and danger to the Claimants and to other road users. They say all of this amounts to trespass and nuisance.

49. Mr Kimblin on behalf of the Claimants accepted that he had to demonstrate trespass and nuisance, and a real and imminent risk of recurrence. He said, in particular, that the protests have: on numerous occasions put at risk protesters' lives and those of others (including the Claimants' contractors); caused disruption, delay and nuisance to works on the HS2 Land; prevented the Claimants and their contractors and others (including members of the public) from exercising their ordinary rights to use the public highway or inconvenienced them in so doing, eg by blocking access gates. Further, he said that the Defendants' actions amount to a public nuisance which have caused the Claimants particular damage over and above the general inconvenience and injury suffered by the public, including costs incurred in additional managerial and staffing time in order to deal with the protest action, and costs and losses incurred as a result of delays to the HS2 construction programme; and other costs incurred in remedying the alleged wrongs and seeking to prevent further wrongs.

50. Based on previous experience, and on statements made by protesters as to their intentions, the Claimants say they reasonably fear that the Defendants will continue to interfere with the HS2 Scheme along the whole of the route by trespassing, interfering with works, and interfering with the fencing or gates at the perimeter of the HS2 Land and so hinder access to the public highway.

51. They argue, by reference in particular to the evidence in Mr Jordan's and Ms Dilcock's statements and exhibits, that there is a real and imminent risk of trespass and nuisance in relation to the whole of the HS2 Land, thus justifying an anticipatory injunction.

52. They say that Defendants, or some of them, have stated an intention to continue to take part in direct action protests against HS2, moving from one parcel of land to another in order to cause maximum disruption.

53. Thus, the Claimants say they are entitled to a route wide injunction, extensive though this is. They draw an analogy with the injunctions granted over thousands of miles of roads in relation to continuing and moving road protests by a group loosely known as 'Insulate Britain': see, in particular, *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB) (Lavender J); *National Highways Limited v Persons Unknown and others* [2022] EWHC 1105 (QB) (Bennathan J)**.**

54. I have the Revised HS2 Land Plans in hard copy form. I have studied them. They are clear, detailed and precise. I reject any suggestion that they are unclear. They clearly

show the land to which the injunction, if granted, will apply. Whether it should be granted is a different question.

The Defendants' cases

55. Mr Moloney addressed me on behalf of Mr Knaggs (D6), and I was also addressed by a number of unrepresented defendants (and others). I thought it appropriate to allow anyone present in court to address me, in recognition of the strength of feeling which HS2 generates. I exercised my case management powers to ensure these were kept within proper bounds. I had in mind an approach analogous to that set out by the Court of Appeal in *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160, [63]. Mr Kimblin did not object to this course.

56. I have considered all of the points which were made, whether orally or in writing. The failure to mention a particular point in this judgment does not mean that it has been overlooked. I am satisfied that everyone had the opportunity to make any point they wanted.

57. D6's case can be summarised as follows. Mr Moloney submitted that the Claimants are not entitled to the relief which they seek because (Skeleton Argument, [2]]): (a) they are seeking to restrain trespass in relation to land to which there is no demonstrated immediate right of possession; (b) they are seeking to restrain lawful protest on the highway; (c) the test for a precautionary injunction is not met because of a lack of real and imminent risk, which is the necessary test for which a 'strong case' is required; (d) it is wrong in principle to make a final injunction in the present case (I have dealt with that); (e) the definition of 'Persons Unknown' is overly broad and does not comply with the *Canada Goose* requirements (see *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, [82]); (f) the service provisions are inadequate; (g) the terms of the injunction are overly broad and vague; (h) discretionary relief should not be granted; and (i) the proposed order would have a disproportionate chilling effect.

58. Developing these arguments, Mr Moloney said that the Claimants have not yet taken possession of much of the HS2 Land – which can only arise in the statutorily prescribed circumstances - and so its possessory right needed to found an action in trespass had not yet crystallised and its application was premature. There is hence a fundamental difference between land where works are currently ongoing or due to commence imminently (for which, subject to notification requirements, the Claimants have a cause of action in trespass at the present date) and land where works are not due to commence for a considerable period (for which no cause of action in trespass currently arises for the Claimants). He distinguished the earlier injunctions in relation to land where work had commenced on that basis.

59. Notwithstanding the decision of the Court of Appeal in *Barking and Dagenham* to the effect that final injunctions may in principle be made against persons unknown, they remain inappropriate in protest cases in which the Article 10 and 11 rights of the individual must be finely balanced against the rights of the Claimants.

60. Next, Mr Moloney submitted that there was not the necessary strong case of a real and imminent danger to justify the grant of a precautionary injunction. He said the Claimant had to establish that there is a risk of actual damage occurring on the HS2 Land subject

to the injunction that is imminent and real. Mr Moloney said this was not borne out on the evidence, given no work or protests were ongoing over much of the HS2 Land.

61. The next point is that D6 says the categories of unknown Defendant are too broad and will catch, for example, persons on the public highway that fall within the scope of HS2 Land. The second category of Unknown Defendant (ie, D2) (as set out in the APOC and in Appendix 1 below) is:

> "(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT https://www.gov.uk/government/publications/hs2-route-wide-injunction-
> proceedings ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES"

62. Paragraph 54(i) of D6's Skeleton Argument asserts that D2 will catch:

> "It includes those present on HS2 land on public highways. A person who walks over HS2 land on a public footpath is covered by the definition (subject to the consent of the Claimants). A demonstration on a public footpath which had the effect (intended or not) of hindering those connected to the Claimants (for any degree) would be caught within the definition."

63. I can deal with this submission now. I think it is unmeritorious. Paragraph 3 of the draft injunction prohibits various activities eg, [3(b)], 'obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land …'. However, [4(a)] provides that nothing in [3], 'shall prevent any person from exercising their rights over any open public right of way over the HS2 Land'. Paragraph 4(c) provides that nothing in [3], 'shall prevent any person from exercising their lawful rights over any public highway'. Contrary to the submission, such people therefore do not fall within [3] and do not need the First Claimant's consent. I also find it difficult to envisage that a walk or protest on a public footpath would infringe [3(a)]. As I have already said, the proposed order does not prevent lawful protest.

64. In [54(ii)] D6 also argued that the injunction would include those present on HS2 land which has been sublet. It was argued that a person present on sublet HS2 land with the permission of the sub-lettor, but without the consent of HS2, is covered by the definition of D2.

65. Again, I can deal with that point now. As I have set out, the Revised HS2 Land Plans produced by Ms Dilcock exclude let land; the original version of the Plans did not

because of lack of data when those plans were drawn up, but that has now been corrected ([Dilcock 3, [39]). Two of the Recitals to the order put the matter beyond doubt:

> "AND UPON the Claimants confirming that they do not intend for any freeholder or leaseholder with a lawful interest in the HS2 Land to fall within the Defendants to this Order, and undertaking not to make any committal application in respect of a breach of this Order, where the breach is carried out by a freeholder or leaseholder with a lawful interest in the HS2 Land on the land upon which that person has
> an interest.
>
> AND UPON the Claimants confirming that this Order is not intended to act against any guests or invitees of any freeholder or leaseholder with a lawful interest in the HS2 Land unless that guest or invitee undertakes actions with the effect of damaging, delaying or otherwise hindering the HS2 Scheme on the land held by the freeholder or leaseholder with a lawful interest in the HS2 Land."

66. Mr Moloney then went on to criticise the proposed methods of service in the draft injunction at [8]-[11] as being inadequate. The fundamental submission is that the steps for alternative service cannot reasonably be expected to bring the proceedings to the attention of someone proposing to protest against HS2 (Skeleton Argument, [98]).

67. Various points about the wording of the injunction were then made to the effect, for example, that it was too vague (Skeleton Argument, [105] et seq).

68. Turning to the points made by those who addressed me in court, I can summarise these (briefly, but I hope fairly) as follows. There were complaints about poor service of the injunction application. However, given those people were able to attend the hearing, service was obviously effective. It was said that HS2 would 'hammer another nail into the coffin of the climate crisis', and that land and trees should be nurtured. It was then said that there was no need for another railway line. It was in the public interest to protest against HS2 which is a 'classist project'. It was said that there had been violence, and racist and homophobic abuse of protesters by HS2 security guards, who had acted in a disproportionate manner. Many of the written submissions also complained about the behaviour of HS2's security guards. The injunction would condone that behaviour. Some named defendants said that there was insufficient evidence against them. The injunction was intended to 'terrorise' and 'coerce', and the judiciary was being 'weaponised' against protest (a point I have already rejected). It was a 'fantasy' to say that HS2 would benefit the environment; there had been environmental damage and the First Claimant had failed to honour the environmental obligations it said it would fulfil. It was said that the First Claimant was committing 'wildlife crimes' on a daily basis. Several people indicated they had signed undertakings and so should not be injuncted (as I have said, any such persons who have entered into appropriate undertakings will be exempted from the scope of any injunction). There had been an impact on journalistic freedom to report on HS2. The maps showing HS2 Land are hard to make out and/or are unclear.

69. In reply, Mr Kimblin said there was nothing about the application which was novel. The grant of injunctions against groups of unknown protesters to prevent trespass and nuisance had become common in recent times. He accepted the land affected was extensive, but pointed to injunctions over the country's road networks granted in recent years which are even more extensive. He said, specifically in relation to the green land and in response to the First Claimant's right of possession not having 'crystallised', that all of the relevant statutory notices had been served, and the First Claimant therefore had the right to take immediate possession of that land at a time of its choosing where it was not already in actual possession. That was sufficient. He also said that there is a system for receiving complaints, and that complaints were frequent and were always investigated. There was always scope to amend the order if necessary, and Mr Kimblin ended by emphasising that the injunction would have no effect on, and would not prevent, lawful protest.

70. Turning to the material filed by Mr Keir, I reiterate I am not concerned with the merits of HS2. Parliament has decided that question. The grounds advanced by Mr Keir are that: (a) the area of land subject to this claim is incorrect in a number of respects; (b) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (c) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (d) the project is harmful and should not have been consented to, or has not been properly consented to, by Parliament.

71. Appendix 2 to this judgment sets out in summary form points made by those who filed written submissions. I have considered these points.

Discussion

Legal principles

72. The first part of this section of my judgment addresses the relevant legal principles. Many of these have emerged recently in cases concerned with large scale protests akin to those involved in this matter.

(i) Trespass and nuisance

73. I begin with trespass and nuisance, the Claimants' causes of action.

74. A landowner whose title is not disputed is *prima facie* entitled to an injunction to restrain a threatened or apprehended trespass on his land: Snell's Equity (34th Edn) at [18-012].

75. It has already been established that even the temporary possession powers in the HS2 Acts give the Claimants sufficient title to sue for trespass. The question of trespass on HS2 Land was considered in *Secretary of State for Transport and another v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch) at [7]. [30]-[32]. The judge said:

> "7. There are subject to the order three different categories of land. First of all, there is land within the freehold ownership of the First Claimant that is coloured blue on both sets of plans, and is referred to as "the blue land". Secondly, there is land acquired by the First Claimant pursuant to its compulsory purchase powers

> in the High Speed Rail (London - West Midlands) Act 2017 (to which I shall refer as "the 2017 Act"). That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of the Second Claimant by reason of the exercise of its powers pursuant to section 15 and Schedule 16 of the 2017 Act, that land is coloured green on the plans
>
> ….
>
> 30. The first cause of action is trespass. The Claimants are entitled, as a matter of law, to bring a claim in trespass in respect of all three categories of land and, as I have said, it was not seriously suggested that they could not. In particular, I was referred to section 15 and paragraphs 1, 3 and 4 of Schedule 16 to the 2017 Act …
>
> 31. Thus, the procedure is simply this: if the Second Claimant wishes to take temporary possession of land within a defined geographical limit, it serves 28 days' notice pursuant to paragraph 4. Thereafter, it is entitled to enter on the land and 'take possession'. That, to my mind, and it was not seriously argued otherwise, gives it a right to bring possession proceedings and trespass proceedings in respect of that land.
>
> 32. In paragraph 40 of his judgment in *Ineos* at first instance [*Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)], Mr. Justice Morgan says this:
>
> > "The cause of action for trespass on private land needs no further exposition in this case."
>
> Exactly the same is the case here, it seems to me, and it is the First Defendant, the definition of which persons I have described above, who is, or are, subject to such a claim in trespass."

76. Mr Moloney for D6 sought to distinguish this and other HS2 cases on the basis that work was ongoing on the sites in question, and so the First Claimant was in possession, whereas the present application related to green land which the First Claimant was not currently in possession of.

77. In relation to trespass, all that needs to be demonstrated by the claimant is a better right to possession than the occupiers: *Manchester Airport plc v Dutton* [2000] QB 133, 147. In that case the Airport was granted an order for possession over land for which it had been granted a licence in order to construct a second runway, but which it was not yet in actual possession of.

78. I can therefore, at this point, deal with D6's 'prematurity' point. As I have said, Mr Kimblin was quite explicit that the Claimants do, as of now, have the right to immediate possession over the green land because the relevant statutory notices have been served, albeit (to speak colloquially) the diggers have not yet moved in. That does not matter, in

my judgment. I am satisfied that the Claimants do, as a consequence, have a better title to possession that the current occupiers – and certainly any protesters who might wish to come on site. Actual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ's judgment at p151; the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled. That is what the First Claimant has in relation to the green land.

79. This conclusion is supported by what Warby LJ said in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)] (emphasis added):

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

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

81. A protestor's rights under Articles 10 and 11 of the ECHR, even if engaged in a case like this, will not justify continued trespass onto private land or public land to which the public generally does not have a right of access: see the passage from Warby LJ's judgment in *Cuciurean* I quoted earlier, *Harvil Road*, [136]; and *DPP v Cuciurean* at [45]-[49] and [73]-[77]. There is no right to undertake direct action protest on private land: *Crackley and Cubbington*, [35], [42]. In the most recent of these decisions, *DPP v Cuciurean*, the Lord Chief Justice said:

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

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

47. We now return to *Richardson* [*v Director of Public Prosecutions* [2014] AC 635] and the important statement made by Lord Hughes JSC at [3]:

> ‘By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights

> were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences.'

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

48. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

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

…

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

> 74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).
>
> 75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.
>
> 76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.
>
> 77. Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly."

82. I will return to the issue of Convention rights later.

83. The second cause of action pleaded by the Claimants in the APOC is nuisance. Nuisances may either be public or private.

84. A public nuisance is one which inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere or neighbourhood of its operation. It may, however, affect some to a greater extent than others: *Soltau v De Held* (1851) 2 Sim NS 133, 142.

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

> "Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right

> of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

86. The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, [13]; and can be an unlawful interference with one or more of the claimant's rights of way over land privately owned by a third party: *Gale on Easements*, 13-01.

87. In *Cuadrilla*, [13], the Court said:

> "13 The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially a□ected 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 su□ered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181."

88. The position in relation to actions which amount to an obstruction of the highway, for the purposes of public nuisance, is described in *Halsbury's Laws*, 5th ed. (2012). [325], where it is said (in a passage cited in *Ineos*, [44], (Morgan J)): (a) whether an obstruction amounts to a nuisance is a question of fact; (b) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance; (c) generally, it is a nuisance to interfere with any part of the highway; and (d) it is not a defence to show that although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public.

89. In *Harper v G N Haden & Sons* [1933] Ch 298, 320, Romer LJ said:

> "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others."

90. A member of the public has a right to sue for a public nuisance if he has suffered particular damage over and above the ordinary damage suffered by the public at large: *R v Rimmington* [2006] AC 459, [7], [44]:

> "44. The law of nuisance and of public nuisance can be traced back for centuries, but the answers to the questions confronting the House are not to be found in the details of that history. What may, perhaps, be worth noticing is that in 2 Institutes 406 Coke adopts a threefold classification of nuisance: public or general, common, private or special. Common nuisances are public nuisances which, for some reason, are not prosecutable. See *Ibbetson*, *A Historical Introduction to the Law of Obligations*, p 106 nn 62 and 65. So for Coke, while all public nuisances are common, not all common nuisances are public. Later writers tend to elide the distinction between common and public nuisances but, throughout, it has remained an essential characteristic of a public nuisance that it affects the community, members of the public as a whole, rather than merely individuals. For that reason, the appropriate remedy is prosecution in the public interest or, in more recent times, a relator action brought by the Attorney General. A private individual can sue only if he can show that the public nuisance has caused him special injury over and above that suffered by the public in general. These procedural specialties derive from the effect of the public nuisance on the community, rather than the other way round.

(ii) The test for the grant of an injunction

91. In relation to remedy, the starting point, if not the primary remedy in most cases, will be an injunction to bring the nuisance to an end: *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 322-323, per A L Smith LJ; *Hunter v Canary Wharf Ltd* [1997] AC 655, 692 per Lord Goff; *Lawrence v Fen Tigers Ltd and others* [2014] AC 822, [120]-[124] per Lord Neuberger. In that case his Lordship said at [121] (discussing when and whether damages rather than an injunction for nuisance should be granted):

> "I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not."

92. The High Court may grant an injunction (whether interlocutory or final) in all cases in which it appears to the court to be just and convenient: s 37(1) of the Senior Courts Act 1981 (the SCA 1981).

93. The general function of an interim injunction is to 'hold the ring' pending final determination of a claim (*United States of America v Abacha* [2015] 1 WLR 1917). The basic underlying principle of that function is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or another: *National Commercial Bank Jamaica Limited v Olint Corp Ltd (Practice note)* [2009 1 WLR 105 at [17].

94. The general test for the grant of an interim injunction requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience): *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

95. The threshold for obtaining an injunction is normally lower where wrongs have already been committed by the defendant: *Secretary of State for Transport and HS2 Limited v Persons Unknown* [2019] EWHC 1437 (Ch) at [122] to [124]. Snell's Equity states at [18-028]:

> "In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts."

96. This, it seems to me, is not a rule of law but one of evidence which broadly reflects common sense. Where a defendant can be shown to have already infringed the claimant's rights (eg, by committing trespass and/or nuisance), then the court *may* decide that that weighs in the claimant's favour as tending to show the risk of a further breach, alongside other evidence, if the claimant seeks an anticipatory injunction to restrain further such acts by the defendant.

97. However, *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [44]-[48] (CA) makes clear, in light of s 12(3) of the Human Rights Act 1998, that the Court must be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried (see also *Crackley and Cubbington*, [35]). 'Likely' in this context usually means more likely than not: *Cream Holdings Limited v Banerjee* [2005] 1 AC 253, [22].

98. This is accepted by the Claimants (Principles Skeleton Argument, [19]), and it is the test that I will apply. The draft injunction has a long stop date and will be subject to regular review by the court, as I have said. There is the usual provision allowing for applications to vary or discharge it.

99. Where the relief sought is a precautionary injunction (formerly called a *quia timet* injunction, however Latin is no longer to be used in this area of the law, per *Barking and Dagenham,* [8]), the question is whether there is an *imminent* and *real* risk of harm: *Ineos* at [34(1)] (Court of Appeal) and the first instance decision of Morgan J ([2017] EWHC 2945 (Ch)), [88].

100. 'Imminent' means that the circumstances must be such that the remedy sought is not premature. In *Hooper v Rogers* [1975] Ch 43, 49-50, Russell LJ said:

> "I do not regard the use of the word 'imminent' in those passages as negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that the injunction must not be granted prematurely.
>
> …

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

101. In *Canada Goose*, [82(3)] the Court said:

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

102. As I have already said, one of the points made by Mr Moloney is that the 'imminent and real' test is not satisfied over the whole of the HS2 route because over much of it, work has not started and there have been no protests.

(iii) The Canada Goose *requirements*

103. I turn to the requirements governing the sort of injunction which the Claimants seek in this case against unknown persons (ie, D1-D4). So, for example, I set out the definition of D2 earlier.

104. The guidelines set out by the Court of Appeal in *Canada Goose*, [82], are as follows:

> "(1) The 'persons unknown' defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The 'persons unknown' defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.
>
> (2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
>
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief.
>
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons

> unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
>
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
>
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.
>
> (7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

105. In *National Highways Limited*, [41], Bennathan J said this:

> "41. Injunctions against unidentified defendants were considered by the Court of Appeal in the cases of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ["*Ineos*"] and *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ['*Canada Goose*']. I summarise their combined affect as being:
>
> (1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
>
> (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
>
> (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights [*Canada Goose*]."

106. The authorities in this area, including in particular, *Canada Goose*, were reviewed by the Court of Appeal in *Barking and Dagenham*. Although some parts of the decision in

Canada Goose were not followed, the guidelines in [82], were approved (at [56]) and I will apply them.

107. The parts of *Canada Goose* which the Court of Appeal in *Barking and Dagenham* disagreed with were the following paragraphs (see at [78] of the latter decision), where the Court also made clear they were not part of its *ratio*:

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

> to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also 'persons unknown' who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the 969trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that."

108. Some points emerging from the discussion of these paragraphs in *Barking and Dagenham* are as follows:

    a. the Court undoubtedly has the power under s 37 of the SCA 1981 to grant final injunctions that bind non-parties to the proceedings ([71]).

    b. the remedy can be fairly described as 'exceptional', albeit that formulation should not be used to lay down limitations on the Court's broad discretion. The categories in which such injunctions can be granted are not closed and they may be appropriate in protest cases ([120]);

    c. there is no real distinction between interim and final injunctions in the context of injunctions granted against persons unknown ([89] and [93]). While the guidance regarding identification of persons unknown in *Canada Goose* was given in the context of an application for an interim injunction, the same principles apply in relation to the grant of final injunctions ([89]; see also [102] and [117];

    d. as to the position of a non-party who behaves so as satisfy the definition of persons unknown only after the injunction has been granted (ie, a 'newcomer'), such a person becomes a party on knowingly committing an act that brings them within the description of persons unknown set out in the injunction: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, [32]. There is no need for a claimant to apply to join newcomers as defendants. There is 'no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort': *Boyd*, [30];

    e. procedural protections available to ensure a permanent injunction against persons unknown is just and proportionate include the provision of a mechanism for review by the Court: 'Orders need to be kept under review. 'For as long as the court is concerned with the enforcement of an order, the action is not at end' ([89]); '… all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases' ([91]); 'It is good practice to provide for a periodic review, even when a final order is made' ([108]);

    f. in the unauthorised encampment cases, the Court of Appeal has suggested that borough-wide injunctions should be limited to one year at a time before a review: *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043, [106].

109. So far as keeping the injunction in this case under review is concerned, the draft order provides for a long stop date of 31 May 2023, when it will expire unless renewed (at [3]). It also provides for yearly reviews around May time (ie roughly the anniversary of the

hearing before me) in order 'to determine whether there is a continued threat which justifies continuation of this Order' (at [15]), and there are the usual provisions allowing for persons affected to apply to vary or discharge it (at [16] and [18]).

(iv) Geographical scope of the order sought

110. I turn to the question of the geographical scope of the injunction sought. As I have said, the proposed injunction stretches along the whole of the HS2 route. Massive tracts of land are potentially affected. The Claimants say that of itself is not a bar to injunctive relief, to which there is no geographical limit (at least as a matter of law).

111. Specifically in relation to trespass and nuisance, the Claimants said that this Court (Lavender J) was not troubled by a 4,300 mile injunction against environmental protesters along most of the Strategic Roads Network (namely motorways and major A roads) in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB), [24(7)]:

> "… the geographical extent is considerable, since it covers 4,300 miles of roads, but this is in response to the unpredictable and itinerant nature of the Insulate Britain protests".

112. See also his judgment at [15], and also Bennathan J's judgment at [2022] EWHC 1105 (QB), [3], where they referenced other geographically wide-ranging injunctions against environmental road protesters. For example, on 24 September 2021 Cavanagh J granted an interim injunction which applied to the A2, A20, A2070, M2 and M20 in Claim No QB-2021-003626.

113. Lavender J at [24(7)(c)] found additionally that if a claimant is entitled to an injunction, it would not be appropriate to require it to apply for separate injunctions for separate roads, requiring the claimant in effect to 'chase' protestors around the country from location to location, not knowing where they will go next:

114. For these reasons, the Claimants submitted that there is a real and imminent risk of torts being carried out unless this injunction is granted across the whole of the HS2 Land.

115. The Claimants also submitted that although an individual protest may appear small in the context of HS2 as a whole, that was not a reason to overlook its impact. They relied on *DPP v Cuciurean*, [87], where the Lord Chief Justice said:

> "87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to 'only' £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect."

(v) European Convention on Human Rights

116. I turn next to the important issue of the European Convention on Human Rights (the ECHR). The ECHR is given effect in domestic law by the Human Rights Act 1998 (the HRA 1998). Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Court is a public authority: s 6(3)(a).

117. The key provisions for these purposes are Article 10 (freedom of expression); Article 11 (freedom of assembly); and Article 1 of Protocol 1 (A1P1) (right to peaceful enjoyment of property).

118. Articles 10 and 11 provide:

> "*Article 10 Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> *Article 11 Freedom of assembly and association*
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

119. A1P1 provides:

> "*Article 1 Protection of property*

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

120. Articles 10 and 11 potentially pull in one direction (that of the Defendants) whilst A1P1 pulls in the Claimants' favour. That tension was one of the matters discussed in *DPP v Cuciurean*, [84]:

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

121. Section 12 provides:

> "12. - Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied -
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the
>
> court is satisfied that the applicant is likely to establish that publication should not be allowed."

122. 'Publication' in s 12(3) has been interpreted by the courts as extending beyond the literal meaning of the word to encompass 'any application for prior restraint of any form of communication that falls within Article 10 of the Convention': *Birmingham City Council v Afsar* [2019] ELR 373, [60]-[61].

123. It is convenient here to deal with a point raised in particular by D6 about whether the First Claimant, as (at least) a hybrid public authority, can rely on A1P1. He flagged up this point in his Skeleton Argument and Mr Moloney also addressed me on it. After the hearing Mr Moloney and Mr Greenhall filed further submissions arguing, in summary, that: (a) the First Claimant is a core public authority, alternatively a hybrid public authority and a governmental organisation, being wholly owned by the Secretary of State and publicly funded: see *Aston Cantlow* [2004] 1 AC 546; (b) the burden lies on the First Claimant to establish in law and in fact that it may rely on its A1P1 rights; (c) so far as previous cases say otherwise, they are wrongly decided or distinguishable; (d) the exercise of compulsory purchase powers falls within 'functions of a public nature'; (e) thus, the First Claimant may not rely on A1P1 rights in support of the application.

124. The Claimants filed submissions in response.

125. I am satisfied that the First Claimant can pray in aid A1P1, and the common law values they reflect, and that the approach set out in *DPP v Cuciurean* and other cases is binding upon me. The point raised by D6 was specifically dealt with by the Court of Appeal in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [28]:

> "28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a 'non-

> governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law …"

126. D6's submissions are also inconsistent with Warby LJ's judgment in *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, [9(1)]-[9(2)], which I quoted earlier.

127. D6's submissions are also inconsistent with the approach of Arnold J (as he then was) in *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch). The judge accepted the submission that the Authority had A1P1 rights which went into the balance against the protesters' Article 10/11 rights, at [22]:

> "22. In those circumstances, it seems to me that the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1 AC 593 at [17] is applicable in the present case. Here we are concerned with a conflict between the ODA's rights under Article 1 of the First Protocol, and the protesters' rights under Articles 10 and 11. The correct approach, therefore, is as follows. First, neither the ODA's rights under Article 1 of the First Protocol, nor the protesters' rights under Articles 10 and 11 have precedence over each other. Secondly, where the values under the respective Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test, or ultimate balancing test, must be applied to each."

128. The Olympic Authority was unquestionably a public body. The judge described it at [2] as:

> "… an executive non-departmental public body and statutory corporation established by section 3 of the London Olympic Games and Paralympic Games Act 2006 to be responsible for the planning and delivery of the Olympic Games 2012, including the development and building of Games venues."

129. In a later judgment in the same case ([2012] EWHC 1114 (Ch)), the judge said:

> "23. The protestors who have addressed me have made the point that they have sought to engage with the planning process in the normal way, and they have considered the possibility of seeking judicial review. As is so often the case, they say that they are handicapped by the lack of professional legal representation and the lack of finances to instruct lawyers of the calibre instructed by the ODA. They have also sought to engage normal democratic processes in order to make their points. It is because those processes have failed, as the protestors see it, that they have engaged in their protests.

> 24. That is all very understandable, but it does not, in my judgment, detract from the basic position which confronts the court. The ODA has rights as exclusive licensee of the land in question under Article 1 of the First Protocol to the Convention. As I observed in my judgment on 4 April 2012, the protestors' rights under Articles 10 and 11 are not unqualified rights. They must give way, where it is necessary and proportionate to do so, to the Convention rights of others, and specifically in the present case, of the ODA. The form of injunction sought by the ODA and which I granted on the last occasion does not, in and of itself, prevent or inhibit lawful and peaceful protest. It does not prevent or inhibit the protestors who wish to protest about the matters I have described from doing so in ways which do not interfere with the ODA's enjoyment of its rights in respect of the land

130. Articles 10 and 11 were considered in respect of protest on the highway in *Samede* at [38] – [41]. The Court said:

> "38. This argument raises the question which the Judge identified at the start of his judgment, namely 'the limits to the right of lawful assembly and protest on the highway', using the word 'protest' in its broad sense of meaning the expression and dissemination of opinions. In that connection, as the Judge observed at [2012] EWHC 34 (QB), para 100, it is clear that, unless the law is that 'assembly on the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied' – quoting Lord Irvine LC in *DPP v Jones* [1999] 2 AC 240, 259E. However, as the Judge also went on to say at [2012] EWHC 34 (QB), para 145:
>
> > 'To camp on the highway as a means of protest was not held lawful in *DPP v Jones*. Limitations on the public right of assembly on the highway were noticed, both at common law and under Article 11 of the Convention (see Lord Irvine at p 259A-G, Lord Slynn at p 265C-G, Lord Hope of Craighead at p 277D-p 278D, and Lord Clyde at p 280F). In a passage of his speech that I have quoted above Lord Clyde expressed his view that the public's right did not extend to camping.'
>
> 39. As the Judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because, as the Judge said at [2012] EWHC 34 (QB), para 155:

> '[I]t is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command. … [T]he court cannot – indeed, must not – attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of Articles 10 and 11 of the Convention. … [T]he right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the Judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance' - [2012] EWHC 34 (QB), para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov* [2008] ECHR 1170, para 45:

> 'Any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means'.

The Judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

131. However, there is a more restrictive approach (ie, more restrictive against protest) where the protest takes place on private land. This approach was explained by the Strasbourg Court in *Appleby v United Kingdom* [2003] 27 EHRR 38, [43], [47]. The applicants had been prevented from collecting signatures in a private shopping centre for a petition against proposed building work to which they objected. They said this violated their rights under Articles 10 and 11. The Court disagreed:

> "43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.
>
> …
>
> 47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example."

132. The passage from *Samede* I set out earlier was cited with approval by the Supreme Court in *DPP v Ziegler* [2022] AC 408 at [17], [72], [74] to [77], [80] and [152]. In that case, the defendants were charged with obstructing the highway, contrary to s 137 of the Highways Act 1980, by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the road and making it difficult for police to remove them by locking themselves to structures.

133. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted 'without lawful … excuse' within the meaning of s 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under Articles 10 and 11 of the ECHR. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The

prosecution appealed by way of case stated, pursuant to s 111 of the Magistrates Courts Act 1980.

134. The Divisional Court allowed the prosecution's appeal, holding that the district judge's assessment of proportionality had been wrong. The defendant appealed to the Supreme Court. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under Articles 10 or 11 by reason of the prosecution.

135. The Supreme Court allowed the defendants' appeal. It highlighted the features that should be taken into account in determining the issue of proportionality, as including: (a) the place where the obstruction occurred; (b) the extent of the actual interference the protest caused to the rights of others, including the availability of alternative thoroughfares; (c) whether the protest had been aimed directly at an activity of which protestors disapproved, or another activity which had no direct connection with the object of the protest; (d) the importance of the precise location to the protestors; and (e) the extent to which continuation of the protest breaches domestic law.

136. At [16] and [58], the Supreme Court endorsed what have become known as the '*Ziegler* questions', which must be considered where Articles 10 and 11 are engaged:

    a. Is what the defendant did in exercise of one of the rights in Articles 10 or 11?

    b. If so, is there an interference by a public authority with that right?

    c. If there is an interference, is it 'prescribed by law'?

    d. If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?

    e. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

137. This last question can be sub-divided into a number of further questions, as follows:

    a. Is the aim sufficiently important to justify interference with a fundamental right?

    b. Is there a rational connection between the means chosen and the aim in view?

    c. Are there less restrictive alternative means available to achieve that aim?

    d. Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

138. Also, in *Ziegler*, [57], the Supreme Court said:

> "57. Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society'. In *Kudrevicius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that 'The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a

gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly. Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles."

139. The structured approach provided by the *Ziegler* questions is one which the Court of Appeal has said courts would be 'well-advised' to follow at each stage of a process which might restrict Article 10 or 11 rights: *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [13]. Also in that case, at [28]-[34], the Court summarised the relevant Convention principles:

> "28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a 'non-governmental' organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10 (2) and 11 (2) of the ECHR qualify the rights created by articles 10 (1) and 11 (1) respectively. Article 10 (2) relevantly provides that:
>
> > "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of health or morals, for the protection of the reputation or rights of others… or for maintaining the authority… of the judiciary."
>
> 29. Article 11 (2) relevantly provides:
>
> > "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others."
>
> 30. There is no doubt that the right to freedom of expression and the right of peaceful assembly both extend to protesters. In *Hashman v United Kingdom* (2000) EHHR 241, for example, the European Court of Human Rights held that the activity of hunt

saboteurs in disrupting a hunt by the blowing of hunting horns fell within the ambit of article 10 of the ECHR. In *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624 protesters who were part of the 'Occupy London' movement set up a protest camp in the churchyard of St Paul's Cathedral. This court held that their activities fell within the ambit of both article 10 and also article 11.

31. On the other hand, articles 10 and 11 do not entitle a protester to protest on any land of his choice. They do not, for example, entitle a protester to protest on private land: *Appleby v United Kingdom* (2003) 37 EHHR 38; *Samede* at [26]. The Divisional Court so held in another HS2 protest case, involving Mr Cuciurean himself who at that time was living in a tunnel for the purpose of disrupting HS2: *DPP v Cuciurean* [2022] EWHC 736 (Admin). In that case the court (Lord Burnett CJ and Holgate J) said at [45]:

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

32. Even the right to protest on a public highway has its limits. In *DPP v Ziegler* protesters were charged with obstructing the highway without lawful excuse. The Supreme Court held that whether there was a 'lawful excuse' depended on the proportionality of any interference with the protesters' rights under articles 10 and 11. Lords Hamblen and Stephens said at [70]:

> 'It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional

> action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'.'

33. But that proportionality exercise does not apply in a case in which the protest takes place on private land. In *DPP v Cuciurean* the court said:

> "66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.
>
> 67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights."

34. Where a land owner, such as the claimants in the present case, seeks an injunction restraining action which is carried on in the exercise of the right of freedom of expression or the right of peaceful assembly (or both) on private land, the time for the proportionality assessment (to the extent that it arises at all) is at the stage when the injunction is granted. Any 'chilling effect' will also be taken into account at that stage: see for example the decision of Mr John Male QC in *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252 (Ch), especially at [104] to [121], [158] to [167] and [176] (another case of protest predominantly on the highway); and the decision of Lavender J in *National Highways Ltd v Heyatawin* [2021] EWHC 3081 (QB) (also a case of protest on the highway). Once the injunction has been granted then, absent any appeal or application to vary, the balance between the competing rights has been struck: see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB) at [44]; *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) at [30]."

140. The Claimants say that, in having regard to the balance of convenience and the appropriate weight to be had to the Defendants' Convention rights, there is no right to protest on private land (*Appleby*, [43] and *Samede*, [26]) and therefore Articles 10 and 11 rights are not engaged in relation to those protests (see *Ineos* at [36], and *DPP v Cuciurean*, [46], [50] and [77]). In other words, there is no 'freedom of forum' for protest (Ibid, [45]). A protest which involves serious disruption or obstruction to the lawful activities of other parties may amount to 'reprehensible conduct', so that Articles 10 and 11 are not violated: Ibid, [76].

141. The Claimants say that constant direct action protest and trespass to the HS2 Land is against the public interest and rely on *DPP v Cuciurean*, [84], which I quoted earlier. They placed special weight on the Lord Chief Justice's condemnation of endless 'guerrilla tactics'.

142. To the extent that protest is on public land (eg by blocking gates from the highway), to which Articles 10 and 11 do apply, the Claimants say that the interference with that right represented by the injunction is modest and proportionate.

(vi) Service

143. I turn to the question of service. This was something which I canvassed with counsel at the preliminary hearing in April. It is a fundamental principle of justice that a person cannot be subject to the court's jurisdiction without having notice of the proceedings: *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471, [14].

144. The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant: *Cameron*, [21], and *Cuciurean v Secretary of State for Transport and High Speed Two (HS2) Limited* [2021] EWCA Civ 357, [14] – [15], [25] – 26], [60] and [70]; *Canada Goose*, [82]. Posting on social media and attaching copies at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants: *Canada Goose*, [50]:

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

145. There is a difference between service of proceedings, and service of an injunction order. A person unknown is a newcomer, and is served and made a party to proceedings, when they violate an order of which they have knowledge; it is not necessary for them to be personally served with it: *Barking and Dagenham,* [84]-[85], [91], approving *South*

Cambridgeshire District Conucil v Gammell [2005] EWCA Civ 1429, [34]. In the former case, the Court of Appeal said:

> "84. In the first two sentences of para 91, *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.
>
> 85. The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of para 91 are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron.*
>
> …
>
> 91**.** The reasoning in para 92 is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought 976normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases."

146. Service provisions must deal with the question of notice to an unknown and fluctuating body of potential defendants. There may be cases where the service provisions in an order

have been complied with, but the person subject to the order can show that the service provisions have operated unjustly against him or her. In such a case, service might be challengeable: *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [60].

147. In *National Highways Limited*, [50]-[52], Bennathan J adopted the following solution in relation to an injunction affecting a large part of the road network:

> "50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.
>
> 51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB [Insulate Britain] and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.
>
> 52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J [in *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB)], that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction."

Merits

148. The second part of this section of the judgment addresses the merits of the Claimants' application in light of these principles.

149. I plan to deal with the following topics: (a) trespass and nuisance; (b) whether there is a real and imminent risk of unlawfulness; (c) whether there are sufficient reasons to grant the order against known defendants; (d) whether are sufficient reasons to grant the order against unknown defendants; (e) scope of the order; (f) service and knowledge.

150. At [6] and [7] of their Merits Skeleton Argument the Claimants said this:

> "6. The purpose of the order, if granted, is simply to allow the First and Second Claimant to get on with building a large piece of linear infrastructure. Its purpose is not to inhibit normal activities generally, nor to inhibit the expression of whatever views may be held. The fundamental disagreement with those who appear to defend these proceedings is as to what constitutes lawful protest. The Claimants say that they are faced with deliberate interference with their land and work with a view to bringing the HS2 Scheme to a halt.
>
> 7. That is not lawful, and it is not lawful protest."

(i) Trespass and nuisance

151. I begin with the question of title over the HS2 Land. I am satisfied, as other judges have been on previous occasions, that HS2 has sufficient title over the HS2 Land to bring an action in trespass against trespassers. I set out the statutory scheme earlier, and it is described in Dilcock 1, [10] eq seq and Dilcock 4, [21], et seq.

152. I am therefore satisfied that the Claimants are entitled to possession of all of the land comprising the HS2 Land. The fact they are not actually in possession (yet) of all of it does not matter, for the reasons I have already explained. The statutory notices have been served and they are entitled to immediate possession. That is all that is required.

153. I note D36's (Mark Keir's submissions) about the Revised HS2 Land Plans produced by Ms Dilcock. I am satisfied that the points he made are fully answered by Ms Dilcock, in particular, in Dilcock 4, [21] et seq.

154. Turning to the evidence of trespass relied on by the Claimants, I am satisfied that the evidence is plentiful. Jordan 1 is lengthy and contains much detail. It is accompanied by many pages of exhibits containing further specifics. I am satisfied that this evidence shows there has been many episodes of trespass by (primarily) persons unknown – but also by known persons - both on Cash's Pit, and elsewhere along the HS2 Scheme route. Mr Jordan's evidence is that trespassing activities have ranged widely across the HS2 Land as protesters carry out their direct-action activities:

> "10. Those engaged in protest action opposed to the HS2 Scheme are made up of a broad cross-section of society, including concerned local residents, committed environmentalists, academics and also numerous multi-cause transient protestors whom have been resident at a number of protest camps associated with a number of different 'causes'. Groups such as Extinction Rebellion (often known as 'XR') often garner much of the

mainstream media attention and widely publicise their actions. They often only travel into an area for a short period (specific 'days of action' or 'weeks of action'), however once present they are able to execute comprehensive and highly disruptive direct action campaigns, whipping up an almost religious fervour amongst those present. Their campaigns often include direct action training, logistical and welfare support and complimentary media submissions, guaranteeing national media exposure. Such incidents have a significant impact on the HS2 Scheme but make up only a proportion of overall direct action protest against the HS2 Scheme, which occurs on an almost daily basis.

11. By way of explanation of a term that will be found in the evidence exhibited to this statement, activists often seek to anonymise themselves during direct action by referring to themselves and each other as "Bradley". Activists also often go by pseudonyms, in part to avoid revealing their real identities. A number of the Defendants' pseudonyms are provided in the schedule of Named Defendants and those working in security on the HS2 Scheme are very familiar with the individuals involved and the pseudonyms they use.

12. On a day to day basis direct action protest is orchestrated and conducted by both choate groups dedicated to disruption of the HS2 Scheme (such as HS2 Rebellion and Stop HS2) and inchoate groups of individuals who can comprise local activists and more seasoned 'core' activists with experience of conducting direct action campaigns against numerous "causes". The aims of this type of action are made very explicitly clear by those engaged in it, as can be seen in the exhibits to this statement. It is less about expressing the activists' views about the HS2 Scheme and more about causing direct and repeated harm to the HS2 Scheme in the form of delays to works, sabotage of works, damage to equipment, psychological and physical injury to those working on the HS2 Scheme and financial cost, with the overall aim of 'stopping' or 'cancelling' the HS2 Scheme.

13. In general, the Claimants and their contractors and sub-contractors have been subject to a near constant level of disruption to works on the HS2 Scheme, including trespass on and obstruction of access to the HS2 Land, since October 2017. The Defendants have clearly stated - both to contractors and via mainstream and social media - their intention to significantly slow down or stop work on the HS2 Scheme because they are opposed to it. They have trespassed on HS2 Land on multiple occasions and have issued encouragement via social media to others to come and trespass on HS2 Land. Their activities have impeded the First Claimant's staff, contractors and sub-contractors going about their lawful business on the HS2 Land and hampered the work on the HS2 Scheme, causing delays and extremely significant costs

to the taxpayer and creating an unreasonably difficult and stressful working environment for those who work on the HS2 Land."

155. At [14]-[15] Mr Jordan wrote:

> "At page 1 [of Ex RJ1] is a graphic illustration of the number of incidents experienced by the Claimants on Phase One of the HS2 Scheme that have impacted on operational activity and the costs to the Claimant of dealing with those incidents. That shows a total of 1007 incidents that have had an impact on operational activity between the last quarter of 2017 and December 2021. Our incident reporting systems have improved over time and refined since we first began experiencing incidents of direct action protest in October 2017 and it is therefore considered that the total number of incidents shown within our overall reporting is likely fewer than the true total.
>
> 15. The illustration also shows the costs incurred in dealing with the incidents. These costs comprise the costs of the First Claimant's security; contractor security and other contractor costs such as damage and repairs; and prolongation costs (delays to the programme) and show that a total of £121.62 million has been incurred in dealing with direct action protest up to the end of December 2021. The HS2 Scheme is a publicly funded project and accordingly the costs incurred are a cost to the tax-payer and come from the public purse. The illustration at page 2 shows the amount of the total costs that are attributable to security provision."

156. At [29.1] under the heading 'Trespass' Mr Jordan said:

> "Put simply, activists enter onto HS2 Land without consent. The objective of such action is to delay and disrupt works on the HS2 Scheme. All forms of trespass cause disruption to the HS2 Scheme and have financial implications for the Claimants. Some of the more extreme forms of trespass, such as tunnelling (described in detail in the sections on Euston Square Gardens and Small Dean below) cause significant damage and health and safety risks and the losses suffered by the Claimants via the costs of removal and programme delay run into the millions of pounds. In entering onto work sites, the activists create a significant health and safety hazard, thus staff are compelled to stop work in order to ensure the safety of staff and those trespassing (see, for example, the social media posts at pages 38 to 39 about trespassers at the HS2 Scheme Capper's Lane compound in Lichfield where there have been repeated incursions onto an active site where heavy plant and machinery and large vehicles are in operation, forcing works to cease for safety and security reasons. A video taken by a trespasser during an incursion on 16

> March 2022 and uploaded to social media is at Video (7). Worryingly, such actions are often committed by activists in ignorance of the site operations and or equipment functionality, which could potentially result in severe unintended consequences. For example, heavy plant being operated upon the worksite may not afford the operator clear sight of trespassers at ground level. Safety is at the heart of the Claimants' activities on the HS2 Scheme and staff, contractors and sub-contractors working on the HS2 Land are provided with intensive training and inductions and appropriate personal protective equipment. The First Claimant's staff, contractors and sub-contractors will always prioritise safety thus compounding the trespassers' objective of causing disruption and delay. Much of the HS2 Land is or will be construction sites and even in the early phases of survey and clearance works there are multiple hazards that present a risk to those entering onto the land without permission. The Claimants have very serious concerns that if incidents of trespass and obstruction of access continue, there is a high likelihood that activists will be seriously injured."

157. Mr Jordan went on to describe (at [29.1.1] et seq) some of the activities which protesters against HS2 have undertaken since works began. As well as trespass these include: breaching fencing and damaging equipment; climbing and occupying trees on trespassed land; climbing onto vehicles (aka, 'surfing'); climbing under vehicles; climbing onto equipment, eg, cranes; using lock-on devices; theft, property damage and abuse of staff, including staff being slapped, punched, spat at, and having human waste thrown at them; obstruction; (somewhat ironically) ecological and environmental damage, such as spiking trees to obstruct the felling of them; waste and fly tipping, which has required, for example, the removal of human waste from encampments; protest at height (which requires specialist removal teams); and tunnelling.

158. Mr Jordan said that some protesters will often deliberately put themselves and others in danger (eg, by occupying tunnels with potentially lethal levels of carbon dioxide, and protesting at height) because they know that the process of removing them from these situations will be difficult and time-consuming, often requiring specialist teams, thereby maximising the hindrance to the construction works.

159. I am also satisfied that the Claimants have made out to the requisite standard at this stage their claim in nuisance, for essentially the same reasons.

160. The HS2 Scheme is specifically authorised by the HS2 Acts, as I have said. Whilst mindful of the strong opposition against it in some quarters, Parliament decided that the project was in the public interest.

161. I am satisfied that there has been significant violence, criminality and sometimes risk to the life of the activists, HS2 staff and contractors. As Mr Jordan set out in Jordan 1, [14] and [23], 129 individuals were arrested for 407 offences from November 2019 - October 2020.

162. I accept Mr Jordan's evidence at [12] of Jordan 1, which I set out earlier, that much of the direct action seems to have been less about expressing the activists' views about the HS2

Scheme, and more about trying to cause as much nuisance as possible, with the overall aim of delaying, stopping or cancelling it via, in effect, a war of attrition.

163. At [21.2] of Jordan 1, he wrote:

> "21.2 Interviews with the BBC on 19.05.2020 and posted on the Wendover Active Resistance Camp Facebook page. D5 (Report Map at page 32) was interviewed and said: 'The longevity is that we will defend this woodland as long as we can. If they cut this woodland down, there will still be activists and community members and protectors on the ground. We're not just going to let HS2 build here free will. As long as HS2 are here and they continue in the vein they have been doing, I think you'll find there will be legal resistance, there'll be on the ground resistance and there will be community resistance.' In the same interview, another individual said: 'We are holding it to account as they go along which is causing delays, but also those delays mean that more and more people can come into action. In a way, the more we can get our protectors to help us to stall it, to hold it back now, the more we can try and use that leverage with how out of control it is, how much it is costing the economy, to try to bring it to account and get it halted.' A copy of the video is at Video 1."

164. I am entirely satisfied that the activities which Mr Jordan describes, in particular in [29] et seq of Jordan 1, and the other matters he deals with, constitute a nuisance. I additionally note that even following the order made in relation to Cash's Pit by Cotter J on 11 April 2022, resistance to removal in the form of digging tunnels has continued: Dilcock 4, [33]-[43].

165. It is perhaps convenient here to mention a point which emerged at the hearing when we were watching some of the video footage, and about which I expressed concern at the time. There was some footage of a confrontation between HS2 security staff and protesters. One clip appeared to show a member of staff kneeling on the neck of a protester in order to restrain them. One does not need to think of George Floyd to know that that is an incredibly dangerous thing to do. I acknowledge that I only saw a clip, and that I do not know the full context of what occurred. I also acknowledge that there is evidence that some protesters have also been guilty of anti-social behaviour towards security staff. But I hope that those responsible on the part of the Claimants took note of my concerns, and will take steps to ensure that dangerous restraint techniques are not used in the future.

166. I also take seriously the numerous complaints made before me orally and in writing about the behaviour of some security staff. I deprecate any homophobic, racist or sexist, etc, abuse of protesters by security guards (or indeed by anyone, in any walk of life). I can do no more than emphasise that such allegations must be taken seriously, investigated, and if found proved, dealt with appropriately.

167. Equally, however, those protesting must also understand that their right to do so lawfully – which, as I have said, any order I make will clearly state - comes with responsibilities, including not to behave unpleasantly towards men and women who are

just trying to do their jobs.

(ii) Whether there is a real and imminent risk of continued unlawfulness so as to justify an anticipatory injunction

168. I am satisfied that the trespass and nuisance will continue, unless restrained, and that the risk is both real and imminent. My reasons, in summary, are: the number of incidents that have been recorded; the protesters' expressed intentions; the repeated unlawful protests to date that have led to injunctions being granted; and the fact that the construction of HS2 is set to continue for many years.

169. The principal evidence is set out in Jordan 1, [20], et seq. Mr Jordan said at [20]:

> "20. There are a number of reasons for the Claimants' belief that unlawful action against the HS2 Scheme will continue if unchecked by the Court. A large number of threats have been made by a number of the Defendants and general threats by groups opposed to the HS2 Scheme to continue direct action against the HS2 Scheme until the HS2 Scheme is "stopped". These threats have been made on a near daily basis - often numerous times a day - since 2017 and have been made in person (at activist meetings and to staff and contractors); to mainstream media; and across social media. They are so numerous that it has only been possible to put a small selection of examples into evidence in this application to illustrate the position to the Court. I have also included maps for some individuals who have made threats against the HS2 Scheme and who have repeatedly engaged in unlawful activity that show where those individuals have been reported by security teams along the HS2 Scheme route ("Report Map"). These maps clearly demonstrate that a number of the Defendants have engaged in unlawful activity at multiple locations along the route and the Claimants reasonably fear that they will continue to target the length of the route unless restrained by the Court."

170. In *Harvil Road,* [79]-[81], the judge recorded statements by protesters in the evidence in that case which I think are a broad reflection of the mind-set of many protesters against HS2:

> "79. 'Two arrested. Still need people here. Need to hold them up at every opportunity.'
>
> …
>
> 'No, Lainey, these trees are alongside the road so they needed a road closure to do so. They can't have another road closure for 20 days. Meanwhile they have to worry BIG time about being targeted by extinction rebellion and, what's more, they're going to see more from us at other places on the route VERY soon. Tremble HS2, tremble.

…

> "We have no route open to us but to protest. And however much we have sat in camp waving flags, and waving at passersby tooting their support, that was never and will never be the protest that gets our voices heard. We are ordinary people fighting with absolute integrity for truth that is simple and stark. We are ordinary people fighting an overwhelming vast government project. But we will be heard. We must be heard."

> 81. I fully accept that this expresses the passion with which the Fourth Defendant opposes the HS2 scheme and while they may not indicate that the Fourth Defendant will personally breach any order or be guilty of any future trespass, I think there is, I frankly find, a faintly sinister ring to these comments which in light of all that has gone before causes me to agree with Mr. Roscoe and the Claimants that there is a distinct risk of further objectionable activity should an injunction not be granted."

171. Other salient points on the same theme include the following (paragraph numbers refer to Jordan 1):

a. Interview with *The Guardian* on 13 February 2021 given by D27 after he was removed from the tunnels dug and occupied by activists under HS2 Land at Euston Square Gardens, in which he said: 'As you can see from the recent Highbury Corner eviction, this tunnel is just a start. There are countless people I know who will do what it takes to stop HS2.' In the same article he also said: 'I can't divulge any of my future plans for tactical reasons, but I'm nowhere near finished with protesting.'

b. In March 2021 D32 obstructed the First Claimant's works at Wormwood Scrubs and put a call out on Twitter on 24 March 2021 asking for support to prevent HS2 route-wide. He also suggested targeting the First Claimant's supply chain.

c. On 23 February 2022 D6 stated that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they, 'will just hit all the other gates' and 'if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate' ([21.12]).

d. D6 on 24 February 2022 stated if the Cash's Pit camp is evicted, 'we'll just move on. And we'll just do it again and again and again' ([21.13]).

e. As set out in [21.14] on 10 March 2022 D17, D18, D19, D31, D63 and a number of persons unknown spent the morning trespassing on HS2 Land adjacent to Cash's Pit Land, where works were being carried out for a gas diversion by Cadent Gas and land on which archaeological works for the HS2 Scheme were taking place. This incident is described in detail at [78] of Jordan 1. In a video posted on Facebook after the morning's incidents, D17 said:

> "Hey everyone! So, just bringing you a final update from down in Swynnerton. Today has been a really – or this morning today - has been a really successful one. We've blocked the gates for several hours. We had the team block the gates down at the main compound that we usually block and we had – yeah, we've had people running around a field over here and grabbing stuff and getting on grabbers and diggers (or attempting to), but in the meantime, completely slowing down all the works. There are still people blocking the gates down here as you can see and we've still got loads of security about. You can see there's two juicy diggers over there, just waiting to be surfed and there's plenty of opportunities disrupt – and another one over there as well. It's a huge, huge area so it takes a lot of them to, kind of, keep us all under control, particularly when we spread out. So yeah. If you wanna get involved with direct action in the very near future, then please get in touch with us at Bluebell or send me a message and we'll let you know where we are, where we're gonna be, what we're gonna be doing and how you can get involved and stuff like that. Loads of different roles, you've not just, people don't have to run around fields and get arrested or be jumping on top of stuff or anything like that, there's lots of gate blocking to do and stuff as well, yeah so you don't necessarily have to be arrested to cause a lot of disruption down here and we all work together to cause maximum disruption. So yeah, that's that. Keep checking in to Bluebell's page, go on the events and you'll see that we've got loads of stuff going on, and as I say pretty much most days we're doing direct action now down in Swynnerton, there's loads going on at the camp, so come and get involved and get in touch with us and we'll let you know what's happening the next day. Ok, lots of love. Share this video, let's get it out there and let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you."

Hence, comments Mr Jordan, D17 was here making explicit threats to continue to trespass on HS2 Land and to try to climb onto vehicles and machinery and encourages others to engage in similar unlawful activity.

f. Further detail is given of recent and future likely activities around Cash's Pit and other HS2 Land in the Swynnerton area at Jordan 1**,** [72]-[79] and Dilcock 4, [33], et seq.

172. These matters and all of the other examples quoted by Mr Jordan and Ms Dilcock, to my mind, evidence an intention to continue committing trespass and nuisance along the whole of the HS2 route.

173. I also take into account material supplied by the Claimants following the hearing that occupation of Cash's Pit has continued even in the face of Cotter J's order of 11 April 2022 and that committal proceedings have been necessary.

174. The Claimants reasonably anticipate that the activists will move their activities from location to location along the route of the HS2 Scheme. Given the size of the HS2 Scheme, the Claimants say that it is impossible for them to reasonably protect the entirety of the HS2 Land by active security patrol or even fencing.

175. I have carefully considered D6's argument that the Claimants must prove that there is an imminent danger of very substantial damage, and (per Skeleton, [48]):

> "The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction."

176. I do not find this a persuasive argument, and I reject it. Given the evidence that the protesters' stated intention is to protest wherever, and whenever, along HS2's route, I am satisfied there is the relevant imminent risk of very substantial damage. To my mind, it is not an attractive argument for the protesters to say: 'Because you have not started work on a particular piece of land, and even though when you do we will commit trespass and nuisance, as we have said we will, you are not entitled to a precautionary injunction to prevent us from doing so until you start work and we actually start doing so.' As the authorities make clear, the terms 'real' and 'imminent' are to be judged in context and the court's overall task is to do justice between the parties and to guard against prematurity. I consider therefore that the relevant point to consider is not now, as I write this judgment, but at the point something occurs which would trigger unlawful protests. That may be now, or it may be later. Furthermore, protesters do not always wait for the diggers to arrive before they begin to trespass. The fact that the route of HS2 is now publicly available means that protesters have the means and ability to decide where they are going to interfere next, even in advance of work starting.

177. In other words, adopting the *Hooper v Rogers* approach that the degree of probability of future injury is not an absolute standard, and that what is to be aimed at is justice between the parties, having regard to all the relevant circumstances, I am satisfied that (all other things being equal) a precautionary injunction is appropriate given the protesters' expressed intentions. To accede to D6's submission would, it seems to me, be to licence the sort of 'guerrilla tactics' which the Lord Chief Justice deprecated in *DPP v Cucicirean*.

178. Here I think it is helpful to quote Morgan J's judgment in *Ineos*, [87]-[95] (and especially [94]-[95]), where he considered an application for a precautionary injunction against protests at fracking sites where work had not actually begun:

> "87. The interim injunctions which are sought are mostly, but not exclusively, claimed on a *quia timet* basis. There are respects in which the Claimants can argue that there have already been interferences with their rights and so the injunctions are to prevent repetitions of those interferences and are not therefore claimed on a *quia timet* basis. Examples of interferences in the past are said to be acts on trespass on Site 1, theft of, and criminal damage to,

seismic testing equipment and various acts of harassment. However, the greater part of the relief is claimed on the basis that the Claimants reasonably apprehend the commission of unlawful acts in the future and they wish to have the protection of orders from the court at this stage to prevent those acts being committed. Accordingly, I will approach the present applications as if they are made solely on the quia timet basis.

88. The general test to be applied by a court faced with an application for a *quia timet* injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in *London Borough of Islington v Elliott* [2012] EWCA Civ 56, per Patten LJ at 29, as follows:

> '29 The court has an undoubted jurisdiction to grant injunctive relief on a *quia timet* basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on *American Cyanamid* principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted."

89. In *London Borough of Islington v Elliott*, the court considered a number of earlier authorities. The authorities concerned claims to *quia timet* injunctions at the trial of the action. In such cases, particularly where the injunction claimed is a mandatory injunction, the court acts with caution in view of the possibility that the contemplated unlawful act, or the contemplated damage from it, might not occur and a mandatory order, or the full extent of the mandatory order, might not be necessary. Even where the injunction claimed is a prohibitory injunction, it is not enough for the claimant to say that the injunction only restrains the defendant from doing something which he is not entitled to do and causes him no harm: see Paul *(KS) (Printing Machinery) v Southern Instruments (Communications)* [1964] RPC 118 at 122; there must still be a real risk of the unlawful act being committed. As to whether the contemplated harm is 'imminent', this word is used

in the sense that the circumstances must be such that the remedy sought is not premature: see *Hooper v Rogers* [1975] Ch 43 at 49-50. Further, there is the general consideration that 'Preventing justice excelleth punishing justice': see *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] Ch 235 at 242, quoting the Second Institute of Sir Edward Coke at page 299.

90. In the present case, the Claimants are applying for *quia timet* injunctions on an interim basis, rather than at trial. The passage quoted above from *London Borough of Islington v Elliott* indicated that different considerations might arise on an interim application. The passage might be read as suggesting that it might be easier to obtain a *quia timet* injunction on an interim basis. That might be so in a case where the court applies the test in *American Cyanamid* where all that has to be shown is a serious issue to be tried and then the court considers the adequacy of damages and the balance of justice. Conversely, on an interim application, the court is concerned to deal with the position prior to a trial and at a time when it does not know who will be held to be ultimately right as to the underlying dispute. That might lead the court to be less ready to grant quia timet relief particularly of a mandatory character on an interim basis.

91. I consider that the correct approach to a claim to a *quia timet* injunction on an interim basis is, normally, to apply the test in *American Cyanamid*. The parts of the test dealing with the adequacy of damages and the balance of justice, applied to the relevant time period, will deal with most if not all cases where there is argument about whether a claimant needs the protection of the court. However, in the present case, I do have to apply section 12(3) of the Human Rights Act 1998 and ask what order the court is likely to make at a trial of the claim.

92. I have dealt with the question of *quia timet* relief in a little detail because it was the subject of extensive argument. However, that should not obscure the fact that the decision in this case as to the grant of *quia timet* relief on an interim basis is not an unduly difficult one.

93. What is the situation here? On the assumption that the evidence does not yet show that protestors have sought to subject Ineos to their direct action protests, I consider that the evidence makes it plain that (in the absence of injunctions) the protestors will seek to do so. The protestors have taken direct action against other fracking operators and there is no reason why they would not include Ineos in the future. The only reason that other operators have been the subject of protests in the past and Ineos has not been (if it has not been) is that Ineos is a more recent entrant into the industry. There is no reason to think that (absent injunctions) Ineos will be treated any differently in the future

> from the way in which the other fracking operators have been treated in the past. I therefore consider that the risk of the infringement of Ineos' rights is real.
>
> 94. The next question is whether the risk of infringement of Ineos' rights is imminent. I have described earlier the sites where Ineos wish to carry out seismic testing and drilling. It seems likely that drilling will not commence in a matter of weeks or even months. However, there have been acts of trespass in other cases on land intended to be used for fracking even before planning permission for fracking had been granted and fracking had begun. I consider that the risk of trespass on Ineos' land by protestors is sufficiently imminent to justify appropriate intervention by the court. Further, there have already been extensive protests outside the depots of third party contractors providing services to fracking operators. One of those contractors is P R Marriott. Ineos uses and intends to use the services of P R Marriott. Accordingly, absent injunctions, there is a continuing risk of obstruction of the highway outside P R Marriott's depot and when that contractor is engaged to provide services to Ineos, those obstructions will harm Ineos.
>
> 95. To hold that the risk of an infringement of the rights of Ineos is not imminent with the result that the court did not intervene with injunctions at this stage would leave Ineos in a position where the time at which the protestors might take action against it would be left to the free choice of the protestors without Ineos having any protection from an order of the court. I do not consider that Ineos should be told to wait until it suffers harm from unlawful actions and then react at that time. This particularly applies to the injunctions to restrain trespass on land. If protestors were to set up a protest camp on Ineos land, the evidence shows that it will take a considerable amount of time before Ineos will be able to recover possession of such land. In addition, Ineos has stated in its evidence on its application that it wishes to have clarity as to what is permitted by way of protest and what is not. That seems to me to be a reasonable request and if the court is able to give that clarity that would seem to be helpful to the Claimants and it ought to have been considered to be helpful by the Defendants. A clear injunction would allow the protestors to know what is permitted and what is not."

179. This part of the judgment was not challenged on appeal: see at [35] of the Court of Appeal's judgment: [2019] 4 WLR 100.

180. I think my conclusion is consistent with this approach, and also to that taken by the judges in the *National Highways* cases, where the claimants could not specifically say where the next road protests were going to occur, but could only say that there was a risk they could arise anywhere, at any time because of the protesters' previous behaviour. That uncertainty did not defeat the injunctions.

181. I find further support for my conclusion on this aspect of the Claimants' case in the history of injunctive relief sought by the Claimants over various discrete parcels of land within the HS2 Land. These earlier injunctions are primarily described in Dilcock 1 at [37] – [41]. They show a repeat and continued pattern of behaviour.

(iii) Whether an injunction should be granted against the named Defendants

182. I set out the *Canada Goose* requirements earlier. One of them is that in applications such as this, defendants whose names are known should be named. The basis upon which the named Defendants have been sued in this case is explained in Dilcock 1 at [42]-[46]:

> "42. The Claimants have named as Defendants to this application individuals known to the Claimants (sometimes only by pseudonyms) the following categories of individuals:
>
> 42.1 Individuals identified as believed to be in occupation of the Cash's Pit Land whether permanently or from time to time (D5 to D20, D22, D31 and D63);
>
> 42.2 the named defendants in the Harvil Road Injunction (D28; D32 to D34; and D36 to D59);
>
> 42.3 The named defendants in the Cubbington and Crackley Injunction (D32 to D35); and
>
> 42.4 Individuals whose participation in incidents is described in the evidence in support of this claim and the injunction application and not otherwise named in one of the above categories.
>
> 43. It is, of course open to other individuals who wish to defend the proceedings and/or the application for an injunction to seek to be joined as named defendants. Further, if any of the individuals identified wish to be removed as defendants, the Claimants will agree to their removal upon the giving of an undertaking to the Court in the terms of the injunction sought. Specifically, in the case of D32, who (as described in Jordan 1) has already given a wide-ranging undertaking not to interfere with the HS2 Scheme, the Claimants have only named him because he is a named defendant to the proceedings for both pre-existing injunctions. If D32 wishes to provide his consent to the application made in these proceedings, in view of the undertaking he has already given, the Claimants will consent to him being removed as a named defendant.
>
> 44. This statement is also given in support of the First Claimant's possession claim in respect of the Cash's Pit Land and which the Cash's Pit Defendants have dubbed: "Bluebell Wood". The

> unauthorised encampment and trespass on the Cash's Pit Land is the latest in a series of unauthorised encampments established and occupied by various of the Defendants on HS2 Land (more details of which are set out in Jordan 1).
>
> 45. The possession proceedings concern a wooded area of land and a section of roadside verge, which is shown coloured orange on the plan at Annex A of the Particulars of Claim ("Plan A"). The HS2 Scheme railway line will pass through the Cash's Pit Land, which is required for Phase 2a purposes and is within the Phase 2a Act limits.
>
> 46. The First Claimant is entitled to possession of the Cash's Pit Land having exercised its powers pursuant to section 13 and Schedule 15 of the Phase 2a Act. Copies of the notices served pursuant to paragraph 4(1) of Schedule 15 of the Phase 2a Act are at pages 30 to 97 of JAD3. For the avoidance of doubt, these notices were also served on the Cash's Pit Land addressed to "the unknown occupiers". Notices requiring the Defendants to vacate the Cash's Pit Land and warning that Court proceedings may be commenced in the event that they did not vacate were also served on the Cash's Pit Land. A statement from the process server that effected service of the notices addressed to "the unknown occupiers" and the Notice to Vacate is at pages 98 to 112 of JAD3 and copies of the temporary possession notice addressed to the occupiers of the Cash's Pit Land and the notice to Vacate are exhibited to that statement."

183. Appendix 2, to which I have already referred, summarises the defences which have been filed, and the representations received from non-Defendants. The main points made are (with my responses), in summary, as follows:

    a. The actions complained of are justifiable because the HS2 Scheme causes environmental damage. That is not a matter for me. Parliament approved HS2.

    b. The order would interfere with protesters' rights under Articles 10 and 11. I deal with the Convention later.

    c. Lawful protest would be prevented. As I have made clear, it would not and the draft order so provides.

    d. The order would restrict rights to use the public highway and public rights of way. These are specifically carved out in the order (paragraph 4).

    e. Concern about those who occupy or use HS2 Land pursuant to a lease or licence with the First Claimant. That has now been addressed in the Revised Land Plans.

    f. Complaints about HS2's security guards. I have dealt with that.

(iv) Whether there are reasons to grant the order against persons unknown

184. I am satisfied that the Defendants have all been properly identified either generally, where they are unknown, or specifically where their identities are known. Those who have been identified and joined individually as Defendants to these proceedings are the 'named Defendants' and are listed in the Schedule on the RWI wesbsite. The 'Defendants' (generally) includes both the named Defendants and those persons unknown who have not yet been individually identified. The names of all the persons engaged in unlawful trespass were not known at the date of filing the proceedings (and are largely still not known). That is why different categories of 'persons unknown' are generically identified in the relevant Schedule. That is an appropriate means of seeking relief against unknown categories of people in these circumstances: see *Boyd and another v Ineos Upstream Ltd and others* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose*, [82], which I set out earlier.

185. I am satisfied that this is one of those cases (as in other HS2 and non-HS2 protest cases) in which it is appropriate to make an order against groups of unknown persons, who are generically described by reference to different forms of activity to be restrained. I quoted the principles contained in *Canada Goose*, [82] earlier. I am satisfied the order meets those requirements, in particular [82(1) and (2)].

186. I am satisfied that the definitions of 'persons unknown' set in Appendix 1 are apt and appropriately narrow in scope in accordance with the *Canada Goose* principles. The definitions would not capture innocent or inadvertent trespass.

187. I accept (and as is clear from the evidence I have set out) that the activists involved in this case are a rolling and evolving group. The 'call to arms' from D17 that I set out earlier was a clear invitation to others, who had not yet become involved in protests – and hence by definition were not known - to do so. The group is an unknown and fluctuating body of potential defendants. It is not effective to simply include named defendants. It is therefore necessary to define the persons unknown by reference to the consequence of their actions, and to include persons unknown as a defendant.

(v) Scope

188. Paragraphs 3-6 provide for what is prohibited:

> "3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
>
> a. entering or remaining upon the HS2 Land;
>
> b. obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or
>
> c. interfering with any fence or gate on or at the perimeter of the HS2 Land.
>
> 4. Nothing in paragraph 3 of this Order:

a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.

b. Shall affect any private rights of access over the HS2 Land.

c. Shall prevent any person from exercising their lawful rights over any public highway.

d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.

e. Shall extend to any interest in land held by statutory undertakers.

5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to):

a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;

b. digging, erecting any structure or otherwise placing or leaving any object or thing on the carriageway which may slow or impede the safe and uninterrupted passage of vehicles or persons onto or from the HS2 Land;

c. affixing or attaching their person to the surface of the carriageway where it may slow or impede the safe and uninterrupted passage of vehicles onto or from the HS2 Land;

d. affixing any other object to the HS2 Land which may delay or impede the free passage of any vehicle or person to or from the HS2 Land;

e. climbing on to or affixing any object or person to any vehicle in the vicinity of the HS2 Land; and

f. slow walking in front of vehicles in the vicinity of the HS2 Land.

6. For the purposes of paragraph 3(c) prohibited acts of interference shall include (but not be limited to):

a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the HS2 Land;

> b. the prohibition includes carrying out the aforementioned acts in respect of the fences and gates; and
>
> c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate."

189. Subject to two points, I consider these provisions comply with *Canada Goose*, [82], in that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the Claimants seeks to prevent. I also consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. The 'carve-outs' in [4] make clear that ordinary lawful use of the highway is not prohibited. I do not agree with D6's submission (Skeleton Argument, [52], et seq).

190. The two changes I require are as follows. The first, per *National Highways*, Lavender J, at [22] and [24(6), a case in which Mr Greenhall was involved, is to insert the word 'deliberately' in [3(b)] so that it reads:

> "3. With immediate effect until 23:59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
>
> …
>
> b. *deliberately* obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or

191. The second, similarly, is to insert the word, 'deliberate' in [5(f)] so that it reads, '*deliberate* slow walking …'

192. I have also considered the point made by D6 that 'vicinity' in [5(f)] is unduly vague. I note that in at least two cases that term has been used in protester injunctions without objection. In *Canada Goose,* [12(14)], it was used to prevent the use of a loudhailer 'within the vicinity of' Canada Goose's store in Regent Street. There was no complaint about it, and although the application failed ultimately, that was for other reasons. Also, in *National Highways Limited v Springorum* [2022] EWHC 205 (QB), [8(5)], climate protesters were injuncted from blocking, obstructing, etc, the M25, which was given an extensive definition in the order. One of the terms prevented the protesters from 'tunnelling in the vicinity of the M25'. No objection was taken to the use of that term. Overall, I am satisfied that in the circumstances, use of this term is sufficiently clear and precise.

193. As to the wide geographical scope of the order, I satisfied, for reasons already given, that the itinerant nature of the protests, as in the *National Highways* cases, justifies such an extensive order.

(vi) Convention rights

194. This, as I have said, is an important part of the case. The right to peaceful and lawful protest has long been cherished by the common law, and is guaranteed by Articles 10 and 11 of the ECHR and the HRA 1998. However, these rights are not unlimited, as I explained earlier.

195. I begin by emphasising, again, that nothing in the proposed order will prevent the right to conduct peaceful and lawful protest against HS2. I set out the recitals in the order at the beginning of this judgment.

196. I am satisfied there would be no unlawful interference with Article 10 and 11 rights because, in summary: (a) there is no right of protest on private land, and much, although not all, or what protesters have been doing has taken place on such land; and (b) there is no right to cause the type and level of disruption which would be restrained by the order; (c) to the extent that protest takes place on the public highway, or other public land, the interference represented by the injunction is proportionate.

197. Turning, as I must in accordance with the Court of Appeal's guidance, to the *Zeigler* questions, I will set them out again for convenience (adapted to the present context), and answer them in the following way:

Would what the defendants are proposing to do be exercise of one of the rights in Articles 10 or 11?

198. I am prepared to accept in the Defendants' favour that further continued protests of the type they have engaged in in the past potentially engages their rights under these Articles. In line with the principles set out earlier, I acknowledge that Articles 10 and 11 do not confer a right of protest on private land, per *Appleby*, and much of what the Claimants seeks the injunction to restrain relates to activity on private land (in particular, by the unknown groups D1, D2 and D4). But I accept - as I think the Claimants eventually accepted in post-hearing submissions at least – that some protests may on occasion spill over onto the public highway (per Jordan 1, [29.2] in relation to eg, blocking gates), and that such protests do engage Articles 10 and 11.

If so, would there be an interference by a public authority with those rights?

199. Yes. The application for, and the grant of, an injunction to prevent the Defendants interfering with HS2's construction in the ways provided for in the injunction is an interference with their rights by a public authority so far as it touches on protest on public land, such as the highway, where Articles 10 and 11 are engaged.

If there is an interference, is it 'prescribed by law'?

200. Yes. The law in question is s 37 of the SCA 1981 and the cases which have decided how the court's discretion to grant an anticipatory injunction should be exercised: see *National Highways Ltd*, [31(2)] (Lavender J).

If so, would the interference be in pursuit of a legitimate aim as set out in paragraph (2) of Articles 10 and 11, for example the protection of the rights of others?

201. Yes. It would be for the protection the Claimants' rights and freedoms, and those of their contractors and others, to access and work upon HS2 Land unhindered, in accordance with the powers granted to them by Parliament which, as I have said already, determined HS2 to be in the public interest. The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained. The interference in question pursues the legitimate aims: of preventing violence and intimidation; reducing the large expenditure of public money on countering protests; reducing property damage; and reducing health and safety risks to protesters and others arising from the nature of some of the protests.

If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This involves considering the following: Is the aim sufficiently important to justify interference with a fundamental right? Is there a rational connection between the means chosen and the aim in view? Are there less restrictive alternative means available to achieve that aim? Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others ?

202. These are the key questions on this aspect of the case, it seems to me.

203. The question whether an interference with a Convention right is 'necessary in a democratic society' can also be expressed as the question whether the interference is proportionate: *National Highways Limited,* [33] (Lavender J).

204. In *Ziegler*, Lords Hamblen and Stephens stated in [59] of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

205. Lords Hamblen and Stephens also quoted, *inter alia*, [39] to [41] of Lord Neuberger MR's judgment in *Samede*

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself

> or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in Kuznetsov v Russia, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles - however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

206. I have set out this passage, as Lavender J did in *National Highways Limited,* [35], because, given the nature of some of the submissions made to me, I want to underscore the point I made at the outset that I am not concerned with the merits of HS2, or whether it will or will not cause the environmental damage which the protesters fear it will. I readily acknowledge that many of them hold sincere and strongly held views on very important issues. However, it would be wrong for me to express either agreement or disagreement with those views, even if I had the institutional competence to do so, which I do not. Many of the submissions made to me consisted of an invitation to me to agree with the Defendants' views and to decide the case on that basis. But just like Lavender J said in relation to road protests, that is something which I cannot do, just as I could not decide this case on the basis of disagreement with protesters' views.

207. Lords Hamblen and Stephens reviewed in [71] to [86] of their judgment in *Ziegler* the factors which may be relevant to the assessment of the proportionality of an interference with the Article 10 and 11 rights of protestors blocking traffic on a road.

208. Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary: (a) the peaceful nature of the protest; (b) the fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder; (c) the fact that the defendants did not commit any criminal offences other than obstructing the highway; (d) the fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair; (e) the fact that the protest related to a 'matter of general concern'; (f) the limited duration of the protest; (g) the absence of any complaint about the defendants' conduct; and (h) the defendants' longstanding commitment to opposing the arms trade.

209. As Lavender J said in his case at [39], this list of factors is not definitive, but it serves as a useful checklist. I propose now to discuss how they should be answered in this case.

210. The HS2 protests have in significant measure not been peaceful. There have been episodes, for example, of violence, intimidation, criminal damage, and assault, as described by Mr Jordan. There have been many arrests. Even where injunctions have been obtained, protesters have resisted being removed (most recently at Cash's Pit, as described in Dilcock 4 and in other material). It follows that the protests have given rise to considerable disorder. The protesters are specifically targeting HS2, and in that sense are in a somewhat different position to the protesters in the *National Highways Ltd* case, whose protests were aimed at the public as a means of trying to influence government policy. But the HS2 protests do also affect others, such as contractors employed to work on the project (for example Balfour Beatty), those in HS2's supply chain, security staff, etc. I accept that the HS2 protests relate to a matter of general concern, but on the other hand, at the risk of repeating myself, the many and complicated issues involved – including in particular environmental concerns - have been debated in Parliament and the HS2 Acts were passed. The HS2 protests are many in number, continuing, and are threatened to be carried on in the future along the whole of the HS2 route without limit of time. The disruption, expense and inconvenience which they have caused is obvious from the evidence. I do not think that I am in any position to assess the public mood about HS2 protests. No doubt some members of the public are in favour and no doubt some are against. As I have already said, I accept that the defendants are expressing genuine and strongly held views.

211. Turning to the four questions into which the fifth *Ziegler* proportionality question breaks down, I conclude as follows.

212. Firstly, by committing trespass and nuisance, the Defendants are obstructing a large strategic infrastructure project which is important both for very many individuals and for the economy of the UK, and are causing the unnecessary expenditure of large sums of public money. In that context, I conclude that the aim pursued by the Claimants in making this application is sufficiently important to justify interference with the Defendants' rights under Articles 10 and 11, especially as that interference will be limited to what occurs on public land, where lawful protest will still be permitted. Even if the interference were more extensive, I would still reach the same conclusion. I base that

conclusion primarily on the considerable disruption caused by protests to date and the repeated need for injunctive relief for specific pockets of land.

213. Second, I also accept that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow for the unhindered completion of HS2 by the Claimants over land which they are in possession of by law (or have the right to be). Prohibiting activities which interfere with that work is directly connected to that aim.

214. Third, there are no less restrictive alternative means available to achieve that aim. As to this, an action for damages would not prevent the disruption caused by the protests. The protesters are unlikely to have the means to pay damages for losses caused by further years of disruption, given the sums which the Claimants have had to pay to date. Criminal prosecutions are unlikely to be a deterrent, and all the more so since many defendants are unknown. By contrast, there is some evidence that injunctions and allied committal proceedings have had some effect: see APOC, [7].

215. I have anxiously considered the geographical extent of the injunction along the whole of the HS2 route, and whether it should be more limited. I have concluded, however, given the plain evidence of the protesters' intentions to continue to protest and disrupt without limit – 'let's keep fucking up HS2's day and causing as much disruption and cost as possible. Coming to land near you' – such an extensive injunction is appropriate. The risks are real and imminent for the reasons I have already given. I accept that the Claimants have shown that the direct action protests are ongoing and simply move from one location to another, and that the protesters have been and will continue to cause maximum disruption across a large geographical extent. As the Claimants put it, once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new hub from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or to fence it, or make it otherwise inaccessible.

216. Fourth, taking account of all of the factors which I have identified in this judgment, I consider that the injunction sought strikes a fair balance between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy. As to this: (a) on the one hand, the injunction only prohibits the defendants from protesting in ways that are unlawful. Lawful protest is expressly not prohibited. They can protest in other ways, and the injunction expressly allows this. Moreover, unlike the protest in *Ziegler*, the HS2 protests are not directed at a specific location which is the subject of the protests. They have caused repeated, prolonged and significant disruption to the activities of many individuals and businesses and have done so on a project which is important to the economy of this country. Finally on this, the injunction is to be kept under review by the Court, it is not without limit of time, and can and no doubt will be discharged should the need for it disappear.

217. Finally, drawing matters together and looking at the same matters in terms of the general principles relating to injunctions:

    a. I am satisfied that it is more likely than not that the Claimants would establish at trial that the Defendants' actions constitute trespass and nuisance and that they will continue to commit them unless restrained. There is an abundance of evidence that leads to the conclusion that there is a real and imminent risk of the tortious behaviour

continuing in the way it has done in recent years across the HS2 Land. I am satisfied the Claimants would obtain a final injunction.

b. Damages would not be an adequate remedy for the Claimants. They have given the usual undertakings as to damages.

c. The balance of convenience strongly favours the making of the injunction.

(vii) Service

218. Finally, I turn to the question of service and whether the service provisions in the injunction are sufficient.

219. The passages from [82] of *Canada Goose* I quoted earlier show that the method of alternative service against persons unknown must be such as can reasonably be expected to bring the proceedings (ie, the application) to their attention.

220. I considered service of the application at a directions hearing on 28 April 2022. At that hearing, I made certain suggestions recorded in my order at [2] as to how the application for the injunction was to be served:

> "Pursuant to CPR r. 6.27 and r. 81.4 as regards service of the Claimants' Application dated 25 March 2022:
>
> a. The Court is satisfied that at the date of the certificates of service, good and sufficient service of the Application has been effected on the named defendants and each of them and personal service is dispensed with subject to the Claimants' carrying out the following additional methods within 14 days of the date of this order:
>
> i. advertising the existence of these proceedings in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website.
>
> ii. where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the papers in the proceedings within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish notice boards in the same approximate location.
>
> iii. making social media posts on the HS2 twitter and Facebook pages advertising the existence of these proceedings and the web address of the HS2 Proceedings website.
>
> b. Compliance with 2 (a)(i), (ii) and (iii) above will be good and sufficient service on "persons unknown"'

221. The injunction at [7]-[11] provides under the heading 'Service by Alternative Method – This Order'

> "7. The Court will provide sealed copies of this Order to the Claimant's solicitors for service (whose details are set out below).
>
> 8. Pursuant to CPR r.6.27 and r.81.4:
>
> a. The Claimant shall serve this Order upon the Cash's Pit Defendants by affixing 6 copies of this Order in prominent positions on the perimeter of the Cash's Pit Land.
>
> b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
>
> i. Affixing 6 copies in prominent positions on the perimeter each of the Cash's Pit Land (which may be the same copies identified in paragraph 8(a) above), the Harvil Road Land and the Cubbington and Crackley Land.
>
> ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
>
> iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
>
> iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.
>
> c. Service of this Order on Named Defendants may be effected by personal service where practicable and/or posting a copy of this Order through the letterbox of each Named Defendant (or leaving in a separate mailbox), with a notice drawing the recipient's attention to the fact the package contains a court order. If the premises do not have a letterbox, or mailbox, a package containing this Order may be affixed to or left at the front door or other prominent feature marked with a notice drawing the recipient's attention to the fact that the package contains a court order and should be read urgently. The notices shall be given in prominent lettering in the form set out in Annex B. It is open to any Defendant to contact the Claimants to identify an alternative

place for service and, if they do so, it is not necessary for a notice or packages to be affixed to or left at the front door or other prominent feature.

d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.

e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has as at the date hereof provided an email address to the Claimants to the email address: HS2Injunction@governmentlegal.gov.uk

9. Service in accordance with paragraph 8 above shall:

a. be verified by certificates of service to be filed with Court;

b. be deemed effective as at the date of the certificates of service; and

c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.

10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.

11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant of whom they become aware is, or has been on, the HS2 Land without consent and shall verify any such service with further certificates of service (where possible if persons unknown can be identified) to be filed with Court."

222. Further evidence about service is contained in Dilcock 3, [7], et seq, and Dilcock 4, [7] et seq. I can summarise this as follows.

223. Before I made my order, Ms Dilcock explained that the methods of service used by the Claimants as at that date had been based on those which had been endorsed and approved by the High Court in other cases where injunctions were sought in similar terms to those in this application. She said the methods of service to that date had been effective in publicising the application.

224. She said that there had been 1,371 views (at 24 April 2022) of the Website: Dilcock 3**,** [11]; By 17 May 2022 (a week or so before the main hearing, and after my directions

had come into effect) there had been 2,315 page views, of which 1,469 were from unique users: Dilcock 4**,** [17]. So, in round terms, there were an additional 1,000 views after the directions hearing.

225. Twitter accounts have shared information about the injunction application and/or the fundraiser to their followers. The number of followers of those accounts is 265,268: Dilcock 3, [16].

226. A non-exhaustive review of Facebook shows that information about the injunction and/or the link to a fundraiser has been posted and shared extensively across pages with thousands of followers and public groups with thousands of followers. Membership of the groups on Facebook to which the information has been shared amounts to 564,028: Dilcock 3, [17].

227. Dilcock 4, [7] – [17], sets out how the Claimants complied with the additional service requirements pursuant to my directions of 28 April 2022. Those measures are not reliant on either notice via website or social media. The Claimants say that they complement and add to the very wide broadcasting of the fact of the proceedings.

228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.

229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75].

Final points

230. I reject the suggestion the injunction will have an unlawful chilling effect, as D6 in particular submitted. There are safeguards built-in, which I have referred to and do not need to mention again. It is of clear geographical and temporal scope. Injunctions against defined groups of persons unknown are now commonplace, in particular in relation to large scale disruptive protests by groups of people, and the courts have fashioned a body of law, much of which I have touched on, in order to address the issues which such injunctions can raise, and to make sure they operate fairly. I also reject the suggestion that the First Claimant lacks 'clean hands' so as to preclude injunctive relief.

Conclusion

231. I will therefore grant the injunction in the terms sought in the draft order of 6 May 2022 in Bundle B at B049 (subject to any necessary and consequential amendments to reflect post-hearing matters and in light of this judgment).

APPENDIX 1

UNNAMED DEFENDANTS
(TAKEN FROM THE AMENDED PARTICULARS OF CLAIM DATED 28 APRIL 2022 – WITH TRACKED CHANGED REMOVED)

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

APPENDIX 2

SUMMARY OF DEFENDANTS' RESPONSES

Name	Received and reference in the papers	Summary
D6 – James Knaggs	SkA for initial hearing (05.04.22)	Definition of persons unknown is overly broad, contrary to Canada Goose. Service provisions inadequate. No foundation for relief based on trespass because not demonstrated immediate right to possession, and seeking to restrain lawful protest on highway. No imminent threat. Scope of order is large. Terms impose blanket disproportionate prohibitions on demonstrations on the highway. Chilling effect of the order.
	Defence (17.05.22)	C required to establish cause of action in trespass & nuisance across all of HS2 Land *and* existence of the power to take action to prevent such. No admission of legal rights of the C represented in maps. Denied that Cash's Pit land is illustrative of wider issues re entirety of HS2 Land. Denied there is a real and imminent risk of trespass & nuisance re HS2 Land to justify injunction. Impact and effect of injunction extends beyond the limited remit sought by HS2. Proportionality. Denial that D6 conduct re Cash's Pit has constituted trespass or public/private nuisance.
D7 – Leah Oldfield	Defence (16.05.22) **[D/3]**	D7s actions do not step beyond legal rights to protest, evidence does not show unlawful activity. Right to protest. Complaints about HS2 Scheme, complaints about conduct of HS2 security contractors. Asks to be removed from injunction on basis of lack of evidence
D8 – Tepcat Greycat	Email (16.05.22) **[D/4]**	Complaint that D8 was not identified properly in injunction application papers and that she would like name removed from schedule of Ds.
D9 – Hazel Ball	Email (13.05.22) **[D/7]**	Asks for name to be removed. Queries why she has been named in injunction application papers. Has only visited Cash's Pit twice, with no intention to return. Never visited Harvil Road.
D10 – IC Turner	Response (16.05.22) **[D/8]**	Inappropriateness of D10's inclusion as a named D (peaceful protester, no involvement with campaign this year, given proximity to route the injunction would restrict freedom of movement within vicinity). Inappropriateness of proceedings (abuse of process because of right to protest). Complaints about HS2 Scheme.
D11 – Tony Carne	Submission (13.05.22) **[D/10]**	Denies having ever been an occupier of Cash's Pit Land. Asks to be removed as named D.
D24 – Daniel Hooper	Email (16.05.22) **[D/12]**	Asks for name to be removed because already subject to wide ranging undertaking. Asks for assurance of the same by 20th May.

D29 – Jessica Maddison	Defence (16.05.22) **[D/14]**	Injunction would restrict ability to access Euston station and prevent access to GP surgery and hospital. Restriction on use of footpaths, would result from being named in injunction. Would lead to her being street homeless. Lack of evidence for naming within injunction. Criminal matters re lock on protests were discontinued before trial. Complaints about HS2 contractor conduct.
D35 – Terry Sandison	Email (07.04.22) **[D/15]**	Complaint about lack of time to prepare for initial hearing.
	Application for more time – N244 (04.04.22)	Says he wishes to challenge HS2 on various points of working practices, queries why he is on paperwork for court but feels he hasn't received proof of claims they have to use his conduct to secure injunction. Asks for a month to consider evidence and challenge the injunction and claims against himself.
D36 – Mark Kier	Large volume of material submitted (c.3k pages) **[D/36/179-D/37/2916]**	Mr Kier sets out four grounds: (1) the area of land subject to the Claim is incorrect in a number of respects; (2) the protest activity is proportionate and valid and necessary to stop crimes being committed by HS2; (3) the allegations of violence and intimidation are false. The violence and intimidation emanates from HS2; (4) the project is harmful and should not have been consented.
D39 – Iain Oliver	Response to application (16.05.22) **[D/16]**	Complaints about alleged water pollution, wildlife crimes and theft and intimidation on HS2's behalf. Considers that injunction is wrong and a gagging order.
D46 – Wiktoria Zieniuk	Not included in bundle	Brief email provided querying why she was included.
D47 – Tom Dalton	Email (05.04.22) **[D/17]**	Complaint about damage caused to door from gaffatape of papers to front door. Says he is happy to promise not to violate or contest injunction as is not involved in anti HS2 campaign and hasn't been for years. (Undertaking now signed)
D54 – Hayley Pitwell	Email (04.04.22) **[D/19]**	Request for adjournment and extension of time to submit arguments, for a hearing and for name to be removed as D. Queries whether injunction will require her to take massive diversions when driving to Wales. Complaint about incident of action at Harvil Road that led to D56 being named in this application – dispute over factual matters (esp Jordan 1 para 29.1.10). Complaint that HS2 security contractor broke coronavirus act and D54 is suing for damages. N.b. no subsequent representations received.
D55 – Jacob Harwood	17.05.22 **[D/20]**	Complaint about injunction restricting ability to use Euston station, public rights of way, canals etc. Complaint that there is lack of evidence against D55 so he should be removed as named D.
D56 – Elizbeth Farbrother	11.05.22 **[D/23**]	Correspondence and undertaking subsequently signed.
D62 – Leanne Swateridge	Email (14.05.22) **[D/23]**	Complaint about reliance on crane incident at Euston. Complaints about conduct of HS2 contractors and merits of HS2 Scheme.
Joe Rukin	First witness statement (04.04.22) **[D/24]**	Says Stop HS2 organisation is no longer operative in practice, so emailing their address does not constitute service, and the organisation is not coordinating or organising illegal activities. Failure of service of injunction application. Scope of injunction

		is disproportionately wide, and D2 definition would cover hundreds of thousands of people on a daily basis. Complaints about GDPR re service of papers for this application. Concerns about injunction restricting normal use of highways, PRoW, and private rights over land where it is held by HS2 temporarily but the original landowner has been permitted to continue to access and use it. Would criminalise people walking into their back garden.
	Second witness statement (26.04.22) **[D/25]**	Complains there is no active protest at Cubbington and Crackley now since clearance of natural habitats. Complains Dilcock 2 [8.11] is wrong about service of proceedings at Cubbington & Crackley Land.
Maren Strandevold	Email (04.04.22) **[D/26]**	Complaints about notice given for temporary possession land. Concern about temporary possession land and that there needs to be clear and unequivocal permission for those permitted to use their land subject to temporary possession to be able to continue to do so. Concerns the scope of the draft order is disproportionate.
Sally Brooks	Statement (04.04.22) [**D/27]**	Complaints about merits of HS2 Scheme, alleged wildlife crimes, and the need for members of the public to monitor the same
Caroline Thompson-Smith	Email (04.04.22) **[D/28]**	Objects to evidence of her, and that the injunction would prevent rights to freedom of expression, arts 10-11. Worry about adverse costs means she fears to engage with process.
Deborah Mallender	Statement (04.04.22) **[D/29]**	Complaints about merits of HS2 Scheme and conduct of HS2 Ltd and security contractors. Complaint that content of injunction has not been provided to all relevant persons.
Haydn Chick	Email (05.04.22) **[D/30]**	Email attachment of statement which will not open, plus article by Lord Berkeley, plus news story
Swynnerton Estates	Email (05.05.22) **[D/31]**	Email re whether Cash's Pit objectors had licence to occupy.
Steve and Ros Colclough	Letter (04.05.22) **[D/32]**	Consider themselves "persons unknown" by living nearby and using nearby PRoW. Complaint that HS2 should have written to everyone on the route informing them.
Timothy Chantler	Letter (14.05.22) **[D/33]**	Complaints about conduct of HS2 security contractors (NET re treatment of other protesters). Objection to the injunction on the basis of right to protest etc.
Chiltern Society	Letter (16.05.22) **[D/34]**	Concerns about public access to PRoW re HS2 Land. Concern of no adequate method to ensure a person using a footpath across HS2 Land would be aware of potential infringement. Concern that maintenance work on footpaths often requires accessing adjacent land which may constitute infringement.
Nicola Woodhouse	Email (16.05.22) **[D/35]**	Not lawful or practical to stop anyone accessing all land acquired by HS2. Maps provided are impossible to decipher, with land ownership not well defined. Excessive geographical scope. Notification of all relevant landowners is impossible. Residents of houses purchased by HS2 cannot move freely around their own homes, and members of the public cannot visit them.
The below statements are contained within the submission of D36 (Mark Keir)		

Val Saunders "statement in support of the defence against the Claim QB-2022-BHM-00044"	Undated **[D/37/2493]** (bundle D, vol F)	Merits of Scheme. Complaints about HS2 contractor conduct and alleged wildlife crimes. Protest important to hold HS2 to account.
Leo Smith "Witness statement" "statement in support of the defence…"	14.05.22 **[D/37/2509-2520]** (bundle D, vol F)	Merits of scheme/process of consultation. Necessity of protest to hold Scheme to account. HS2 use of NDAs re CPO. Photographs of rubbish left behind by protestors is misleading since they have been forcibly evicted. Protest mostly peaceful. Complaints about HS2 security contractor conduct. Alleged wildlife crimes. Negative impact on communities.
Misc statement – "statement in support of the defence…"	Undated **[D/37/2674-2691]** (bundle D, vol G)	Complaints about merits of scheme and conduct of HS2 security contractors against protesters.
Misc statement – "Seven arguments against HS2"	Undated **2692-2697**	Merits of scheme. Argues for scrapping.
Brenda Bateman – "statement in support of the defence…"	Undated **2698-2699**	Confusion caused by what HS2 previously said about which footpaths would be closed. Complaints about ecological impacts of Scheme, and other impacts. Complaints about use of CPO process. Right to peaceful protest should be upheld: injunction would curtail this.
Cllr Carolyne Culver – "statement in support of the Defence…"	Undated **2700-2701**	Complaints about conduct of Jones Hill Wood eviction. Issues over perceived delayed compensation for CPO. Need for nature protectors and right to protest.
Denise Baker – "Defence against the claim…"	Undated **2702-2703**	Photojournalist – concerns that injunction would limit abilities to report fairly on issues related to environment impact of HS2. Risk of arrest of journalists. Detrimental to accountability of project and govt. Concerns over conduct of HS2 security contractors.
Gary Welch – "Statement in support of the Defence…"	Undated **2704**	Criticism of merits of Scheme, and environmental impacts. Concern over closure of public foot paths recently.
Sally Brooks – "Statement in support of the Defence…"	Undated **2705-2710**	Alleged wildlife crimes. Need for members of public to monitor HS2 activities. Injunction would prevent this.
Lord Tony Berkeley – "Witness Statement"; "Statement in support of the Defence…"	12.05.22 **2711-2714**	Doubts HS2 has sufficient land to complete the project without further Parliamentary authorisation. Doubts HS2's land ownership position generally given alteration to maps included with injunction application. Injunction is an abuse of rights, and an abuse of the laws of the country and HS2 Bill which brought it into being.
Jessica Upton – "statement in support of the Defence…"	Undated **2715-2716**	Criticism of merits of scheme, ecological impact etc. Concern that public need to be able to hold HS2 to account without being criminalised for it.
Kevin Hand – "statement in support of the Defence…"	9.05.22 **2717-2718**	Ecologist who provides environmental training courses to activists and protesters against HS2. Emphasises importance of public/protesters being

		able to monitor works taking place to prevent alleged wildlife crimes.
Mark Browning – "Statement in support of the Defence…"	Undated **2719**	Partners brother is renting a property HS2 has compulsorily purchased near Hopwas in Tamworth area. Concern that the management of the pasture will be criminalised if injunction granted. Therefore requests exemption from the injunction.
Talia Woodin – "statement in support of the Defence…"	Undated **2724-2731**	Photographer and filmmaker. Concerns about alleged wildlife crimes and assaults on activists. Injunction would disable right to protest.
Victoria Tindall – "statement in support of the Defence…"	Undated **2735**	Complaint about Buckinghamshire HS2 security van monitoring ramblers near HS2 site. Concerns about privacy.
Mr & Mrs Phil Wall – "Statement"	Undated **2737-2740**	Complaints about conduct of HS2 contractors regarding works in Buckinghamshire. Complaints about CPO/blight compensation issues for their property.
Susan Arnott – "In support of the Defence…"	15.5.22 **2742**	Merits of scheme. Protests are therefore valid.
Ann Hayward – Letter regarding RWI	6.05.22 **2743-2744**	Resident of Wendover. Difficulty of reading HS2 maps, so difficult to know whether trespassing or not. Complaints about HS2 contractor conduct. RWI too broad, and service would be difficult and may be insufficient meaning everyone in vicinity of HS2 works could be at risk of arrest – risk of criminalising communities. People need to know whether injunction exists and where it is, but HS2 maps are not well defined. Would be difficult to apply the order, abide by it and police it. Important for independent ecologists to monitor HS2 works.
Annie Thurgarland – "statement in support of the Defence"	15.05.22 **2745-2746**	Criticism of merits of scheme, especially re environmental impact. Need for public to monitor works re ecology and alleged wildlife crimes. People have a right to peaceful direct action.
Anonymous	16.05.22 **2747-2751**	Anonymity because concerned about intimidation. RWI would have direct impact on tenancy contractual agreement for home, as it lies within the Act Boundary and is owned by HS2. Would be entirely at the mercy of HS2 and subcontractors to interpret the contractual agreement as they chose. Concerned that they were not notified of the RWI given the enormity of impact on residents who are lessees of HS2. Vague term un-named defendants could extend to anyone deemed as trespassing on land part of homes and gardens. Concern therefore that all land within boundary could become subject to constant surveillance, undermining right to privacy. No clarity on terms of injunction regarding tenants and when they would and would not be trespassing. Complaints about ecological impact of Scheme. Complaints about conduct of HS2 security contractors.

Anonymous (near Cash's Pit occupant)	Undated **2752-2753**	Complaints about impact of scheme on ability to use local area for recreation. Concerns that injunction would curtail protest right. Complaints about HS2 security contractors. Complaint that HS2 did not provide local residents with details of the injunction or proceedings.
Anonymous – "statement in support of the Defence…"	Undated **2754-2755**	Criticism of merits of Scheme, argument re right to protest.

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2022

Before :

MR JUSTICE BENNATHAN

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Between :

NATIONAL HIGHWAYS LIMITED	**Claimant**
- 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	**Defendants**
(2) MR ALEXANDER RODGER AND 132 OTHERS	

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Myriam Stacey QC, Admas Habteslasie and Michael Fry (instructed by **DLA Piper LLP UK**) for the **Claimant**
Owen Greenhall (Intervening) (instructed by **Hodge Jones & Allen**)

Hearing dates: 4th and 5th May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BENNATHAN

Mr Justice Bennathan :

1. The Claimant, National Highways Limited ["*NHL*"], seeks summary judgment and various remedies in 3 sets of proceedings brought in relation to protests carried out on the Strategic Road Network ["*SRN*"] under the banner of Insulate Britain ["*IB*"]. The Claimant was represented by Myriam Stacey QC, Admas Habteslasie and Michael Fry, of Counsel. I express my gratitude for all the assistance I have received from all the lawyers in the case.

2. IB is a protest group made up of people whose aims include two demands. First, that the Government undertakes to insulate all social housing in the UK by 2025, and second to do the same for all other housing by 2030. The twin aims behind those demands, as described by IB, are to save the planet from disastrous climate change and to soften the blow of rising fuel prices. The means employed by IB have included protests blocking roads, and protest designed to disrupt other parts of civil society such as various magistrates courts. I should stress that these are all peaceful protests. None of the named Defendants were represented but Ben Horton, who had been a named Defendant, attended at Court and made some submissions about costs. I also made an order under CPR 40.9 and thereafter heard argument from Owen Greenhall of Counsel, who appeared to make submissions on behalf of a person who took an interest in the litigation.

3. There have been 3 interim injunctions granted in 3 sets of proceedings:
   (1) On 21 September 2021 Lavender J granted an order banning protests on M25, and a claim form for an action in trespass and nuisance was lodged on 22 September.
   (2) On 24 September 2021 Cavanagh J granted an order banning protests on parts of the SRN in Kent, and a claim form for an action in trespass and nuisance was lodged on the same day.
   (3) On 2 October 2021 Holgate J granted an order banning protests on certain M25 feeder roads, and a claim form for an action in trespass and nuisance was lodged on 4 October.

4. A number of contempt of court applications for breaches of the terms of those injunctions led to protestors being imprisoned and subject to lesser sanctions, in the decisions in *NHL v Heyatawin and others* [2021] EWHC 3078 (QB), *NHL v Buse and others* [2021] EWHC 3404 (QB), and *NHL v Springorum and others* [2022] EWHC 205 (QB).

5. The Claimant sought summary judgment against 133 named Defendants. Those named Defendants have all been arrested by various police forces in operations connected to IB protests, whereafter their details were notified to the Claimant under disclosure provisions of the interim injunctions. In addition to summary judgment, the Claimant sought:
   (1) A final injunction in terms similar, but not identical to, to those granted in the interim orders, and
   (2) A declaration that the use of the SRN for protests is unlawful, and
   (3) Damages, though the Claimant stated in its Skeleton Argument that it was not pursuing damages against any of the Defendants, and
   (4) Costs.

6. There are certain procedural orders the Claimant also sought, namely to join the 3 sets of proceedings and to order alternative service. The former is uncontroversial, and I made that order, the latter is less straightforward and I will address that later in this judgment.

7. The hearing in this case took place on 4 and 5 May 2022. At the end of the hearing I announced some decisions and reserved judgment on others; this judgment sets out the decisions on reserved issues and explains my reasons for all the decisions I have, or had, to take. If any party seeks to appeal, or to vary the order, the handing down of this judgment should be seen as the date of the decision for the purposes of the periods to make any such applications.

8. The injunction the Claimant sought covers:
   (1) The M25 motorway. The well-known 117 mile long motorway that encircles London.
   (2) The M25 feeder roads [in slightly wider terms than that granted by Holgate J], as listed in the draft order. To take one example, A1 from A1(M) to Rowley Lane: one of the main roads in and out of London to the North, and a road used to divert traffic when other roads, such as the M1, are closed or blocked.
   (3) The Kent roads include the M2, M20, A2 and A20. These roads serve Dover, one of the busiest ports in the UK.

9. The evidence the Claimant relied on is set out in the witness statements of Nicola Bell and Laura Higson.

10. Nicola Bell is the Regional Director for NHL's Operations [South East Region]. In her witness statement dated 22 March 2022 she describes the protests that began on 13 September 2021, in which protestors seemingly affiliated to IB blocked motorways by sitting on the carriageways and by gluing themselves to the roadway. She described their activities as "*dangerous and very disruptive*" though she provided no details of any actual injury to anyone. Ms Bell also set out the importance of the roads that the Claimant seeks to protect by way of injunctive relief.

11. Laura Higson is a lawyer at DLA Piper, NHL's solicitors. In her witness statement of 24 March 2022, she set out the protests that had occurred:
   (1) On 13 September 2021, protestors blocked slip roads and the carriageway around five junctions on the M25.
   (2) Further protests took place on 15 September and 17 September 2021.
   (3) On 21 September 2021 protests on the M25 escalated, including by blocking the main carriageway of the M25 in both directions.
   (4) On 24 September 2021 protestors blocked the A20 in Kent and subsequently the port of Dover.
   (5) On 29 September 2021 protesters blocked, for the second time, Junction 3 of the M25.
   (6) On 30 September 2021, protestors glued their hands to the ground at Junction 30 of the M25.
   (7) On the morning of 1 October 2021, IB reported that around 30 protestors from IB blocked Junction 3 of the M4 and Junction 1 of the M1.
   (8) On 4 October 2021, IB reported that "*54 people from Insulate Britain have blocked three major routes in the capital*", with protestors blocking the Blackwall Tunnel,

Hanger Lane, Arnos Grove and Wandsworth Bridge [all of which do not fall within the SRN].

(9) On 8 October 2021, protestors from IB blocked the M25 at Junction 25.

(10) On 13 October 2021, IB protests took place on the M25.

(11) On 27 October 2021, IB protestors blocked part of the A40 in West London and a roundabout in Dartford.

(12) On 29 October 2021, 19 IB protestors disrupted traffic at two locations on the M25. 10 protestors walked between lanes of oncoming traffic between Junction 28 and Junction 29 of the M25, and a further 9 protestors entered onto the motorway between Junction 21 and Junction 22.

(13) On 2 November 2021, around 60 IB protestors disrupted traffic on Junction 23 of the M25

(14) There have been other protests from time to time in central London. For example, on 20 November 2021 about 400 people blocked Lambeth Bridge.

12. Ms Higson also addressed the risk of future protests. In her 24 March statement, she set out a press release in the name of IB, dated 7 February 2022:

> We did not take part in this campaign to start an insulation brand. We did not cause you disruption to make history as Britain's quickest growing advertising campaign. We took part to force our government to stop failing its people. We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.
>
> Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it. We haven't gone away. We're just getting started.

13. Ms Higson reported a further IB posting spoke of plans for a "*Rave on the M25*" on *Facebook*, beginning at 12pm on 2 April 2022 and ending at 4am on 3 April 2022. This event does not seem to have taken place. Ms Higson then set out a series of news releases that mainly concern another group, "*Just Stop Oil*" ["JSO"] with whom IB wrote of having formed an alliance. The focus of the JSO posts was very much on acting so as to interfere with various parts of the oil industry and while there have been many such protests reported in the press and other media, and the Courts have dealt with a number of applications by Oil companies for injunctions, few have targeted the SRN.

14. Ms Higson also detailed the attitude of at least some protestors towards the Courts in general and injunctions in particular. I can summarise those public comments as expressing views that range from defiance to complete disinterest. Those comments by people associated with IB were put in evidence by the Claimant in support of the application for an injunction but do not seem to me to be particularly relevant to that subject: the fact people may not obey an injunction is not a basis for the Court to refuse to make an order [see Lord Bingham in *South Buckingham District Council v Porter* [2003] 2 AC 558 [at 32]], but nor is disrespect for the Court process a reason to do so.

Where that attitude may be of relevance is when I come to consider the evidential basis for the applications for summary judgment.

15. Finally, in her first statement, Ms Higson reported on a number of incidents whereby IB protests have led to a hostile reaction from other road users:
    (1) A BBC News report of 4 October 2021 reported drivers clashing with IB protestors near the Blackwell Tunnel during a protest that had been timed to take place during the morning rush hour, quoting a road user whose mother was in an ambulance on the way to hospital.
    (2) A video posted on the Daily Express's website showed a van driver attempting to run over an IB Protestor.
    (3) A news report of 13 October 2021 recorded, in relation to an IB Protest on the M25 that day, tense scenes between road users and IB protestors, including, "*a female protester was almost run over after stopping in front of a blue Hyundai car*" and "*a mother getting out of her black Range Rover and arguing with those gathered around her car. "Move out of the f****** way, my son needs to get to school*," she told demonstrators.
    (4) A news report of 19 October 2021 records an incident where "*two grey haired protesters on their backsides* [were] *being pulled off the road by two men - presumably drivers frustrated at the blockage*"
    (5) A news report of 27 October 2021 records that an IB protestor had ink thrown in their face during a protest on the M25.

16. In a further statement dated 25 April 2022, Ms Higson deals with three topics:
    (1) The Claimant's attempts to serve the summary judgment application on the named Defendants. In the main, and with some acknowledged exceptions I will deal with later, it seems to me that the Claimant has served the Defendants sufficiently for the application to proceed.
    (2) She provides some further details from the police, in respect of a few Defendants who have served replies or defences, of their activities.
    (3) Ms Higson also sets out further reasons why, on the Claimant's case, there is a sound basis to fear further actions by the Defendants and persons unknown: the various press releases are almost entirely those of JSO and speak of actions at oil terminals and such premises rather than the SRN. There have, however, been distinct and more recent signs of the threat of a renewal of the type of protests that would be caught by the injunction sought. Interviews in the media in March and April spoke of vowing "*to cause more chaos across the country in the coming weeks*" and that there was going to be "*a fusion of other large-scale blockade-style actions you have seen in the past*".

17. Of the 143 Defendants originally listed, the Claimant did not seek to continue the action against 10 because of troubles with serving the claim upon them and other issues. I consequently dismissed those claims. Of the remaining 133 named Defendants, 24 have been subject to findings of contempt on the basis of substantial evidence of their taking part in protests blocking the M25 [see *NHL v Heyatawin and others* [2021] EWHC 3078 (QB) at 46, *NHL v Buse and others* [2021] EWHC 3404 (QB) at 26, and *NHL v Springorum and others* [2022] EWHC 205 (QB) at 30]. Thus, for some purposes of the decisions I had to take the 133 remaining Defendants could be seen as 2 groups; the 24

who have been sanctioned for contempt ["*the 24*"] and the 109 who have not ["*the 109*"].

18. The main issues I had to consider are:
    (1) Whether to make an order under CPR 40.9.
    (2) Whether to give summary judgment against some or all of the Defendants.
    (3) Whether to make a further injunction, and if so in what terms.
    (4) Whether to abridge the normal rules of service.
    (5) Whether to make disclosure orders binding on the police.
    (6) Whether to make the declaration sought by the Claimant.
    (7) Whether to make an order for damages or costs.

Rule 40.9

19. In advance of the hearing Hodge, Jones and Allen Solicitors served witness statements from Alice Hardy, a Solicitor in the firm's Civil Liberties Department and Jessica Branch, an environmental activist who is not a named defendant and has not attended any IB protests. Those statements argued that the order sought by NHL was overly wide and would have a chilling effect on protests generally. Ms Hardy also expressed concerns on behalf of a campaigner for greater safety measures to protect cyclists who, on occasions, has demonstrated or otherwise campaigned on roads, including of the type that would be caught by NHL's draft order. Hodge Jones and Allen also instructed Counsel, Mr Greenhall, who submitted a Skeleton Argument and attended at the hearing. This raised the issue of whether I should permit Ms Branch to advance argument by way of Mr Greenhall's submissions. The legal route for this to happen is rule 40.9 of the Civil Procedure Rules that states as follows:

> 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

20. On its face, the terms of rule 40.9 are strikingly wide. There is no guidance within the rule itself, and no appellate guidance of which I have been made aware, as to how a judge should decide such applications. Ms Stacey, for the Claimant, submitted that I should not permit Ms Branch to make submissions unless and until she was joined as a Defendant, not least as to do otherwise would equip her with the privilege of a participant without the risk of an adverse costs order for unsuccessful participation. Ms Stacey stressed that the words "*directly affected*" were the only limit on the rule and suggested that Ms Branch was not so affected. In addition, Ms Stacey drew my attention to the order of Chamberlain J who, in his directions [paragraph 14] for this hearing, stated:

> Any person applying to vary or discharge this order must provide their full name and address, an address for service, and must also apply to be joined as a named defendant to the proceedings at the same time (to the extent they are not already so named).

21. Ms Branch's witness statement expresses a general view that the terms of the order sought are so wide as to prevent protests that are lawful and, more specifically, sets out her concern that they might catch people such as her who, while not involved in IB or any of its protests, might protest near some of the many roads specified in NHL's draft order and find herself inadvertently caught up in contempt proceedings. I decided that I should grant the rule 40.9 application on the following grounds:

(1) The scenario suggested by Ms Branch, in her specific concern, is not fanciful and would amount to a sensible basis to regard her as "*directly affected*".
(2) Even absent that most direct connection, in a case where an order is sought for unnamed and unknown defendants, and where [as here] Convention rights are engaged, it is proper for the Court to adopt a flexible approach and a general concern by a person concerned with the political cause involved could, perhaps only just, fit within the term. To take an example far removed from the facts of this case, a member of a proselytising religious group who only attended their local place of worship *might* nonetheless be seen as directly affected by an order banning his co-religionists from travelling to seek converts.
(3) In a case where the Court is being asked to make wide ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition it seemed to me desirable to take a generous view of such applications.

22. While reluctant to vary the order made by another Judge in advance of the hearing it did seem to me, with respect, that Chamberlain J's order was at odds with rule 40.9 which specifically allows for the possibility of participation by non-parties, in other words those who are not defendants. I therefore varied that order to permit Mr Greenhall to advance submissions on behalf of Ms Branch.

23. Before passing on to other matters I should emphasise this was a decision taken on the facts of this case and does not purport to lay down an immutable principle. There may well be other protest cases where it is not appropriate to grant such an application. In addition, if the rule was used as a mechanism to mount arguments that took up excessive time, were repetitious or did not assist the Court [none of which criticisms can be levelled at Mr Greenhall's measured and focused submissions], then there are ample and robust case management powers to stop that happening.

Summary judgment

24. In setting out my reasoning on this aspect of the case I need to rehearse some fundamental underlying principles. The need for this approach occurred because of the course of the hearing. I had indicated my concerns about the evidential basis for the summary judgment applications in respect of some of the Defendants. At that stage Ms Stacey QC, on behalf of NHL, argued that their cause of action was, perhaps amongst other things, for an injunction and that the evidence advanced by the Claimant could be a basis for my giving summary judgement in favour of a final injunction, on the basis that even if I doubted there was sufficient evidence to find tortious liability, the same evidence could and should be seen as an ample basis to show the justification for granting a final injunction. After entertaining those submissions in argument, I reflected on them overnight, then rejected them for the following reasons.

25. An injunction is not a cause of action, it is a remedy. An application for an injunction can only succeed if it is advanced as a necessary relief for an underlying substantive claim. In my view this is basic and beyond debate:
(1) In *Injunctions* [Bean et al, Sweet and Maxwell, 14th Edition, at page 4] under the heading, "*Requirement of a substantive claim*" the authors write, "*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)*"

(2) In *Fourie v Le Roux* [2007] 1 WLR 320 [2] Lord Bingham stated that injunctions "*are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign*". In Lord Scott's speech in the same judgment [30], he also spoke of the need for an underlying cause of action, albeit as a rule of practice rather than a matter of jurisdiction.

26. Summary judgment under CPR part 24 is available for a cause of action or for an issue within that cause of action, but not for a remedy. This is not to say that Judge granting summary judgment may not also grant the consequent relief, but she or he can only do so after the cause of action has been resolved. Although the word "*trial*" is at times used to describe an assessment of a remedy [see, for example, White Book 2022 at 12.0.1] in both the CPR 24 and the accompanying Practice Direction the language is consistent with the narrower meaning, namely a trial of a cause of action. Further, in the context of this case it would make no sense to describe an injunction as "*final*" if the underlying cause of action was yet to be resolved.

27. On the basis of the approach I have described, I turned to consider the applications for summary judgment in the case of the 24 and the 109. The test I had to apply is set out in CPR 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:
> (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.

28. The causes of action pleaded by the Claimant are trespass, public nuisance and private nuisance. I will consider the basis for trespass more fully later in this judgment but for these purposes I summarise the law [based primarily on *DPP v Jones* [1999] 2 AC 240 and *DPP v Ziegler* [2022] AC 408] as being that a protestor using a highway *may* have a defence to an action for trespass but will not do so, to address the specifics relevant to my determination of these applications, if they have protested by obstructing traffic on the M25.

29. Mummery LJ described private nuisance in *West v Sharp* (1999) 79 P&CR 327 at 332, as follows: "*Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him*".

30. Obstruction of the highway, for the purposes of public nuisance, is described in Halsbury's Laws, 5th ed. (2012) at para. 325 where it is said:

(1) whether an obstruction amounts to a nuisance is a question of fact;
(2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;
(3) generally, it is a nuisance to interfere with any part of the highway; and
(4) it is not a defence to show that although the act complained of is a nuisance with regard to the highway it is in other respects beneficial to the public.

31. I note that neither public nor private nuisance have been subject to an appellate review in the light of the Article 10 and 11 rights of protestors, as was carried out for trespass in *DPP v Jones* and other cases to which I have been referred. It seems to me both torts will have a potential defence if the actions of protestors cause *some* interference on a road but, once more moving from the general to the specific, such a defence would not render obstructing traffic on the M25 a lawful, non-tortious, act.

32. With those definitions in mind and applying the broad hearsay provisions of section 1 of the Civil Evidence Act 1995, I found there was sufficient evidence to give summary judgement against the 24 based on the decisions in *NHL v Heyatawin and others*, *NHL v Buse and others* [2021] EWHC 3404 (QB), and *NHL v Springorum and others* [2022] EWHC 205 (QB). Although the Court in those cases was deciding whether there had been breaches of an injunction, rather than the commission of torts, the factual summaries in those cases gives sufficient details for me to conclude there is no realistic basis to believe there would be any issue were there to be a trial of those defendants.

33. The position of the 109 is different. The only basis offered by the evidence supplied by the Claimant was within the witness statement of Laura Higson [at her paragraph 51]. The 28 sub-paragraphs are similar, so I take only the first 2 to illustrate their general nature:

> 51.1 On 13 September 2021, 18 of the Named Defendants were arrested by Hertfordshire Constabulary in connection with a protest which took place under the banner of IB. Of those arrested, all were arrested under suspicion of wilful obstruction of the highway, and 6 under suspicion of conspiracy to cause a public nuisance. I am not personally presently aware of the current status of any prosecutions.
> 51.2 On 13 September 2021, 10 of the Named Defendants were arrested by Kent Police in connection with an IB protest. Each of the 10 individuals were arrested under suspicion of wilful obstruction of the highway and conspiracy to cause a public nuisance. All have been charged with conspiracy to cause a public nuisance.

34. At no stage in this part of her witness statement does Ms Higson identify which defendant was arrested on what date. There are no details of the activities that led the police to arrest. There has been one conviction in Kent for an offence of criminal damage but there is no description of what the unidentified arrestee had done. In other sub-paragraphs Ms Higson states that the police took no further action against some of those arrested on some occasions. Ms Stacey sought to support Ms Higson's evidence by pointing out that none of the defendants, with 2 exceptions I will come to shortly, had served a defence to NHL's claim. In the hearing I was told that the reason [or at least one reason] for the lack of specificity was "*GDPR*": I struggled to understand that explanation given that there have been 3 successful contempt applications wherein defendants were named and their detailed activities set out, given the terms of the

disclosure orders previously made allow for arrestees' details to be deployed in this litigation, and given that in her second witness statement Ms Higson gives the names, dates and [at least some] details of 3 of those who were arrested but later did respond with defences to the claim. Ultimately, however, the reasons for how the Claimant chose to present their case is a matter for them, not me.

35. The task I had to undertake was to assess the material put before me and decide whether the Claimant had shown there was no real prospect of a successful defence to the claims of the 109 Defendants. In my judgment the evidence supplied was manifestly inadequate, given:
    (1) I would have to be satisfied in each case. As a matter of common sense, it is highly likely that many of the defendants *have* committed the 3 torts alleged but I am not able to take a broad brush approach that "*lumps together*" all 109 in a case where I am dealing with important and fundamental rights.
    (2) The fact a protestor has been arrested may well mean they have been obstructing a road so as to commit the torts, but it is entirely realistic that, on a few occasions, the police's reasonable suspicion [the requirement for an arrest] was misplaced or mistaken. English law does not proceed on the basis that a person arrested is assumed to be guilty, even [as here] on a balance of probabilities test.
    (3) One of the defendants who has replied states that she is a film maker who was videoing protestors blocking the M25 as part of a media project. She attached a letter to her reply which showed the Crown Prosecution Service have discontinued prosecuting her on the basis that it is not in the public interest to do so. Her situation is both a case that clearly raises an issue for any trial and one that serves as an example that might apply to some of the other 109.
    (4) In the third committal application [*NHL v Springorum and others*, at 21-24] the Court dismissed the application in respect of 3 defendants on the basis that they had been arrested while on a pavement and had not caused any obstruction of any traffic; I am conscious that the Court was dealing with breaches of an injunction, not tortious liability, but I doubt that the activities of those 3 could amount to the latter. Once more, this serves as an obvious example that the mere fact of an arrest does not necessarily establish the tortious conduct.
    (5) The Claimant did not make any application for default judgments but sought to rely on the general lack of any defences in support of its application for summary judgment. In some situations, the failure to serve a defence could provide such evidence but, in my view, this is not such a case, given the general attitude of disinterest in Court proceedings as described in Ms Higson's witness statement, as above. There is an illustration of the same point in the contempt hearing described above, where 2 of the 3 Defendants expressly disassociated themselves from the submission that they had not breached the injunction and were presumably disgruntled to find the application to sanction them dismissed.
    (6) In her second witness statement Ms Higson gives some further details of 3 of the arrests [the then-defendants Matthew Tully, Ben Horton and Nicholas Till]. Of those 3, Mr Horton has been abandoned as a defendant. Those paragraphs of Ms Higson's statement do not provide a sufficient basis to exclude any realistic possibility that the remaining 2 have a defence to the claim.

36. In the light of the evidence called I granted summary judgment in respect of the 24 and dismissed the application in the case of the 109. The consequence is that the injunctions I was persuade to grant are both final, for the 24, and interim, for the 109 and the

unknown defendants. In the light of the Court of Appeal's decision in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13, I did not view a hybrid injunction as impossible and my preference was the simplicity of the same, but Ms Stacey has expressed a firm preference for separate final and interim injunctions, and I did not think it right to deny the Claimant their choice as to the structure of the relief. Nonetheless, I consider the requirements of both injunctions in a single section of what follows.

Injunction

37. The well-established test for the grant of an interim injunction was described in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The first 2 aspects, whether there is a serious question to be tried and whether damages would be an adequate remedy were no injunction granted, are easily met in this case: the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy. The balance of convenience, however, is not so simply resolved in a case involving a largely anticipatory injunction, unidentified defendants, and the human rights of both sides: in my view that balance can be achieved in this case by modifying the terms of the order from those in the Claimant's draft. I explore the reasons for that being required, below.

38. The injunctions sought are anticipatory injunctions. In *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch) Marcus Smith J summarised the effect of 2 decisions of the Court of Appeal on this topic, and I adopt his summary with gratitude. The questions I have to address are:
    (1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?
    (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*.

39. Mr Greenhall pointed out that the IB protests described by NHL were all in 2021 and there has been no repetition this year. This is a fair point, but it is outweighed by some of the public declarations made on behalf of IB. Once a movement vows "*to cause more chaos across the country in the coming weeks*" and threatens "*a fusion of other large-scale blockade-style actions you have seen in the past*", the Claimant must be entitled to seek the Court's protection without waiting for major roads to be blocked. In my view the scale of the protests being discussed, and those that have already occurred, are sufficient to meet the heightened test of harm so "*grave and irreparable*" that damages would be an inadequate remedy.

40. Section 12(2) of the Human Rights Act 1998 would prevent me from granting an injunction unless I was satisfied that the Claimant had taken all practicable steps to notify the defendants: in this case I am satisfied of that in the cases of the named defendants and will modify the terms of the service of the injunction to avoid rendering unknown people liable until they too have been made aware of the order. Section 12(3) bans the restraint of "*publication*" by way of an interim injunction unless the Court is

satisfied that the Claimant is likely to succeed in stopping publication at any final trial. There is an argument that protests such as those carried out by IB should not be considered as "*publication*" at all but given the Court of Appeal's decision in *Ineos* [as below] I proceed on the basis I should consider them as such. Nonetheless, I am satisfied that the type of "*publication*" that will be banned by the order I am prepared to make will be likely to be similarly banned at any trial.

41. Injunctions against unidentified defendants were considered by the Court of Appeal in the cases of *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 ["*Ineos*"] and *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 ["*Canada Goose*"]. I summarise their combined affect as being:
    (1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
    (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
    (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights [*Canada Goose*].

42. The balance between the competing rights of protestors and others have been considered in a series of cases. In *DPP v Jones* [1999] 2 AC 240 the House of Lords allowed an appeal by protestors convicted on the basis they had taken part in a "*trespassory assembly*". The speeches in the judgment make clear that protests could be a reasonable use of a public highway. Although the European Convention was discussed, the Human Rights Act 1998 was not yet in force and that decision, in my respectful view, has to be read with a degree of caution given the more recent case of *Ziegler*, to which I now turn.

43. In *Director of Public Prosecutions v Ziegler* [2022] AC 408 protestors had blocked a road leading to a venue where an arms fair was being held, by sitting in the road and by attaching themselves to heavy objects. They had been arrested and prosecuted for obstructing the highway under section 137 of the Highways Act 1980, which offence has a "*lawful excuse*" defence. The District Judge hearing the trial dismissed the charges on the basis that, having weighed up considerations that pulled either way including the protestors' Article 10 and 11 rights, he concluded the prosecution had failed to negate the statutory defence advanced by the defendants. The Divisional Court allowed an appeal against the decision of the District Judge. The Supreme Court then allowed the further appeal and restored the dismissals. *Ziegler* was an important, perhaps a landmark, decision about the right to protest, but its effect should not be misunderstood: the Court did not declare that blocking roads was henceforth a legitimate and lawful form of political action, but that on occasions it might not be a crime under that section of that act. It is notable that the Supreme Court discussed and approved a list of considerations of the detailed facts that a judge should weigh in such cases, before reaching a decision.

44. The limits to *Ziegler* were made clear in *DPP v Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett CJ held that *Ziegler* did not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as Article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under Article

1 of Protocol 1 ["*A1P1*"], by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway.

45. The right to peaceful enjoyment of one's property has been honoured by the Courts for centuries, albeit not described as a human right nor still less as A1P1. Article 10 and 11 rights have been described in numerous cases, from which I select only two examples:
    (1) In *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 Lord Justice Laws said [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*."
    (2) In *Kudrevicius v Lithuania* (2015) 62 EHRR 34 [91] the European Court of Human Rights stated that "*the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression ……is one of the foundations of such a society. Thus, it should not be interpreted restrictively*"

46. In assessing the balance between competing rights in protest cases, it is not for the Court to choose between different political causes. In *City of London Corporation v Samede* [2012] PTSR 1624 Lord Neuberger, M.R., stated as follows [within 39 to 41]:

> As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public…… The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command…..the court cannot, indeed, must not, attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous…..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.

47. It is clear that once breach proceedings are under way, it is no defence for the alleged contemnor to argue that the injunction should not have been granted in the first place, or that its terms are too broad. The balance between property rights and the right of protestors is one that has to be struck when the injunction is granted [see *National Highways Ltd v Heyatawin and Others* [2021] EWHC 3078 (QB), at 44 and 45].

48. To draw together the various legal threads: in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*DPP v Jones* and *DPP v*

Ziegler]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the Claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protestors to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*NHL v Heyatawin*].

49. My decision on the terms of the injunctions was communicated in discussion at the end of the hearing and in drafts sent between the parties and myself since. As the detail can be seen in the order, I confine my explanation to broader principles. The general character of the views held by IB protestors are properly described as "*political and economic*" and as such are at the "*top end of the scale*", as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protestors themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson's statement, above. Judging the future risks of protests against IB's past conduct I approved the terms of the draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads.

Alternative service

50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.

51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.

52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction.

Disclosure

53. The interim orders contained provisions requiring the various relevant police forces to provide NHL with the identities of those arrested in circumstances that suggest they may have breached the Court's order, and to also supply the evidence that showed the conduct before arrest. This strikes me as the most efficient way to provide the Claimant with the means to enforce their order, and subject to adding in some confidentiality clauses, I made those orders.

Declaration

54. NHL applied for a declaration to this effect:

> That the use of the SRN by the Defendants for the purposes of protest which causes an obstruction of the public highway is unlawful and a trespass in that it exceeds the lawful right of the public to use the highway and interferes unreasonably with the use of the highway by other members of the public entitled to use it

55. In deciding whether to make the declaration I have to take into account, in the words of Neuberger J [as he then was] in FSA *v Rourke* [2001] EWHC 704 (Ch), "*justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration*".

56. In my view this is not a case in which I should make such a declaration. After *Ziegler* it does not follow automatically in all cases that the use of the SRN for protests is unlawful or a trespass. While I could construct a proposition with caveats and qualifications, it would serve no useful purpose and might be positively unhelpful if it could be read as proffering some sort of arguable defence to contempt proceedings for the breach of the terms of the order that I have been prepared to grant. The injunction is already long and detailed and this judgment is designed to explain the reasoning behind it, and I see no reason to add any further explanation of the law.

Damages and costs

57. The Claimant has stated that they do not seek damages in this case. I have reserved the issue of costs and will give a hand down judgment once I have received written submissions under a timetable agreed at the end of the hearing.

Neutral Citation Number: [2022] EWHC 736 (Admin)

Case No: CO/745/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE

- -

Between:

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
ELLIOTT CUCIUREAN	**Respondent**

- -
- -

Tom Little QC and James Boyd (instructed by **Crown Prosecution Service**) for the **Appellant**
Tim Moloney QC, Blinne Ní Ghrálaigh and Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Respondent**

Hearing date: 23 March 2022

- -

Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *DPP v. Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention on Human Rights ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

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

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

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

4. The prosecution appeal against the acquittal on three grounds:

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

    2) if the respondent's prosecution did engage those rights, a conviction for the offence of aggravated trespass is - intrinsically and without the need for a separate consideration of proportionality in individual cases - a justified and proportionate interference with those rights. The decision in ***Ziegler*** did not compel the judge to take a contrary view and undertake a ***Ziegler***-type fact-sensitive assessment of proportionality; and

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

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

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

7. Rule 35.2(2)(c) of the Criminal Procedure Rules relating to an application to state a case requires:

> "35.2(2) The application must—
>
> …
>
> (c) indicate the proposed grounds of appeal"

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

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

Section 68 of the Criminal Justice and Public Order Act 1994

10. Section 68 of the 1994 Act as amended reads:

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

> adjoining land, does there anything which is intended by him to have the effect—
>
> > (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
> >
> > (b) of obstructing that activity, or
> >
> > (c) of disrupting that activity.
>
> (1A) …
>
> (2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.
>
> (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.
>
> (4) [repealed].
>
> (5) In this section "land" does not include—
>
> > (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of "land" in subsection (9) of that section; or
> >
> > (b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

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

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

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

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

Factual Background

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

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

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

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

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

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

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

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

The Proceedings in the Magistrates' Court

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

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

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

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

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

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

    iii) Accordingly, before the court could find the respondent guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at [71] to [78], [80] to [83] and [85] to [86]). This required a fact-sensitive assessment.

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

25. The judge made the following findings:

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

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

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

4. The Respondent's article 10 and 11 rights were engaged and the principals in R v Ziegler were to be considered.

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

6. He did not act violently.

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

8. The Respondent believed the views he was expressing.

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

10. The land specifically related to the HS2 project.

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

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

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

Convention Rights

26. Article 10 of the Convention provides: -

"**Freedom of expression**

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

> and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27. Article 11 of the Convention provides: -

> "**Freedom of assembly and association**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

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

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

29. Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: -

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

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

31. In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v. France* [1992] EHRR 362 at [37]).

32. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevicius v. Lithuania* [2016] 62 EHRR 34 at [91]).

33. Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevicius v. Lithuania* (2016) 62 EHRR 34, the Grand Chamber of the European Court of Human Rights ("the Strasbourg Court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" ([92]).

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

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

36. The respondent relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (e.g. *Hashman v. United Kingdom* [2000] 30 EHRR 241 at [28]). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevicius* at [97]).

37. Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevicius* at [149] and [172] to

[174]; *Ezelin* at [53]; *Barraco v. France* No. 31684/05, 5 March 2009 at [43] to [44] and [47] to [48]).

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

39. *Barraco* and *Kudrevicius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no right of access at all. The respondent submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (paragraph 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the respondent's argument (e.g. *Samede* at [5] and see Lindblom J (as he then was) [2012] EWHC 34 (QB) at [12] and [136] to [143]; *Canada Goose UK Retail Limited v. Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth LBC v. Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

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

41. Instead, the court stated at [47]: -

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the

> enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see Marsh v. Alabama [326 US 501], cited at paragraph 26 above)."

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

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

43. Likewise, *Taranenko v. Russia* (No.19554/05, 15 May 2014) does not assist the respondent. At [78] the court restated the principles laid down in *Appleby* at [47]. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks ([25], [61] and [79]). The qualified public access was an important factor.

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

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

46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are

prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

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

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

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

49. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

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

Ground 2

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

52. Secondly, if that first contention is rejected, the respondent submits that the court cannot allow the appeal under Ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted Ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

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

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

55. Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 ([37]). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly,

he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass ([38]). It was in this context that he said at [39]:

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

56. Moses LJ then went on to say that his earlier judgment in *Dehal v. Crown Prosecution Service* [2005] 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is nothing more to prove, including proportionality, to convict of that offence ([40]).

57. In *James v. Director of Public Prosecutions* [2016] 1 WLR 2118 the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate ([31] to [34]). Offences falling into that first category were the subject of the decisions in *Norwood v. Director of Public Prosecutions* [2003] EWHC 1564 (Admin), *Hammond v. Director of Public Prosecutions* [2004] EWHC 69 (Admin) and *Dehal*.

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

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

60. *James* concerned an offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a direction imposing

conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 ([38] to [43]). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61. There are also some instances under the common law where proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 ECHR. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the community. In *Gifford v. HM Advocate* [2012] SCCR 751 the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" [15]. Lord Reed added at [17]:

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

62. Similarly, in *R v. Brown* [2022] EWCA Crim 6 the appellant rightly accepted that articles 10 and 11 ECHR do not provide a defence to the offence of public nuisance as a matter of substantive criminal law ([37]). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights ([24] to [39]).

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

64. The second question certified for the Supreme Court in *Ziegler* related to the "lawful excuse" defence in section 137 of the Highways Act ([2021] 3 WLR at [7], [55] to [56] and [98] to [99]). Lord Hamblen and Lord Stephens JJSC referred at [16] to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65. The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second

category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way *sub silencio* suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* or offences such as section 68. That was unnecessary to resolve the issues before the court.

66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.

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

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

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

70. Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration of incompatibility under section 4 of the1998 Act would arise. If granted, it would remain a matter for

Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

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

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

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

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

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

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

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

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

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

80. We gain no assistance from para. 80 of the judgment in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin), relied upon by Mr Moloney. The legislation considered in that case was enacted to address public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

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

Ground 3

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

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

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

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

86. In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the respondent did not act violently. But if the respondent had been violent, his protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to "only" £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

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

Conclusions

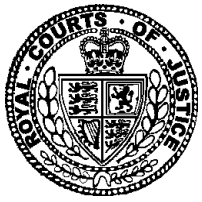
89. We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler*:

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

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

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

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



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Case No: QB-2021-003576, QB-2021-3626 and QB-2021-3737

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2022

Before :
LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JOHNSON

- -

Between :

NATIONAL HIGHWAYS LIMITED — **Claimant**

- and -

(1) ARNE SPRINGORUM
(2) BEN TAYLOR
(3) BENJAMIN BUSE
(4) BIFF WHIPSTER
(5) CHRISTIAN ROWE
(6) DAVID NIXON
(7) DIANA WARNER
(8) ELLIE LITTEN
(9) GABRIELLA DITTON
(10) INDIGO RUMBELOW
(11) JESSICA CAUSBY
(12) LIAM NORTON
(13) PAUL SHEEKY
(14) RUTH JARMAN
(15) STEPHANIE AYLETT
(16) STEPHEN GOWER
(17) STEPHEN PRITCHARD
(18) SUE PARFITT
(19) THERESA NORTON — **Defendants**

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- -

David Elvin QC, Michael Fry and Jonathan Welch (instructed by DLA Piper UK LLP) for the Claimant
Owen Greenhall (instructed by Hodge Jones & Allen) for the Third Defendant;
The other defendants appeared in person

Hearing dates: 1-2 February 2022

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Approved Judgment

Lord Justice William Davis:

1. This is the judgment of the court to which we both made substantial contributions. Between September and November 2021 a series of protests was carried out by members of a group calling itself "Insulate Britain". Many protestors blocked motorways and other roads, usually by sitting down on and/or gluing themselves to the road surface and so preventing the flow of traffic. Others went onto the hard shoulder of motorways so as to endanger themselves and to distract the fast-moving traffic on the motorways. On 21 September 2021 Lavender J granted the claimant an injunction to restrain such activity on the M25 motorway ("the order").

2. This is the third in a series of applications made by the claimant for the committal for contempt of court of those it says have breached the order.

3. The first application was determined on 17 November 2021 - *National Highways Limited v Ana Heyatawin and others* [2021] EWHC 3078 (QB). At the time of that hearing the protests were continuing to take place. The Divisional Court (Dame Victoria Sharp P and Chamberlain J) dealt with nine defendants who the claimant alleged had, on 8 October 2021, breached the order. The court found that the breaches of the order were proved. The defendants were committed to prison for terms of between 3 and 6-months. In the absence of any reasonable basis for concluding that the defendants would comply with the court's orders in the future, the court did not consider that it would be right to suspend the orders for committal (at [65]). The defendants to that application included Ben Taylor and Benjamin Buse. They were committed to prison for terms of 6 months and 4 months respectively.

4. The second application was determined on 15 December 2021 - *National Highways Limited v Benjamin Buse and others* [2021] EWHC 3404 (QB). By that stage the series of protests had come to an end, and no further protests were planned in the immediate future. The Divisional Court (Dingemans LJ and Johnson J) dealt with nine defendants who had on 27 October 2021 (and, in one case, also on 8 October 2021) breached the order. Again, the breaches of the order were found proved. The defendants to that application included Benjamin Buse, Biff Whipster, Diana Warner, Paul Sheeky, Ruth Jarman, Stephen Gower, Stephen Pritchard and Sue Parfitt. Benjamin Buse was committed to prison for a term of 30 days to run consecutively to the 4-month term that had been imposed following the first application. Diana Warner (who initially failed to attend the hearing) was committed to prison for a term of 2-months. Biff Whipster (who had acted in breach of the injunction on two separate occasions) was committed to prison for consecutive terms of 2-months and 30 days, the order for committal being suspended for a period of 2 years on condition that he must not take any of the steps that are forbidden by the order. The remaining defendants were committed to prison for terms of 2 months, the orders being suspended on the same terms. The court decided that there was a principled basis to suspend the orders for committal in those cases because the protests were not continuing, a "dialogue" had started to take place between the court and the defendants, and because of what the court had heard in each individual case (see *per* Dingemans LJ at [57]).

5. This present application concerns three further protest events that took place on the M25, two on 29 October 2021 and one on 2 November 2021. Each of the defendants took part in one of those events. The claimant says that each defendant thereby breached

the order. It seeks an order determining that the defendants are in contempt of court and providing for their committal or other sanction.

6. The defendants each accept that they were validly served with the order. In relation to the events on 29 October 2021, the relevant defendants admit that they breached the order in the terms alleged by the claimant, and that they are therefore in contempt of court. The issue for the court in those cases is the sanction that should be imposed on each defendant.

7. Three defendants, Arne Springorum, Jessica Causby and Liam Norton, are said to have breached the order by their acts on 2 November 2021. On behalf of Jessica Causby, Mr Owen Greenhall argues that the claimant cannot prove a breach of the order by any defendant on that date. Mr Springorum and Mr Norton expressly dissociate themselves from that submission. They assert that they were in breach of the order. We are satisfied that their purported admissions cannot prevail if in fact and law Mr Greenhall is correct.

The order

8. On 21 September 2021 the claimant made an urgent application for an interim injunction against "persons unknown causing the blocking, endangering, slowing down, obstructing or otherwise preventing the free flow of traffic onto or along the M25 motorway for the purposes of protesting". Lavender J made an order the same day. The order defined the M25 as "the London Orbital Motorway including but not limited to the verges, central reservation, on- and off-slip roads, overbridges and underbridges including the Dartford Crossing and Queen Elizabeth II Bridge, and any apparatus related to that motorway". It forbids the persons against whom the order was made from:

   (1) Blocking, endangering, slowing down, preventing, or obstructing the free flow of traffic onto or along or off the M25 for the purposes of protesting.

   (2) Causing damage to the surface or to any apparatus on or around the M25 including but not limited to painting, damaging by fire, or affixing any item or structure thereto.

   (3) Affixing themselves to any other person or object on the M25.

   (4) Erecting any structure on the M25.

   (5) Tunnelling in the vicinity of the M25.

   (6) Entering onto the M25 unless in a motor vehicle.

   (7) Abandoning any vehicle or item on the M25 with the intention of causing an obstruction.

   (8) Refusing to leave the area of the M25 when asked to do so by a police constable, National Highways Traffic Officer or High Court Enforcement Officer.

(9) Causing, assisting or encouraging any other person to do any of the prohibited acts above.

(10) Continuing any of the prohibited acts above.

9. The order stated in bold capitalised text that breach of the order may lead to imprisonment, or a fine, or seizure of assets.

10. Each of the defendants accepts that they were validly served with the order (in some instances by means of forms of alternative service that had been authorised by the court).

Protests on the M25 following the order

Protests prior to 29 October 2021

11. The reaction to the order from Insulate Britain was described by Dame Victoria Sharp P in *Heyatawin* at [15]-[18]:

> "15. On various dates and in various locations, Insulate Britain protestors publicly burned copies of the M25 Order.
>
> 16. On 28 September 2021, Insulate Britain posted an article on its website in these terms:
>
> "INJUNCTION? WHAT INJUNCTION?
>
> …Yesterday, 52 people blocked the M25, in breach of the terms of an injunction granted to the Highways Agency on 22nd September.
>
> A second injunction was granted on 24th September covering the A2, A20 and A2070 trunk roads and M2 and M20 motorway, after an Insulate Britain action outside the Port of Dover last Thursday.
>
> Insulate Britain says actions will continue until the government makes a meaningful commitment to insulate all of Britain's 29 million leaky homes by 2030, which are among the oldest and most energy inefficient in Europe."
>
> 17. On 29 September 2021, there was a further post as follows:
>
> "THE SECOND TIME TODAY
>
> …Insulate Britain has returned for a second time today to block the M25 at Swanley (Junction 3).
>
> …Today's actions are in breach of a High Court injunction imposed on 22nd September, which prohibits 'causing the blocking, endangering, slowing down, preventing, or

> obstructing the free flow of traffic onto or along or off the M25 for the purposes of protesting.'"
>
> 18. On 30 September, Insulate Britain posted that it had blocked the M25 "for the third day this week" and that it was now "raising the tempo". It added that its actions were in breach of a High Court injunction."

12. The protest on 8 October 2021 which resulted in the first application involved 15 to 20 protestors sitting or lying in the road at the roundabout at junction 25 of the M25. Both lanes of the carriageway leading from the M25 slip road were blocked. There was a long line of traffic. The disruption lasted for about 1½ hours.

13. The protest on 27 October 2021 which resulted in the second application took place at the A206 junction with the A282/M25. Protestors sat in the road across the westbound carriageway. It took around an hour to clear the protestors. There were substantial traffic delays.

First protest on 29 October 2021 – junctions 28-29 of the M25

14. At about 8am on 29 October 2021 police were called to the M25 between junctions 28 and 29. When they arrived Benjamin Buse, Christian Rowe, Diana Warner, Ruth Jarman and Sue Parfitt were on the eastbound carriageway, sitting down and blocking all three lanes. They were wearing high visibility vests. Some were holding "Insulate Britain" signs. As a police officer approached them all five lay down on the surface of the carriageway. For about 5 minutes police officers tried to engage with those protestors. They asked them to move. When the protestors declined to engage, they were arrested and lifted by police officers off the carriageway and moved to the hard shoulder.

15. On the westbound carriageway Biff Whipster, Ellie Litten, Gabriella Ditton, Stephen Gower and Stephen Pritchard walked across the grass verge and climbed over the barrier that separated the verge from the carriageway. They did not enter the carriageway. Ellie Litten, Stephen Gower and Stephen Pritchard stood beside the barrier holding "Insulate Britain" signs. A police officer stood between them and the carriageway. Gabriella Ditton and Biff Whipster were a few metres away from them. They also were holding "Insulate Britain" signs. They sat down on the area immediately beside the barrier. None of the protestors agreed to move off the M25. After about fifteen minutes more police officers arrived. Traffic then was stopped on that carriageway to allow the police to remove the protestors. Gabriella Ditton and Biff Whipster obstructed those efforts by sitting down and then "going limp" when the police sought to move them. Gabriella Ditton said "I am breaching the court injunction today… it is important to me that we're not bullied."

16. The protestors were moved by about 8.40am. The allegations of contempt that are made in respect of this protest are that:

> "[Biff Whipster, Ellie Litten, Gabriella Ditton, Stephen Gower and Stephen Pritchard] wilfully breached the M25 Order in the morning of 29 October 2021 by endangering and slowing down the free flow of traffic onto or along or off the M25 for the

> purposes of protesting (in breach of clause 2.1 of the M25 Order), by entering onto the M25 Westbound (anti-clockwise) between junction 28 and 29 without a motor vehicle (in breach of clause 2.6 of the M25 Order) and refusing to leave the area of the M25 when asked to do so by a police constable (in breach of clause 2.8 of the M25 Order).
>
> [Benjamin Buse, Christian Rowe, Diana Warner, Ruth Jarman and Sue Parfitt] wilfully breached the M25 Order in the morning of 29 October 2021 by blocking, endangering, slowing down, preventing, or obstructing the free flow of traffic onto or along or off the M25 for the purposes of protesting (in breach of clause 2.1 of the M25 Order), by entering onto the M25 Eastbound (clockwise) between junction 28 and 29 without a motor vehicle (in breach of clause 2.6 of the M25 Order) and refusing to leave the area of the M25 when asked to do so by a police constable (in breach of clause 2.8 of the M25 Order)."

Second protest on 29 October 2021 – junction 21A of the M25

17. At about 10.30am on 29 October 2021 a second protest took place on the M25, this time in the vicinity of junction 21A. Paul Sheeky, Stephanie Aylett and Theresa Norton walked along the hard shoulder on the westbound carriageway. Aylett and Norton held an "Insulate Britain" banner between them. Sheeky walked behind them. They were stopped and arrested by police officers who had arrived on the scene. Ben Taylor was on the hard shoulder of the eastbound carriageway. He was standing next to another protestor who was holding an "Insulate Britain" sign. David Nixon (who was holding an "Insulate Britain" sign) and Indigo Rumbelow were standing nearby. When the police arrived they went and stood behind the crash barrier running alongside the hard shoulder. The police arrested the protestors on both carriageways. There was no obstruction of the live carriageway. Traffic was able to continue moving as normal.

18. The allegations of contempt that are made in respect of this protest are that:

> "[Ben Taylor, David Nixon and Indigo Rumbelow] wilfully breached the M25 Order in the morning of 29 October 2021 by endangering the free flow of traffic onto or along or off the M25 for the purposes of protesting (in breach of clause 2.1 of the M25 Order), by entering onto the M25 Eastbound (clockwise) between junction 21A and 22 without a motor vehicle (in breach of clause 2.6 of the M25 Order) and refusing to leave the area of the M25 when asked to do so by a police constable (in breach of clause 2.8 of the M25 Order).
>
> [Paul Sheeky, Stephanie Aylett and Theresa Norton] wilfully breached the M25 Order in the morning of 29 October 2021 by endangering the free flow of traffic onto or along or off the M25 for the purposes of protesting (in breach of clause 2.1 of the M25 Order), by entering onto the M25 Westbound (anti-clockwise) between junction 21A and 22 without a motor vehicle (in breach

> of clause 2.6 of the M25 Order) and refusing to leave the area of the M25 when asked to do so by a police constable (in breach of clause 2.8 of the M25 Order).

Protest on 2 November 2021

19. In relation to the various events of 29 October 2021 there is no issue but that the protestors in one or more respects breached the terms of the order made on 21 September 2021. The same does not apply in relation to the events of 2 November 2021.

20. At about 7.45am on that day a group of protestors gathered close to the South Mimms roundabout. This roundabout provides a link between the M25 and the A1(M). It also gives access to the A1081 St Albans Road and to the South Mimms service area. Nicola Bell, who gave evidence on behalf of the claimant, suggested that the roundabout is part of the M25. We are satisfied that it is not. The road signage visible on video evidence makes it plain that the roundabout is not part of the M25. Mr David Elvin QC on behalf of the claimant acknowledges this fact. The definition of the M25 in the order does not expressly include a roundabout linking the M25 to other roads. In a later order made on 2 October 2021 by Holgate J in relation to other motorways and similar roads within the strategic road network, the words "including any roundabouts for access to and from the Roads" were included in the order. Mr Elvin submits that these words simply clarify what is implicit in the M25 order with which we are concerned. We disagree. This was a penal order. Had it been intended to include a roundabout of the type involved here, it could and should have said so explicitly.

21. In any event, the police were alerted to the gathering of the protestors close to the roundabout. When police officers went to the roundabout, they saw Liam Norton on the pavement close to the carriageway. He was about to go onto the road when he was arrested by a police officer. Another police officer went to Arne Springorum and Jessica Causby who were close by and stopped them from going onto the carriageway of the roundabout. They were arrested. During the wait for the police van they asked if they could sit down. Springorum said that he was feeling weak. He and Causby did sit down. Springorum had a bottle of superglue. He spread glue on the pavement beside the carriageway. He and Causby stuck themselves to the pavement. It was over an hour before they could be moved. A short section of one lane of the carriageway on the roundabout was coned off whilst efforts were made to remove Springorum and Causby. It is apparent from the video evidence we have seen that this caused some congestion on the roundabout, in particular when traffic was emerging from the off-slip road from the M25 closest to the area which had been coned off.

22. Nicola Bell produced an incident log relating to 2 November. It purported to describe the events on the roundabout. It referred to the closure of one lane of the off-slip road i.e. part of the M25. There is no evidence that there was any such closure. It described the incident as "pedestrians in the carriageway". In fact, no pedestrian went onto the carriageway. The protestors were on the pavement throughout. Based on this incident log and information provided to her by an incident liaison officer, Nicola Bell stated that delays of 12 minutes and 2.1 miles of congestion resulted from the acts of the protestors. We are not, on the evidence that has been produced, satisfied to the requisite standard that those consequences were caused by anything relating to the protestors.

23. Mr Elvin argues that the protestors slowed down or obstructed the free flow of traffic off the M25 for the purposes of protesting. He submits that, whilst the coning off by the police of a section of one lane of the roundabout may have been the immediate cause of congestion in that area and thereby onto the off-slip of the M25, the real cause was the activity of the protestors. There was a breach of clause 2.1 or, in the alternative, a breach of clause 2.9 of the order. The breach of clause 2.9 arose because the protestors, by their activity, caused the police to obstruct the free flow of traffic. We reject these arguments. Nothing done by Springorum, Causby and Norton slowed down or obstructed the traffic. It may be that, had the police not arrived when they did, one or more of those protestors would have gone onto the carriageway and led to an obstruction of traffic on the off-slip of the M25. But they did not do so. Their presence on the pavement was of no consequence to the traffic flow. That is apparent from the video evidence. Any congestion was caused by the action of the police in placing cones onto the carriageway. That cannot have been something caught by clause 2.9. The police were not caused to do an act prohibited by clause 2.1. An act so prohibited has to be done "for the purposes of protesting".

24. For these reasons we are not satisfied that there was any breach of the order on 2 November 2021 by those named in these proceedings. The application to commit Arne Springorum, Jessica Causby and Liam Norton for contempt fails.

Breach of the order in respect of the 29 October protests

25. In order to establish a contempt of court the claimant must make the court sure that the defendant: (1) knew of the order; (2) committed acts which breached the order; and (3) knew that they were doing acts which breached the order, see *Varma v Atkinson* [2020] EWCA Civ 1602 and *Buse* at [23].

26. The allegations of contempt of court in relation to those involved in the incidents on 29 October 2021 are supported by affidavit evidence and by video evidence. None of the defendants challenges any of that evidence. Each defendant has admitted the allegation of contempt of court that is made against them. We have, separately, considered whether the evidence establishes the allegations of contempt of court that are advanced. Having done so, we are sure that:

    (1) Benjamin Buse, Biff Whipster, Christian Rowe, Diana Warner, Ellie Litten, Gabriella Ditton, Ruth Jarman, Stephen Gower, Stephen Pritchard and Sue Parfitt each deliberately breached the order in the respects alleged (see paragraphs 14 and 15 above) on the morning of 29 October 2021 between junctions 28 and 29 of the M25.

    (2) Paul Sheeky, Stephanie Aylett, Theresa Norton, Ben Taylor, David Nixon and Indigo Rumbelow each deliberately breached the order in the respects alleged (see paragraph 17 above) on the morning of 29 October 2021 at junction 21A of the M25.

27. In addressing us a number of the defendants complain about the use of a civil injunction to police their protest activities. It is argued that their actions were proportionate given the urgency of the threat posed by climate change. It is said that the proper course would have been to charge the protestors with a criminal offence. Had they been charged with wilful obstruction of a highway contrary to Section 137 of the Highways

Act 1980 they say that they would have been able to assert that their actions were a reasonable and proportionate exercise of their Convention rights under Article 10 and Article 11 and thereby avoid criminal liability: see *DPP v Ziegler* [2021] UKSC 23 [2021] 3 WLR 179. On an application for committal for contempt proportionality is not a live issue in determining whether there has been a breach of an order. Whilst proportionality is a matter to be considered when an order is made, the submission is that it is unrealistic to expect full consideration to be given to that issue when (as here) the initial order was made without notice. One defendant argues that it is not a feasible proposition to challenge an order of the kind made here because of the cost involved in doing so. It is suggested that the applications for committal are politically motivated, the claimant having been directed by government to apply for the M25 order and thereafter to enforce it via contempt proceedings.

28. The history of the protests involving obstruction of the highway is rehearsed in *Heyatawin*. It is unnecessary for us to repeat it. Where the body responsible for the strategic road network is aware of organised protests involving repeated obstruction of the highway, it is not a matter of criticism when that body seeks the assistance of the courts to prohibit such protests when they cause very significant inconvenience to members of the public. We do not consider that this demonstrates a political decision on the part of the highway authority whether a decision of its own making or a decision at the behest of others. We recognise the genuine concerns of these defendants and others associated with Insulate Britain in relation to what is and is not being done to meet the challenges of climate change. Equally, they must recognise that a High Court judge acting wholly independently made the M25 order after balancing the Convention rights of those involved with the activity of Insulate Britain against those of the general public. We are concerned only to enforce that order by such sanctions as we consider appropriate and proportionate. In doing so we maintain the rule of law.

Sanction for contempt of court

29. There is no material dispute about the principles that apply. They are set out in *Heyatawin* at [49] and *Buse* at [27]-[31]. In both those cases the court found that custodial threshold was crossed in respect of each individual defendant. In respect of the question of whether committal to prison should be immediate, the court in *Buse* said at [29]:

> "In relation to the issue of suspension where a contempt takes place in the course of a protest, that is a significant factor. Articles 10 and 11 of the European Convention on Human Rights are engaged. As was made clear in *Heyatawin and others* and *Cuadrilla* the conscientious motives of protestors are relevant. This is because most will not be conventional law breakers but motivated by a desire to improve matters, as they see it. A lesser sanction may be appropriate because the sanction can be seen as part of a dialogue with the defendant so that they may appreciate "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 activities are contrary to the protestor's own moral convictions". The reason for this duty is because it would not be possible to co-exist in a

> democratic society if individuals chose which laws they decided to obey.
> …
> A form of "bargain or mutual understanding" operates between protestors and the court: where the former exercise a sense of proportion (for example in avoiding excessive danger or inconvenience) then the court may take a "relatively benign approach", see Lord Burnett CJ at paragraph 34 of *R v Roberts (Richard)* [2018] EWCA Crim 2739; [2019] 1 WLR 2577.
> These principles, from criminal cases, have been applied in cases involving sanctions for contempt of court, see *Cuadrilla* at paragraph 98, but it is very important to note that in cases for contempt of court the court has already balanced the rights of protesters and the rights of others in deciding whether to grant the injunction."

Culpability

30. Each defendant made a free and deliberate decision to breach the order, knowing that the consequence might be imprisonment. Each did so as part of a group activity. In each case their conduct was designed to cause significant disruption and inconvenience, targeting important national infrastructure during rush-hour on a weekday. Each defendant knew that their actions would require police attendance, diverting officers from other policing functions and potentially putting them at risk. The culpability of each defendant is akin to that of the defendants in *Heyatawin* at [54(a)] and *Buse* (at [32]-[34]).

Harm

31. 29 October junction 28-29: The westbound carriageway of the M25 was blocked by the protestors during a weekday morning rush-hour for a period of 40 minutes. There was no incursion into the eastbound carriageway, but the presence of the protestors on the verge meant that the police closed the carriageway as a precautionary measure. There was a significant impact on motorists. There was congestion for 3-4 miles in both directions. Average speeds were reduced to 3mph on the eastbound carriageway, and 27mph on the westbound carriageway. There was, we accept, the potential to cause a serious traffic incident.

32. 29 October junction 21A: The protestors remained on the hard-shoulder, and there was no incursion into the live carriageway. The protest lasted for around 25 minutes. The impact on motorists was minimal, aside from the distracting effect of the protest on fast moving traffic.

33. General risk of harm: Aside from the specific identified harm in each case, the potential risks are obvious, as explained in *Buse* at [37]:

> "The effect on those marooned in the traffic is not difficult to contemplate. There is a risk that emergency services will not be able to respond. This is so even though the defendants operated what they called a "blue light" policy, which was to move from one lane if they saw a blue light approaching. This does not deal

> with the emergency workers stuck in traffic on their way to work, or the emergency vehicles stuck at the back of the queue. Workers will be late for work. Drivers and passengers will be late for appointments or meetings. The time of every normal driver and passenger stuck on the roads was treated by the defendants as not counting enough to outweigh the protesters' own view of how people should be alerted to their view. This might be considered to be the antithesis of the individual rights which are still to be provided to the nine defendants by this court. This is because it has never been the law that one wrongful action justifies another."

Antecedents and totality

34. Ben Taylor, Benjamin Buse, Biff Whipster, Diana Warner, Paul Sheeky, Ruth Jarman, Stephen Gower, Stephen Pritchard and Sue Parfitt have each previously been committed for contempt of court for similar conduct, and have been subject to orders of imprisonment (immediate in the case of Ben Taylor, discharged in the case of Benjamin Buse, and suspended in the remaining cases). Ben Taylor and Benjamin Buse took part in the protest on 8 October which was the subject of the first application for committal. That application was issued on 22 October 2021. Taylor and Buse were served personally with the application. Each was aware of the application when he took part in the protests on 29 October 2021.This is a significant aggravating feature. It also raises a question of totality, that is the need to ensure that the overall penalty is proportionate to the seriousness of the contempt. There is no reason to take a different approach to totality from that which would be taken when sentencing for criminal offences. The Sentencing Council's overarching guidance on totality states:

> "Consider what the sentence length would have been if the court had dealt with the offences at the same time and ensure that the totality of the sentence is just and proportionate in all the circumstances. If it is not, an adjustment should be made to the sentence imposed for the latest offence."

Acceptance of breach at first reasonable opportunity

35. Each defendant fully admitted in advance of the hearing that they had deliberately breached the order (although, as we have found in the cases of Liam Norton, Arne Springorum and Jessica Causby, the admissions were wrongly made). None of the defendants who now fall to be considered have ever sought to resile from those admissions. Up until the start of the hearing, none of them sought to disrupt the process and each had been co-operative. All attended court at the start of the hearing, and all made it clear at the start of the hearing that they admitted deliberately breaching the order.

36. The claimant does not accept that the admissions were made at the first reasonable opportunity. Mr Elvin QC correctly points out that the admissions were made at various different stages. He relies on a letter from the claimant dated 8 October 2021 (when the order of Lavender J was served) in which admissions of contempt are invited. We do not consider there is any merit in that reliance. The letter pre-dated all of the contempts

with which we are concerned. We accept the submission of Mr Greenhall that it is not possible to draw a precise link with the carefully calibrated scheme for the credit resulting from a guilty plea in criminal proceedings – see the Sentencing Council's overarching guidance on reduction in sentence for a guilty plea. In criminal cases, the defendant will typically have received legal advice at the police station, together with pre-interview disclosure. Here, there is no equivalent to the first hearing before a Magistrates' Court or a plea and trial preparation hearing. Moreover, as our decision on the 2 November 2021 protest shows, the question of whether a contempt has taken place is not always clear-cut, even where a defendant intended to breach the order. Each defendant was entitled to time to obtain legal advice. Each defendant is, we consider, entitled to a full one third reduction of the sanction on account of their admissions.

Individual circumstances of the defendants

37. The defendants were, we accept, all motivated by a genuine and deep-seated concern about the lack of government action in response to the climate crisis. A number apologised for the disruption that their activities had caused, but they did not regret their actions and maintain what they consider is a highly principled stand: that although unlawful, their actions were justified by the emergency that faces the whole of humanity. They were proud of their actions, ashamed of the government, and they acted, they said, "out of love".

38. The claimant drew our attention to public statements made by a number of the defendants as to their intention to continue to protest in order to influence a change in government policy. They have every right to do so. What they are not entitled to do is to breach court orders or commit criminal offences. None of the public statements on which the claimant relies amounts to a direct threat to do either of those things, although some of the statements are more equivocal than others.

39. In the course of these proceedings, none of the defendants evinced an intention to commit further breaches of the order, although again, some were more equivocal about their intentions than others, and (leaving aside Dr Warner) only in the case of Benjamin Buse was there a clear undertaking not to commit any further breach.

40. Mr Greenhall, on behalf of Benjamin Buse, told us that everything he had said when he successfully purged his previous contempts of court applied equally to the contempt on 29 October 2021. He maintained the sincere apology that he had previously proffered to the court. His mother is elderly and unwell, and he is remorseful as to the impact that his imprisonment has had on both of his parents. He has made a determined decision to find different and lawful ways to persuade others of the importance of addressing climate change. That commitment is supported by character evidence adduced on his behalf.

41. On behalf of Dr Diana Warner, Mr Greenhall told us that she is a medical doctor by training and has spent many years working for the NHS as a general practitioner. He relied on the observations in *Buse* as to a "dialogue" between the court and those who commit acts of protest in breach of a court order. He said that Dr Warner had now served the term of imprisonment that was imposed following the decision in *Buse* and that she now gave a sincere undertaking that she would not breach the order in the

future. That, he said, was the start of the dialogue. He invited the court to respond by not imposing an immediate custodial order and instead suspending any order.

42. Those submissions had force at the time they were made, on the first morning of the hearing. Dr Warner did not attend the hearing in the afternoon of the first day. Instead, she glued herself to the steps outside the Royal Courts of Justice. She did so in the knowledge of what the consequence would be. In *Buse* she had failed to attend the start of the hearing. A warrant was issued for her arrest and the resulting order for committal was not suspended (see at [8]-[9] and [54]). When Dr Warner was brought back before the court Mr Greenhall said that if an order for committal were suspended then she would comply with the terms.

43. Ben Taylor is in custody as a result of the previous committal order. In mitigation he relied on the fact that before he became involved with the campaign to insulate homes he had not committed any offence. He explained that the conditions in custody are onerous as a result of the covid pandemic. He has to spend 23½ hours in his cell each day. His partner is pregnant and is due to give birth in approximately 6 months.

44. Biff Whipster told us that (aside from his previous committal for contempt) he has never received so much as a speeding fine or a parking ticket. He was asked to stand as a local councillor. He focusses on living with a small carbon footprint. He lives a frugal life, undertakes volunteering activities, and is in receipt of universal credit.

45. David Nixon has been a careworker for 10 years, working with young people. He regards that as part of his identity, and considers his acts of protest as an extension of his care work. He has left his job in order to pursue his commitment to campaigning in relation to the climate crisis.

46. Gabriella Ditton told us that she did not regret her actions and could not express remorse, albeit she regretted the impact of her actions on others. She felt ashamed that she was not with the four defendants who had glued themselves to the steps outside the court building. Her mother is terminally ill and she was worried about not being able to spend time with her mother if she was sent to prison. She said that she had no plans to breach the order again, and that "none of us are malicious people, we are genuinely trying to do the right thing."

47. Indigo Rumbelow emphasised that her actions were peaceful, accountable and carefully planned. The police had been called in advance of the protest so that they could attend and ensure the safety of the public. She said that she would continue campaigning until there is a change in government policy. She was not sure what form that campaigning would take.

48. Paul Sheeky considered that the Insulate Britain campaign was a proportionate protest to secure action on the climate emergency. The protest had originally been planned for 8am. At that point it was dark and wet. They delayed the start of the protest until the road conditions were safer. He had not decided what he would do, in terms of protest activity, in the coming months.

49. Ruth Jarman said that she answered to a higher authority – "love and life". She did not wish to be a bystander in the face of the climate emergency. She was sorry for the effect of the protests, but she did not regret breaching the order and could not make a promise

not to do it again. She had no contempt for the court, but she did have contempt for "the system."

50. Stephanie Aylett described herself as a scientist, a mother and a sister. She had been brought up not to consume unnecessarily. She delivers food parcels to the homeless, is on universal credit, and sometimes relies on food donations herself. She explained that the police were called 10 minutes before starting the protest so that they could ensure safety.

51. Stephen Gower is a volunteer advocate for the homeless. He has received a community award. He gave examples of cases where he had sought to procure help for others but public bodies had failed to act and "nothing was done". He felt that there was nowhere else to turn other than "civil non violent direct action."

52. Sue Parfitt is an Anglican priest. She said that everything she had done was motivated by her Christian faith. She wished to bear witness to the truth of the science regarding the climate catastrophe and to respond to God's command to stand up for the poor. She, and her fellow defendants, were "people of high principle willing to sacrifice liberty, if need be, for the sake of waking up the government to the insanity of the [failure to address the climate emergency]."

53. Christian Rowe believed his actions were necessary and proportionate. He stressed that he acted peacefully at all times and that he was cooperative with the police. He said he was only trying to shine a light on the truth about climate change.

54. Ellie Litten described herself as a programmer and "quite an ordinary sort of person." She lives quitely in a flat. She said she was sorry for the "stress" she had caused, but was not able to apologise because she purposefully broke the injunction and decided not to attend the afternoon of the first day of the hearing. She said that insulating homes would significantly reduce the number of deaths each year that occur through fuel poverty. She said that she would keep protesting until things change.

55. Stephen Pritchard said he was motivated by the selfless example of his parents who "modelled compassion") and his grandfather. He had spent his adult life trying to make the world a better place. He had planted tens of thousands of trees and dug hundreds of wildlife ponds. He had tried writing to his MP to effect change, but without a positive response. He considered that the use of civil law was a politically motivated attempt to bypass the decision in *Ziegler* and to avoid a jury trial. He had breached the injunction 5 times in the past (more if one included occasions on which he had encouraged others to do so).

56. Theresa Norton is an active member of the labour party and is an elected local councillor. She volunteers to help at the local food bank. She apologised to the people who were inconvenienced and disrupted by her actions, but she would do it again. She would continue to fight for climate and social justice. She was willing to serve a prisons sentence "in solidarity with those sentneced before me." In mitigation, she told us that she is the primary carer for her 92-year-old mother (although she had put contingency arrangements in place), and she has council and volunteering commitments.

The appropriate sanction in each case

57. We consider that the custody threshold is passed in relation to each individual defendant. In other words, having considered the possibility of imposing a fine, we have concluded that each contempt is so serious that only a custodial penalty will suffice. In each case we make a reduction to reflect the restrictive custodial regime that is continuing to operate in the light of the Covid-19 pandemic.

58. In respect of those who entered the live carriageway on 29 October 2021 (Benjamin Buse, Christian Rowe, Diana Warner, Ruth Jarman and Sue Parfitt) we consider that the 2-month term that was imposed in *Buse* is, in principle, the shortest period of imprisonment which properly reflects the seriousness of the contempt and is proportionate, taking account of prison conditions and the admissions (3-months before allowing for the admissions).

59. In the case of Benjamin Buse, the term falls to be adjusted to reflect the aggravating feature that the contempt was committed after service of earlier applications to commit for contempt of court. In the case of Benjamin Buse, Diana Warner, Ruth Jarman and Sue Parfitt a further adjustment falls to be made for totality. Taking these factors into account we consider that the appropriate term following a contested application would be 60 days in the cases of Benjamin Buse (so 40 days after reducing for the early admission), and 45 days in the cases of Diana Warner, Ruth Jarman and Sue Parfitt (so 30 days after reducing for the early admissions).

60. In the remaining cases there was no incursion into the live carriageway of the motorway. Although the level of harm caused was slightly different between the two protests (see paragraphs 31 and 32 above), is not possible to distinguish between the level of harm that was intended, and we do not consider it appropriate to draw a distinction in the sanctions to be imposed. We consider that the appropriate term in those cases is, in principle, 9 weeks, reduced to 6 weeks for the admissions. In Theresa Norton's case, in the light of her caring responsibilities, we consider that the appropriate term is 4 weeks.

61. In the case of Ben Taylor there is the aggravating factor that the contempt was committed after service of the application to commit for the earlier contempt. In the cases of Ben Taylor, Biff Whipster, Paul Sheeky, Stephen Gower and Stephen Pritchard the terms fall to be adjusted to reflect totality. Taking those factors into account we consider that the appropriate term is 48 days in the case of Ben Taylor (reduced to 32 days for the admission), and 36 days in the cases of Biff Whipster, Paul Sheeky, Stephen Gower and Stephen Pritchard (reduced to 24 days for the admissions).

62. This results in the following terms:

    (2) Ben Taylor: 32 days

    (3) Benjamin Buse: 40 days.

    (4) Biff Whipster: 24 days.

    (5) Christian Rowe: 60 days.

(6) David Nixon: 42 days.

(7) Diana Warner: 30 days.

(8) Ellie Litten: 42 days.

(9) Gabriella Ditton: 42 days.

(10) Indigo Rumbelow: 42 days.

(13) Paul Sheeky: 24 days.

(14) Ruth Jarman: 30 days.

(15) Stephanie Aylett: 42 days.

(16) Stephen Gower: 24 days.

(17) Stephen Pritchard: 24 days.

(18) Sue Parfitt: 30 days.

(19) Theresa Norton: 28 days.

63. Ben Taylor is currently in custody. It does not seem to us to be right to impose a suspended order which in practice will only be effective after his release (see *Buse* at [55]). He will therefore be subject to an order for committal to custody for a term of 32 days, to run consecutively to the existing 6-month term.

64. In the cases of Theresa Norton, Diana Warner, Ellie Litten and Stephen Pritchard their actions in gluing themselves to the pavement in front of the court building, rather than attending the hearing, shows that they are not prepared to engage in the dialogue referred to in the cases (see *Buse* at [54]). The orders for committal to custody in their cases will therefore take immediate effect.

65. In the remaining cases, we consider that the reasons given in *Buse* for suspending the orders for committal apply. In particular, it remains the case that no further protests organised by Insulate Britain have taken place over the road network in breach of injunctions granted by the court. There is no evidence that further protests are imminent. None of the defendants have said that they have any intention to commit further breaches of the court's order. Mr Buse has gone further, and has apologised for the contempts of court, undertaken not to breach further court orders, and committed to finding other ways to demonstrate his sincere commitment to communicate to others the urgency of the climate crisis.

66. Accordingly, we will suspend the orders we have made in each case (save that of Ben Taylor, Theresa Norton, Diana Warner, Ellie Litten and Stephen Pritchard) on terms. In each case we direct that the order for committal shall be suspended for 2 years so that the committal to prison shall not take effect so long as, during the next 2 years, the defendant does not take any of the steps that are forbidden by paragraphs 2.1-2.10 of the order of Lavender J dated 21 September 2021 (the "M25" for the purposes of those

paragraphs, being defined in the same way as paragraph 1 of that order). This condition will apply whether or not the order of Lavender J remains in force.

Route of appeal

67. The route of appeal is to the Supreme Court, with a requirement that leave to appeal is granted before an appeal may be pursued – see *Buse* at [58]-[62].

Neutral Citation Number: [2022] EWCA Civ 13

Appeal Nos. See Appendix 1 to [2021] EWHC 1201 (QB)
Case Nos: See Appendix 1 to [2021] EWHC 1201 (QB)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2021] EWHC 1201 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/01/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ELISABETH LAING

BETWEEN:

(1) London Borough of Barking and Dagenham
(2) Other Local Authorities (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Claimants/Appellants

-and –

(1) Persons Unknown
(2) Other named Defendants (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Defendants/Respondents

-and -

(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

(4) High Speed Two (HS2) Limited
(5) Basildon Borough Council

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** (London Borough of Barking and Dagenham, London Borough of Havering, London Borough of Redbridge, Basingstoke and Deane Borough Council and Hampshire County Council, Nuneaton and Bedworth Borough Council and Warwickshire County Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council)

Ranjit Bhose QC and Steven Woolf (instructed by **South London Legal Partnership**) for the **7th and 12th claimants** (London Borough of Hillingdon, and London Borough of Richmond-Upon-Thames)

Nigel Giffin QC and Simon Birks (instructed by **Walsall Metropolitan Borough Council Legal Services**) for the **35th claimant** (Walsall Metropolitan Borough Council)

Mark Anderson QC and Michelle Caney (instructed by **Wolverhampton City Council Legal Services**) for the **36th claimant** (Wolverhampton County Council)

Marc Willers QC, Tessa Buchanan and Owen Greenhall (instructed by **Community Law Partnership**) for the **first three interveners** (London Gypsies and Travellers, Friends, Families and Travellers, and Derbyshire Gypsy Liaison Group)

Richard Kimblin QC (instructed by **Eversheds Sutherland (International) LLP**) for the **4th intervener** (HS2)

Wayne Beglan (instructed by **Basildon Borough Council Legal Services**) for the **5th intervener** (Basildon Borough Council) (making written submissions only)

Tristan Jones (instructed by **the Attorney General**) as **Advocate to the Court**

Hearing dates: 30 November and 1 and 2 December 2021

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JUDGMENT

"Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:30am, Thursday 13 January 2022."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

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

2. The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land. The judge, Mr Justice Nicklin, 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 and another* [2020] EWCA Civ 202, [2020] 1 WLR 2802 (*Canada Goose*) and the Supreme Court's decision in *Cameron v. Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau Intervening)* [2019] UKSC 6, [2019] 1 WLR 1471 (*Cameron*). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3. The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong,[1] and that, even if that is what the Court of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v. Gammell* [2006] 1 WLR 658 (*Gammell*), *Ineos Upstream Ltd v. Persons Unknown and others* [2019] EWCA Civ 515, [2019] 4 WLR 100 (*Ineos*), and *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12, [2020] PTSR 1043 (*Bromley*).

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

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

[1] There were 38 local authorities before the judge.

planning control validates the 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.

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 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.

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.

The essential factual and procedural background

9. There were 5 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 by the London Borough of Hillingdon (Hillingdon), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by the London Borough of Barking and Dagenham (Barking) and the London Borough of Havering (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.

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.

11. It is important to note at the outset that these claims were all started under the procedure laid down by CPR Part 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 8.1(2)(a)). Whilst CPR 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 [9]). Moreover, CPR 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 8.1(5)). Nonetheless, CPR 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 *London Borough of Enfield 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 [32] in *Enfield* that, in the light of the decision in *Speedier Logistics v. Aadvark Digital* [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 [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 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".

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 had been made in favour of Wolverhampton by 3 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] EWHC 1205, [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 application to be made against persons unknown.

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

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 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 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 38.2(2)(a), (b) otherwise, as against the Category 1 persons unknown defendants, to apply for (i) default judgment;[3] or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance,

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

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

that the claim be struck out and the interim injunction against persons unknown discharged.

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

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

The main authorities preceding the judge's decision

20. It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only 4½ years ago.

Bloomsbury: judgment 23 May 2003

21. The persons unknown in *Bloomsbury* had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt VC 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 [4] described the defendants' conduct and was held to be sufficient to identify them [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" [19]. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738, [2004] Env. L. R. 9 (*Hampshire Waste*): judgment 8 July 2003

22. *Hampshire Waste* was a protester case, in which Sir Andrew Morritt VC granted a without notice injunction against unidentified "[p]ersons 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 [6]-[10] that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23. In *South Cambridgeshire*, 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.

24. At [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*.

Gammell: judgment 31 October 2005

25. In *Gammell*, 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 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* [2003] UKHL 26, [2003] 2 AC 557 (*Porter*) applied to cases where injunctions were granted against newcomers [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 1998 (the 1998 Act) and the European Convention on Human Rights and Fundamental Freedoms (the Convention).

27. Sir Anthony noted at [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 at [20]) approved [38]-[42] of Simon Brown LJ's judgment, which suggested that injunctive relief was always discretionary and ought to be proportionate. That meant 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 gipsy'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 & Malling Borough Council* [2004] EWCA Civ 194 (*Davis*) at [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 [37] in *Davis* had explained that *Porter* 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*, was whether those principles applied to the cases in question [12].

28. At [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 [30]-[31] that the court would have regard to statements in *Mid-Bedfordshire District Council v. Brown* [2004] EWCA Civ 1709, [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 [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 [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 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] UKSC 11, [2009] 1 WLR 2780 (*Meier*): judgment 1 December 2009

32. In *Meier*, the Forestry Commission sought an injunction against 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 made some general comments at [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 VC had overcome the procedural problems in *Bloomsbury* and *Hampshire Waste*. Referring to *South Cambridgeshire*, he cited with approval Brooke LJ's statement that "[t]here 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]

Cameron: judgment 20 February 2019

33. In *Cameron*, an injured motorist applied to amend her claim to join "[t]he 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.

34. Lord Sumption said at [1] that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at [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 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".

35. After commenting at [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 Part 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at [13] between two kinds of case in which the defendant cannot be named: (i) anonymous defendants 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.

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4 Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

36. At [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 [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 per Bingham LJ at page 523. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR 6.15, which was why proceedings against anonymous trespassers under CPR 55.3(4) had to be effected in accordance with CPR 55.6 by placing them in a prominent place on the land. In *Bloomsbury*, 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* 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 "[i]n 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 [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 [17] was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.[5]

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

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

proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see [32] in *Gammell*).

40. At [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 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 [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 [25], Lord Sumption commented that the power in CPR 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 [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* was argued just 2 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 [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 [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 [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 "[h]e 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 [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*, 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 [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 [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 [31]-[34], Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gipsy and traveller community". Relying on article 6 of the Convention, *Attorney General v. Newspaper Publishing plc* [1988] Ch 333 and *Jacobson*, Coulson LJ said that "the principle that the court should 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*, before referring at [44] to *Chapman v. United Kingdom* 33 EHRR 18 (*Chapman*) at [73], where the European Court of Human Rights (ECtHR) had said that the occupation of a caravan by a member of the 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 a□ected her ability to maintain her identity as a gipsy. Other cases decided by the ECtHR were also mentioned.

48. After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at [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 [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 thought to be the only way forward, then engagement was still of the utmost importance: "[w]elfare 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' 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 su□cient 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) 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 gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "[a]n injunction which 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.

Cuadrilla: judgment 23 January 2020

51. In *Cuadrilla*, 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 [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 [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* (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 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 [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 [60] Lord Sumption's two categories from [13] of *Cameron*, before saying at [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" [14]. This citation may have sown the seeds of what was said at [89]-[92], to which I will come in a moment.

55. At [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] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [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 [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 [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 [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 [*Venables*], 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 [*Spycatcher*]. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in [*Spycatcher*] of the usual principle that a final injunction operates only between the parties to the proceedings.

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

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the

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

The reasons given by the judge

59. The judge began his judgment at [2]-[5] by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley*. At [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* 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 an assumed general principle derived from *Spycatcher* or *Cameron* 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*.

60. At [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 [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 8.2A, the [mainly 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.

62. On the first issue before him (what I have described at [4] above as the secondary question before us), the judge stated his conclusion at [120] to the effect that the court retained jurisdiction to consider the terms of the final injunctions. At [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 be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR 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 [124] that the injunctions granted in the Cohort Claims were subject to the *Spycatcher* principle (derived from page 224 of the speech of Lord Oliver) 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 [161]-[189].

64. On the third issue before him (but part of the main issue before us), the judge concluded at [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***)**. 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*, 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 [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 [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: "[i]t 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 [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 [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 [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 [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 [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 [244]-[246], the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see [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* 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 [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 [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 [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 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 [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 [88] as being further reasons for it.

[89] of *Canada Goose*

79. The first sentence of [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 local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80. *Canada Goose* then referred at [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 appropriate in such cases.

81. *Canada Goose* then said at [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 [17]. That passage was, in my judgment, a misunderstanding of [17] of *Cameron*. As explained above, [17] of *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 [32] in *Gammell*). Moreover at [63] in C*anada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people 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 [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 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 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 *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.

[90] of *Canada Goose*

83. In my judgment both the judge at [90] and the Court of Appeal in *Canada Goose* at [90] were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch) (*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 [19]-[25], Marcus Smith J explained his reasoning relying

on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945 (Ch)). At [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: "[u]ntil 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 a□ected by the order could apply to set it aside under CPR 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

[91] of *Canada Goose*

84. In the first two sentences of [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 [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 [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 [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 40.9. In addition, in the case of a third-party costs order, CPR 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 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 83.8A. Where a judgment is to be enforced by charging order CPR 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* [2019] EWHC 3217 (QB) at [132] provides no further substantive reasoning beyond [159] of Nicklin J.

Paragraph [92] of *Canada Goose*

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

92. It was illogical for the court at [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 "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

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

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

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

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

The doctrine of precedent

97. We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and [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 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* decided, and *Ineos* accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron*, 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 that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, [89]-[92] of *Canada Goose* were inconsistent with *Ineos* and *Gammell*. Moreover, those paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at [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* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at [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 [89]-[92] of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that [89]-[92] of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v. CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch. 306 at [65]-[67] and [97]).

Conclusion on the main issue

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

102. We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at [82] of *Canada Goose* (see [56] above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment cases at [99]-[109] in *Bromley* [see [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 gipsy and traveller community" or any other community has article 8 rights. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* (and unlike in *Manchester City Council v. Pinnock* [2010] UKSC 45, [2011] UKSC 6, [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* 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 HRA 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 protocol 1 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 [248] (see [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 [104]-[106] above), and those mentioned below at [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 [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 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 8APD.20 provides at [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 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 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 cases under section 187B as they are to one sought in such a case to restrain apprehended trespass or nuisance. Indeed, CPR 8APD.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 orders against all the world?

119. As I have said, Nicklin J decided at [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 injunctions can be granted at [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 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 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.

123. I have concluded, as I indicated at [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.

Lord Justice Lewison:

125. I agree.

Lady Justice Elisabeth Laing:

126. I also agree.

Neutral Citation Number: [2021] EWHC 3081 (QB)

Claim No: QB-2021-003977

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Law Courts
50 West Bar
Sheffield S3 8PH

Date: 17 November 2021

Before:

MR JUSTICE LAVENDER

- -

Between:

National Highways Limited

Claimant

- and -

Persons unknown deliberately causing the blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or off or along the strategic road network for the purpose of protesting and Others

Defendants

- -
- -

Saira Kabir Sheikh QC and Charles Merrett (instructed by the **Government Legal Department**) for the **Claimant**

The following Defendants in Person: **Dr Diana Lewen Warner** (27th), **Jerrard Mark Latimer** (44th), **Liam Norton** (54th), **Michael Brown** (67th), **Rob Stuart** (83rd), **Stephen Gower** (95th), **Tim Speers** (105th), **Victoria Anne Lindsell** (110th) and **Andria Efthimious-Mordaunt** (123rd)

Owen Greenhall (instructed by **Hodge Jones Allen**) for **Jessica Branch** and **Caspar Hughes**

Hearing date: 11 November 2021

- -

JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. The purpose of this judgment is to set out the reasons for the decision which I announced at the conclusion of the hearing in the Royal Courts of Justice on 11 November 2021, which was that I would not set aside the ex parte interim injunction made by Linden J on 25 October 2021.

2. In that hearing, I was also invited to vary Linden J's injunction, if I did not set it aside altogether, and, in some respects, it was conceded that I should do so. Insofar as there were disputed issues about the terms of Linden J's injunction, I decided those issues at the hearing for the reasons which I gave then, which I will not rehearse.

3. In effect, I varied Linden J's injunction, although the means by which I achieved that end was to discharge his order with effect from 11 November 2021 and to make a differently worded injunction in its place.

4. For the purposes of this judgment, it is only necessary to refer to paragraphs 3.1 and 3.2 of the injunction which I made on 11 November 2021, which is in the following terms:

> With immediate effect and until the earlier of (i) Trial; (ii) Further Order; or (iii) 23.59 pm on 31 December 2021, the Defendants and each of them are forbidden from deliberately undertaking the activities prohibited in paragraphs 3.1, 3.2, 3.3 and 3.4 below:
>
> 3.1 Blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or along or off the SRN for the purpose of protesting.
>
> 3.2 Blocking, slowing down, obstructing or otherwise interfering with access to or from the SRN, including doing so by any activity on any adjacent slip roads or roundabouts which are not vested in the Claimant, for the purpose of protesting which has the effect of slowing down or otherwise interfering with the flow of traffic onto or along or off the SRN.

5. This injunction applies to the whole of the Strategic Road Network ("the SRN"), except those parts covered by the earlier injunctions which I will mention later.

(2) Background

(2)(b) The Insulate Britain Protests

6. There have in recent months been a number of well-publicised protests by individuals associated with a movement called "Insulate Britain". I will call these the "Insulate Britain protests". It is not suggested that Insulate Britain is either a legal entity or the sort of unincorporated association against which an order could properly be made. The first five Insulate Britain protests were on 13 September 2021, at various locations on the M25 motorway. By the date of the hearing, there had been many more Insulate Britain protests, including:

   (1) five protests on the M25 on 15 September 2021;

(2) three protests on the M25 on 17 September 2021;

(3) protests on the M3 at Junction 1 and the M11 at Junction 8 on 17 September 2021;

(4) a protest on the M25 and one on the A1M at Junction 4 (Hatfield) on 20 September 2021;

(5) two protests on the M25 on 21 September 2021;

(6) a protest on the A20 near Dover on 24 September 2021;

(7) protests on the M25 on 27, 29 and 30 September 2021;

(8) protests on the M25 and on the M1 at Junction 1 (Brent Cross) and the M4 at Junction 3 (Heathrow Airport) on 1 October 2021;

(9) four protests on roads in London which are not part of the SRN on 4 October 2021;

(10) a protest on the M25 on 8 October 2021 (which is the subject of committal applications currently being heard by the Divisional Court);

(11) a protest on the M25 on 13 October 2021;

(12) protests on roads in London on 25 October 2021;

(13) protests on the M25 and, outside the SRN, on the A206 and the A40/4000 on 27 October 2021;

(14) two protests on the M25 on 29 October 2021;

(15) protests on the M25 and, outside the SRN, on the A538 (in Manchester) and the A4400 (in Birmingham) on 2 November 2021; and

(16) a protest in Parliament Square, London on 2 November 2021.

7. The protestors who appeared before me on 11 November 2021 and on earlier occasions made clear that it was their intention to continue protesting in this way and, indeed, that they considered themselves obliged to do so. That is consistent with press releases and statements by other protestors reported in the media.

8. The aims of the protestors are, in summary, to draw attention to what they consider to be failings in government policy in relation to the likely consequences of climate change resulting from global warming and to promote changes in that policy, notably the introduction of a new policy for insulating all homes in Britain.

9. The protestors block traffic on the road where they are protesting and continue to do so until they are removed. In addition to sitting on the road, they also glue themselves to the road or to police vehicles. The protests can last for several hours, with the longest of which I am aware having lasted for seven and a quarter hours. No warnings are given to allow drivers to choose a different route so as to avoid the protest.

10. The protestors are non-violent. They are usually removed by the police, but some drivers have taken it upon themselves to remove protestors or to drive slowly into them in an attempt to force them out of the way.

(2)(b) The Strategic Road Network and National Highways Limited

11. Many, but not all, of the Insulate Britain protests have taken place on motorways or other parts of the SRN, which consists of 4,300 miles of motorways and major A roads. The roads forming the SRN are illustrated on maps attached to Linden J's and my order and are more precisely identified in a 249-page list attached to those orders. The SRN is of considerable importance to the economy of this country. Individuals use it daily to get to work and for a host of other purposes. It carries 69% of lorry traffic in England. In 2016 it carried 126 billion vehicle miles. That is equivalent to an average of about 29 million vehicle miles per mile of road per year, or about 80,000 vehicle miles per mile of road per day.

12. The claimant, National Highways Limited (known until 8 September 2021 as Highways England Company Limited), was appointed as a strategic highways company and as the highway authority for the SRN pursuant to section 1 of the Infrastructure Act 2015 by the Appointment of a Strategic Highways Company Order 2015 (SI 2015/376). Title to the SRN was vested in National Highways pursuant to section 263 of the Highways Act 1980 and a Transfer Scheme made pursuant to section 15 of the Infrastructure Act 2015.

13. The claimant has, inter alia, the following duties:

    (1) The claimant maintains the SRN pursuant to a licence dated 1 April 2015 which obliges it, inter alia, to seek to minimise disruption to road users which might reasonably be expected to occur as a result of unplanned disruption to the network.

    (2) Section 5(2)(b) of the Infrastructure Act 2015 provides that the claimant must, in exercising its functions, have regard to the effect of the exercise of those functions on the safety of users of highways.

    (3) Section 130 of the Highways Act 1980 provides that 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.

(2)(c) The Injunctions

14. The claimant contends that the Institute Britain protests:

    (1) constitute trespasses and nuisances;

    (2) have caused widespread and serious disruption to road users, considerable economic damage, considerable public expense and anxiety, inconvenience and distress for road users; and

    (3) create an immediate threat to the lives of the protestors and road users, including those reliant on the movement of emergency services vehicles.

15. The claimant has obtained four injunctions against "Persons unknown causing the blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or off or along" relevant roads, as follows:

    (1) On 21 September 2021 I granted an interim injunction which applied to the M25 motorway ("the M25 injunction": claim number QB-2021-003576).

    (2) On 24 September 2021 Cavanagh J granted an interim injunction which applied to the A2, A20, A2070, M2 and M20: claim number QB-2021-003626.

    (3) On 2 October 2021 Holgate J granted an interim injunction covering various access roads to London: claim number QB-2021-003737.

    (4) On 25 October 2021 Linden J made the injunction which on 11 November 2021 I effectively varied, but refused to set aside, and which applies to the whole of the SRN, except those roads covered by the first three injunctions.

16. It is relevant to note that Transport for London has also obtained two similar injunctions, covering various significant roads in London.

17. The only defendants to the M25 injunction were "Persons unknown", but individual defendants have been named in subsequent injunctions, in part as a result of orders made against relevant chief constables requiring them to provide to the claimant the names of protestors who are arrested at Insulate Britain protests. There were 122 individuals named as defendants in a schedule to Linden J's injunction. 13 more have been added. Orders have also been made in each case for alternative service on individuals by posting copies of the injunction and associated documents through their letterbox or leaving them in a separate mailbox or affixing them to the front door.

(2)(d) The Hearing

18. A number of named defendants attended the return date hearing for Linden J's injunction on 28 October 2021. At their request, I adjourned the hearing to 11 November 2021, both to enable them to instruct counsel and to allow time for others who were affected by Linden J's injunction, but who were not involved in the Insulate Britain protests, to consider their position.

19. In the event, the defendants did not instruct counsel. Instead, nine of them attended the hearing and eight of them addressed me. Their submissions primarily concerned the reasons why they had joined the protests and, especially, their concerns at the potential consequences of global warming, if it is not properly addressed. They submitted that the Insulate Britain protests were necessary, targeted, proportionate and effective and that these proceedings were not in the public interest. Indeed, they submitted that they were acting to prevent to overthrow of institutions such as the court, which they contended would be the outcome of global warming, if not properly addressed.

20. Mr Greenhall was instructed by two individuals, Jessica Branch and Caspar Hughes, who contended that they were affected by Linden J's injunction, although they have not taken part in the Insulate Britain protests. Ms Branch attends demonstrations organised by Extinction Rebellion and Mr Hughes attends demonstrations organised by Stop Killing Cyclists, who hold protests to mark the death of cyclists in road traffic accidents.

21. Mr Greenhall provided helpful written and oral submissions, but those submission were primarily directed at the terms of the injunction. In particular, he submitted, and I accepted, that I should discharge the provision of Linden J's injunction which provided that service of the injunction on all "Persons unknown" could be effected by sending a copy of the injunction by email to the Insulate Britain email address, since that was not likely to bring the injunction to the attention of people who were not associated with Insulate Britain, but who might fall within the definition of "Persons unknown".

22. I also accepted many of Mr Greenhall's submissions as to the operative terms of the injunction, some of which, as I have said, were not opposed. I asked him to consider over the short adjournment whether there was any way of amending paragraph 3.1 of the injunction so as to make it more focused on the activities which the claimant contends constitute torts by the Insulate Britain protestors. Other than suggesting the insertion of the word "deliberately" in paragraph 3.1 and in the definition of "Persons unknown2, a suggestion which I accepted, he did not suggest any other change to paragraph 3.1.

(3) Injunction against Persons Unknown

23. Linden J's injunction was made against 122 named defendants as well as "Persons unknown". The named defendants included eight of the nine individuals who attended the hearing before me. The ninth individual has now been added as a named defendant. Nevertheless, it is appropriate to consider the guidance recently given by the Court of Appeal as to injunctions against "Persons unknown" in paragraph 82 of its judgment in *Canada Goose UK Limited v Persons Unknown* [2020] 1 WLR 2802:

> "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 are 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. As to these seven points:

(1) The 122 defendants whose names were known were added as individual defendants when the proceedings were commenced.

(2) I have already set out the definition of "Persons unknown" in the present case.

(3) Paragraph 82(3) identifies what I consider to be the central issue for me to decide. I will return to this issue.

(4) As I have said, 122 defendants were named in the order. The "Persons unknown" are capable of being identified, as attested to by the fact that more defendants have been added.

(5) Especially in the light of the changes made at the hearing, I consider that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the claimant seeks to prevent.

(6) Likewise, I consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. There are references to intention both in the word "deliberately" and in the words "for the purposes of protesting", but "deliberately" was included at Mr Greenhall's suggestion to protect people in the position of his clients and "for the purposes of protesting" serves to distinguish protestors from others who might block or slow down the flow of traffic, perhaps merely as a result of poor driving.

(7) I consider that the injunction has clear geographic and temporal limits. The geographic extent is considerable, since it covers 4,300 miles of roads, but this

is in response to the unpredictable and itinerant nature of the Insulate Britain protests. Thus:

(a) I granted the M25 injunction on 21 September 2021 and the next Insulate Britain protests, on 24 September 2021, were in Kent.

(b) More recently, there have been protests in Manchester and Birmingham as well as Parliament Square in London. These protests were not on parts of the SRN, but they demonstrate that Insulate Britain protests can be held throughout the country.

(c) If the claimant is entitled to an injunction, then I do not consider that it is appropriate to require the claimant to continue seeking separate injunctions for separate roads, effectively chasing the protestors from one location to another, not knowing where they will go next. (I note, although this did not form part of my decision, that, at a hearing on 12 November 2021 in relation to the second injunction obtained by Transport for London, one of the protestors complained of the sheer volume of documents being served pursuant to the six injunctions now in place.)

(4) The Lawfulness (or Otherwise) of the Insulate Britain Protests

25. As I have said, the central issue for me to determine is whether there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief. As to that, it was effectively common ground that there is a real and imminent risk of more Insulate Britain protests taking place. As I have said, the protestors regard themselves as obliged to continue with their protests. There is a dispute, however, whether the protests involve the commission of the torts of trespass and nuisance. In effect, the defendants contend that, by conducting the Insulate Britain protests, they are exercising their rights to freedom of expression and freedom of assembly.

26. It is not, of course, for the claimant to prove its case on an application for an interim injunction. According to the principles established in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (which Morgan J held in paragraph 91 of his judgment in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) apply to an application for an interim quia timet injunction), it is sufficient for the claimant to show that there is at least a serious issue to be tried. However, I bear in mind that section 12(4) of the Human Rights Act 1998 requires that the court must have particular regard to the importance of the Convention right to freedom of expression if the court is considering whether to grant any relief which, if granted, might affect the exercise of that right.

27. Not every protest on a highway constitutes a trespass. That was decided by a majority of the House of Lords in *DPP v Jones* [1999] 2 AC 240. More recently, in *DPP v Ziegler* [2021] 3 WLR 179, the Supreme Court has considered the extent to which a protest which involved obstructing the highway may be lawful by reasons of articles 10 and 11 of the European Convention on Human Rights.

28. *Ziegler* was a criminal case. The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980. They accepted that they had obstructed the highway, since they had lain in the middle of the approach road to

the conference centre where the arms fair against which they were protesting was taking place and had blocked traffic approaching the centre for 90 minutes. They contended, however, that they had not acted "without lawful .. excuse". The district judge acquitted them, on the basis that the prosecution had not proved that they acted without lawful excuse. The Divisional Court allowed an appeal by the prosecution, but the Supreme Court reversed the Divisional Court's decision.

29. Although *Ziegler* was a criminal case, the submissions of both Miss Sheikh and Mr Greenhall proceeded on the basis that what was said in that case was applicable to the question whether the obstruction of the highway by protestors constituted the tort of trespass or nuisance. I agree.

30. In paragraph 58 of their judgment, Lords Hamblen and Stephens JSC agreed with the Divisional Court that the issues which arise under articles 10 and 11 require consideration of the following five 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?

31. In the present case, the answers to the first four questions are as follows:

    (1) By participating in the Insulate Britain protests, the defendants are exercising their rights to freedom of expression and freedom of assembly in articles 10 and 11.

    (2) The application for, and the grant of, an injunction to prevent the defendants continuing with the Insulate Britain protests on the SRN is an interference with those rights by a public authority.

    (3) That interference is "prescribed by law", namely section 37 of the Senior Courts Act 1981 and the cases which have decided how the discretion to grant an interim quia timet injunction should be exercised, together with section 130 of the Highways Act 1980.

    (4) The interference is also in pursuit of a legitimate aim, namely the protection of the rights of other road users and the promotion of safety on the SRN.

32. Turning to the question whether the interference is "necessary in a democratic society", I note that the Divisional Court in *Ziegler* said as follows in paragraph 64 of its judgment ([2020] QB 253):

> "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?"

33. The question whether an interference with a Convention right is "necessary in a democratic society" can also be expressed as the question whether the interference is proportionate. In *Ziegler*, Lords Hamblen and Stephens JSC stated in paragraph 59 of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

34. Lords Hamblen and Stephens JSC quoted, inter alia, paragraphs 39 to 41 of Lord Neuberger MR's judgment in *City of London Corpn v Samede* [2012] PTSR 1624:

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is

> being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia*, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

35. I have set this passage out in full because, given the nature of the submissions which the defendants made to me, I want them to understand that, while I can acknowledge, and I readily do acknowledge, that, by the Insulate Britain protests, they are expressing sincere and strongly held views on very important issues, it would be wrong for me to express either agreement or disagreement with those views. Many of the submissions made to me consisted of an invitation to me to agree with the defendants' views and to decide the case on that basis. That is something which I cannot do, just as I could not decide this case on the basis of disagreement with their views.

36. It is permissible for me to observe that, insofar as the defendants assert that something should be done about the prospect of climate change, they are in agreement with the government. Where they disagree with the government is on what should be done about the prospect of climate change. The hearing took place during the 26th Conference of the Parties, also known as CoP26, which has demonstrated that there are many different views on that subject, a fact which is hardly surprising, since it is a very important political issue.

37. Moreover, the specific objective of the Insulate Britain protests, namely a change in government policy in relation to the insulation of homes in the United Kingdom, concerns a very particular aspect of government policy in this field. Again, CoP26 has demonstrated that many measures contribute to the efforts which are being made to limit global warming. Whether to emphasise one policy response or another to a perceived threat is a quintessentially political issue.

38. Lords Hamblen and Stephens JSC reviewed in paragraphs 71 to 86 of their judgment the factors which may be relevant to the assessment of the proportionality of an interference with the article 10 and 11 rights of protestors blocking traffic on a road.

Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary:

(1) The peaceful nature of the protest.

(2) The fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder.

(3) The fact that the defendants did not commit any criminal offences other than obstructing the highway.

(4) The fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair.

(5) The fact that the protest related to a "matter of general concern".

(6) The limited duration of the protest.

(7) The absence of any complaint about the defendants' conduct.

(8) The defendants' longstanding commitment to opposing the arms trade.

39. This list of factors is not definitive, but it can serve as a useful checklist. In the present case:

(1) The Insulate Britain protests have been peaceful. Although some protestors have glued themselves to the road, it has not been suggested that there has been any instance in which a protestor has offered physical or violent resistance to being removed from the road.

(2) The Insulate Britain protests have, so far, not given rise to any form of disorder. However, other road users have increasingly taken steps themselves to remove the protestors from the road. On one occasion, this resulted in a protestor being tied up with his own banner. The risk of disorder is increasing.

(3) It is not suggested that the Insulate Britain protestors committed any offences other than obstructing the highway.

(4) The Insulate Britain protests are not targeted in any way at those against whom the protestors are protesting. Insofar as they are protesting about government policy, the protests (save perhaps for the recent protest in Parliament Square) are not targeted at government.

(5) I accept that the Insulate Britain protests relate to a "matter of general concern", in that they relate to what the government acknowledge to be an important issue. However, insofar as they seek to pursue the specific objective of changing government policy about home insulation, the protests could be said to relate to a rather more specific issue.

(6) The Insulate Britain protests are many in number and are not limited in duration. The disruption which they have caused to users of the SRN is considerable.

(7) It is abundantly clear from press reports that many members of the public object to the Insulate Britain protests. At least one press report suggested than an ambulance was held up at one protest, but the defendants deny this.

(8) As I have already said, I accept that the defendants are expressing genuine and strongly held views.

40. Looking at the four questions identified in paragraph 64 of the Divisional Court's judgment in *Ziegler*:

(1) By protesting on the SRN, the defendants are obstructing a road network which is important both for very many individuals and for the economy of England and Wales. In that context, it is strongly arguable that the aim pursued by the claimant is sufficiently important to justify interference with a fundamental right. I base that conclusion primarily on the considerable disruption caused by the Insulate Britain protests and less on the risk to safety, which, thankfully, has not yet resulted in any injuries being inflicted at any of the protests.

(2) I also accept that it is strongly arguable that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow road users to make use of the SRN, which is their right. Prohibiting the blocking of those road users' exercise of their rights is directly connected to that aim.

(3) There are no less restrictive alternative means available to achieve that aim. As to this:

(a) An action for damages would not prevent the disruption caused by the protests. The claimant is suing to enforce the rights of others and so could not claim damages for their loss. The loss caused by the protests would be difficult, if not impossible, to quantify. Several of the defendants told me that they did not have much money, so they may well be unable to pay substantial damages. The threat of having to pay damages does not appear in the circumstances to be likely to have any deterrent effect.

(b) It might be said that prosecutions for the offence of obstructing the highway would be a sufficient response to the Insulate Britain protests. However, all of the named defendants have been arrested and some of them have told me that they will continue to protest and they are willing to give up their liberty.

(c) By contrast, there is some evidence that injunctions do affect the protestors' behaviour. For instance, it may be that the M25 injunction was the reason why the next Insulate Britain protest was in Kent, rather than on the M25. More recent protests have been on roads which are not part of the SRN. Moreover, the M25 injunction has already led to committal applications, which, if successful, may prevent some protestors from continuing their protests during the period of their committal.

(4) Taking account of all of the factors which I have identified in this judgment, I consider that it is strongly arguable that the injunction granted by Linden J strikes a fair balance between the rights of the individual protestors and the general interest of the community, including the rights of others. As to this:

(a) On the one hand, the injunction only prohibits the defendants from protesting in a particular way. I do not accept the defendants' claim that it was necessary for them to protest in this way. There are many other ways of protesting. Moreover, as I have already noted, unlike the protest in *Zeigler*, the Insulate Britain protests on the SRN are not directed at a specific location which is the subject of the protests.

(b) On the other hand, the Insulate Britain protests have caused repeated, prolonged and serious disruption to the activities of many individuals and businesses and have done so on roads which are particularly important to the population and economy of this country. The protestors choose where to protest, but they deprive other road users of any choice to avoid the protests and to avoid being held up for long periods of time, with all of the personal or economic consequences which may follow.

41. Finally, looking at the same matters in terms of the *American Cyanamid* principles:

(1) There is a serious issue to be tried whether the Insulate Britain protests involve the commission of the torts of trespass and nuisance on the SRN. Indeed, although section 12(3) of the Human Rights Act 1998 is not applicable, I consider that the test which it imposes is met and that the claimant is likely to establish at trial that the Insulate Britain protests involve the commission of the torts of trespass and nuisance on the SRN.

(2) Damages would not be an adequate remedy for either party. I have already dealt with the position of the claimant. It would be difficult to quantify the loss to the defendants if they were wrongly prohibited from carrying on a lawful protest.

(3) For reasons which I have already given, the balance of convenience strongly favours the continuation of the injunction.

(5) Conclusion

42. For all of these reasons, I concluded that it was appropriate not to set aside Linden J's injunction.

Neutral Citation [2020] EWHC 2614 (Ch)

Case No PT-2020-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST

The Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 13 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

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

Claimants/Applicants

- and -

ELLIOTT CUCIUREAN

Defendant/Respondent

- -

- -

Mr Michael Fry (instructed by **DLA Piper UK LLP**) for the Applicants
Mr Adam Wagner (instructed by **Robert Lizar Solicitors**) for the Respondent

Hearing dates: 30 and 31 July, 17 September and 13 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The Order

1. By an order dated 17 March 2020, sealed on 23 March 2020, Andrews J made various orders consequential upon her decision in these proceedings dated 20 March 2020, published under Neutral Citation Number [2020] EWHC 671 (Ch) (respectively, the **Order** and the **Judgment**[1]).

2. The Order, obtained on the application of the above-named Claimants/Applicants (together either the **Claimants** or **HS2**), was directed at four (groups of) defendants (**Defendants**). The second (group of) Defendants, the **Second Defendants**, were defined and identified in the Order as follows:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

3. I shall refer to the land described in this definition of the Second Defendants as the **Crackley Land** or the **Land** and the plan identifying this land as **Plan B**. A copy of Plan B, which formed part of the Order and was appended to it, is appended to this Judgment as **Annex 2**. Thus, the Second Defendants are persons defined by reference to their entering upon or remaining on the Land without the Claimants' consent. It appears to be perfectly possible – in these circumstances – to become one of the Second Defendants simply by entering upon the Land absent consent.

4. The other (groups of) Defendants identified in the Order are not relevant to this Judgment, and I consider them no further.

5. The Order contained a penal notice (the **Penal Notice**), headed as such in bold capital letters, in the following terms:

> "**Penal Notice**
>
> If you the within named Defendants or any of you disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.
>
> **Important Notice to the Defendants**
>
> This Order prohibits you from doing the acts set out in this Order. You should read it very carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge this Order."

6. The Order contains a number of recitals, and then, provides:

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[1] The terms and abbreviations used in this Judgment are listed in **Annex 1** hereto, together with the paragraph number in the judgment in which each term/abbreviation is first used.

(1) By paragraph 1, that the steps taken by the Claimants "to serve the Claim, the Application and the evidence in support on the Defendants shall amount to good and proper service of the proceedings on the Defendants and each of them. The proceedings shall be deemed served on 4 March 2020."

(2) By paragraphs 8, 9 and 10, service of the Order on (amongst others) the Second Defendants is provided for. These paragraphs provide:

> "8. Pursuant to CPR 6.27 and 81.8, service of this Order on the…Second Defendants shall be dealt with as follows:
>
> 8.1 The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around…the Crackley Land.
>
> 8.2 The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.
>
> 8.3. The Claimants shall email a copy of the Order to the email address helpstophs2@gmail.com.
>
> 8.4 The Claimants shall further advertise the existence of this Order in a prominent location on the websites: (i) https://hs2warwicks.commonplace.is/; and https:/www.gov.uk/government/organisations/high-speed-two-limited, together with a link to download an electronic copy of this Order.
>
> 9. The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the…Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.
>
> 10. The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2][2] remain in place and legible, and, if not, shall replace them as soon as practicable."

(3) By paragraph 3, the Second Defendants (amongst others) were obliged forthwith to give the Claimants vacant possession of all the Crackley Land. By paragraph 7.2, the court declared that "[t]he Claimants are entitled to possession of the Crackley Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

(4) By paragraph 4, from 4pm on 24 March 2020 – and subject to a "carve-out" in paragraph 5 of the Order considered below – the Second Defendants and each of them were forbidden from entering or remaining upon the Crackley Land.

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[2] The Order refers to paragraphs 7.1 and 7.2, which is an obvious error. The correct references are, as is evident from the face of the Order, clearly the paragraphs I have identified.

(5) Paragraph 5 – the "carve-out" – provided that:

"Nothing in paragraph 4 of this Order:

5.1 Shall prevent any person from exercising their rights over any open public right of way over the Land. These public rights of way shall, for the purposes of this Order, include the "unofficial footpath" between two points of the public footbath "PROW130" in the location indicated on Plan C annexted to the Particulars of Claim and reproduced as an annexe to this Order;

5.2 Shall affect any private rights of access over the Land held by any neighbouring landowner."

(6) The injunction in paragraph 4 of the Order is explicitly an interim injunction, as is made clear by paragraph 6 of the Order, which provides:

"The order at paragraph 4 above shall:

6.1 remain in effect until trial or further order or, if earlier, a long-stop date of 17 December 2020."

(2) This Application

7. This is the application, dated 9 June 2020, of the Claimants to commit the Respondent, Mr Cuciurean, for various breaches of the Order (the **Application**). The Application is supported by a statement of case (the **Statement of Case**) and by an affidavit sworn by a Mr Gary Bovan (**Bovan 1**). The Statement of Case provides as follows:

"18. It is the [Claimants'] case that [Mr Cuciurean] has on at least 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the Order, by wilfully breaching paragraph 4.2 of the Order by entering on to and remaining on the Crackley Land.

19. The [Claimants] set out in the Schedule to this Statement of Case each of the 17 alleged acts of contempt. Plan E and the Incident Location Photo also identify the location of each act.

20. As set out by the [Claimants] in the **Proceedings**,[3] the protestors (such as [Mr Cuciurean]) are strongly against the HS2 Scheme and, as feared, have not been deterred from seeking to return and trespass on the Crackley Land simply because the Second Defendants were evicted from the Crackley Land and relocated to Camp 2.[4]

21. The conduct of [Mr Cuciurean] is very serious and significant and has resulted in:

[3] These were the proceedings commenced by the Claimants before Andrews J, which resulted in the Order.

[4] **Camp 1** was the protestors' original location, within the Crackley Land. Pursuant to the Order, and as is further described below, the protestors were removed from Camp 1 and relocated to **Camp 2**, which lies on the Southern border of the Crackley Land.

21.1 substantial costs being incurred by the [Claimants] in seeking to ensure compliance with the Order. The costs alone of [High Court Enforcement Group Limited, **HCE**][5] are in the hundreds of thousands of pounds.

21.2 delays to the HS2 Scheme in the region of approximately 6 months;

21.3 serious risks to the health and safety of the [Claimants'] staff and contractors, members of the public and the protestors themselves;

21.4 risks of damage to plant and machinery used by the [Claimants'] contractors to carry out Phase One works; and

21.5 the [Claimants] now incurring further legal fees in seeking to enforce the Order via this application.

22. There is a real risk that if [Mr Cuciurean] is not sanctioned for the breach of the Order that he (and other protestors) will continue to act in contempt of the authority of the court and continue to breach the Order. In the event of continuing delays to works at the Crackley Land the HS2 Scheme will not be prevented, however, the necessary costs to the taxpayer will be substantial and is estimated to be in the hundreds of millions of pounds."

8. Paragraph 18 of the Statement of Case refers to "at least" 17 alleged breaches of the Order said to amount to contempt of court. I am obviously only interested in, and will only take account of, the 17 incidents described in the schedule to the Statement of Case (the **Schedule**). It will be necessary to consider these 17 incidents specifically in due course. For the present, all that needs to be noted is that I shall, in this judgment, refer to them as **Incidents 1 to 17**.

9. Clearly, the background to the Order and to this Application is the **HS2 Scheme**, by which I mean the works for the high speed rail project commonly referred to as HS2. Phase One of the construction of the HS2 Scheme has been sanctioned by – amongst other legislation – the High Speed Rail (London – West Midlands) Act 2017.

10. As is common knowledge, the HS2 Scheme is a highly controversial one, the sanctioning of which has provoked significant public protest, which has resulted in (amongst other things) the Proceedings and the Order. I should make absolutely clear that these are background facts only, of substantial irrelevance to the matters arising out of the Application. More particularly:

(1) I am not concerned with the lawfulness or desirability of the HS2 Scheme. I proceed on the basis that, in a democratic society such as ours, people are in general entitled to protest, and to voice their protest, in relation to matters that move them. Whilst there are limits to the right to protest, those limits are not before me for any kind of determination.

(2) The Claimants – in paragraph 3 of the Statement of Case – quoted from [133] of *Packham v. Secretary of State for Transport*:[6]

[5] As explained in paragraph 9 of the Statement of Case

[6] [2020] EWHC 829 (Admin).

> "…the clearance works were long ago authorised by Parliament and there is a strong public interest in ensuring that, in a democracy, activities sanctioned by Parliament are not stopped by individuals merely because they do not personally agree with them."

This statement was made in connection with an attempt to judicially review and injunct certain clearance works done – or about to be done – in furtherance of the HS2 Scheme. The point is of no relevance to this Application. This Application is concerned only with *(i)* whether the Order has been breached and *(ii)* whether the circumstances of those breaches – if they occurred – are such as to trigger the contempt jurisdiction. These are extremely important questions to do with the consequences of an alleged breach of a court order. Their resolution does not depend on the merits or otherwise of the HS2 Scheme or the extent of a person's right of protest to that Scheme. The rule of law is, in this case, narrowly and importantly engaged in the sense that there is, before me, the question of whether an order of the court – the Order – has been breached.

(3) Mr Wagner, on behalf of Mr Cuciurean, contended that I should tread with particular care, and apply the rules of contempt with particular rigour, because Mr Cuciurean was exercising his fundamental right of free speech. I reject that submission, which was considered and rejected by Andrews J:[7]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

The fact is that Andrews J declared that the Claimants had the right to possess the Crackley Land[8] and she made an order buttressing that right to possess in the form of an interim injunction forbidding the Second Defendants and each of them from entering or remaining upon the Crackley Land. It is the breach of that order that is before me: <u>why</u> the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction (which is not a matter on which I have been addressed). Thus, whilst I shall of course apply the rigour and care that I would apply in any application to commit, I see no cause for adopting a different or more rigorous standard in the present case.

11. This is, therefore, an application made under CPR 81.4 concerning the enforcement, against Mr Cuciurean, of the Order. No-one – in particular not Mr Cuciurean – sought to dispute the validity of the Order. However, for reasons that I describe more specifically below, Mr Cuciurean contended that the Application must be dismissed.

(3) The hearing of the Application

12. The hearing of the Application was listed for two days, on 30 and 31 July 2020. I received helpful written submissions from both the Claimants and Mr Cuciurean before the hearing, and at the hearing heard – over two very full days – the oral evidence adduced by the parties. This evidence comprised:

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[7] Judgment at [35].

[8] Paragraph 7.2 of the Order.

(1) *The evidence of Mr Bovan on behalf of the Claimants.* Mr Bovan is a High Court Enforcement Officer, who was present on the Crackley Land to execute the writ of possession made pursuant to the Order (the **Writ**).[9] Mr Bovan's evidence was contained in two affidavits, Bovan 1 (sworn 9 June 2020) and **Bovan 2** (sworn 23 July 2020). Mr Bovan gave evidence, for about 3 hours, on 30 July 2020, when he was largely cross-examined (his affidavits being admitted as evidence in-chief). In response to a request from me for a diagrammatic representation of his understanding of the perimeter to the Crackley Land, Mr Bovan produced a plan, which he spoke to briefly at the conclusion of the evidence on 31 July 2020. On his recall, Mr Bovan explained the diagram he had produced (by himself) and was briefly cross-examined on it. At my invitation, he formalised his evidence in a third affidavit (**Bovan 3**), sworn 14 August 2020.

I found Mr Bovan to be a stolid witness, clearly telling what he considered to be the truth, and doing his best to assist the court.

(2) *The evidence of Mr William Sah on behalf of the Claimants.* Mr Sah is a project engineer retained by the Claimants in connection with the HS2 Scheme. Mr Sah's evidence was contained in an affidavit sworn on 24 July 2020 (**Sah 1**). Mr Sah gave evidence – briefly, for about 30 minutes – on 30 July 2020. Mr Sah's evidence was unsatisfactory. In their written closing submissions, the Claimants suggested that Mr Sah "appeared to be over-awed by the occasion, and failed to come up to proof".[10] I hope and believe that the atmosphere in court was not so difficult for witnesses as this, and certainly all of the other witnesses appeared to give their evidence unimpaired by their surroundings. It appeared to me that Mr Sah simply did not recognise the affidavit he had sworn, and parts of it appeared to have been written for him. Thus, Mr Sah did not recognise – and certainly was unable to give evidence in relation to[11] – a plan exhibited to his statement[12] and a video similarly exhibited.[13] I do not propose to speculate on why Mr Sah was adduced as a witness, but clearly I can place no weight on his evidence.

(3) *The evidence of Mr Cuciurean.* As to this:

(a) Mr Cuciurean gave two witness statements to the court. His first was dated 15 July 2020 (**Cuciurean 1**) and his second bears the date 15 July 2020 (**Cuciurean 2**), but is almost certainly made later than this date.[14]

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[9] As I have described, the Order gave possession of the Crackley Land to the Claimants: see paragraph 3 of the Order and paragraph 6(3) above.

[10] Claimants' written closing submissions at paragraph 34.

[11] Indeed, Mr Sah came close to disowning the evidence, on the basis it was nothing to do with him.

[12] This was the plan at page 4 of the exhibit to Sah 1. The plan – referred to at paragraph 14 of Sah 1 – was provided to Mr Sah by a Mr Maurice Stokes.

[13] See paragraph 9 of Sah 1. The video was again provided by Mr Stokes.

[14] A number of the witness statements given on behalf of Mr Cuciurean were unsigned at the time of the hearing, but all of the witnesses adopted their evidence, and nothing turns on this. Signed statements were subsequently provided by Mr Cuciurean's representatives. However, it does mean that the dates of the statements before me were almost certainly wrong, assuming those dates to refer to the date the statement was made. Nothing turns on this, but I note the formal position for completeness.

(b) Mr Cuciurean gave evidence on his own behalf on 31 July 2020. He was to have given evidence on the previous day, 30 July 2020. It was clear during the course of the afternoon of 30 July 2020 that it would not be possible to complete Mr Cuciurean's evidence on 30 July 2020, if it was commenced after that of Mr Sah which, as I say, was given on on 30 July 2020. Mr Wagner, counsel for Mr Cuciurean suggested that, rather than be in "purdah" overnight, it would be better for Mr Cuciurean to give evidence fresh at the beginning of the next day. That sensible suggestion was adopted by the court.

(c) Mr Cuciurean gave evidence for about three hours, most of this being cross-examination. Mr Cuciurean was a charming, funny but ultimately evasive witness. He was – and is – obviously very much committed to his opposition to the HS2 Scheme, and was willing to place himself (and others) in positions of some danger if that furthered his ends in resisting the HS2 Scheme. One example of this arises in relation to Incident 14. Incident 14 involved Mr Cuciurean climbing the extending arm or boom of a piece of machinery used in connection with the HS2 Scheme, locking himself on to the boom (using a thumb lock) approximately 20 metres above the ground, without (so far as I could see) any form of protective harness. Mr Cuciurean was removed from this position by four specialist climbing officers, using two cherry pickers. Mr Cuciurean was either unable or unwilling to disengage or release the thumb lock, which had to be cut off, resulting in injury to Mr Cuciurean.

(d) For the present, it does not matter whether this conduct amounted to a breach of the Order or constituted some other offence. The latter is a matter falling altogether outside the province of this judgment; the former is a matter that I shall come to. I refer to the incident simply as a rather graphic illustration of Mr Cuciurean's commitment. I consider that Mr Cuciurean would go to very considerable lengths in order to give his objections to the HS2 Scheme as much force as they possibly could have. If such steps involved inconveniencing those carrying forward the Scheme or slowed progress down, then I consider that Mr Cucuirean would regard this as a positive and not a negative.

(e) I consider that Mr Cuciurean regarded the Application in exactly the same light. Mr Cuciurean saw the expense and trouble incurred by the Claimants in seeking to make good their Application as a positive and not a negative, and it is my judgement (having watched Mr Cucuirean carefully in the witness box) that in furtherance of this objective he was prepared to be evasive, but not to outright lie to the court.

(f) In short, Mr Cucuirean was a committed opponent of the HS2 Scheme, and I must treat his evidence with considerable caution. However, I do not reject that evidence as that of a liar.

(g) Three of the Incidents (Incidents 14, 16 and 17) have exposed Mr Cuciurean to the potential for separate criminal proceedings.[15] Mr Cucuirean invoked his right against self-incrimination in relation to these incidents and declined to answer certain questions in relation to them.[16] I am satisfied that Mr Cuciurean properly invoked his privilege against self-incrimination, and draw no adverse inference from his failure to answer.

(4) *Other evidence in support of Mr Cuciurean.* The other witnesses who gave evidence on behalf of Mr Cuciurean were all fellow protestors[17] against the HS2 Scheme. The original intention was for all of these witnesses to give evidence in person – as Mr Bovan, Mr Sah and Mr Cuciurean had done[18] - but (late in the day) three witnesses sought permission to give evidence remotely by Skype. More specifically:

(a) Mr Alexander Corcos was interposed as a witness before Mr Cuciurean gave evidence, on 30 July 2020. Mr Corcos is an academic living close to the HS2 Scheme development at the Crackley Land. His exercise regime brought him close to the HS2 Scheme work, but he was not a resident of either of the two camps at which protesters to the HS2 Scheme resided, nor did he regard himself as a part of these protests. However, he was independently concerned about the HS2 Scheme, and filmed and recorded activities on and around the Crackley Land. He made one statement in these proceedings (**Corcos 1**) and gave evidence briefly (for about 30 minutes) on 30 July 2020. He was a clear and careful witness, and I found the video footage exhibited to Corcos 1 particularly helpful in understanding the physical dynamics of the Crackley Land.

The remaining witnesses were called after Mr Cuciurean gave evidence, on 31 July 2020.

(b) Ms Brenda Hillier is, in her own words, opposed to the HS2 Scheme, and gave evidence chiefly in relation to the footpaths ordinarily running across the Crackley Land. Her evidence was contained in one witness statement

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[15] Early in the course of the Application, it was suggested by Mr Cucuirean's solicitors that the substantive determination of the Application should await the outcome of the criminal proceedings. That point was not pursued and the Application was heard, without objection, in the manner I have described.

[16] The existence of related criminal proceedings was always known. The specific question of self-incrimination arose during the course of Mr Cuciurean's evidence. I permitted Mr Wagner, Mr Cuciurean's counsel, and his solicitor, to speak to Mr Cuciurean during the course of his evidence, to determine the extent to which Mr Cuciurean wished to invoke the privilege. The invocation of the privilege was assessed on a question-by-question basis, with Mr Fry, counsel for the Claimants, asking his questions, and Mr Cuciurean invoking his right not to answer individually.

[17] To a greater or lesser extent. All were opposed to the HS2 Scheme: some would not accept the label "protester", and in some cases (but not in others) that would be a fair point to take in the sense that some were not "professional" protestors. I use the term simply to refer generically to people present around the Crackley Land, interested in and opposed to the HS2 Scheme.

[18] This was a hearing during the COVID-19 pandemic, and a socially distanced court room was used, with other interested persons (other members of the legal teams, the press, members of the public) participating by Skype for Business. I should record my great debt to both the court staff and to the parties' legal teams for their considerable assistance in making the trial work as well as it did.

(**Hillier 1**), and Ms Hillier was only briefly cross-examined on it (for less than 5 minutes). I therefore had little time to assess Ms Hillier as a witness, as her evidence was substantially unchallenged by the Claimants. I accept her as an honest witness, doing her best to assist the court.

(c) Mr Hicks has resided at both camps, and is part of the local protests to the HS2 Scheme. The evidence in his first statement (**Hicks 1**) chiefly concerned an incident taking place on 21 April 2020 (Incident 16). Mr Hicks – both in the video footage and before me in court – presented as a massively calm and naturally authoritative figure. He gave evidence for about 10 minutes, and was forthright and clear in his evidence. After the evidential hearings on 30 and 31 July, Mr Hicks submitted a further statement (**Hicks 2**), which was essentially in response to Bovan 3.

(d) Ms Elizabeth Cairns runs her own business, and in her spare time supports the protests against the HS2 Scheme. She did not reside at either camp, but attended both camps from time-to-time. She gave one witness statement (**Cairns 1**) and gave evidence briefly (for about 20 minutes) on 31 July 2020. Although clearly and firmly opposed to the HS2 Scheme, she sought to give her evidence as clearly and fairly as she could, and was obviously an honest and straightforward witness.

(e) Ms Hayley Pitwell sought to give evidence by video–link (Skype for Business). The connection was appalling, and there was no way in which Ms Pitwell's evidence could sensibly be heard. Fortunately, Ms Pitwell's statement (**Pitwell 1**) sought to adduce video footage, and she made no other substantive points. On this basis, I admitted her statement into evidence, but Mr Fry did not have the opportunity of cross-examining her. I do not consider – given the nature of Ms Pitwell's evidence – that the Claimants were in any way prejudiced by this.

(f) Ms Rebecca Beaumont is a photographer, living close to the Crackley Land in Leamington Spa (less than 10 miles from the site). She attended the site, according to her statement, on three occasions. Ms Beaumont was a not particularly satisfactory witness, in that she attempted to portray herself as rather less engaged in the protests against the HS2 Scheme than she in fact was. Although I accept her interest in photography, I do not accept that that was why she was present around the Crackley Land. I do not know why she sought to play down her role as a protestor (for that is what I consider her to have been), but if it was in order to portray herself as a more objective witness, then she did not come across in this way. For the reasons I give later on in this judgment, I consider that I must treat the evidence of all the witnesses with some care: but Ms Beaumont's evidence I consider to have been tendentious and I have approached it with particular caution. Ms Beaumont gave one witness statement (**Beaumont 1)** and was cross-examined upon it for about 20 minutes. I take account of the fact that Ms Beaumont gave evidence by video-link (Skype for Business) and not in court. However, I consider that the quality of her evidence was sufficient for me to reliably make the assessment of her evidence that I have done.

(g) Mr Simon Pook is a solicitor in Robert Lizar Solicitors, the firm retained by Mr Cuciurean. He made a single statement (**Pook 1**) and gave evidence via video-link (Skype for Business). He presented as an entirely clear and straightforward witness, and the concerns that I express in this paragraph have nothing to do with the tenor of his evidence. Mr Pook's evidence post-dated the Incidents, and described a site visit made by him on 1 July 2020. His statement principally concerned the signage around the Crackley Land on that date. My concerns about Mr Pook's evidence are twofold:

(i) First, I am not sure that his was factual evidence at all. Essentially, Mr Pook was seeking to evidence the signage at the Crackley Land at the time the Incidents took place by an *ex post facto* examination. This, as it seems to me, was either expert evidence or irrelevant factual evidence, relating to a point in time that I am not concerned with.

(ii) Secondly, Mr Pook is obviously *parti pris*, being part of the firm whose duty it is to represent Mr Cuciurean.

In these circumstances, I do not consider that I can place much weight on Mr Pook's evidence. But I would wish to stress that this is in no way a criticism of the manner in which Mr Pook gave his evidence (which was for about 20 minutes).

13. With two exceptions – Mr Cuciurean himself and Ms Beaumont – where, for the reasons I have given, I treat their evidence with caution, I have found that all of the witnesses (with the further exception of Ms Pitwell, whose evidence was effectively admitted without examination, for reasons beyond her control) sought to give their evidence honestly and with the intention of doing their best to assist the court. However, I am conscious that the work on the HS2 Scheme and the protests to that Scheme have polarised views and that this inevitably affects how one group regards the other. There is an entirely unsurprising degree of mistrust and wariness, occasionally manifesting itself in violence. Each side is inclined unconsciously to read the worst and not the best into the conduct of the other, and I consider that this will have affected all of the evidence before me, even though I acknowledge (and have so found) that most of the witnesses were trying to help the court as best they could. Nevertheless, this an aspect of the oral evidence that I bear well in mind.

14. In many cases, a judge would draw on contemporaneous documentary evidence to cross-check – and often prefer over – the after-the-event oral evidence that is heard in court. In this case, there is an unsurprising absence of such documentary evidence:

(1) Although I have before me – generally exhibited to the witness statements that I have described – a large number of photographs and diagrams, these are inevitably not capable of presenting a complete contemporary picture of what was going on at the Crackley Land. Diagrams are essentially subjective representations of the views of the person making the diagram. Although it might be said that the camera does not lie (an aphorism I treat with a degree of scepticism in any event), the fact is that the photographs in this case are inevitably a snapshot of what occurred at a specific instant, and from a single

distance and angle. They will lack – inevitably, and without any criticism of the photographer – context.

(2) I was shown, and have admitted into evidence, a great deal of video-footage. Like photographs, such footage lacks context, and must be treated with caution. Inevitably, the camera operator films what he or she wants to record, which will (depending on the skill of the operator) be that person's take of the events being films. Although I have admitted into evidence – with the agreement of all parties – all of the video-evidence, I place more weight on the excerpts that were shown to the witnesses, about which they were asked. Even so, I treat this evidence with care.

15. Two days (30 and 31 July 2020) were set aside for the hearing of the Application. In the event, those days were only sufficient to hear the evidence in the case, and I adjourned the Application to the next two days convenient to the parties and to the court, 17 and 18 September 2020. I should place on the record that this is no criticism of the parties' hearing timetable. The fact is that technical issues arising out of the hearing forum (a socially distanced, "hybrid", hearing involving the attempted streaming of significant portions of video footage) meant that a great deal of time was lost, despite the very considerable efforts of both the legal teams before me and the court staff.

16. At the end of the hearing on 31 July 2020, the limited need for further evidence (Bovan 3 and Hicks 2, which I have described) was discussed, and a timetable for written closing submissions arranged, so that I could read and consider these well-before the resumed hearing on 17 September 2020. On 17 September 2020, I heard (sitting remotely in Birmingham[19]) oral closing submissions, and reserved my judgment. The hearing day scheduled for 18 September 2020 was vacated.

17. A further hearing – 16 October 2020 – was arranged for the hand-down of this Judgment, and any consequential matters.

B. THE RELEVANT LEGAL PRINCIPLES IN GENERAL TERMS

(1) Introduction

18. The breach of an order of the court is an act of contempt of court for which a defendant can be committed.[20] Unsurprisingly, given that the liberty of the subject is potentially at stake, the rules regarding committal are stringent and designed to protect the defendant.

19. This Section seeks to set out the applicable rules in general terms, before considering – in later Sections – whether the Application for committal can succeed in this case. I should stress that these legal principles have been articulated and developed in the context of "traditional" orders, where there is a named – an identified – defendant. This

[19] This was due to the "enhanced" COVID-19 restrictions in force in Birmingham at that time. These did not render an in-person hearing impossible, but did cause me to raise with counsel the (un)desirability of multiple persons physically assembling in Birmingham. The consensus was that oral closings could be as effectively conducted remotely.

[20] CPR 81.4.

case, of course, involves an order against "persons unknown" and Mr Cuciurean contended that the rules applied differently in the context of such orders. This Section does no more than articulate the general rules: the points taken by Mr Cuciurean are considered in later Sections.

(2) The standard of proof

20. The standard of proof on a committal application is the criminal standard of proof, that is to say, beyond reasonable doubt.[21] Rather than, mantra like, to repeat this requirement throughout this judgment, I should stress that this is the standard that I have applied throughout. When I say, in this judgment, that I am satisfied of something or find that something is the case, that means that I am satisfied to or have made a finding at and to the requisite standard.

(3) Requirements regarding the application for committal itself

21. As I have noted, the Application is for committal for breach of a judgment, order or undertaking to do or abstain from doing an act.[22] Such an application is made under CPR 23 and CPR 81.10.

22. The following requirements must be met in relation to such an application:[23]

(1) The application must "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts".[24] The importance of stating precisely and specifically the grounds of contempt was emphasised in *Ocado Group plc v. McKeeve*.[25]

(2) The application notice must contain a prominent notice stating the possible consequences of the court making a committal order.[26]

(3) The written evidence in support of the application must be by way of affidavit.[27]

(4) Unless dispensed with, the committal application must be personally served.[28]

23. I consider whether these requirements are met in Section C below.

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[21] CPR PD 81.9.

[22] The relevant rules are in Section II of CPR 81.

[23] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [26].

[24] CPR 81.10(3)(a).

[25] [2020] EWHC 1463 (Ch) at [18] to [36].

[26] CPR PD 81.13.2(4).

[27] CPR 81.10(3)(b).

[28] CPR. 81.10(4).

(4) Procedural pre-conditions regarding the order said to have been breached

24. Not every breach of a judgment, order or undertaking is capable of founding an application under CPR 81.10. There are three requirements that must be satisfied for a breached order to found the basis for an application under CPR 81.10:[29]

(1) Subject to limited exceptions, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form.[30]

(2) The order said to have been breached must have been served personally on the defendant, unless the requirement is dispensed with.[31]

(3) The relevant order must have been served before the end of the time fixed for the doing of the relevant acts.[32] According to its wording, this provision applies only to a mandatory order requiring the doing of an act. The point is that the target of the order must be able – within the time-frame envisaged by the order – to do the act ordered, in order for commital for breach of the order to be sought. There is no similar rule as regard prohibitory orders. That is because – as the wording of the relevant provision makes clear[33] – service is sufficient to put the defendant on notice not to do a certain act, and there is no time needed for compliance. Given that this was a prohibitory and not a mandatory order, it follows that I will only need to note this requirement.

25. I consider these requirements in Section D below.

(5) Substantive requirements

26. Assuming these (important) procedural requirements in relation to the order are met, there are two (what I shall call) substantive requirements:[34]

(1) The order must be clear and unambiguous.[35]

(2) The order must have been breached, and that breach must have been deliberate. It will be necessary to consider, in the context of this case, precisely what "deliberate" means.

27. I consider these requirements in Section E below.

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[29] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [28].

[30] CPR 81.9(1).

[31] CPR 81.5 and CPR 81.6.

[32] CPR 81.5(1).

[33] I.e. CPR 81.5(1).

[34] See, generally, *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30].

[35] *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30(1)] lists a number of other requirements, which have already been identified. I do not repeat them.

C. PROCEDURAL REQUIREMENTS IN RELATION TO THE APPLICATION

28. I set out the procedural requirements that had to be met in relation to the Application in paragraph 22 above.

29. Turning, then, to the requirements set out in paragraph 22 above:

(1) As to the first requirement described in paragraph 22(1) above:

(a) The Application was made by formal application notice, supported by the Statement of Case. The Statement of Case sets out, with great specificity, the alleged grounds of contempt, in particular in the Schedule which lists the 17 Incidents, each of which is said to constitute a breach of the Order and a contempt of court.

(b) Paragraph 50.2.2 of Mr Cuciurean's written closing submissions asserts that the Claimants are now pleading (or, perhaps more clearly, contending for) a different case to that set out in their Application. Specifically, the Schedule to the Statement of Case sought to identify the location of the various Incidents by reference to certain plans and photographs of the Crackley Land. However, in cross-examination, Mr Bovan accepted that the locations there set out were approximate or rough. Mr Cuciurean contends that this renders the Schedule "inaccurate". It is contended that the Claimants should have applied to amend the Statement of Case and/or the Schedule and – absent such amendment – the Application must fail.

(c) I reject this contention. It is, of course, the case that a respondent to an application for committal is entitled to know, with proper particularity stated in the application for committal, just what the case against him or her is.[36] That is precisely what the Claimants have done. Rather than simply assert that the nature of Mr Cuciurean's alleged contempt is the breach of paragraph 4.2 of the Order, the Claimants have (helpfully and properly) sought to enable Mr Cuciurean to respond in his own defence, by identifying each Incident relied upon with precision.

(d) In due course, I will consider whether the grounds of contempt have, or have not, been made out. But the suggestion that the Application is defective on this ground is hopeless.

I find that the requirement described in paragraph 22(1) above is satisfied.

(2) The Statement of Case, which is part of the application notice, contains a clear and appropriately prominent notice setting out the consequences of the Application. I find that the requirement described in paragraph 22(2) above is satisfied.

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[36] *Ocado Group plc v. McKeeve*, [2020] EWHC 1463 (Ch) at [18] to [36].

(3) The Application is supported by Bovan 1, which an affidavit sworn by Mr Bovan, as I have described, and which was attached to the application notice. I find that the requirement described in paragraph 22(3) above is satisfied.

(4) The Application (meaning the application notice, Statement of Case, Bovan 1 and exhibits) have been served on Mr Cucuirean in the manner described in the affidavit of Mr Robert Shaw, a solicitor in the firm instructed by the Claimants, DLA Piper UK LLP (**Shaw 1**). The content of Shaw 1 was not challenged by Mr Cuciurean. It is evident from Shaw 1 that the Claimants were put to considerable trouble in seeking to serve Mr Cuciurean personally. By this, I do not mean to suggest that Mr Cuciurean was consciously seeking to evade service. However, the fact that Mr Cuciurean was, at this time, continuing his activities as a protester to the HS2 Scheme, and the unfortunate hostility that exists as between those who protest the HS2 Scheme and those who are engaged in it (even if only as process servers) meant that although the Application was ready for service on 19 June 2020,[37] it was only served personally on Mr Cuciurean on 24 June 2020, when Mr Cuciurean attended the hotel at which the process server (Mr Long, an enforcement officer with HCE) was staying.[38] I therefore find that Mr Cuciurean was personally served on 24 June 2020, and that the requirement described in paragraph 22(4) above is satisfied. I should be clear that I consider that Mr Cuciurean had notice of the Application well before this date: I cannot be sure whether he actually received the Application prior to 24 June 2020, but clearly something caused Mr Cuciurean to attend at Mr Long's hotel. Had it been necessary – and it is not – I would have been prepared to dispense with personal service of the Application.

D. PROCEDURAL PRE-CONDITIONS REGARDING THE ORDER SAID TO HAVE BEEN BREACHED

(1) The pre-conditions

30. I set out the procedural pre-conditions that must be met before an application for committal can substantively be entertained in paragraph 24 above.

(2) The first pre-condition

31. So far as the first requirement is concerned (described in paragraph 24(1) above), it was accepted by all, and is clear from the face of the Order, that the Order – at least in the abstract – contains the appropriate penal notice. Had the Order been served personally, this requirement would unequivocally have been satisfied.

32. In his submissions to me, Mr Wagner for Mr Cuciurean contended that the importance of a penal notice was clear given that it is expressly dealt with in a specific rule of the CPR, CPR 81.9(1). I accept this. Mr Wagner's point was that – given the way in which the Order was served (a point I have yet to consider) – CPR 81.9(1) was not satisfied. I propose to consider this point when I consider the question of service on "persons unknown", and it seems to me these points (service and the need for a penal notice) are

[37] See paragraphs 8 and 9 of Shaw 1.

[38] See paragraph 18 and in particular paragraphs 18.8 to 18.10 of Shaw 1.

inextricably linked. Subject, therefore, to this major reservation, which I deal with later, I find that the first pre-condition has been satisfied.

(3) The second pre-condition

(a) The issue stated

33. So far as the second requirement is concerned (described in paragraph 24(2) above), it was common ground, and indeed obvious from the narrative in this judgment, that the Order was not personally served on Mr Cuciurean at the time it was made.

34. If this is a deficiency in the Application, it is not one that I consider can be cured after the event. That is because the contempt jurisdiction must operate prospectively. In other words, the acts said to have been in breach of the Order must, at the very least,[39] have been done after service of the Order. The Incidents all took place between 4 April 2020 and 26 April 2020 and it is common ground that there was no personal service of the Order on Mr Cuciurean during this period – although, as Mr Cuciurean stressed, there could have been.

35. In short, unless the requirement for personal service has been dispensed with, and service properly undertaken in accordance with some form of alternative service, this deficiency is fatal to the Application, which would have to be dismissed on this basis alone. Unless I am satisfied that there has been proper service in advance of the Incidents, I am not going to permit any deficiency to be cured retrospectively. The law clearly sets its face against retrospective rules: and that is all the more important in the contempt jurisdiction, where the liberty of the subject is at stake.

36. Claims against persons unknown have in recent years come before the courts with increasing frequency. The civil legal process, and private law rights, are used in order to control ongoing public demonstrations by a continually fluctuating body of protestors. In *Canada Goose UK Retail Ltd v. Persons Unknown*, the Court of Appeal sounded a cautionary note in relation to such processes:[40]

> "As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what it sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation…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."

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[39] Mr Cuciurean contended that even this was not enough. That is a point I consider later on in this judgment.

[40] [2020] EWCA Civ 303 at [93].

37. *Canada Goose* concerned an injunction in relation to persons demonstrating near a store at 244 Regent Street in London. The present case concerns trespass to land with a defined perimeter in the countryside[41] to which the Claimants have the right of possession, which the court has declared in their favour.[42] They are doing work on that land pursuant to statutory authority, to which (amongst others) Mr Cuciurean objects. As Andrews J made clear in the Judgment, interests of public protest and demonstration are attenuated in this case:[43]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

As I noted earlier, no-one is seeking to enjoin the right of protest or free expression, save where that protest or free expression involves trespass onto the Crackley Land.

38. The Claimants are, therefore, simply asserting, against an unknown body of persons, their right to free enjoyment of their property. True it is that civil proceedings against a fluctuating body of persons are a "blunt instrument", but it is a blunt instrument that must be made to work so that the rights of all interested persons, including the civil rights of property-holders, are properly respected and upheld.[44]

39. The present issue – one of service – concerns the rights not of the Claimants, but of persons like Mr Cuciurean, who have not, in any conventional sense, been made party to these proceedings. Making an order against such persons is, in itself, a serious matter; bringing committal proceedings for breach of such an order even more so. Mr Wagner, on behalf of Mr Cucuirean, stressed the importance of procedural safegards. He was right to do so.

(b) Procedural guidelines

40. The law has recently and helpfully been clarified in a trilogy of cases, *Cameron*, *Cuadrilla* and *Ineos*.[45] These culminated in *Canada Goose*, to which I have already

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[41] I shall come to the definition of the Crackley Land, its perimiter, and how that perimeter was demarcated, in due course. Nothing in this paragraph should be taken as a suggestion that I am assuming that the perimeter was clear.

[42] I.e. by way of the Order.

[43] Judgment at [35].

[44] In this regard, it is worth noting that the Claimants did try to engage non-civil remedies. The description of Incident 1 in the schedule to the Statement of Case states:

"[Mr Cuciurean] appeared intoxicated and refused to leave the Crackley Land. [Mr Cuciurean] was therefore arrested by Enforcement Agents, employed by [HCE], for preventing a High Court Enforcement Officer from carrying out his lawful duty. [Mr Cuciurean] became violent by resisting his arrest and was subsequently restrained using reasonable force and secured on the ground.

Warwickshire Police were contacted. However, due to the lack of available space in custody and available policy units, they refused to attend to take [Mr Cuciurean] into custody. [Mr Cuciurean] was therefore de-arrested at approximately 21:00 by the Enforcement Officer and excorted off the Crackley Land."

[45] The trilogy, fully considered in *Canada Goose*, are: *Cameron v. Hussain*, [2019] UKSC 6; *Cuadrilla Bowland Ltd v. Persons Unknown*, [2020] EWCA Civ 9; *Ineos Upsteam Ltd v. Persons Unknown*, [2019] EWCA Civ 515.

referred. In *Canada Goose*, the Court of Appeal identified three classes of "persons unknown" against whom proceedings might be commenced and against whom injunctions might be sought. Those classes are as follow:

(1) *Category 1.* Anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying property.[46]

(2) *Category 2.* Defendants who are not only anonymous, but who cannot even be identified. A good example of a Category 2 Defendant is a "hit and run" driver.[47]

(3) *Category 3.* People who will or who are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought.[48]

41. The present case concerns **Category 3 Defendants**. The Court of Appeal noted at [63] in relation to this category:

> "It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire Distict Council v. Gammell*…[49] in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land."

42. At [64], the Court of Appeal also noted:

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

43. It is fair to say that Morgan J, who decided *Ineos* at first instance, expressed a degree of concern about proceedings and orders having this effect.[50] Nevertheless, the Court of Appeal in *South Cambridgeshire Distict Council v. Gammell* was clear:[51]

> "…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 WM 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 KG she became both a person to whom the injunction was addressed and the defendant when she

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[46] *Canada Goose* at [60].

[47] *Canada Goose* at [60].

[48] *Canada Goose* at [63].

[49] [2005] EWCA Civ 1429.

[50] [2017] EWHC 2945 9 (Ch) at [119].

[51] [2005] EWCA Civ 1429 at [32]. Emphasis added.

caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

44. In short, the identity of a defendant in this, third category, is defined by reference to a person's future act, provided that act is defined with sufficient clarity in the proceedings. Thus, in this case, as I have described, the Second Defendants, were:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

A person would become a Second Defendant by entering on the Crackley Land without the Claimants' consent.

45. Clearly, this is why Category 3 Defendants have caused a degree of unease. It would be concerning if a person could become party to proceedings, subject to an order and in breach of that order (all at the same time) simply by doing something enjoined by that very order. No doubt for this reason, the Court of Appeal emphasised that, whilst the doing of such an enjoined act might be a necessary condition to becoming a Category 3 Defendant, this was by no means a sufficient condition. Service of the proceedings is a fundamental, and generally anterior, critical requirement;[52] as is service of the order itself in order to commit.[53] The question of service of the order is the matter here specifically in issue. As regards the service of the proceedings, the Court of Appeal said this in *Canada Goose*:[54]

> "…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."

46. In light of this, the Court of Appeal articulated "the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one":[55]

> "(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".

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[52] *Canada Goose* at [61].

[53] Hence the requirement of service of the order, now being considered.

[54] *Canada Goose* at [61].

[55] *Canada Goose* at [82]. The guidance is more general than this, but here we are concerned with a Category 3 Defendant.

(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 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, 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."

(c) The Canada Goose guidelines and service in this case

47. Andrews J has, of course, made the Order, which includes the making of an interim injunction against persons unknown. That Order was made after careful submissions by counsel and a reserved judgment – the Judgment – by Andrews J. The Order includes, as I have described, specific provision for:

(1) Service of the originating proceedings and the application for – amongst other things – the interim injunction: see paragraph 6(1) above.

(2) Service of the Order itself, containing the interim injunction: see paragraph 6(2) above.

48. In each case, the specific service provisions – which were expressly contemplating service on the Second Defendants, a class of persons unknown – did <u>not</u> require personal service, but rather service in accordance with the terms of the Order. However, the Order does not, <u>in terms</u>, state that personal service is to be dispensed with.

49. The Judgment, however, makes clear that the issues regarding service on "persons unknown" were carefully considered by the Judge, with the assistance of counsel.[56] The

[56] The Judgment at [2] states that "Mr Wagner [of counsel, and counsel to Mr Cuciurean in this case]…assisted the Court by drawing attention to points that he considered might have been made by the "persons unknown" trespassing on the...Crackley Land..., who are named as the…Second Defendants and who were not represented at the hearing".

question of the service of the proceedings on the Second Defendants was considered by the Judge at [15] and [16] of the Judgment:

> "15. There is a bespoke procedure for serving trespassers who are "persons unknown" with a claim for possession of the land under CPR 55.6. That procedure was followed by the Claimants' solicitors and the process servers, Mr Finch and Mr Seymour, but additional steps were also taken to bring these proceedings to the attention of anyone likely to have an interest in defending them.I am satisfied that the further steps that were taken, described in the evidence of Ms Jenkins, were both reasonable and sufficient, as evidenced by the fact that Mr Bishp and Mr Rukin [these were the Third and Fourth Defendants, obviously not persons unknown and specifically identified in the proceedings by name] were able to respond to the claim and instruct counsel to represent them.
>
> 16. The Claimants have made an application, to the extent that elements of the claim go beyond a claim for possession, for an order that the steps taken to bring the claim form to the attention of the defendants (including the "persons unknown" defendants) were good alternative service methods pursuant to CPR 6.15 and 6.27. I am satisfied that they were. Quite apart from the fact that these service methods sufficed to bring the proceedings to the attention of the two named defendants, Ms Jenkins' second witness statement confirms that a number of interested parties have sought and obtained copies of the proceedings since the notice was published on the websites to which she refers."

50. Equally, the question of interim injunctive relief against protestors whose identities are unknown was specifically considered, and the Judge expressly referred to the *Canada Goose* guidelines, the Court of Appeal's decision in *Canada Goose* having been handed down on 5 March 2020, a couple of weeks before the Judgment and the Order. The Judge bore these (and other) authorities in mind when making the Order. The Judgment says this (under the heading "The claim for an interim injunction"):

> "30. This proved to be the most controversial aspect of the claim, and at one point I was minded to refuse such relief on the basis that the declaration would suffice to protect the Claimants' interests. However, Mr Roscoe [counsel for the Claimants] made the valid point that an injunction may have a deterrent effect, at least so far as otherwise law-abiding protesters are concerned, and that the difficulties of enforcement which he acknowledged when pressing for declaratory relief have not prevented such relief from being granted by the courts in the past.
>
> 31. To the extent that injunctive relief was pursued against Mr Bishop and Mr Rukin personally, there was no evidence that either of these gentlemen was likely to trespass on the land in future if they were required by the Court to give possession back to the Claimants. Mr Wagner [counsel for Mr Bishop] assured me that this was so in the case of his client, and that if I granted an order for possession the only purpose for which Mr Bishop would return would be to assist in the dismantling of the camps and the removal of any structures erected by the protesters. Mr Powlesland [counsel for Mr Rukin], in echoing those assurances, pointed out that Mr Rukin had gone to the trouble of seeking out land that he believed did not belong to the Secretary of State on which to set up the protest site at Crackley, which was a clear indication that he would not deliberately set out to trespass on land to which the Claimants had rights of possession.
>
> 32. I made it very clear to Mr Bishop and Mr Rukin, who were present in court, that if they were found trespassing on the land in future, contrary to those assurances, it would not bode well for them in any contempt proceedings. I did not require any express undertakings to be given in lieu of an injunction because in order to obtain relief of

either sort the Claimants must first establish a real and imminent risk of further torts being committed by the relevant defendant. The Claimants have failed to do so. That being the case, there is no need for either Mr Bishop or Mr Rukin to continue to be named defendants to these proceedings.

33. So far as the claim for injunctive relief against "persons unknown" (including new protesters) is concerned, there is no dispute that, apart from Mr Bishop and Mr Rukin, the previous and current occupiers of the…Crackley Land have not been identified by the Claimants. Both Mr Wagner and Mr Powlesland raised the question whether sufficient steps had been taken by the Claimants to attempt to identify those other persons. There was no evidence, for example, that any of the "persons unknown" referred to in the evidence of Mr Corvin who were encountered by contractors, were asked the simple question "who are you?". That is fair comment, although it may be unrealistic to expect that a protester would answer that question. The group of protesters at the Crackley site comprised a handful of people, and the posts on social media could have been used in an effort to trace them, but it seems that apart from Mr Bishop and Mr Rukin no such effort was made. Indeed, no-one appears to have taken the fairly obvious step of asking Mr Bishop and Mr Rukin to identify them.

34. In light of this, I accept that perhaps the Claimants could have done more to identify the protesters who were in occupation of the protest camps on the two sites; but bearing in mind the evidence of Mr Bishop, in particular, it seems unlikely that any of the existing protesters associated with the camps will engage in any future trespasses. The problem lies with those who did not abide by the Code of Conduct.

35. If an injunction is granted in the short-term, the Claimants know that they will have to do better in terms of identifying those responsible if they are to convert it into a final order In a case such as this, the test for interim relief is a higher one than the standard *American Cyanamid* test for an injunction, because it must be shown that the Claimants are likely to obtain final relief. I consider that they are. In this regard, the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly. If persons are found trespassing in the future, and those people are identified or are sufficiently capable of being identified by the time of the hearing, then the conditions for final relief will be established.

36. The next thing that the Claimants must establish is that there is a sufficiently real and imminent risk of a tort being committed (in this case, a future trespass or trespasses) to justify *quia timet* relief. Mr Wagner submitted that much of the evidence of past behaviour relied on by the Claimants was contested. So far as the uncontested evidence was concerned – the nails and glass on the roadway, for example – these were isolated incidents for which the protesters at the camp were not responsible. Unlike *Cuadrilla*, this was not a case where committed and experienced protesters were using direct action to disrupt the works every day, by standing in front of truck and so forth. This was a case where peaceful protest camps had attracted one or two unfortunate incidents from outsiders, and going forward, such matters may well resolve. If they did not, it would be open to the Claimants to come back with better evidence.

37. Mr Powesland likewise submitted that so far as the Crackley Land was concerned, the incidents logged on Plan D and referred to in Mr Corvin's evidence were all in the immediate vicinity of the camp. Soe where well in the past, and had not been repeated, whilst others were apparently committed on the public highway. Once the camp has gone, he submitted, there was unlikely to be any risk of repetition.

38. However, as Mr Roscoe pointed out, such control of the land as there was by the responsible element of the protesters will cease with the dismantling of the camps. The problem potentially lies with those of a more militant persuasion who are prepared to do the type of things that Mr Bishop and those associated with him would not do, and have vehemently denied doing in the past, such as the breaking down of fencing or cutting the ties and padlocks on it; the digging up of closed badger setts; and the placing of nails and glass on the access roads. People who are prepared to engage in that sort of behaviour are less likely than the current protesters to make themselves known and less likely to desist in the face of orders for possession and declarations of landowners' rights.

39. I am satisfied that there is enough evidence to demonstrate a real risk of further trespasses on the land in future by persons who are opposed to the HS2 project and that such persons are unlikely to confine their activities in the way in which the peaceful protesters allied to Mr Bishop and Mr Rukin have done in the past.

40. I was initially inclined to take the view that it might be possible to formulate any interim injunction in a more focussed way that would specifically address the type of objectionable (and tortious) behaviour which is a particular cause of concern – breaking down fencing, for example. However, leaving aside the difficulty of proving individual responsibility for such acts, there is a wide variety of conduct that could disrupt the project – someone wandering into an area where soil has been excavated from the woodland for the purpose of replanting, for example. The concept of interference with the work of contrators is far more nebulous than trespass and there is a need to define with clarity precisely what someone is and is not entitled to do. Trespass is a binary and simple tort which is easily defined as entering on another person's land without permission, and therefore it is simple enough to formulate an injunction preventing future trespasses in terms that are clear and unambiguous.

41. Both Mr Wagner and Mr Powlesland raised consideration of whether HS2 had come to equity with clean hands. Reference was made to the evidence that their contractors had felled woodland that was outside the construction boundaries, and to Mr Rukin's evidence of incidents on other sites on the HS2 corridor where, for example, the habitats of nesting birds had been disturbed. Mr Roscoe's response was that the concerns that the Defendants have may well be legitimate concerns shared by the general public, but they have no private rights to protect the trees or the wildlife. There are bodies that do have such rights and they are the appropriate bodies to be policing the matter. There are ecologists who are actively involved in supervising the works, and it would be unrealistic to suggest that a largescale project of this type would not cause some ecological damage. Nevertheless, steps are being taken to mitigate that damage.

42. Like it or not, Mr Roscoe submitted, secure access is needed to the whole of the site in order for the works to be carried out safely. You cannot have people roaming around freely on the site in order to carry out monitoring. As Mr Holland QC observed in the previous HS2 case at [136], "there is not warrant for the court contemplating the commission of torts even if this could be described as "peaceful and non-violent civil disobedience" or "direct action". I respectfully agree.

43. At the end of the day, there is no material distinction to be drawn between the situation in that case and in this, so far as justification exists for granting an interim injunction. That said, I am not prepared to grant the injunction for a period of 2 yesrs as Mr Roscoe initially sought. 9 months should suffice to cover the two key periods of the year within the ecological cycle referred to by Mr Corvin, namely April-May and September-October, and given the Claimants sufficient time to identify the "persons

> unknown" against whom they would seek final injunctive relief. These proceedings should not be allowed to remain unresolved for longer than is necessary.
>
> 44. The Claimants can always seek an extension of time, but at the present time of economic uncertainty, there are many factors which could have an impact on the future of this project. That is yet another reason why I am not prepared to grant an injunction for more than 9 months. Mr Roscoe offered to include in the order a provision requiring the Claimants to inform the Court if something that materially affects the future of the HS2 project arises during the period of the injunction and I consider it would be sensible to do so."

51. It was not contended by Mr Cuciurean that the Order was irregular. Nor did Mr Cuciurean seek to avail himself of his undoubted right under paragraph 15 of the Order to apply to the court at any time (on notice to the Claimants) to vary or discharge it.

52. In these circumstances, it is very difficult to see how the Order has not, <u>of itself</u>, dispensed with the requirement for personal service:

(1) It is quite clear from *Canada Goose* that it is perfectly possible for a person or persons unknown – including Category 3 Defendants, which Mr Cuciurean is – to be joined to proceedings by alternative service and for an interim injunction to be made against such person or persons.

(2) In such a case, the persons unknown must be defined in the originating process by reference to their alleged unlawful conduct. In this case, the Second Defendants are materially defined as those "entering…without the consent of the Claimants [the Crackley Land]". Assuming – for present purposes – that Mr Cuciurean <u>did</u> enter the Crackley Land without the consent of the Claimants, he became a Second Defendant at that instant <u>provided</u> he was properly served with the proceedings.

(3) In this case, the Order expressly provided that the steps taken by the Claimants to serve the claim, the application and the evidence in support should amount to good service, the proceedings being deemed served on 4 March 2020.[57]

(4) <u>Assuming</u> entry by Mr Cuciurean onto the Crackley Land any time after 4 March 2020 (I will, of course, be coming to the Incidents), there is no doubt in my mind that by the operation of the Order, Mr Cuciurean became a Second Defendant at the time when entry was effected.

(5) Paragraph 1 of the Order only made provision for the service of the proceedings and the application pursuant to which the Order was ultimately made. Whether an order <u>should</u> be made, and whether it should contain an interim injunction was – as has been seen from the passages quoted in paragraph 50 above – the subject of careful consideration by the Judge. The Judge determined that it was appropriate to order an interim injunction. She obviously had well in mind the *Canada Goose* guidelines:

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[57] See paragraph 1 of the Order, quoted in paragraph 6(1) above.

(a) The injunction in the Order was expressly limited in time, with a long stop date of 17 December 2020.[58]

(b) The injunction was expressly limited in geographical scope, as set out in Plan B appended to the Order.[59]

(c) Service of the Order was expressly provided for. Paragraph 8 of the Order deals with service on the Second Defendants,[60] and provides that "service of this Order on the…Second Defendants shall be dealt with"[61] in the various ways set out in paragraph 8. Paragraph 8 is mandatory, in that service had to be effected in this way. That provision must have been made pursuant to CPR 81.8(2)(b), and it seems to me that an automatic consequence of making an order for alternative service under this provision is that personal service be dispensed with. CPR 81.8(2) provides:

> "In the case of any judgment or order the court may –
>
> (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place".

The court, in paragraph 8 of the Order, was obviously exercising the jurisdiction under CPR 81.8(2)(b). That is clear from the reference to CPR 6.27 and CPR 81.8.[62] The whole point of providing service "by an alternative method"[63] is that the primary method of service is dispensed with, but only to be replaced by a different (and, inferentially, in the circumstances more appropriate) form of service. There is no way that paragraph 8 of the Order can be read as making provision for service by an additional method.

(6) I have yet to consider whether these requirements in the Order were met. Mr Cuciurean's contentions focussed on the point that personal service was a requirement of the Order notwithstanding what I have found to be the effect of CPR 81.8(2)(b) and the relevant provisions of the Order. As to this:

(a) The foregoing analysis was adopted by His Honour Judge Pelling and the Court of Appeal in *Cuadrilla Bowland v. Ellis*[64] and was relied upon by

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[58] See paragraph 6 of the Order, quoted in paragraph 6(6) above.

[59] See paragraphs 2, 3 and 6(4) above, which refer to the relevant parts of the Order.

[60] Quoted in paragraph 6(2) above.

[61] Emphasis supplied.

[62] These are both provisions dealing with service by an alternative method.

[63] Emphasis added.

[64] [2019] E30MA313 at [13] and [14]; [2020] EWCA Civ 9 at [28].

the Claimants in support of their contention that personal service was not a requirement in this case.[65]

(b) Mr Cuciurean's written submissions did not address CPR81.8(2)(b). Rather, reference was made to service not being compliant with CPR81.8(1), which provides:

> "In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –
>
> (a) by being present when the judgment or order was given or made; or
>
> (b) by being notified of its terms by telephone, email or otherwise".

This provision deals with dispensation of service, not the present case of alternative service. It is clearly irrelevant in the present circumstances. The Order, as I have stated, makes provision for alternative service, it does not dispense with service altogether or at all. It might, fairly, be said that the method of alternative service replaces personal service.

53. It follows that Mr Cuciurean's points that he needed to be personally served and that, because he had not been, the Application must fail, are misconceived, and I reject them. Personal service was not required: alternative service was specified in the Order pursuant to CPR81.8(2)(b).

54. Of course, it does not follow from this that the Application must succeed. Mr Wagner, on behalf of Mr Cucuirean, made a number of points related to – but, in the final analysis, different from – the question of service that I have just considered. It will be necessary to consider these points specifically, and I do so in Section D(3)*(e)* below. Before I turn to these points, however, I must satisfy myself that the service requirements stipulated in the Order were complied with.

(d) The service requirements contained in the Order

(i) Compliance

55. It is, of course, necessary that the service requirements in the Order be strictly complied with. I find that they were:

(1) Paragraph 9 of the Order provides that the taking of the steps set out in paragraph 8 would be good and sufficient service of the Order on the Second Defendants. Service would be deemed when the last of those steps had been taken, and needed to be verified by a certificate of service.[66]

(2) The steps taken in order to comply with the service provisions of the Order are set out in a witness statement of a process server, Mr Ian Beim, dated 27 March 2020

[65] See paragraphs 24 and 25 of the Claimants' written opening submissions.

[66] See paragraph 6(2) above.

(**Beim 1**). Mr Beim was not called for cross-examination as the content of his statement was not challenged.

(3) In accordance with the Order, certificates of service were provided. They were before me, and I am satisfied that they show service of the Order in accordance with its terms.

56. I find that the service requirements contained in the Order were complied with. I find that, in accordance with the terms of the Order, service of the Order was effective on 25 March 2020.

(ii) The provisions regarding notice of the Order

57. Notice of the Order was thus provided for in three ways:

(1) On-line by publication on a website: see paragraph 8.4 of the Order.[67]

(2) By email to an email address: see paragraph 8.3 of the Order.[68]

(3) By notice: see paragraphs 8.1 and 8.2 of the Order.[69] It is necessary to explore the nature of these notices in greater detail:

(a) The Order specified two types of notice:

(i) What I shall term an **Injunction Notice**, affixing sealed copies of the Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around the Crackley Land.[70]

(ii) What I shall term an **Injunction Warning Notice**, a notice no smaller than A3 size, advertising the existence of the Order, and providing the Claimants' solicitors' contact details in case of requests for a copy of the Order or further information in relation to it.

(b) From the photographic evidence exhibited to Bovan 1, it is clear that Injunction Notices and Injunction Warning Notices were actually placed in the same locations (and that, I infer, was the intention of the Order: the Injunction Warning Notice was intended to advertise the Injunction Notice). Even if this was not the intention of the Order, this was an entirely proper and sensible course: the Injunction Notice is a copy of the Order (on A4 paper) and lacks a degree of visual prominence when affixed in the open air. That lack of visual prominence is made up for by the Injunction Warning Notice, which (whilst twice the size of the Injunction Notice) contains less detail, and a much more stark warning (white lettering on a red background) stating "HIGH COURT INJUNCTION IN

[67] These provisions are all set out in paragraph 6(2) above.

[68] These provisions are all set out in paragraph 6(2) above.

[69] These provisions are all set out in paragraph 6(2) above.

[70] Paragraph 8.1 of the Order.

FORCE" together with the necessary details and a map of the relevant land affected.

(c) I shall come to describe the Crackley Land – and the parts of the Crackley Land most important for the purposes of the Application – in due course. Conservatively, there were seven Injunction Notices and Injunction Warning Notices in the most important parts of the Crackley Land, and more if one considers the Crackley Land as a whole.

(d) In addition to the Injunction Notice and the Injunction Warning Notice, there was a third form of notice, which I shall call a **No Trespass Notice**. The No Trespass Notice – which was not provided for in the Order – stated:

"Trespassers keep out

Private property

This land is in possession of HS2

This is a personal protective equipment zone

Risk of injury from construction activities

Trespassers may be subject to civil/criminal proceedings

24/7 Freephone Community Helpline 08081 434 434"

These notices were large (about twice the size of the A3 Injunction Warning Notices) and again were visually distinctive – white text on a red background.

(e) As I have said, the No Trespass Notices were not ordered, and I was not provided with a map of their locations. However, it was common ground that these notices appeared not only at the perimeter of the Crackley Land, but also inside the perimeter. A person penetrating the Crackley Land, and proceeding within it, would be likely to see multiple No Trespass Notices.

(e) Further points taken by Mr Cucuirean

(i) Introduction

58. As I have noted, Mr Cuciurean's first point, as regards the requirement of service, was that personal service was required: and so, the Order was not properly served. I have rejected that contention, for the reasons already given.

59. However, the Order is no ordinary order and, as I noted in paragraph 54 above, Mr Cuciurean took a number of points <u>related</u> to the question of service but <u>distinct</u> from it. In short, Mr Cuciurean contended that <u>even if</u> (as I have found) there was proper service, the Application must still fail for these (independent) reasons. These points were as follows:

(1) There was a requirement of knowledge of the Order, including knowledge of its terms, operating independently of the requirement of service, that had to be satisfied before the Application could succeed. It was Mr Wagner's contention, on behalf of Mr Cuciurean, that what was required was some knowledge of the Order – going beyond the service requirements contained in the Order – of which I had to be satisfied before acceding to the Application (assuming satisfaction of all other requirements).

(2) There was a requirement that the penal notice in the Order be specifically – and separately – drawn to Mr Cuciurean's attention, and that this had not been done, sufficiently or otherwise.

(3) There was a continuing requirement that the service requirements specified in the Order be complied with. Mr Wagner made the point that the Order, albeit interim, had a duration of months (it had a long-stop date of 17 December 2020[71]) and that the notices put up pursuant to the Order might be subject of physical deterioration or damage (whether accidental or deliberate).

60. I consider these points in turn below.

(ii) An additional requirement of knowledge

61. In the law of contempt, it is very difficult to point to any clear law suggesting that there is a requirement of "knowledge" of the order independent of the requirement that the order be served, and neither Mr Wagner (for Mr Cuciurean) nor Mr Fry (for the Claimants) were able to do so. Of course, the vast majority of the case-law in this area relates to orders where there is a named defendant who is personally served. In such cases, it is very difficult to see how there is space for the existence of a knowledge requirement going beyond personal service. The whole point about personal service is to bring the order to the attention or notice of the person being served. If that person – despite personal service – chooses to pay no heed to the order, by (for instance) immediately binning it, then that sort of unwillingness to engage clearly cannot permit such a person to avoid the consequences of breaching the order (including committal).

62. CPR 81, as I have described, makes provision for service by alternative means. The whole point of this jurisdiction is to enable proper service to be effected by a different means, a means other than personal service. Any judge exercising this jurisdiction – particularly when the order in question is going to bear a penal notice – will be concerned to ensure that whatever method of alternative service is adopted is sufficient to bring to the notice of the persons concerned both *(i)* the existence of the order and *(ii)* either the terms of the order or else the means of knowing the terms of the order.

63. In these circumstances, I approach the question of the need for an additional knowledge requirement – over and above service – in the following way:

(1) The Order in this case is, as I have repeatedly noted, made against persons unknown. Almost inevitably in such cases – and inevitably in the case of Category 3 Defendants – that will involve some dispensation from the obligation

[71] See paragraph 6 of the Order.

of personal service and some form of alternative or substituted service in place of personal service.

(2) Because of the need to have effective service before the order in question is breached, it is inevitable that the question of alternative service be considered when the order is made and not when the breach of the order is brought before the court.

(3) A judge, when considering alternative service must, in the case of persons unknown, bear in mind and apply the guidance of the Court of Appeal in *Canada Goose*. In particular, it is necessary to note the fundamental importance of service, both of the originating proceedings and of the order itself.

(4) Obviously, what ought to be ordered by way of service depends on all the circumstances of the case. It is the judge making the order who is the person best qualified to determine:

(a) Whether service by alternative means is appropriate; and

(b) If so, how such service should be accomplished.

Where such an order is breached, and an application for committal made, the judge hearing that application ought to be slow to second guess the judge who made the order itself, particularly where the judge who made the order has paid due regard to the *Canada Goose* guidance.

(5) In this case, as I have described, Andrews J considered both the service of the originating process and the service of the Order with great care, in light of the *Canada Goose* guidance. The question of alternative service was expressly considered. It seems to me – if I may respectfully say so – that the question of service was gone into extremely thoroughly by the Judge, and that this is precisely the sort of case where the judge making the order ought not to be second-guessed. Matters would be very different if the service provisions either failed to consider the *Canada Goose* guidance or – in light of the circumstances as they stood at the time of the order – failed properly to apply that guidance. Neither of these points pertains here.

(6) This means that I must be slow to re-visit the question of service. But I do not consider that the question of service can be altogether disregarded on an application for committal, no matter how carefully the matter has been considered by the judge making the order. There is no inconsistency between attaching proper weight to the order of the judge making it, and taking account of matters subsequent to the making of the order. The circumstances in which service is in fact effected will always be relevant. Generally speaking, personal service of an order will be sufficient to bring both the existence of the order and the ability to consider its terms to the attention of the person served. But there may be exceptions. Even in the case of personal service, it is possible that (unknown to the applicant for committal) the person served suffers from some lack of capacity, rendering him or her incapable of considering the terms of the order or even the fact that it is an order of the court at all. In such a case – whilst the burden of proving this hypothetical lack of capacity would rest on those representing that

person – it is inconceivable that a court would consider the contempt procedure applicable. What was, on the face of it, good service, would be set aside.[72]

(7) I consider that precisely the same approach must apply in this case. Given that, in the case of Category 3 Defendants, the service provisions in the order will have to deal with the question of notice to an unknown and fluctuating body of potential defendants, there may very well be cases where *(i)* the rules on service may have been complied with, but *(ii)* the person infringing the order knows nothing about even the existence of the order, when infringing it, or that he or she is doing anything wrong. In such a case, provided the person alleged to be in contempt can show that the service provisions have operated unjustly against him or her, the service against that person may be set aside.

(8) I stress that where it can be shown that the service provisions that apply in the case of a given order can be shown to have operated unjustly, this is a matter that goes not merely to sanction (although such matters might also be relevant to sanction). Where the person subject to the order can show that the service provisions have operated unjustly against him or her, then service ought to be set aside and the threat of committal removed altogether. It is not, to my mind, sufficient to say, in such a case, that there is a contempt, but that the punishment ought to be minimal or none.[73]

(9) Mr Wagner contended that such an approach effectively reversed the burden of proof, and required Mr Cuciurean to show he had not been served with the Order. I disagree. The whole point of alternative service is that appropriate alternative means of service are imposed on the claimant, who is obliged to comply with them and to prove (to the requisite standard) that service on the defendant has been effected in this way. This, the Claimants have done, as I have found. There is nothing to prevent Mr Cuciurean from contending that the circumstances in this case are such that service should be set aside because the service provisions operate unjustly against him, even though the *Canada Goose* guidance has been carefully and appropriately considered by Andrews J. But – at this point – the burden is on him.

(10) Mr Wagner did not put Mr Cuciurean's case in this way. He contended that it was for the Claimants to show that some criterion beyond service had been satisfied (although he was unclear as to precisely what that criterion might be), rather than it being for Mr Cuciurean to show that ordinarily proper requirements for service had, in this case, operated unjustly. I reject this argument because it replaces the

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[72] I stress that I was taken to no authority for this point, but it seems to me inevitable when considering how courts generally deal with service. Thus, for instance, where proceedings are served out of the jurisdiction, and that service is found to be (for whatever reason) wrongly based, service is set aside.

[73] In *Cuadrilla Bowland v. Ellis*, [2019] E30MA313 at [14], His Honour Judge Pelling, QC said:

"…If the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed, then it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…"

I agree. However, one much not overlook the anterior question that it always possible – albeit only in the appropriate case – to set aside service altogether.

very clear rules on service with an altogether incoherent additional criterion for the service of an order.

(11) Although, for the reasons that I have given, I have rejected Mr Wagner's argument, it is nevertheless appropriate to consider whether the circumstances of this case warrant the setting aside of service. I have no doubt that they do not:

(a) Mr Wagner submitted that there were a number of other steps that the Claimants could have taken so as to bring the Order to Mr Cuciurean's notice or attention. For instance, when Mr Cuciurean was in the Claimants' custody or in the presence of agents or employees of the Claimants, it would have been easy to hand Mr Cuciurean a copy of the order and (say) video-tape the event as evidence. That may very well be the case, but it is not the point. This is to suggest an embellishment to the service provisions, not to suggest that service in accordance with the order operated unjustly against Mr Cuciurean.

(b) Mr Wagner submitted that, whilst he could not say that Mr Cuciurean was unaware of the Order (he knew there was an order in existence, but (according to his evidence, thought it related only to the Cubbington Land), he (Mr Cuciurean) was unaware of its terms, and that this was enough to render it unjust to proceed with the committal. I am afraid that I do not accept this contention. It will be necessary – when considering the various Incidents said to amount to a breach of the Order – to make findings as to Mr Cuciurean's knowledge, and I do not intend to anticipate those findings, which at least in part turn on a description of the Incidents themselves. It is sufficient for me to note now that, for the reasons I give later on in this judgment, I am satisfied:

(i) That Mr Cuciurean knew of the existence of the Order.

(ii) That Mr Cuciurean not only knew of the existence of the Order, but of its material terms. The material terms of the Order, to be clear, were not to enter upon the Crackley Land.

Mr Cuciurean came closer to admitting the first point than the second. Certainly, he accepted that there was an order made, but his evidence appeared to be that that order related to land that was not the Crackley Land.

64. For these reasons, I reject the contention that something more than compliance with the service provisions of the Order was required.

(iii) The penal notice

65. CPR 81.9(1) provides that an order to do or not to do an act may only be enforced by the committal process under CPR 81.4 where "there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets".

66. It is accepted by all that the Order contains an appropriate penal notice.

67. All that CPR 81.9 requires is that the order be served in accordance with this Section. It was not accepted by Mr Cuciurean that the Order had been served in accordance with the applicable Section (Section II) of CPR 81. However, I am satisfied that it was, for the reasons that I have given. In these circumstances, it is clear that CPR 81.9 has been complied with. There is nothing in this point, which I reject.

(iv) A continuing requirement that the service provisions in the Order be complied with

68. Clearly, the notice given to interested persons by service via email and by posting on a webside will not degrade over time. The same cannot be said of the physical notices – the Injunction Notices and the Injunction Warning Notices that I have described. I quite accept that, over the duration of operation of the Order – a period of months – these Notices might be subject to physical deterioration or damage (whether accidental or deliberate).

69. This contingency was anticipated by Andrews J in paragraph 10 of the Order:

> "The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2] remain in place and legible and, if not, shall replace them as soon as reasonably practicable."

70. It is noteworthy that the Order says nothing about the consequences of non-compliance with this provision. It would be possible for an order expressly to provide that, if the notices it stipulates are not replaced as and when necessary during the operation of the order, then service ceases to be effective after the date of that failure to comply.

71. That may be an appropriate order in an appropriate case, but it is <u>not</u> the order made by Andrews J. Clearly, compliance by the Claimants with paragraph 10 of the Order was an important matter. I have no reason to doubt that this part of the Order <u>was</u> complied with by the Claimants, but (as Mr Wagner contended) I do not consider that I can be satisfied <u>to the appropriate standard</u> that the Order was in fact so complied with. For instance, there was not before me any evidence as to the regular inspection of the Injunction Notices and Injunction Warning Notices, nor any evidence of their replacement where Notice were no longer fit for purpose. In these circumstances, it is difficult to be satisfied beyond all reasonable doubt that paragraph 10 of the Order was complied with.

72. If I were required to be satisfied beyond all reasonable doubt that paragraph 10 had been complied with, I would find that it had not been. But I do not consider that to be a necessary or relevant finding for me to make in relation to the Application. The Order does not provide for the automatic setting aside of service where there has been a failure to establish beyond all reasonable doubt that paragraph 10 of the Order has not been complied with. The question, as before, is whether, given that service on Mr Cuciurean was regular and in accordance with the terms of the Order, it would be unjust not to set service aside in all the circumstances. For the following reasons, I consider that service should <u>not</u> be set aside on this basis:

(1) As I have noted, the Order was deemed served on 25 March 2020,[74] pursuant to paragraph 9 of the Order.

(2) The Incidents, as I have noted, all occurred in the period commencing 4 April 2020 and ending 26 April 2020. Thus, assuming an obligation to check the Notices every 28 days, the 28 day period ended on 22 April 2020. Most of the Incidents – although by no means all – fall within the period within which the Claimants were entitled to proceed on the basis that the Notices did not require inspection.

(3) This was Mr Fry's primary point as to why paragraph 10 was an irrelevance, in this case. Although I consider that the point is good as far as it goes, I consider that it misses the reality of the case and the essence of the question that I must ask. The true position is that, the Order having (properly) defined what constitutes service, and the provisions in the Order having been followed, service should not be set aside unless Mr Cucuirean can show – the burden being on him – that the service provisions have operated unjustly against him.

(4) That is not the case here. Clearly, the service provisions were complied with, and (absent a co-ordinated attack on the Injunction Notices and Injunction Warning Notices) they could be expected to survive in readable and usable form throughout the Incidents.

(5) Although the Claimants could not produce evidence of regular inspections and replacements of the Injunction Notices and Injunction Warning Notices, the Claimants did carry out a random spot check of the signage at the Crackley Land on 14 June 2020,[75] and a plan of the Injunction Notices and Injunction Warning Notices present at the site was produced as an exhibit to Bovan 2. This shows a substantial number of notices at the relevant area, perhaps fewer than originally placed, but not materially so. In his evidence, basing himself on this inspection, Mr Bovan stated:[76]

> "I can also confirm that copies of the Order [i.e. Injunction Notices] and A3 Injunction Warning Notice remain in place around the Crackley Land or have been replaced."

Whilst Mr Bovan clearly could not say whether the Notices in question were original or replacement (a point Mr Wagner placed some stress on), the fact is that they were there on 14 June 2020 and had been out there on or before 25 March 2020. I have noted the evidence of Mr Pook – albeit with the reservations identified in paragraph 12(4)(g) above. Mr Pook suggested that when he inspected the site on 1 July 2020, there was a lack of signage. Mr Pook's statement is not especially clear about whether the signs Mr Bovan had identified on 14 June 2020 were no longer present on 1 July 2020. Whatever the position on 1 July 2020, I accept the evidence of Mr Bovan as to the position on 14 June 2020.

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[74] See paragraph 56 above.

[75] Bovan 2 at paragraph 29.

[76] Bovan 2 at paragraph 29.

(6) In all the circumstances, given the presence of the Notices on 25 March 2020 and the presence of the Notices on 14 June 2020, it is difficult to accept – and I do not accept – that there were not Notices on site when the Incidents took place.

73. Thus, I do not consider that Mr Cucuirean has in any way demonstrated that service should be set aside because of an inability to demonstrate – beyond all reasonable doubt – that paragraph 10 of the Order was complied with. For the reasons I have given, I do not consider that it is necessary, in order for the Application to succeed, for strict compliance with paragraph 10 to be shown.

(4) The third pre-condition

74. The third pre-condition does not arise in this case.[77]

E. SUBSTANTIVE REQUIREMENTS

(1) Introduction

75. I turn to the requirements set out in paragraph 26 above. These are that the Order must be clear and unambiguous and that the Order must *(i)* have been breached and *(ii)* that that breach must have been deliberate. I consider these requirements in turn below.

(2) Clear and unambiguous

76. I consider the entirety of the Order to be extremely clear and unambiguous, and will focus on the operative provisions that are most pertinent to this Application. These are, in the first instance, paragraph 4.2 of the Order, which states that the Second Defendants and each of them are forbidden from entering or remaining upon the Crackley Land. The Crackley Land – as I have described – is the land edged red on Plan B, which was annexed to the Order.

77. It is difficult to imagine a more straightforward or clearer provision.

(1) The act enjoined is easy to understand. It is not to enter (or remain upon) certain land.

(2) The land in question is clearly identified as that outlined in red on a plan that is attached to the Order – a copy of which is attached to this judgment as Annex 2.

78. The consequences of breaching the Order are set out in the penal notice that I have already referred to.

79. There is a "carve-out" to paragraph 4 of the Order contained in paragraph 5.1.[78] This provides that nothing in paragraph 4 shall prevent any person from exercising their rights over any open public right of way over the Land. This provision, I find, to be clear and unambiguous on its face. However, it will be necessary to re-visit this provision once the position regarding the footpaths over the Crackley Land has been

[77] For the reason given in paragraph 24(3) above.

[78] Described in paragraph 6(5) above.

explained, for Mr Wagner made a number of submissions in relation to footpaths on behalf of Mr Cuciurean.

80. I am satisfied that the Order is clear and unambiguous.

(3) Breach of the Order

(a) Approach

81. I approach the question of breach of the Order in the following way:

(1) Since all of the Incidents alleged to constitute contempt of court on the part of Mr Cuciurean involve a breach of paragraph 4.2 of the Order (i.e. not to enter upon the Crackley Land), the Incidents can only be understood when once the Crackley Land, certain footpaths on it, and the manner in which its perimeter was protected is understood. These matters are considered in Section E(3)*(b)* below.

(2) Thereafter, in Section E(3)*(c)* below, I describe the various Incidents that underlie the Application, and seek to locate them by reference to my description of the Crackley Land.

(3) I then deal with the various points made by Mr Cuciurean to suggest either that the Order had not, in fact, been breached or that I could not be satisfied, to the appropriate standard, that the Order had been breached. These various points are described and considered in Section E(3)*(d)* below.

My conclusion on the question of breach is stated in Section E(3)*(e)* below.

82. Finally, in Section E(4), I consider the question of deliberation.

(b) The Crackley Land

(i) The Crackley Land generally

83. The Crackley Land, as has been noted, is described by reference to the plan known as Plan B and annexed as such to the Order. It comprises Annex 2 to this Judgment. As can be seen from Annex 2, the Crackley Land is essentially a strip of land running (beginning at its Western tip) South-East. At approximately its halfway point, the strip is bisected by a road (known as Crackley Lane). It can be seen that the red-edging that demarcates the boundary of the Crackley Land runs parallel on either side of Crackley Lane as it bisects the Crackley Land. The Crackley Land is thus not a unitary tract of land, but in fact comprises two tracts of land, both edged red, divided by Crackley Lane.

84. I shall refer to the Crackley Land lying to the West of Crackley Lane as **Crackley Land (West)**. I shall refer to the Crackley Land lying to the Easy of Crackley Lane as **Crackley Land (East)**. It is the latter tract of land – Crackley Land (East) – that we are here concerned with.

(ii) Crackley Land (East)

85. The Incidents are alleged to have involved non-consensual entry upon the land by Mr Cuciurean on the Eastern side of Crackley Lane, that is Crackley Land (East). Although the colours on Plan B signify nothing for the purposes of the Order, they are helpful in identifying specific portions of Crackley Land (East), which I shall use to describe Crackley Land (East) more specifically:

(1) Immediately to the East (or right) of Crackley Lane is a rough square, coloured pink and green on Plan B (the **Square**).

(2) Immediately to the East (or right) of the Square is a portion of land, coloured pale blue on Plan B, in the shape of an isosceles triangle (the **Triangle**).

(3) The **Remaining Portion** comprises the remaining Crackley Land (East), that is all parts of Crackley Land (East) apart from the Square and the Triangle.

(iii) The physical nature of the perimeter of Crackley Land (East)

86. It is necessary to describe the manner in which the perimeter or boundary of Crackley Land (East) was demarcated. In large part, the basis for my findings in this regard is the evidence of Mr Bovan and Mr Hicks, both of whom provided helpful evidence enabling me to understand the nature of the perimeter, as well as the video evidence that was adduced before me. In order to understand the physical perimeter, it is necessary to refer to **Annex 3** to this Judgment, which constitutes a marked-up version of Plan B at Annex 2. The marking up, to be clear, has been done by me, based upon the evidence I have heard. More specifically:

(1) Annex 3 shows a line (running from Point 1 to Point 2) which bisects the Remaining Portion of Crackley Land (East). I stress that this line is roughly drawn, and makes no claims to particular accuracy. It is not necessary in order to understand the physical geography for the line to be precisely drawn.

(2) The line between Point 1 and Point 2 represents a line of **Heras fence panels**. Heras fence panels are forms of temporary, heavy duty, wire-mesh fencing in the form of panels, capable of being linked together. They are, thus, capable of being moved. Generally speaking, they are footed by large concrete blocks, out of which the feet of the Heras fence panel can be lifted.

(3) As part of the development of the HS2 Scheme on the Crackley Land, the contractors employed or retained by the Claimants often fenced off portions within the Crackley Land, using Heras fence panels. This fencing was, I stress, intended to be internal to the Crackley Land and did not seek to demarcate any boundary of or perimeter to the Crackley Land. Rather, the purpose of such internal fencing was to isolate from third parties those specific areas where work was being done or to protect equipment from such third parties. Of course, one might say that since these enclosures were all within the Crackley Land, such enclosures were unnecessary: the only persons present on the Crackley Land would be those present with the consent of the Claimants. That would, however, be wrong. As the Judgment of Andrews J makes clear, in addition to Mr Bishop and Mr Rukin (the individually named defendants to the Proceedings), there were

trespassers on the Crackley Land against whom such internal barriers might be needed:

> "11. The Claimants accepted, as do I, that Mr Bishop's activities as a concerned local resident have been genuine and sincere, and that at all times he has acted responsibly and peacefully. He is seen as a very important moderating influence, who has forged a good relationship with the HS2 representatives.
>
> 12. Mr Rukin has a wider agenda, in that he is the Campaign Manager of "Stop HS2" which, as its name suggests, is opposed to the project in principle. However, so far as the occupation of the Cubbington Land[79] and Crackley Land is concerned, Mr Rukin supports Mr Bishop's evidence that this is aimed at protecting the ancient woodland and observing and recording HS2 Ltd and their contractors' operations with a view to reporting any illegal activities to the relevant authorities. He denies that he or anyone associated with him or the camps has been responsible for litter or any anti-social behaviour on the land.
>
> 13. Unfortunately, the evidence of Ms Jenkins and Mr Corvon-Czarnodolski…on behalf of the Claimants indicates that not all trespassers on the Cubbington Land and Crackley Land are so well-behaved. People have carried out damage to the Heras fencing which is used to demarcate the land, in some areas pulling it down and abusing workmen who have taken in panels to repair it; nails and glass have been placed on roads used by construction traffic, and some people have actively blocked access to the sites or erected structures on them which have impeded the work."

In these circumstances, it is easy to understand why such internal fencing, intended to protect on-going works or equipment, might be necessary. I shall refer to such fencing as ***Ad Hoc* Fencing**, as it was moved according to the work going on. Its defining positive characteristic is that it was intended to protect on-going works; its defining negative characteristic is that *Ad Hoc* Fencing was <u>not</u> intended to demarcate the boundary or perimeter of the Crackley Land.

(4) The Heras fence panels running from Point 1 to Point 2 are to be differentiated from other types of *Ad Hoc* Fencing. This particular fence-line (which I shall refer to as the **Internal Boundary**) is significant because the land to the East (or right) of the Internal Boundary – designated by the letter B in Annex 3 (**Area B**) – was unfenced and comprised essentially open space. The perimeter of Area B was marked by No Trespass Notices,[80] but there was no fencing of any sort. The Internal Boundary thus:

(a) Merely constituted an internal perimeter or boundary <u>within</u> Crackley Land (East). It was not intended to demarcate the edge of the Crackley Land.

(b) However, the Internal Boundary was significant because it constituted a part of the <u>physical</u> boundary of the Crackley Land. A person approaching

[79] This was the other tract of land with which the Judgment was concerned. I have, generally, omitted reference to the Cubbington Land in this judgment, as it is not directly relevant to the Incidents.

[80] There were some Injunction Notices and some Injunction Warning Notices also.

the Internal Boundary through Area B would be on Crackley Land and – absent the consent of the Claimants – would be a trespasser on the land. However – apart from the Notices – there would be no physical demarcation of the boundary until the Internal Boundary was reached.

87. Thus, Area B is a portion of Crackley Land East, largely without perimeter fencing. The only physical perimeter (apart from Notices) was the Internal Boundary running along its Western flank, and dividing Area B from the other part of Crackley Land (East), **Area A**.

88. The Internal Boundary was moved at least once during the period of the Incidents, on 21 April 2020, when the Internal Boundary was moved Eastwards by a couple of meters, so as to enlarge Area A of the Crackley Land (East) and correspondingly reduce Area B of the Crackley Land (East).

89. Area A, in contrast to Area B, was fenced. It is important to describe the nature of this fencing. I shall do so by describing the perimeter of Area A in a clockwise fashion, starting at **Point 1,** which identifies the starting point of the Internal Boundary, and is marked as such on Annex 3. Taking this as the starting point, the perimeter of Area A was as follows:

(1) *Point 1 to* ***Point 2***. This is the Internal Boundary, which comprised, as I have stated, Heras fence panels.

(2) *Point 2 to* ***Point 3***. (I have not marked anything other than Points 1 and 2 on the map at Annex 3. To do so would lend a spurious specificity to what is intended to be a more broadbrush description of the physical geography.) This was intended to comprise part of Crackley Land (East)'s external boundary, and consisted of Heras fence panels. Point 3 was located around the Eastern tip of the Triangle.

(3) *Point 3 to* ***Point 4***. This was a continuation of Crackley Land (East)'s external boundary, and consisted of boarding or hoardings about 3 metres high (the **Hoarding Fence**). The Hoarding Fence ran substantially along the bottom edge of the Triangle, ending roughly at the Western tip of the Triangle, where the Triangle abuts the Square. The Hoarding Fence was intended to offer some sort of visual and sound protection to the residents of the farms located to the South of the Triangle. It was on this land South of the Triangle – not part of the Crackley Land – that the protestors to the HS2 Scheme had their camp (i.e., Camp 2).

(4) *Point 4 to* ***Point 5***, *Point 5 to* ***Point 6***, *Point 6 to* ***Point 7***. These three boundaries represent three sides of the Square, the middle boundary (Points 5 to Point 6) being the boundary running along Crackley Lane. These boundaries comprised Heras fence panels.

(5) *Point 7 to* ***Point 8***. This is part of the Northern boundary of Crackley Land (East), essentially opposite to and running parallel with the Hoarding Fence between Point 3 and Point 4. The perimeter was marked by a post and wire fence (the **Post and Wire Fence**).

(6) *Point 8 to Point 1*. The final stretch of the Northern boundary, terminating with the beginning of the Internal Boundary at Point 1 again comprised Heras fence panels.

90. I should stress that it is unnecessary to be more precise about the geographic location of Points 1 to 8. They are intended to enable better description of the Incidents to which I will come. It is also worth stressing that the demarcation between different fence lines – clear in my description – will have been less clear to the person walking around the Crackley Land. Thus, for example, the Internal Boundary (Point 1 to Point 2) comprised Heras fence panels, as did the external boundaries on either side, namely Point 2 to Point 3 and Point 8 to Point 1. I am not suggesting that it would have been possible to differentiate between these parts of the perimeter of Area A: the perimeter would simply have been a series of Heras fence panels. I do not consider that such inability to differentiate is in any way material to the matters considered in this judgment.

(iv) Footpaths

91. The public right of way known as **PROW165X** runs in part across the Crackley Land. It bisects the Crackley Land (East) running from South to North. Insofar as it crosses Crackley Land (East) it begins (at its Southern-most point) at a point between Point 1 and Point 2. It then runs roughly along the Eastern edge of the Triangle and across a part of the Square to its end (at least so far as material for present purposes) at Cryfield Grange Road on the Northern edge of Crackley Land (East), roughly at Point 7.

92. The Claimants sought to close PROW165X. The reason for this was that protestors were using PROW165X to access the Crackley Land. This is described by Mr Bovan in Bovan 2:

> "18 As described at paragraph 19 of my first affidavit, on 26 March 2020 steps were taken by myself and HCE to enforce the Writ and evict the protestors in Camp 1 on the Crackley Land. While we successfully removed 18 persons on the ground, this was not without difficulties and 5 protestors managed to scale trees at height on the Crackley Land and remained there until 3 April 2020.
>
> 19 4 of these 5 protestors at height had managed to enter onto the Crackley Land (without permission) during the process of eviction by walking on to the PROW and climbing over or under existing wooden fences. If it had not been for the PROW being open there would only have been 1 protestor in the trees at height.
>
> 20 Other protestors were also standing on the PROW during the course of the eviction, some of whom were: *(i)* shouting and being verbally abusive to my team and [me]; *(ii)* at times spitting on my team and [me]; *(iii)* failing and/or refusing to maintain a social distance of at least 2 metres in accordance with COVID-19 Government guidelines; and *(iv)* supplying the protestors at height in the trees with food and water.

I accept this statement of events.

93. It was common ground that:

(1) The Claimants had the statutory power to close PROW165X pursuant to powers conferred under the High Speed Rail (London – West Midlands) Act 2017.

(2) The Claimants' power was exerciseable only on consultation with the relevant local authority, which in this case was Warwickshire County Council (and only that authority). The purpose of the consultation was to ensure public safety and, so far as reasonably practicable, to reduce public inconvenience.

(3) The Claimants did so consult. However, that consultation stated, as I find, that a diversion would be in place before PROW165X was closed. In its consultation, the Claimants identified, on a plan, the route of a temporary diversion, which I shall term a temporary public right of way or **TPROW**.[81]

(4) The planned route of the TPROW was disclosed to Warwickshire County Council, which itself noted that "HS2 have confirmed that at no point will [PROW165X] be closed without the diversion being in place". The TPROW proposed is shown on the plan at **Annex 4** to this judgment. As to this:

(a) For the purposes of orientation, at the bottom left-hand corner of Annex 4, Birches Wood Farm can be seen. Above Birches Wood Farm, one can see the Hoarding Fence that runs between Point 3 and Point 4 marked as a fine red line. The Heras fence panels comprising Point 2 to Point 3 are to the right of the Hoarding Fence, marked as a green line. Other Heras fence panels – which were intended to enclose the TPROW, and to which I shall come – are also marked as a green line.

(b) The route of PROW165X is clearly marked. The part to be closed is marked by a thick red line. The TPROW constitutes a diversion from the closed part of PROW165X. Essentially, the diverted part of PROW165X – which roughly runs along the hypoteneuse of a triangle – is replaced by the TPROW, which runs along the other two sides of that triangle. The first side of that triangle runs parallel to the Hoarding Fence (at about 2-3 metres distance – the **Strip**), and then cuts across the Crackley Land away from the Hoarding Fence so as to rejoin the undiverted part of PROW165X, which then runs on to Cryfield Grange Road.

(c) Apart from the entrance point on the Southern boundary of the Crackley Land, which I shall return to, the TPROW was closed off from the rest of the Crackley Land by Heras fence panels running along either side of the TPROW. Although these enclosures to the TPROW are not fully disclosed in the diagram, I am satisfied that this was the case.[82] Thus, there were Heras fence panels running along either side of the TPROW intended:

(i) To prevent persons on the TPROW from leaving it;

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[81] I should be clear that whether this was a public right of way is a matter of controversy that I will have to consider. Mr Bovan used the term TPROW, which I adopt without prejudice to my consideration of this question.

[82] This was clear from the evidence of Mr Bovan in Bovan 2 (in particular, paragraph 13 of Bovan 2) and the video evidence that I saw. I put my understanding to counsel in the course of oral closing submissions, and neither party dissented from this explanation.

(ii) To ensure that the TPROW was only accessed from the Southern starting point of PROW165X described in paragraph 91 above. Thus, the Heras fence panels were intended to prevent persons joining the TRPOW midway rather than at the Southern starting point of PROW165X.

Clearly, these measures were intended to ensure that the TPROW was only used to pass and repass along its length, and to prevent entrance or exit from that length save at its start and end points. I shall refer to the Heras fence panels running along both sides of the TPROW as the **TPROW Fencing**.

94. PROW165X was closed on 26 March 2020.[83] Although the intention was that the TPROW would be made available to the public, it never was. Mr Bovan explained the position in Bovan 2:

> "21 I thus took the decision that the only way to complete a safe eviction (for both the protestors, HCE staff, [HS2's] contractors and site security) and secure the Crackley Land under the powers afforded to me as the authorised High Court Enforcement Officer under the Writ to close [PROW165X]. This was done by placing metal heras fencing across the top and bottom sections of the PROW to prevent further access.
>
> 22 Following the eviction on 26 March 2020, it was then the intention of the [Claimants] to open the TPROW. However, while we considered opening the TPROW on a couple of occasions, I never considered it feasible to do so due to the recurrent (almost daily) incursions on to the Crackley Land (and the TPROW) by protestors.
>
> 23 The TPROW was therefore never opened. It remained closed between the dates (4 April 2020 to 26 April 2020) on which the [Claimants] assert that [Mr Cuciurean] breached the Order.
>
> 24 The protestors were regularly informed by myself, enforcement officers from HCE and [the Claimants'] contractors that the TPROW was closed and had not been opened."

PROW165X was re-opened on 23 June 2020 (well after the Incidents were over).[84] The TPROW never opened.[85]

95. It was, therefore, the Claimants' position that Mr Cuciurean had no right – during the period in which the Incidents took place – to be on either PROW165X or the TPROW. This was disputed by Mr Cuciurean, and it will be necessary to consider the arguments advanced by both sides on this point.

(v) Gaps in the perimeter

96. It would be wrong to give the impression that the physical boundary surrounding Area A of the Crackley Land (East) was impregnable. Mr Hicks gave evidence that there was – at least for substantial parts of the period during which the Incidents occurred – a gap

[83] Bovan 2 at paragraph 21.

[84] Bovan 2 at paragraph 17.

[85] Bovan 2 at paragraph 23.

in the Heras fence panels between Point 2 and Point 3 – that is the external perimeter between the Internal Boundary fencing and the Hoarding Fence.

97. Mr Hicks' evidence was supported by that of Mr Cuciurean, who made clear in the course of his cross-examination that he entered what the Claimants contend was the Crackley Land not by climbing over the Hoarding Fence (or, at least, not always) but by going around it, which was easier.

98. I should make clear that I accept this evidence. Specifically, I accept that there were times when Mr Cuciurean may have – instead of climbing over the Hoarding Fence – gone around it. Where that may have been the case, I indicate as much in my description of the Incidents below. Equally, where I am satisfied that Mr Cuciurean did climb the Hoarding Fence, I say so.

99. I conclude that there was from time-to-time a gap in the Heras fence panels between Point 2 and Point 3, very roughly at around the point where PROW165X and the TPROW were intended to start at the Southern border of the Crackley Land. I find that the gap was created by unknown third parties. I do not consider that it would have existed without the intervention of such third parties. It was Mr Bovan's evidence, which I accept, that the Claimants closed the Southern end of PROW165X/the TPROW and that the Claimants would not have permitted a gap in the Heras fence panels of the perimeter of Area A. That, of course, does not mean that such a gap did not exist. I find that:

(1) From time-to-time, such a gap did exist; and

(2) It was a gap created by the actions of unknown persons not comprising the Claimants or agents under their control.

(c) The Incidents

100. The Incidents are described in detail in the Schedule. Although the Schedule lists 17 different Incidents, a number of these occurred in very close temporal succession. Thus, for example, Incidents 1, 2, 3, 4 and 5 occurred between 8:30pm and 12:25am on 4 and 5 April 2020. It is necessary to bear in mind this closeness in time, simply because it is (in my view) a little unrealistic (if technically accurate) to say that in the night of 4/5 April 2020 there were five Incidents. In reality, there was a single, but sustained, attempt to penetrate what the Claimants contend was the Crackley Land.

101. The table below sets out a chronology of the relevant Incidents, and seeks to place each of them in context and to describe their salient details as I have found them on the evidence, according to the requisite standard. There was, in fact, remarkable little difference between the parties in terms of the description of events as set out in the Schedule: where such differences have arisen, I have resolved them in my narrative. In general terms, I seek to describe the Incidents by reference to my foregoing description of the Crackley Land. I should make clear that these findings of fact are expressly without prejudice to Mr Cuciurean's contention that the borders of the Crackley Land – as manifested by the physical border I have described – do not match the land edged red as described in Plan B, which was attached to the Order and which appears here as Annex 2 to this judgment. More particularly:

(1) One of Mr Cuciurean's contentions, which I consider below, was that there was a mismatch between the land edged red on Plan B (which was the land that Mr Cuciurean was injuncted from entering: the "Crackley Land") and the physical demarcation of the perimeters of what the Claimants contended was the Crackley Land, those perimeters having been put in place by the Claimants.

(2) In other words, Mr Cuciurean contended that the Claimants had not established and/or he was not actually on the Crackley Land. He might have penetrated the physical perimeter (this Mr Cuciurean rarely denied), but in doing so he did not infringe the land edged in red on Plan B and so did not breach the Order.

I consider this point below. For the purposes of describing the Incidents, however, it is inevitable that I refer to the physical perimeter using the term the "Crackley Land". I do so, in order to make findings as to what Mr Cuciurean did. I stress that these findings are not necessarily findings that the Order was breached (even though I refer to Mr Cuciurean entering (for example) the "Crackley Land"). That is because I have yet to consider and determine the point made by Mr Cuciurean that there was a mismatch between Plan B and the physical perimeter. The table below must be read with that important qualification in mind:

Date	Occurrence
17 March 2020	The Order was granted by Andrews J.
24 March 2020	The injunction under the Order came into force from 4:00pm and the Writ is issued.
25 March 2020	The date of service of the Order, pursuant to its terms.
26 March 2020	Eviction action pursuant to the Writ took place on the Crackley Land. Camp 1 was closed down; and Camp 2 commenced effective operation.
26 March 2020	PROW165X is closed.
4 April 2020	Mr Cuciurean arrived at Camp 2. Incidents 1 to 4 took place during the evening of 4 April 2020. Incident 5 – which is related – took place in the early hours of 5 April 2020.
8:30pm	**Incident 1** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. Mr Cuciurean entered the Strip between the Hoarding Fence and the TPROW Fencing. He unclipped one of the Heras fence panels comprising the TPROW Fencing and entered on to the TPROW. He was asked to leave, and was told that he was on land in breach of an order of the court. He refused to leave, was restrained and arrested. He was then "de-arrested", when it was clear that Warwickshire police would not attend. Mr Cuciurean was released at about 9:00pm.
9:35pm	**Incident 2** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the

	Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His activities were monitored by the Claimants' agents. When they sought to approach him, he retreated back over the Hoarding Fence.
10:45pm	**Incident 3** Mr Cuciurean entered Area A of the Crackley Land, traversing the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His movements were monitored by two of the Claimants' enforcement officers. Through the TPROW Fencing, Mr Cuciurean was told he was trespassing. Mr Cuciurean exited the Crackley Land by climbing over the Hoarding Fence and returning to Camp 2.
11:25pm	**Incident 4** This Incident took place at the perimeter of Crackley Land (East) between Points 2 and 3. A Heras fence panel was pulled over by protestors. It was later retrieved and re-installed. Mr Cuciurean was one of the protestors detained but not arrested. Mr Cuciurean and the others were released and returned to Camp 2. I am not satisfied so that I am sure that Mr Cuciurean himself was involved in physically pulling down the Heras fence panel. That would, in my judgment, have involved entering upon the Crackley Land. However, Mr Cuciurean may have been supporting others whilst standing outside the Crackley Land. I am not satisfied so that I am sure that Mr Cuciurean was on the Crackley Land.
5 April 2020	Although Incident 5 formed part of the pattern of Incidents taking place on 4 April, it occurred after midnight. Incidents 6, 7 and 8 occurred later on that day.
00:25am	**Incident 5** Mr Cuciurean and two other protestors were reported as being by the Heras fence panels between Points 2 and 3. That would not necessarily have involved entering the Crackley Land. Mr Cuciurean then climbed the Hoarding Fence (between Points 3 and 4), and approached the TPROW Fencing, walking on the Strip, but he did not enter the TPROW. The protestors were reminded that they were on the Claimants' land, although I have insufficient evidence as to the exact words used. Two of the Claimants' enforcement officers removed a Heras fence panel from the TPROW Fencing in order to arrest Mr Cuciurean. Mr Cucuirean retreated to Camp 2.
10:52am	**Incident 6** Mr Cuciurean removed the clips from a Heras fence panel forming part of the perimeter between Points 2 and 3, and removed the panel from the fence line abutting the Hoarding Fence. He (with others) entered upon the Crackley Land. Mr Bovan informed Mr Cuciurean that he was on the Crackley Land. Mr Bovan attempted to reinstate the Heras fence panel that had been removed, and the protestors (including Mr Cuciurean) left the Crackley Land and returned to Camp 2.

10:55am	**Incident 7** Mr Cuciurean and other protestors entered the Crackley Land at the same place – and by the same means – as in Incident 6. Mr Bovan again attempted to reinstate the Heras fence panel, and the protestors (including Mr Cucuirean) again retreated to Camp 2.
11:25am	**Incident 8** Incident 8 was very similar to Incidents 6 and 7, albeit that this Incident involved the removal of <u>two</u> Heras fence panels from the perimeter between Points 2 and 3. Attempts were made to restore the perimeter fence panels, which was met by resistance from the protesters, including Mr Cuciurean. The protestors took Heras fence panels intended to fill the gap created back to Camp 2. There was a subsequent further attempt by Mr Cuciurean to enter upon the Crackley Land in the same way. Mr Cuciurean was repelled by the Claimants' officers, but not detained.
7 Apr 2020	Incidents 9, 10 and 11 all took place on 7 April 2020.
12:24pm	**Incident 9** The Schedule describes this as a "specimen example of repeated acts of contempt". Incident 9 concerned Mr Cuciurean climbing the Post and Wire Fence on the Northern border of the Crackley Land between Points 7 and 8. It is said that Mr Cuciurean did this on a daily basis, in order to distract the Claimants' staff or to facilitate others entering the Land or to examine the fences for weaknesses. I am satisfied that Incident 9 took place, as described. However, I am not prepared to include it as a "specimen example", and it must stand alone. Equally, I am not satisfied as to Mr Cuciurean's precise motives in entering the Crackley Land here.
1:32pm	**Incident 10** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. Mr Cuciurean and another protestor attempted to remove Heras fence panels and the footers that keep them upright. When approached by the Claimants' enforcement officers, they left the Crackley Land and returned to Camp 2.
1:39pm	**Incident 11** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the area between the Hoarding Fence and the TPROW Fencing and penetrated the TPROW Fencing, entering upon the TPROW.
14 April 2020	Incidents 12 and 13 took place on 14 April 2020.
2:33pm	**Incident 12** Incident 12 is *mutatis mutandis* the same as Incident 9.

1:58pm[86]	**Incident 13** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW.
15 April 2020	
11:50am	**Incident 14** This is the Incident described in paragraph 12(3)(c) above, where Mr Mr Cuciurean penetrated *Ad Hoc* Fencing within the Crackley Land (East) and locked himself to the boom of a machine used by the Claimants for the HS2 works.
17 April 2020	
15:24pm	**Incident 15** Mr Cuciurean and other persons penetrated *Ad Hoc* Fencing on the Crackley Land (East).
21 Apr 2020	
10:40am	**Incident 16** Mr Cuciurean, one of a group of around 12 protestors, penetrated *Ad Hoc* Fencing on the Crackley Land (East). Mr Cuciurean was asked to leave on several occasions and warned of arrest. He resisted removal from the site, and was arrested. There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.
26 Apr 2020	
7:30am	**Incident 17** Mr Cuciurean and four other protestors climbed trees on Crackley Land (East). They were warned that they were trespassing by Mr Bovan and asked to climb down. They declined to do so, and specialist climbers had to be deloyed by the Claimants to remove them, using "cherry pickers". There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.

102. I am satisfied, so that I am sure, that all of the Incidents that I have described, with the exception of Incident 4, took place on what the Claimants contend was the Crackley Land. Whether these findings are sufficient to amount to findings that the Order was breached depends upon Mr Cuciurean's contention that what the Claimants said was Crackley Land was not, in fact, the land identified in the Order. So far as Incident 4 is concerned, I am not satisfied that it has been established that Mr Cuciurean was even on land that the Claimants contended was Crackley Land.

[86] The timing of this Incident in the Schedule appears to be out of chronological sequence. I do not consider that anything turns on this.

(d) Points taken by Mr Cuciurean

(i) Introduction

103. Mr Cuciurean contended that he was not in breach of the Order – notwithstanding the facts that I have found – for the following reasons:

(1) The boundaries of the Crackley Land were wrongly demarcated and did not reflect the Crackley Land defined in the Order – namely, the land identified as edged in red on Plan B.

(2) The boundaries of the Crackley Land were, in any event, unclear and confusing.

(3) Mr Cuciurean had a licence to enter upon the Crackley Land.

I shall consider each of these points in turn in the following paragraphs.

(ii) The boundaries of the Crackley Land were wrongly demarcated

104. It is clear – and Mr Cuciurean did not contest – that the Order defines the geographical scope of the Crackley Land (by reference to Plan B) and that <u>if</u> Mr Cuciurean entered upon the Crackley Land so defined, Mr Cuciurean will have breached the Order.

105. Mr Cuciurean's point was that it was incumbent upon the Claimants to prove that Mr Cuciurean's actions – as I have described them in the Incidents above – took place on the Crackley Land as defined in the Order and not merely on land that the Claimants <u>asserted</u> to be Crackley Land falling within the Order.

106. It seems to me that this must be right. I consider – contrary to the submissions of the Claimants – that I must be satisfied to the criminal standard that Mr Cuciurean breached the Order, which means that I must be satisfied (so that I am sure) that Mr Cuciurean entered land that he was enjoined from entering by the Order, namely the land "edged in red on Plan B".[87]

107. It was to deal with this point that the Claimants adduced the evidence of Mr Sah. Mr Sah's evidence (in part) addressed the question of how the Claimants caused the physical perimeter of the Crackley Land to be established by reference to GPS measurements. I shall not refer in any detail to the evidence of Mr Sah. That is because – for the reasons given in paragraph 12(3) above – I do not consider that I can place any weight on Mr Sah's evidence.

108. Mr Cuciurean's point was that the evidence of Mr Sah was the <u>only</u> evidence to support the contention that the physical perimeter and the trespass signs were actually on the red-edged land and that – since I could not be satisfied in relation to the evidence of Mr Sah – the Application must fail. In his written closing submissions, Mr Wagner on behalf of Cuciurean submitted that:[88]

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[87] The Order also refers to the colours on the plan, but these are all within the red-edging, and add nothing to the definition of the geographical scope of the Land.

[88] At paragraph 49.6.

> "There is therefore no authoritative evidence before the Court as to the precise land boundaries, and certainly not enough to prove those boundaries to the criminal standard of proof."

109. I accept – as I have already noted – that Mr Sah's evidence cannot be relied upon. However, I do not consider that the point made by Mr Cuciurean is, without more, correct. It is necessary to consider the Incidents – and their geographical location – in greater detail:

(1) I have, in the course of this judgment, attempted to describe the physical perimeter of Crackley Land (East) in some detail, so that the location of the Incidents may be understood. It is very clear that this is far easier to do in the case of Area A than Area B. That is because – as I have described – the perimeter of Area B is largely without perimeter fencing, whereas Area A is entirely fenced in.

(2) It follows that Incidents occurring in Area B – or Incidents where it is not clear, from the Schedule, whether they took place within Area A or Area B – are far harder to give a precise location to, compared to those Incidents were a precise penetration of the physical perimeter has been shown.

(3) Thus, there is, to my mind, a very sharp distinction to be drawn between Incidents 14, 15, 16 and 17 and the other Incidents (with the exception of Incident 4, which I do not consider involved entry on the Crackley Land, even as understood by the Claimants).

(4) Incidents 14, 15, 16 and 17 all have a vagueness to them which has not enabled me to pin down, in my findings in relation to these Incidents, a very precise geographic location. All of the Incidents are (in the evidence before me) detached from the physical geography of the site, as I have described it, such that I do not consider that I can (to the requisite standard) conclude that the Incidents took place on the Crackley Land as defined in the Order. I am quite sure that the Claimants consider that these Incidents took place on the Crackley Land, but that is not enough. Although the Schedule was accompanied by plans purporting to show the actual location of all of the Incidents, Mr Bovan had to accept that this was no more than a rough indicator of location.

(5) Although I appreciate that Mr Cuciurean did not advance any positive case as to location, but only put the Claimants to proof, I do not consider that the Claimants have met that standard in relation to Incidents 14, 15, 16 and 17.[89]

(6) Matters are very different as regards the remaining Incidents (excepting Incident 4, which I shall not refer to again). These Incidents can be pinned down to a precise geographic location, as I have described. It is thus possible to state – as I have stated – that the perimeter of Area A was breached in a very specific way.

(7) Of course, this does not preclude the possibility that there is a mismatch between the physical perimeter of Area A, as I have described it, and the demarcation of

[89] There was, between the parties, debate as to whether expert evidence as to the geographical ambit of the Crackley Land was required. The Claimants did not consider that such evidence was necessary, and Mr Cuciurean never pursued an application to adduce expert evidence himself.

the Crackley Land as set out in the Order. However, on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical. I consider that the Claimants have established, to the requisite standard, that these Incidents (1 to 3 and 5 to 13) did involve a breach of the Order. It seems to me that Mr Cuciurean's case involves an assertion that the Claimants have been exercising possessory rights over someone else's land in a most aggressive way and in circumstances where one would expect – if that were the case – clear challenge to the exercise of those rights by those whose interests were being usurped. More specifically:

(a) The physical boundaries that I have described were up at the time of Andrews J's Judgment and Order.[90] If there was a serious argument that the Claimants were operating on land to which they had no claim, then that argument would have been articulated before Andrews J. As she noted in her Judgment, one of the purposes of the defendants before her was to monitor the conduct of the Claimants, so as to ensure they did not act unlawfully.[91]

(b) Equally, it is unlikely in the extreme that neighbouring landowners would permit the erection, on their land, of barriers like the Hoarding Fence without objection, particularly given the controversial nature of the HS2 Scheme.

(c) Nor do I consider that the Claimants would dare to pursue the aggressive vindication of their rights (erecting barriers and notices; ejecting persons; arresting them; diverting and closing footpaths) without being very sure that they were acting clearly within their rights.

(8) If Mr Cuciurean had mounted a positive case that the Claimants had overreached, then of course that case would have to be considered by me and determined. But no evidence has been advanced by Mr Cuciurean in this regard, and the Claimants have simply been put to proof. Such a course is absolutely within Mr Cuciurean's rights, and I take the burden and standard of proof – which rests on the Claimants – extremely seriously. But, in the case of Incidents 1 to 3 and 5 to 13, I am satisfied that that burden has been met taking all of the evidence before me into account.

I have used the term "aggressive" in describing the Claimants' vindication of its rights. By this, I do not mean to suggest anything disproportionate or wrong in the Claimants' conduct. The importance of the term lies in the overtness of the Claimants' conduct. This was not a case where the Claimants were, hidden from sight, asserting their rights. Given this overtness, some form of pushpack would be inevitable if the Claimants' were asserting rights that they did not have.

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[90] See, for instance, [13] of the Judgment, referring to the Heras fences.

[91] See [9] of the Judgment in relation to the Crackley Land.

(iii) The boundaries of the Crackley Land were unclear

110. It was contended that the boundaries of the Crackley Land were unclear. A great deal of the evidence adduced by Mr Cuciurean (including in particular the evidence described in paragraph 12(4) above) went to this point. Thus, it was suggested that the Injunction Notices and Injunction Warning Notices were not present; that the multiple layers of No Trespass Notices were confusing; that the agents of the Claimants were unclear as to the boundaries they were patrolling; that the fence lines – in particular the Internal Boundary and the *Ad Hoc* Fencing – were confusing; and that much more could have been done to clarify the position.

111. I do not accept this evidence. It seems to me that once the conclusion has been reached that the physical perimeter around Area A matched the land edged in red defined in the Order, there was little or no scope for misunderstanding the perimeter of the Crackley Land. The suggestion that the boundaries of the Crackley Land were unclear to the protestors in general, and to Mr Cuciurean in particular, rather misstates the purpose of the protests and the purpose of Mr Cuciurean's conduct at the Crackley Land. Mr Cuciurean was not an unknowing roamer of the countryside, accidently coming across the Hoarding Fence and deciding to climb it. He was – as he fully acknowledged – a committed opponent of the HS2 Scheme and his conduct and commitment must be seen in that light. Mr Cuciurean was not, by some terrible mistake that could have been avoided if only the Claimants had been clearer, penetrating the perimeter of the Crackley Land several times in one night (Incidents 1 to 5). He was doing so because (as I have noted) he was seeking to lend as much force to his objections to the HS2 Scheme as he could, by inconveniencing the Claimants as much as possible.

112. In short, whilst I do not consider that the Claimants could (within reason[92]) have been any clearer about the perimeter of Area A, it is my settled view that even if additional steps had been taken to publicize the Area A perimeter, those steps would have made no difference to Mr Cuciurean's conduct.

113. I should add, by way of postscript, that I consider the clarity or otherwise of the boundaries of the Crackley Land to be a matter essentially irrelevant to the outcome of the Application. It seems to me that either Mr Cuciurean entered upon the Crackley Land or he did not. If he did – as I have concluded he did – he was in breach of the Order.

(iv) A licence was granted to Mr Cuciurean to cross the Crackley Land

114. This contention has, as I understand it, two bases: the first is what Mr Cuciurean suggested was the unlawful failure to open the TPROW; the second arises out of paragraph 30 of Bovan 2, which states:

> "…This access across the Crackley Land was tolerated by the [Claimants] as the entirety of the Crackley Land was not required for all times for Phase One works. I have also been informed by employees of LM (the contractor employed by the Second [Claimant]) that there would be a significant and disproportionate cost to fence the entire perimeter…"

[92] It would, of course, have been possible – but economically mad – to have encircled the Crackley Land with an insurmountable barrier.

115. It is convenient to deal with the second point first. It is evident that Mr Bovan is here describing the Claimants' attitude in relation to the unfenced part of Crackley Land (East), what I have termed Area B.[93] I regard the contention that the Claimants were – by reason of the unfenced nature of Area B – consenting to trespasses of the sort described in Incidents 1 to 3 and 5 to 13 as unarguable.[94] In these Incidents, Mr Cuciurean was obviously entering upon land where he was not welcome, and where his presence was quite the reverse of being consented to. He was, in these Incidents, either driven from the land, escorted off it or arrested. The suggestion that his presence was or had been consented to – or even tolerated – is fanciful.

116. Although it is immaterial to the outcome, it seems to me necessary to state that the mere passage and re-passage of persons across Area B cannot, of itself, be enough to establish consent on the part of the Claimants to such passage and re-passage. As Mr Bovan described, the Crackley Land is a large tract of land, which cannot (economically) be completely fenced in. The mere fact that trespass is easily possible in no way means it is permitted.

117. I turn, then, to the question of whether the conduct of the Claimants in relation to PROW165X and TPROW can give rise to any kind of justification for the Incidents (by which I mean Incidents 1 to 3 and 5 to 13) so as to avoid the conclusion that Mr Cuciurean was in breach of the Order. As to this:

(1) The starting point must be the terms of the Order itself, and the relevant part of the Order is paragraph 5.1. As I have described,[95] conduct which would otherwise be an infringement of paragraph 4.2 of the Order (entry upon the Crackley Land) is not an infringement where a person is exercising his or her rights of way over any open public right of way over the land.[96]

(2) It is clear – and not contested – that PROW165X was lawfully closed.[97] Mr Cuciurean contended that the consequence of this was that the TPROW was open and that the Claimants, by their conduct, improperly closed it. As a result, Mr Cuciurean contended, he was entitled to be on the TPROW and was entitled to use "self-help" remedies if (as was the case) the Claimants blocked the access to the TPROW.[98]

(3) I consider that these contentions to be basically misconceived and wrong. They can provide no justification for what would otherwise be a breach of the Order. My reasons for reaching this conclusion are multiple. In the first place, in none of the Incidents did Mr Cuciurean actually seek to use the TPROW. By this, I mean he never sought to pass or re-pass along it from its Southern starting point

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[93] See paragraph 87 above, where the limited perimeter fencing is described.

[94] These are the Incidents where I have concluded that there was – to the requisite standard – entry upon the Crackley Land and therefore – absent consent of the Claimants – a breach of the Order.

[95] See paragraph 6(5) above.

[96] My emphasis. Andrews J had well in mind the power in the Claimants to close public rights of way.

[97] See paragraphs 93(1) and 94 above.

[98] See paragraph 94 above, which describes the manner in which the TPROW was kept closed by the Claimants.

between Point 1 and Point 2.[99] Instead, he either climbed or circumvented the Hoarding Fence (an unjustifiable entry onto the Crackley Land) and entered upon the Strip between the perimeter and the TPROW Fencing (another unjustifiable entry onto the Crackley Land) and (from time to time) scaled the TPROW Fencing (which is not passage or re-passage along the TPROW). In short, Mr Cuciurean was not exercising his right over a public right of way – even assuming, in his favour, that the TPROW was a public right of way within the meaning of paragraph 5.1 of the Order.

(4) On behalf of Mr Cuciurean, it was suggested that the obstruction, by the Claimants, of the access point to the TPROW justified "self-help" in the form of the Incidents I have described. I reject this contention. Whilst I accept – assuming the TPROW to have been open or unlawfully not opened – Mr Cuciurean might have been justified in circumventing the obstruction and entering at the lawful point, that did not justify surmounting or circumventing the Hoarding Fence, thereby gaining access to land (i.e. the Strip) that – on no view – constituted the TPROW (or any right of way).[100]

(5) Moreover, I do not consider that the TPROW was ever open in the sense that a right of way was conferred on the public. The position was that PROW165X was closed, and no footpath was opened to replace it. I accept that this may very well have been a breach of the Claimants' public law powers under High Speed Rail (London – West Midlands) Act 2017. I shall – without deciding the point – assume that the terms of the Claimants' consultation with Warwickshire Country Council[101] were such that it was (in the public law sense) unlawful for the Claimants to close PROW165X without opening the TPROW. Making that assumption in Mr Cuciurean's favour, this might have given him the right to review juducially the Claimants' decision to close PROW165X. But it could in no way confer upon him the right to pass or repass in any way along the TPROW.

118. For these reasons, I do not consider that the exception to paragraph 4 of the Order, contained in paragraph 5.1, was engaged.

(e) Conclusion on breach

119. For all these reasons, the Order, which was clear and unambiguous, was breached by Mr Cucuirean when he committed Incidents 1 to 3 and 5 to 13.

(4) Deliberation

120. Deliberation refers to the mental element or *mens rea* in civil contempt. Proudman J helpfully set out the matters that have to be established where contempt by breach of an order is alleged in *FW Farnsworth Ltd v.* Lacy:[102]

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[99] See paragraphs 91 and 93(4) above.

[100] The reliance on *Stacey v. Sherrin*, (1913) 29 TLR 555 was, for this reason, misconceived.

[101] See paragraph 93 above.

[102] [2013] WHC 3487 (Ch) at [20].

"A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

121. The *mens rea* or mental element for civil contempt (which this Application is concerned with) is considered in *Arlidge*, which both parties before me relied upon:[103]

"12-93 Warrington J expressed the principle in *Stancomb v. Trowbridge UDC*:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it there was no direct intention to disobey the order."

That this expresses the true position has since been confirmed by the Court of Appeal and also by the House of Lords in *Heatons Transport (St Helens) Ltd v. TGWU*, in *Director Genral of Fair Trading v. Pioneer Concrete (UK) Ltd* and in *M: M v. Home Office, Re*. Motive is immaterial to the question of liability.

12-94 What was traditionally required was to demonstrate that the alleged contemnor's *conduct* was intentional (in the sense that what he actually did, or omitted to do, was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence. By reason of CPR 81.8(1) in the case of a prohibitory order, the court may dispense with service of a copy of the order if satisfied that the person had been present when the judgment was given or the order made. As Christopher Clarke J explained in *Masri v. Consolidated Contractors* "it would not…be just to exercise a contempt jurisdiction against a defendant who had not had notice of the order in order to be able to comply with it". This will not necessarily, however, in itself demonstrate that the alleged contemnor actually knows of the order. The problem was highlighted by Eveleigh LJ in *Z Ltd v. A-Z and AA-LL*:

> "In the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation is said to be acting knowingly."

12-95 Yet there is no need to go so far as to show that the respondent *realised* that his conduct would constitute a breach, or even that he had read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general."

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[103] Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) (omitting footnotes and references).

122. Thus, the element of "deliberation" is actually a very attenuated requirement, which in reality requires no more than that the alleged contemnor do the acts that constitute a breach of the order with deliberation, as opposed to by accident or unconsciously. The low standard of the mental element is very well illustrated by the decision of Jacob J in *Adam Phones Ltd v. Gideon Goldschmidt*,[104] where the Jacob J nevertheless (albeit with some reluctance) considered a contempt to be established even where the contemnor had thought he was obeying the court's order:

> "The claimant says that provided that Gideon intended to do what he did, that is enough to prove contempt. It is no defence to say "I thought was obeying the order" if in fact you were wrong.
>
> The claimant relies upon what was said by Mr Justice Millett in *Spectravest v. Aperknit*:
>
> > "To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order.
> >
> > Authority for this conclusion may be found in *Heatons Transport (St. Helen's) Ltd v Transport & General Workers' Union*, [1973] AC 15 at 108-110, and *Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137. In the first of those cases, Lord Wilberforce described as contempt conduct which was "neither casual nor accidental and unintentional". That phrase was carefully chosen and repeated several times. It clearly describes only two alternatives, not three. Conduct which is deliberate but unintentional, in the sense in which that word was used by Mrs Giret, cannot be brought within Lord Wilbeforce's formula.
> >
> > In the Mileage case, the defendants had given undertakings to the court not to enter into a particular agreement or any agreement "to the like effect". The question whether one agreement is of like effect to another is a question of fact and degree, as the court expressly held. The court, nevertheless, held that a contempt had been established. At 1162 the court said:
> >
> > "We conclude, therefore, that the breaches of undertaking here were contempts of court, even though it were to be shown that they were things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."
> >
> > A little later on he said:
> >
> > "Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt. *Bona fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant and sometimes very important as mitigation. The extent of such mitigation must, however, depend upon the circumstances of the particular case, and the evidence adduced."
>
> The cases referred to by Millett J support his conclusion. It is also the generally received view, see e.g. the Supreme Court Practice 1999 paragraph 45/5/5:
>
> > "It is no answer to say that the Act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order".

[104] [2000] FSR 163 at 170-171.

123. Although Jacob J considered contrary authority, and expressed the view that "it is appropriate for the mental element of contempt of court to be reconsidered by a higher court",[105] his conclusion was that the law as stated by Millett J and cited by him was the law he was bound to apply.[106] That remains the position in this case.

124. I am satisfied that Mr Cuciurean breached the Order deliberately, in that he consciously and deliberately entered the Crackley Land. That is all the Order enjoined. In case I am wrong about the attenuated nature of the requirement of deliberation, I should make clear the following findings:

(1) Mr Cuciurean obviously entered the Crackley Land wilfully, intending to enter upon land where he knew he should not be. I consider his conduct in crossing the Area A perimeter in the way he did in Incidents 1 to 3 and 5 to 13 to demonstrate a subjective understanding that he was trespassing on another's land, and that he was doing so in the face of a clear determination on the part of the Claimants that he should not do so.

(2) I consider that Mr Cuciurean entered upon the Crackley Land with the subjective intention to further the HS2 protest, and to inhibit or thwart the HS2 Scheme to the best of his ability.

(3) I find that he did so in knowledge of the Order. I cannot say that he knew the full terms of the Order. Mr Cuciurean may very well have taken the course of adopting wilful blindness of its terms. But in light of the events described in this judgment, I conclude that Mr Cuciurean fully understood the terms of paragraph 4.2 of the Order, namely that he was not to enter upon the Crackley Land.

F. CONCLUSIONS

125. For all these reasons, I am satisfied that of the alleged grounds of contempt described in Statement of Case and in the Schedule thereto, Incidents 1 to 3 and 5 to 13 are made out to the requisite standard, and that Mr Cucuirean has breached the Order and is in contempt of court in these respects.

126. At the hearing at which I heard the parties' helpful closing submissions on 17 September 2020, it was agreed that if (as I have found) Mr Cuciurean was in contempt of court, his counsel, Mr Wagner, would wish some time to consider points in mitigation. That is, of course, entirely right.

127. I have listed this matter for hearing on 16 October 2020, when I propose formally to hand down this judgment (subject to any typographical corrections the parties may have). However, it should be noted that this judgment was circulated to the parties, in draft, on 2 October 2020, so as to enable Mr Cuciurean and his legal team to consider it.

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[105] At 172.

[106] At 172.

ANNEX 1

TERMS USED IN THE JUDGMENT

(footnote 1 in the judgment)

TERM	PARAGRAPH IN THE JUDGMENT IN WHICH THE TERM IS FIRST USED
Ad Hoc Fencing	§86(3)
Annex 1	§1 (footnote 1)
Annex 2	§3
Annex 3	§86
Annex 4	§93(4)
Application	§7
Area A	§87
Area B	§85(4)
Beaumont 1	§12(4)(f)
Beim 1	§55(2)
Bovan 1	§7
Bovan 2	§12(1)
Bovan 3	§12(1)
Cairns 1	§12(4)(d)
Camp 1	§7 (footnote 4)
Camp 2	§7 (footnote 4)
Category 3 Defendants	§41
Claimants	§2
Corcos 1	§12(4)(a)
Crackley Land	§3
Crackley Land (East)	§84
Crackley Land (West)	§84
Cuciurean 1	§12(3)(a)
Cuciurean 2	§12(3)(a)
Defendants	§2
HCE	§7 (in quotation)
Heras fence panels	§86(2)

Hicks 1	§12(4)(c)
Hicks 2	§12(4)(c)
Hillier 1	§12(4)(b)
Hoarding Fence	§89(3)
HS2	§2
HS2 Scheme	§10(1)
Incident(s)	§8
Injunction Notice	§57(3)(a)(i)
Injunction Warning Notice	§57(3)(a)(ii)
Internal Boundary	§86(4)
Judgment	§1
Land	§3
No Trespass Notice	§57(3)(d)
Order	§1
Penal Notice	§5
Pitwell 1	§12(4)(e)
Plan B	§3
Point 1	§89
Point 2	§89(1)
Point 3	§89(2)
Point 4	§89(3)
Point 5	§89(4)
Point 6	§89(4)
Point 7	§89(4)
Point 8	§89(5)
Pook 1	§12(4)(g)
Post and Wire Fence	§89(5)
Proceedings	§7 (in quotation)
PROW165X	§91
Remaining Portion	§85(3)
Sah 1	§12(2)
Schedule	§8
Second Defendants	§2
Shaw 1	§29(4)

Square	§85(1)
Statement of Case	§7
Strip	§93(4)(b)
TPROW	§93(3)
TPROW Fencing	§93(4)(c)
Triangle	§85(2)
Writ	§12(1)

ANNEX 2

"PLAN B": THE PLAN OF THE CRACKLEY LAND ATTACHED TO THE ORDER

(paragraph 3 in the judgment)

ANNEX 3

"PLAN B" MARKED UP FOR THE PURPOSE OF THIS JUDGMENT

(paragraph 86 in the judgment)

ANNEX 4

THE PLAN SHOWING THE INTENDED DIVERSION OF PROW165X TO A TPROW

(paragraph 93(4) in the judgment)