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Case No		**QB-2021-003576**
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) MX CATHERINE RENNIE-NASH AND 9 OTHERS**
Hearing date		**26 April 2024**
Party filing this document		**Claimant**

AUTHORITIES

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Michaelmas Term
[2023] UKSC 47
On appeal from: [2022] EWCA Civ 13

JUDGMENT

Wolverhampton City Council and others (Respondents) *v* London Gypsies and Travellers and others (Appellants)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
29 November 2023

Heard on 8 and 9 February 2023

Appellants
Richard Drabble KC
Marc Willers KC
Tessa Buchanan
Owen Greenhall
(Instructed by Community Law Partnership (Birmingham))

1st Respondent
Mark Anderson KC
Michelle Caney
(Instructed by Wolverhampton City Council Legal Services)

2nd Respondent
Nigel Giffin KC
Simon Birks
(Instructed by Walsall Metropolitan Borough Council Legal Services)

3rd to 10th Respondents
Caroline Bolton
Natalie Pratt
(Instructed by Sharpe Pritchard LLP and London Borough of Barking and Dagenham Legal Services)

1st Intervener
Stephanie Harrison KC
Stephen Clark
Fatima Jichi
(Instructed by Hodge Jones & Allen LLP)

2nd Intervener
Jude Bunting KC
Marlena Valles
(Instructed by Liberty)

3rd and 4th Interveners
Richard Kimblin KC
Michael Fry
(Instructed by HS2 Ltd Legal Department and the Government Legal Department)

Appellants
(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

Respondents
(1) Wolverhampton City Council
(2) Walsall Metropolitan Borough Council
(3) London Borough of Barking and Dagenham
(4) Basingstoke and Deane Borough Council and Hampshire County Council
(5) London Borough of Redbridge
(6) London Borough of Havering
(7) Nuneaton & Bedworth Borough Council and Warwickshire County Council
(8) Rochdale Metropolitan Borough Council
(9) Test Valley Borough Council and Hampshire County Council
(10) Thurrock Council
(11) Persons unknown

Interveners
(1) Friends of the Earth
(2) Liberty
(3) High Speed Two (HS2) Ltd
(4) Secretary of State for Transport

LORD REED, LORD BRIGGS AND LORD KITCHIN (with whom Lord Hodge and Lord Lloyd-Jones agree):

1. Introduction

(1) The problem

1. This appeal concerns a number of conjoined cases in which injunctions were sought by local authorities to prevent unauthorised encampments by Gypsies and Travellers. Since the members of a group of Gypsies or Travellers who might in future camp in a particular place cannot generally be identified in advance, few if any of the defendants to the proceedings were identifiable at the time when the injunctions were sought and granted. Instead, the defendants were described in the claim forms as "persons unknown", and the injunctions similarly enjoined "persons unknown". In some cases, there was no further description of the defendants in the claim form, and the court's order contained no further information about the persons enjoined. In other cases, the defendants were described in the claim form by reference to the conduct which the claimants sought to have prohibited, and the injunctions were addressed to persons who behaved in the manner from which they were ordered to refrain.

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

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

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

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

(2) The factual and procedural background

6. Between 2015 and 2020, 38 different local authorities or groups of local authorities sought injunctions against unidentified and unknown persons, which in broad terms prohibited unauthorised encampments within their administrative areas or on specified areas of land within those areas. The claims were brought under the procedure laid down in Part 8 of the Civil Procedure Rules 1998 ("CPR"), which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR rule 8.1(2). The claimants relied upon a number of statutory provisions, including section 187B of the Town and Country Planning Act 1990, under which the court can grant an injunction to restrain an actual or apprehended breach of planning control, and in some cases also upon common law causes of action, including trespass to land.

7. The claim forms fell into two broad categories. First, there were claims directed against defendants described simply as "persons unknown", either alone or together with named defendants. Secondly, there were claims against unnamed defendants who were described, in almost all cases, by reference to the future activities which the claimant sought to prevent, either alone or together with named defendants. Examples included "persons unknown forming unauthorised encampments within the Borough of Nuneaton and Bedworth", "persons unknown entering or remaining without planning consent on those parcels of land coloured in schedule 2 of the draft order", and "persons unknown who enter and/or occupy any of the locations listed in this order for residential purposes (whether temporary or otherwise) including siting caravans, mobile homes, associated vehicles and domestic paraphernalia".

8. In most cases, the local authorities obtained an order for service of the claim forms by alternative means under CPR rule 6.15, usually by fixing copies in a prominent location at each site, or by fixing there a copy of the injunction with a notice

that the claim form could be obtained from the claimant's offices. Injunctions were obtained, invariably on without notice applications where the defendants were unnamed, and were similarly displayed. They contained a variety of provisions concerning review or liberty to apply. Some injunctions were of fixed duration. Others had no specified end date. Some were expressed to be interim injunctions. Others were agreed or held by Nicklin J to be final injunctions. Some had a power of arrest attached, meaning that any person who acted contrary to the injunction was liable to immediate arrest.

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

10. From around mid-2020, applications were made in some of the claims to extend or vary injunctions of fixed duration which were nearing their end. After a hearing in one such case, Nicklin J decided, with the concurrence of the President of the Queen's Bench Division and the Judge in Charge of the Queen's Bench Civil List, that there was a need for review of all such injunctions. After case management, in the course of which many of the claims were discontinued, there remained 16 local authorities (or groups of local authorities) actively pursuing claims. The appellants were given permission to intervene. A hearing was then fixed at which four issues of principle were to be determined. Following the hearing, Nicklin J determined those issues: *Barking and Dagenham London Borough Council v Persons Unknown* [2021] EWHC 1201 (QB); [2022] JPL 43.

11. Putting the matter broadly at this stage, Nicklin J concluded, in the light particularly of the decision of the Court of Appeal in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 ("*Canada Goose*"), that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought. If the relevant local authority could identify anyone in the category of "persons unknown" at the time the final order was granted, then the final injunction bound each person who could be identified. If not, then the final injunction granted against "persons unknown" bound no-one. In the light of that conclusion, Nicklin J discharged the final injunctions either in full or in so far as they were addressed to any person falling within the definition of "persons unknown" who was not a party to the proceedings at the date when the final order was granted.

12. Twelve of the claimants appealed to the Court of Appeal. In its decision, set out in a judgment given by Sir Geoffrey Vos MR with which Lewison and Elisabeth Laing LJJ agreed, the court held that "the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of

the order, from occupying and trespassing on land": *Barking and Dagenham London Borough Council v Persons Unknown* [2022] EWCA Civ 13; [2023] QB 295, para 7. The appellants appeal to this court against that decision.

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

> (1) Is it wrong in principle and/or not open to a court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 ("the 1981 Act") so as to grant an injunction which will bind "newcomers", that is to say, persons who were not parties to the claim when the injunction was granted, other than (i) on an interim basis or (ii) for the protection of Convention rights (ie rights which are protected under the Human Rights Act 1998)?
>
> (2) If it is wrong in principle and/or not open to a court to grant such an injunction, then –
>
> > (i) Does it follow that (other than for the protection of Convention rights) such an injunction may likewise not properly be granted on an interim basis, except where that is required for the purpose of restraining wrongful actions by persons who are identifiable (even if not yet identified) and who have already committed or threatened to commit a relevant wrongful act?
> >
> > (ii) Was Nicklin J right to hold that the protection of Convention rights could never justify the grant of a Traveller injunction, defined as an injunction prohibiting the unauthorised occupation or use of land?

2. The legal background

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

> (1) Are newcomers parties to the proceedings at the time when the injunction is granted? If not, is it possible to obtain an injunction against a non-party? If they are not parties at that point, when (if ever) and how do they become parties?

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

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

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

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

(1) The jurisdiction to grant injunctions

16. As Lord Scott of Foscote commented in *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 WLR 320, para 25, in a speech with which the other Law Lords agreed, jurisdiction is a word of some ambiguity. Lord Scott cited with approval Pickford LJ's remark in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 that "the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised". However, as Pickford LJ went on to observe, the word is often used in another sense: "that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances". In order to avoid confusion, it is necessary to distinguish between these two senses of the word: between the power to decide – in this context, the power to grant an injunction – and the principles and practice governing the exercise of that power.

17. The injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited: Spry, *Equitable Remedies*, 9th ed

(2014) ("Spry"), p 333, cited with approval in, among other authorities, *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, paras 20-21 and *Cartier International AG v British Sky Broadcasting Ltd* [2016] EWCA Civ 658; [2017] Bus LR 1, para 47 (both citing the equivalent passage in the 5th ed (1997)), and *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24; [2023] AC 389 ("*Broad Idea*"), para 57. The breadth of the court's power is reflected in the terms of section 37(1) of the 1981 Act, which states that:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

As Lord Scott explained in *Fourie v Le Roux* (ibid), that provision, like its statutory predecessors, merely confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act and has been preserved by section 18(2) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 19(2)(b) of the 1981 Act.

18. It is also relevant in the context of this appeal to note that, as a court of inherent jurisdiction, the High Court possesses the power, and bears the responsibility, to act so as to maintain the rule of law.

19. Like any judicial power, the power to grant an injunction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of court. Accordingly, as Lord Mustill observed in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 360-361:

> "Although the words of section 37(1) [of the 1981 Act] and its forebears are very wide it is firmly established by a long history of judicial self-denial that they are not to be taken at their face value and that their application is subject to severe constraints."

Nevertheless, the principles and practice governing the exercise of the power to grant injunctions need to and do evolve over time as circumstances change. As Lord Scott observed in *Fourie v Le Roux* at para 30, practice has not stood still and is unrecognisable from the practice which existed before the 1873 Act.

20. The point is illustrated by the development in recent times of several new kinds of injunction in response to the emergence of particular problems: for example, the

Mareva or freezing injunction, named after one of the early cases in which such an order was made (*Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509); the search order or *Anton Piller* order, again named after one of the early cases in which such an order was made (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55); the *Norwich Pharmacal* order, also known as the third party disclosure order, which takes its name from the case in which the basis for such an order was authoritatively established (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133); the *Bankers Trust* order, which is an injunction of the kind granted in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; the internet blocking order, upheld in *Cartier International AG v British Sky Broadcasting Ltd* (para 17 above), and approved by this court in the same case, on an appeal on the question of costs: *Cartier International AG v British Telecommunications plc* [2018] UKSC 28; [2018] 1 WLR 3259, para 15; the anti-suit injunction (and its offspring, the anti-anti-suit injunction), which has become an important remedy as globalisation has resulted in parties seeking tactical advantages in different jurisdictions; and the related injunction to restrain the presentation or advertisement of a winding-up petition.

21. It has often been recognised that the width and flexibility of the equitable jurisdiction to issue injunctions are not to be cut down by categorisations based on previous practice. In *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, for example, Lord Scarman stated at p 573, in a speech with which the other Law Lords agreed, that "the width and flexibility of equity are not to be undermined by categorisation". To similar effect, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, Lord Goff of Chieveley, with whom Lord Mackay of Clashfern agreed, stated at p 44:

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (para 19 above), Lord Browne-Wilkinson, with whose speech Lord Keith of Kinkel and Lord Goff agreed, expressed his agreement at p 343 with Lord Goff's observations in the *South Carolina* case. In *Mercedes Benz AG v Leiduck* [1996] AC 284, 308, Lord Nicholls of Birkenhead referred to these dicta in the course of his illuminating albeit dissenting judgment, and stated:

> "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be

> viewed and decided in the light of today's conditions and standards, not those of yester-year."

22. These dicta are borne out by the recent developments in the law of injunctions which we have briefly described. They illustrate the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice, such as freezing injunctions, *Anton Piller* orders, *Norwich Pharmacal* orders and *Bankers Trust* orders, and also, more significantly for present purposes, in respect of orders designed to protect substantive rights, such as internet blocking orders. That is not to undermine the importance of precedent, or to suggest that established categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require.

(2) Injunctions against non-parties

23. It is common ground in this appeal that newcomers are not parties to the proceedings at the time when the injunctions are granted, and the judgments below proceeded on that basis. However, it is worth taking a moment to consider the question.

24. Where the defendants are described in a claim form, or an injunction describes the persons enjoined, simply as persons unknown, the entire world falls within the description. But the entire human race cannot be regarded as being parties to the proceedings: they are not before the court, so that they are subject to its powers. It is only when individuals are served with the claim form that they ordinarily become parties in that sense, although is also possible for persons to apply to become parties in the absence of service. As will appear, service can be problematical where the identities of the intended defendants are unknown. Furthermore, as a general rule, for any injunction to be enforceable, the persons whom it enjoins, if unnamed, must be described with sufficient clarity to identify those included and those excluded.

25. Where, as in most newcomer injunctions, the persons enjoined are described by reference to the conduct prohibited, particular individuals do not fall within that description until they behave in that way. The result is that the injunction is in substance addressed to the entire world, since anyone in the world may potentially fall within the description of the persons enjoined. But persons may be affected by the injunction in ways which potentially have different legal consequences. For example, an injunction designed to deter Travellers from camping at a particular location may be addressed to persons unknown camping there (notwithstanding that no-one is currently doing so) and may restrain them from camping there. If Travellers elsewhere learn about the injunction, they may consequently decide not to go to the site. Other Travellers,

unaware of the injunction, may arrive at the site, and then become aware of the claim form and the injunction by virtue of their being displayed in a prominent position. Some of them may then proceed to camp on the site in breach of the injunction. Others may obey the injunction and go elsewhere. At what point, if any, do Travellers in each of these categories become parties to the proceedings? At what point, if any, are they enjoined? At what point, if any, are they served (if the displaying of the documents is authorised as alternative service)? It will be necessary to return to these questions. However these questions are answered, although each of these groups of Travellers is affected by the injunction, none of them can be regarded as being party to the proceedings at the time when the injunction is granted, as they do not then answer to the description of the persons enjoined and nothing has happened to bring them within the jurisdiction of the court.

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

(i) Representative proceedings

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

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

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

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

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

30. However, there are a number of principles which restrict the circumstances in which relief can be obtained by means of a representative action. In the first place, the claimant has to be able to identify at least one individual against whom a claim can be brought as a representative of all others likely to interfere with his or her rights. Secondly, the named defendant and those represented must have the same interest. In practice, compliance with that requirement has proved to be difficult where those sought to be represented are not a homogeneous group: see, for example, *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, concerned with industrial action, and *United Kingdom Nirex Ltd v Barton*, The Times, 14 October 1986, concerned with protests. In addition, since those represented are not party to the proceedings, an injunction cannot be enforced against them without the permission of the court (CPR rule 19.8(4)(b)): something which, it has been held, cannot be granted before the individuals in question have been identified and have had an opportunity to make representations: see, for example, *RWE Npower plc v Carrol* [2007] EWHC 947 (QB).

(ii) Wardship proceedings

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

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

(iii) Injunctions to protect human rights

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

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

(iv) Reporting restrictions

34. Reporting restrictions are prohibitions on the publication of information about court proceedings, directed at the world at large. They are not injunctions in the same sense as the orders which are our primary concern, but they are relevant as further

examples of orders granted by courts restraining conduct by the world at large. Such orders may be made under common law powers or may have a statutory basis. They generally prohibit the publication of information about the proceedings in which they are made (eg as to the identity of a witness). A person will commit a contempt of court if, knowing of the order, he frustrates its purpose by publishing the information in question: see, for example, *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 and *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

(v) Embargoes on draft judgments

35. It is the practice of some courts to circulate copies of their draft judgments to the parties' legal representatives, subject to a prohibition on further, unauthorised, disclosure. The order therefore applies directly to non-parties to the proceedings: see, for example, *Attorney General v Crosland* [2021] UKSC 15; [2021] 4 WLR 103 and [2021] UKSC 58; [2022] 1 WLR 367. Like reporting restrictions, such orders are not equitable injunctions, but they are relevant as further examples of orders directed against non-parties.

(vi) The effect of injunctions on non-parties

36. We have focused thus far on the question whether an injunction can be granted against a non-party. As we shall explain, it is also relevant to consider the effect which injunctions against parties can have upon non-parties.

37. If non-parties are not enjoined by the order, it follows that they are not bound to obey it. They can nevertheless be held in contempt of court if they knowingly act in the manner prohibited by the injunction, even if they have not aided or abetted any breach by the defendant. As it was put by Lord Oliver of Aylmerton in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191, 223, there is contempt where a non-party "frustrates, thwarts, or *subverts the purpose* of the court's order and thereby interferes with the due administration of justice in the particular action" (emphasis in original).

38. One of the arguments advanced before the House of Lords in *Attorney General v Times Newspapers Ltd* was that to invoke the jurisdiction in contempt against a person who was neither a party nor an aider or abettor of a breach of the order by the defendant, but who had done what the defendant in the action was forbidden by the order to do was, in effect, to make the order operate in rem or contra mundum. That, it was argued, was a purpose which the court could not legitimately achieve, since its orders were only properly made inter partes.

39. The argument was rejected. Lord Oliver acknowledged at p 224 that "[e]quity, in general, acts in personam and there are respectable authorities for the proposition that injunctions, whether mandatory or prohibitory, operate inter partes and should be so expressed (see *Iveson v Harris: Marengo v Daily Sketch and Sunday Graphic Ltd* [1948] 1 All ER 406)". Nevertheless, the appellants' argument confused two different things: the scope of an order inter partes, and the proper administration of justice (pp 224-225):

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

40. In answer to the objection that the non-party who learns of the order has not been heard by the court and has therefore not had the opportunity to put forward any arguments which he may have, Lord Oliver responded at p 224 that he was at liberty to apply to the court:

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

The non-party's right to apply to the court is now reflected in CPR rule 40.9, which provides:

> "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied."

A non-party can also apply to become a defendant in accordance with CPR rule 19.4.

41. There is accordingly a distinction in legal principle between being bound by an injunction as a party to the action and therefore being in contempt of court for

disobeying it and being in contempt of court as a non-party who, by knowingly acting contrary to the order, subverts the court's purpose and thereby interferes with the administration of justice. Nevertheless, cases such as *Attorney-General v Times Newspapers Ltd* and *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046*,* and the daily impact of freezing injunctions on non-party financial institutions (following *Z Ltd v A-Z and AA-LL* [1982] QB 558), indicate that the differences in the legal analysis can be of limited practical significance. Indeed, since non-parties can be found in contempt of court for acting contrary to an injunction, it has been recognised that it can be appropriate to refer to non-parties in an injunction in order to indicate the breadth of its binding effect: see, for example, *Marengo v Daily Sketch and Sunday Graphic Ltd* at p 407; *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, 387-388.

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

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

43. An injunction against newcomers purports to restrain the conduct of persons against whom there is no existing cause of action at the time when the order is granted: it is addressed to persons who may not at that time have formed any intention to act in the manner prohibited, let alone threatened to take or taken any steps towards doing so. That might be thought to conflict with the principle that an injunction must be founded on an existing cause of action against the person enjoined, as stated, for example, by Lord Diplock in *Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA* [1979] AC 210 ("*The Siskina*"), 256. There has been a gradual but growing reaction against that reasoning (which Lord Diplock himself recognised was too narrowly stated: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81) over the past 40 years, culminating in the recent decision in *Broad Idea,* cited in para 17 above, where the Judicial Committee of the Privy Council rejected such a rigid doctrine and asserted the court's governance of its own practice. It is now well established that the grant of injunctive relief is not always conditional on the existence of a cause of action. Again, it is relevant to consider some established categories of injunction against "no cause of action defendants" (as they are sometimes described) in order to see whether newcomer injunctions fall into an existing legitimate class, or, if not, whether they display analogous features.

44. One long-established exception is an injunction granted on the application of the Attorney General, acting either ex officio or through another person known as a relator, so as to ensure that the defendant obeys the law (*Attorney-General v Harris* [1961] 1 QB 74; *Attorney General v Chaudry* [1971] 1 WLR 1614).

45. The statutory provisions relied on by the local authorities in the present case similarly enable them to seek injunctions in the public interest. All the respondent local authorities rely on section 222 of the Local Government Act 1972, which confers on local authorities the power to bring proceedings to enforce obedience to public law, without the involvement of the Attorney General: *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754. Where an injunction is granted in proceedings under section 222, a power of arrest may be attached under section 27 of the Police and Justice Act 2006, provided certain conditions are met. Most of the respondents also rely on section 187B of the Town and Country Planning Act 1990, which enables a local authority to apply for an injunction to restrain any actual or apprehended breach of planning control. Some of the respondents have also relied on section 1 of the Anti-Social Behaviour, Crime and Policing Act 2014, which enables the court to grant an injunction (on the application of, inter alia, a local authority: see section 2) for the purpose of preventing the respondent from engaging in anti-social behaviour. Again, a power of arrest can be attached: see section 4. One of the respondents also relies on section 130 of the Highways Act 1980, which enables a local authority to institute legal proceedings for the purpose of protecting the rights of the public to the use and enjoyment of highways.

46. Another exception, of great importance in modern commercial practice, is the *Mareva* or freezing injunction. In its basic form, this type of order restrains the defendant from disposing of his assets. However, since assets are commonly held by banks and other financial institutions, the principal effect of the injunction in practice is generally to bind non-parties, as explained earlier. The order is ordinarily made on a without notice application. It differs from a traditional interim injunction: its purpose is not to prevent the commission of a wrong which is the subject of a cause of action, but to facilitate the enforcement of an actual or prospective judgment or other order. Since it can also be issued to assist the enforcement of a decree arbitral, or the judgment of a foreign court, or an order for costs, it need not be ancillary to a cause of action in relation to which the court making the order has jurisdiction to grant substantive relief, or indeed ancillary to a cause of action at all (as where it is granted in support of an order for costs). Even where the claimant has a cause of action against one defendant, a freezing injunction can in certain limited circumstances be granted against another defendant, such as a bank, against which the claimant does not assert a cause of action (*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 and *Revenue and Customs Comrs v Egleton* [2006] EWHC 2313 (Ch); [2007] Bus LR 44; [2007] 1 All ER 606).

47. Another exception is the *Norwich Pharmacal* order, which is available where a third party gets mixed up in the wrongful acts of others, even innocently, and may be ordered to provide relevant information in its possession which the applicant needs in order to seek redress. The order is not based on the existence of any substantive cause of action against the defendant. Indeed, it is not a precondition of the exercise of the jurisdiction that the applicant should have brought, or be intending to bring, legal proceedings against the alleged wrongdoer. It is sufficient that the applicant intends to seek some form of lawful redress for which the information is needed: see *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 1 WLR 2033.

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

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

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

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

51. The commencement of proceedings is an essentially formal step, normally involving the issue of a claim form in an appropriate court. The forms prescribed in the CPR include a space in which to designate the claimant and the defendant. As was observed in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471 ("*Cameron*"), para 12*,* that is a format equally consistent with their being designated by name or by description. As was explained earlier, the claims in the present case were brought under Part 8 of the CPR. CPR rule 8.2A(1) provides that a practice direction "may set out circumstances in which a claim form may be issued under this Part without naming a defendant". A number of practice directions set out such circumstances, including Practice Direction 49E, paras 21.1-21.10 of which concern applications under certain statutory provisions. They include section 187B of the Town and Country Planning Act 1990, which concerns proceedings for an injunction to restrain "any actual or apprehended breach of planning control". As explained in para 45 above, section 187B was relied on in most of the present cases. CPR rule 55.3(4) also permits a claim for possession of property to be brought against "persons unknown" where the names of the trespassers are unknown.

52. The only requirement for a name is contained in paragraph 4.1 of Practice Direction 7A, which states that a claim form should state the full name of each party. In *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 ("*Bloomsbury*"), it was said that the words "should state" in paragraph 4.1 were not mandatory but imported a discretion to depart from the practice in appropriate cases. However, the point is not of critical importance. As was stated in *Cameron,* para 12, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. It has no statutory force and cannot alter the general law.

53. As we have explained at paras 27-33 above, there are undoubtedly circumstances in which proceedings may be validly commenced although the defendant is not named in the claim form, in addition to those mentioned in the rules and practice directions mentioned above. All of those examples – representative defendants, the wardship jurisdiction, and the principle established in the *Venables* case - might however be said to be special in some way, and to depend on a principle which is not of broader application.

54. A wider scope for proceedings against unnamed defendants emerged in *Bloomsbury*, where it was held that there is no requirement that the defendant must be named. The overriding objective of the CPR is to enable the court to deal with cases justly and at proportionate cost. Since this objective is inconsistent with an undue reliance on form over substance, the joinder of a defendant by description was held to be permissible, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21). It will be necessary to return to that case, and also to consider more recent decisions concerned with proceedings brought against unnamed persons.

55. Service of the claim form is a matter of greater significance. Although the court may exceptionally dispense with service, as explained below, and may if necessary grant interlocutory relief, such as interim injunctions, before service, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction, in the sense of its power to make orders against him or her (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 523; *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 WLR 1119). Service is significant for many reasons. One of the most important is that it is a general requirement of justice that proceedings should be brought to the notice of parties whose interests are affected before any order is made against them (other than in an emergency), so that they have an opportunity to be heard. Service of the claim form on the defendant is the means by which such notice is normally given. It is also normally by means of service of the order that an injunction is brought to the notice of the defendant, so that he or she is bound to comply with it. But it is generally sufficient that the defendant is aware of the injunction at the time of the alleged breach of it.

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

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

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

(1) Bloomsbury

58. One of the earliest injunctions of this kind was granted in the context of the protection of intellectual property rights in connection with the forthcoming publication of a novel. The *Bloomsbury* case, cited at para 52 above, is one of two decisions of Sir Andrew Morritt V-C in 2003 which bear on this appeal. There had been a theft of several pre-publication copies of a new Harry Potter novel, some of which had been offered to national newspapers ahead of the launch date. By the time of the hearing of a

much adjourned interim application most but not all of the thieves had been arrested, but the claimant publisher wished to have continued injunctions, until the date a month later when the book was due to be published, against unnamed further persons, described as the person or persons who had offered a copy of the book to the three named newspapers and the person or persons in physical possession of the book without the consent of the claimants.

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

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

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

> "The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.

(2) Hampshire Waste Services

60. Later that same year, Sir Andrew Morritt V-C made another order against persons unknown, this time in a protester case, *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 ("*Hampshire Waste Services*"). The claimants, operators of a number of waste incinerator sites which fed power to the national grid, sought an injunction to restrain protesters from entering any of various named sites in connection with a "Global Day of Action against Incinerators" some six days later. Previous actions of this kind presented a danger to the protesters and to others and had resulted in the plants having to be shut down. The police were, it seemed, largely powerless to prevent these threatened activities. The Vice-Chancellor, having referred to *Bloomsbury*, had no doubt the order was justified save for one important matter: the claimants were unable to

identify any of the protesters to whom the order would be directed or upon whom proceedings could be served. Nevertheless, the Vice-Chancellor was satisfied that, in circumstances such as these, joinder by description was permissible, that the intended defendants should be described as "persons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites at [specified addresses] in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003", and that posting notices around the sites would amount to effective substituted service. The court should not refuse an application simply because difficulties in enforcement were envisaged. It was, however, necessary that any person who wished to do so should be able promptly to apply for the order to be discharged, and that was allowed for. That being so, there was no need for a formal return date.

61. Whereas in *Bloomsbury* the injunction was directed against a small number of individuals who were at least theoretically capable of being identified, the injunction granted in *Hampshire Waste Services* was effectively made against the world: anyone might potentially have entered or remained on any of the sites in question on or around the specified date. This is a common if not invariable feature of newcomer injunctions. Although the number of persons likely to engage in the prohibited conduct will plainly depend on the circumstances, and will usually be relatively small, such orders bear upon, and enjoin, anyone in the world who does so.

(3) Gammell

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

63. Some of these issues were considered by the Court of Appeal only a short time later in two appeals concerning Gypsy caravans brought onto land at a time when planning permission had not been granted for that use: *South Cambridgeshire District Council v Gammell*; *Bromley London Borough Council v Maughan* [2005] EWCA Civ 1429; [2006] 1 WLR 658 ("*Gammell*").

64. The material aspects of the two cases are substantially similar, and it will suffice for present purposes to focus on the South Cambridgeshire case. The Court of Appeal (Brooke and Clarke LJJ) had earlier granted an injunction under section 187B of the Town and Country Planning Act 1990 against persons described as "persons unknown … causing or permitting hardcore to be deposited … caravans, mobile homes or other forms of residential accommodation to be stationed … or existing caravans, mobile homes or other forms of residential accommodation … to be occupied" on land adjacent to a Gypsy encampment in rural Cambridgeshire: *South Cambs District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 PLR 88 ("*South Cambs*"). The order restrained the persons so described from behaving in the manner set out in that description. Service of the claim form and the injunction was effected by placing them in clear plastic envelopes in a prominent position on the relevant land.

65. Several months later, Ms Gammell, without securing or applying for the necessary planning permission or making an application to set the injunction aside or vary its terms, proceeded to station her caravans on the land. She was therefore a newcomer within the meaning of that word as used in this appeal, since she was neither a defendant nor on notice of the application for the injunction nor on the site when the injunction was granted. She was served with the injunction and its effect was explained to her, but she continued to station the caravans on the land. On an application for committal by the local authority she was found at first instance to have been in contempt. Sentencing was adjourned to enable her to appeal against the judge's refusal to permit her to be added as a defendant to the proceedings, for the purpose of enabling her to argue that the injunction should not have the effect of placing her in contempt until a proportionality exercise had been undertaken to balance her particular human rights against the grant of an injunction against her, in accordance with *South Bucks District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558.

66. The Court of Appeal dismissed her appeal. In his judgment, Sir Anthony Clarke MR, with whom Rix and Moore-Bick LJJ agreed, stated that each of the appellants became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Ms Gammell had therefore already become a defendant when she stationed her caravan on the site. Her proper course (and that of any newcomer in the same situation) was to make a prompt application to vary or discharge the injunction as against her (which she had not done) and, in the meantime, to comply with the injunction. The individualised proportionality exercise could then be carried out with regard to her particular circumstances on the hearing of the application to vary or discharge, and might in any event be relevant to sanction. This reasoning, and in particular the notion that a newcomer becomes a defendant by committing a breach of the injunction, has been subject to detailed and sustained criticism by the appellants in the course of this appeal, and this is a matter to which we will return.

(4) Meier

67. We should also mention a decision of this court from about the same time concerning Travellers who had set up an unauthorised encampment in wooded areas managed by the Forestry Commission and owned by the Secretary of State for the Environment, Food and Rural Affairs: *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780 ("*Meier*"). This was in one sense a conventional case: the Secretary of State issued proceedings alleging trespass by the occupying Travellers and sought an order for possession of the occupied sites. More unusual (and ultimately unsuccessful) was the application for an order for possession against the Travellers in respect of other land which was wholly detached from the land they were occupying. This was wrong in principle for it was simply not possible (even on a precautionary basis) to make an order requiring persons to give immediate possession of woodland of which they were *not* in occupation, and which was wholly detached from the woodland of which they *were* in occupation (as Lord Neuberger of Abbotsbury MR explained at para 75). But that did not mean the courts were powerless to frame a remedy. The court upheld an injunction granted by the Court of Appeal against the defendants, including "persons names unknown", restraining them from entering the woodland which they had not yet occupied. Since it was not argued that the injunction was defective, we do not attach great significance to Lord Neuberger's conclusion at para 84 that it had not been established that there was an error of principle which led to its grant. Nevertheless, it is notable that Lord Rodger expressed the view that the injunction had been rightly granted, and cited the decisions of the Vice-Chancellor in *Bloomsbury* and *Hampshire Waste Services,* and the grant of the injunction in the *South Cambs* case, without disapproval (at paras 2-3).

(5) Later cases concerning Traveller injunctions

68. Injunctions in the Traveller and Gypsy context were targeted first at actual trespass on land. Typically, the local authorities would name as actual or intended defendants the particular individuals they had been able to identify, and then would seek additional relief against "persons unknown", these being persons who were alleged to be unlawfully occupying the land but who could not at that stage be identified by name, although often they could be identified by some form of description. But before long, many local authorities began to take a bolder line and claims were brought simply against "persons unknown".

69. A further important development was the grant of Traveller injunctions, not just against those who were in unauthorised occupation of the land, whether they could be identified or not, but against persons on the basis only of their potential rather than actual occupation. Typically, these injunctions were granted for three years, sometimes more. In this way Traveller injunctions were transformed from injunctions against wrongdoers and those who at the date of the injunction were threatening to commit a

wrong, to injunctions primarily or at least significantly directed against newcomers, that is to say persons who were not parties to the claim when the injunction was granted, who were not at that time doing anything unlawful in relation to the land of that authority, or even intending or overtly threatening to do so, but who might in the future form that intention.

70. One of the first of these injunctions was granted by Patterson J in *Harlow District Council v Stokes* [2015] EWHC 953 (QB). The claimants sought and were granted an interim injunction under section 222 of the Local Government Act 1972 and section 187B of the Town and Country Planning Act 1990 in existing proceedings against over thirty known defendants and, importantly, other "persons unknown" in respect of encampments on a mix of public and private land. The pattern had been for these persons to establish themselves in one encampment, for the local authority and the police to take action against them and move them on, and for the encampment then to disperse but later reappear in another part of the district, and so the process would start all over again, just as Lord Rodger had anticipated in *Meier*. Over the months preceding the application numerous attempts had been made using other powers (such as the Criminal Justice and Public Order Act 1994 ("CJPOA")) to move the families on, but all attempts had failed. None of the encampments had planning permission and none had been the subject of any application for planning permission.

71. It is to be noted, however, that appropriate steps had been taken to draw the proceedings to the attention of all those in occupation (see para 15). None had attended court. Further, the relevant authorities and councils accepted that they were required to make provision for Gypsy and Traveller accommodation and gave evidence of how they were working to provide additional and appropriate sites for the Gypsy and Traveller communities. They also gave evidence of the extensive damage and pollution caused by the unlawful encampments, and the local tensions they generated, and the judge summarised the effects of this in graphic detail (at paras 10 and 11).

72. Following the decision in *Harlow District Council v Stokes* and an assessment of the efficacy of the orders made, a large number of other local authorities applied for and were granted similar injunctions over the period from 2017-2019, with the result that by 2020 there were in excess of 35 such injunctions in existence. By way of example, in *Kingston upon Thames Royal London Borough Council v Persons Unknown* [2019] EWHC 1903 (QB), the injunction did not identify any named defendants.

73. All of these injunctions had features of relevance to the issues raised by this appeal. Sometimes the order identified the persons to whom it was directed by reference to a particular activity, such as "persons unknown occupying land" or "persons unknown depositing waste". In many of the cases, injunctions were granted against persons identified only as those who might in future commit the acts which the injunction prohibited (eg *UK Oil and Gas Investments plc v Persons Unknown* [2018]

EWHC 2252 (Ch); [2019] JPL 161). In other cases, the defendants were referred to only as "persons unknown". The injunctions remained in place for a considerable period of time and, on occasion, for years. Further, the geographical reach of the injunctions was extensive, indeed often borough-wide. They were usually granted without the court hearing any adversarial argument, and without provision for an early return date.

74. It is important also to have in mind that these injunctions undoubtedly had a significant impact on the communities of Travellers and Gypsies to whom they were directed, for they had the effect of forcing many members of these communities out of the boroughs which had obtained and enforced them. They also imposed a greater strain on the resources of the boroughs and councils which had not yet obtained an order. This combination of features highlighted another important consideration, and it was one of which the judges faced with these applications have been acutely conscious: a nomadic lifestyle has for very many years been a part of the tradition and culture of many Traveller and Gypsy communities, and the importance of this lifestyle to the Gypsy and Traveller identity has been recognised by the European Court of Human Rights in a series of decisions including *Chapman v United Kingdom* (2001) 33 EHRR 18.

75. As the Master of the Rolls explained in the present case, at paras 105 and 106, any individual Traveller who is affected by a newcomer injunction can rely on a private and family life claim to pursue a nomadic lifestyle. This right must be respected, but the right to that respect must be balanced against the public interest. The court will also take into account any other relevant legal considerations such as the duties imposed by the Equality Act 2010.

76. These considerations are all the more significant given what from these relatively early days was acknowledged by many to be a central and recurring set of problems in these cases (and it is one to which we must return in considering appropriate guidelines in cases of this kind): the Gypsies and Travellers to whom they were primarily directed had a lifestyle which made it difficult for them to access conventional sources of housing provision; their attempts to obtain planning permission almost always met with failure; and at least historically, the capacity of sites authorised for their occupation had fallen well short of that needed to accommodate those seeking space on which to station their caravans. The sobering statistics were referred to by Lord Bingham of Cornhill in *South Bucks District Council v Porter* (para 65 above), para 13.

77. The conflict to which these issues gave rise was recognised at the highest level as early as 2000 and emphasised in a housing research summary, "Local Authority Powers for Managing Unauthorised Camping" (Office of the Deputy Prime Minister, No 90, 1998, updated 4 December 2000):

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

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

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

whether they should be made subject to particular conditions and safeguards and, if so, what those conditions and safeguards should be.

(6) Cameron

80. The decision of the Supreme Court in *Cameron* (para 51 above) highlighted further and more fundamental considerations for this developing jurisprudence, and it is a decision to which we must return for it forms an important element of the case developed before us on behalf of the appellants. At this stage it is sufficient to explain that the claimant suffered personal injuries and damage to her car in a collision with another vehicle. The driver of that vehicle failed to stop and fled the scene. The claimant then brought an action for damages against the registered keeper, but it transpired that that person had not been driving the vehicle at the time of the accident. In addition, although there was an insurance policy in force in respect of the vehicle, the insured person was fictitious. The claimant could not sue the insurers, as the relevant legislation required that the driver was a person insured under the policy. The claimant could have sought compensation from the Motor Insurers' Bureau, which compensates the victims of uninsured motorists, but for reasons which were unclear she applied instead to amend her claim to substitute for the registered keeper the person unknown who was driving the car at the time of the collision, so as to obtain a judgment on which the insurer would be liable under section 151 of the Road Traffic Act 1988 ("the 1988 Act"). The judge refused the application.

81. The Court of Appeal allowed the claimant's appeal. In the Court of Appeal's view, it would be consistent with the CPR and the policy of the 1988 Act for proceedings to be brought and pursued against the unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151 of the 1988 Act for any judgment obtained against that driver.

82. A further appeal by the insurer to the Supreme Court was allowed unanimously. Lord Sumption considered in some detail the extent of any right in English law to sue unnamed persons. He referred to the decision in *Bloomsbury* and the cases which followed, many of which we have already mentioned. Then, at para 13, he distinguished between two kinds of case in which the defendant could not be named, and to which different considerations applied. The first comprised anonymous defendants who were identifiable but whose names were unknown. Squatters occupying a property were, for example, identifiable by their location though they could not be named. The second comprised defendants, such as most hit and run drivers, who were not only anonymous but could not be identified.

83. Lord Sumption proceeded to explain that permissible modes of service had been broadened considerably over time but that the object of all of these modes of service

was the same, namely to enable the court to be satisfied that one or other of the methods used had either put the defendant in a position to ascertain the contents of the claim or was reasonably likely to enable him to do so within an appropriate period of time. The purpose of service (and substituted service) was to inform the defendant of the contents of the claim and the nature of the claimant's case against him; to give him notice that the court, being a court of competent jurisdiction, would in due course proceed to decide the merits of that claim; and to give him an opportunity to be heard and to present his case before the court. It followed that it was not possible to issue or amend a claim form so as to sue an unnamed defendant if it was conceptually impossible to bring the claim to his attention.

84. In the *Cameron* case there was no basis for inferring that the offending driver was aware of the proceedings. Service on the insurer did not and would not without more constitute service on that offending driver (nor was the insurer directly liable); alternative service on the insurer could not be expected to reach the driver; and it could not be said that the driver was trying to evade service for it had not been shown that he even knew that proceedings had been or were likely to be brought against him. Further, it had not been established that this was an appropriate case in which to dispense with service altogether for any other reason. It followed that the driver could not be sued under the description relied upon by the claimant.

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

(7) Ineos

86. In *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, the claimants, a group of companies and individuals connected with the business of shale and gas exploration by fracking, sought interim injunctions to restrain what they contended were threatened and potentially unlawful acts of protest, including trespass, nuisance and harassment, before they occurred. The judge was satisfied on the evidence that there was a real and imminent threat of unlawful activity if he did not make an order pending trial and it was likely that a similar order would be made at trial. He therefore made the orders sought by the claimants, save in relation to harassment.

87. On appeal to the Court of Appeal it was argued, among other things, that the judge was wrong to grant injunctions against persons unknown and that he had failed properly to consider whether the claimants were likely to obtain the relief they sought at

trial and whether it was appropriate to grant an injunction against persons unknown, including newcomers, before they had had an opportunity to be heard.

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

89. Longmore LJ went on tentatively to frame the requirements of an injunction against unknown persons, including newcomers, in a characteristically helpful and practical way. He did so in these terms (at para 34): (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

(8) Bromley

90. The issue of unauthorised encampments by Gypsies and Travellers was considered by the Court of Appeal a short time later in *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12; [2020] PTSR 1043. This was an appeal against the refusal by the High Court to grant a five year de facto borough-wide prohibition of encampment and entry or occupation of accessible public spaces in Bromley except cemeteries and highways. The final injunction sought was directed at "persons unknown" but it was common ground that it was aimed squarely at the Gypsy and Traveller communities.

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

them, thereby imposing a greater strain on the resources of those which had not yet applied for such orders; there was a strong possibility that unless restrained by the injunction those targeted by these proceedings would act in breach of the rights of the relevant local authority; and although aspects of the resulting damage could be repaired, there would nevertheless be significant irreparable damage too. The judge was satisfied that all the necessary ingredients for a quia timet injunction were in place and so it was necessary to carry out an assessment of whether it was proportionate to grant the injunction sought in all the circumstances of the case. She concluded that it was not proportionate to grant the injunction to restrain entry and encampments but that it was proportionate to grant an injunction against fly-tipping and the disposal of waste.

92. The particular questions giving rise to the appeal were relatively narrow (namely whether the judge had fallen into error in finding the order sought was disproportionate, in setting too high a threshold for assessment of the harm caused by trespass and in concluding that the local authority had failed to discharge its public sector equality duty); but the Court of Appeal was also invited and proceeded to give guidance on the broader question of how local authorities ought properly to address the issues raised by applications for such injunctions in the future. The decision is also important because it was the first case involving an injunction in which the Gypsy and Traveller communities were represented before the High Court, and as a result of their success in securing the discharge of the injunction, it was the first case of this kind properly to be argued out at appellate level on the issues of procedural fairness and proportionality. It must also be borne in mind that the decision of the Supreme Court in *Cameron* was not cited to the Court of Appeal; nor did the Court of Appeal consider the appropriateness as a matter of principle of granting such injunctions. Conversely, there is nothing in *Bromley* to suggest that final injunctions against unidentified newcomers cannot or should never be granted.

93. As it was, the Court of Appeal dismissed the appeal. Coulson LJ, with whom Ryder and Haddon-Cave LJJ agreed, endorsed what he described as the elegant synthesis by Longmore LJ in *Ineos* (at para 34) of certain essential requirements for the grant of an injunction against persons unknown in a protester case (paras 29-30). He considered it appropriate to add in the present context (that of Travellers and Gypsies), first, that procedural fairness required that a court should be cautious when considering whether to grant an injunction against persons unknown, including Gypsies and Travellers, particularly on a final basis, in circumstances where they were not there to put their side of the case (paras 31-34); and secondly, that the judge had adopted the correct approach in requiring the claimant to show that there was a strong probability of irreparable harm (para 35).

94. The Court of Appeal was also satisfied that in assessing proportionality the judge had properly taken into account seven factors: (a) the wide extent of the relief sought; (b) the fact that the injunction was not aimed specifically at prohibiting anti-social or criminal behaviour, but just entry and occupation; (c) the lack of availability of

alternative sites; (d) the cumulative effect of other injunctions; (e) various specific failures on the part of the authority in respect of its duties under the Human Rights Act and the public sector equality duty; (f) the length of time, that is to say five years, the proposed injunction would be in force; and (g) whether the order sought took proper account of permitted development rights arising by operation of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), that is to say the grant of "deemed planning permission" for, by way of example, the stationing of a single caravan on land for not more than two nights, which had not been addressed in a satisfactory way. Overall, the authority had failed to satisfy the judge that it was appropriate to grant the injunction sought, and the Court of Appeal decided there was no basis for interfering with the conclusion to which she had come.

95. Coulson LJ went on (at paras 99-109) to give the wider guidance to which we have referred, and this is a matter to which we will return a little later in this judgment for it has a particular relevance to the principles to which newcomer injunctions in Gypsy and Traveller cases should be subject. Aspects of that guidance are controversial; but other aspects about which there can be no real dispute are that local authorities should engage in a process of dialogue and communication with travelling communities; should undertake, where appropriate, welfare and impact assessments; and should respect, appropriately, the culture, traditions and practices of the communities. Similarly, injunctions against unauthorised encampments should be limited in time, perhaps to a year, before review.

(9) Cuadrilla

96. The third of these appeals, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29, concerned an injunction to restrain four named persons and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with their rights of passage to and from that land, and unlawfully interfering with the supply chain of the first claimant, which was involved, like *Ineos*, in the business of shale and gas exploration by fracking. The Court of Appeal was specifically concerned here with a challenge to an order for the committal of a number of persons for breach of this injunction, but, at para 48 and subject to two points, summarised the effect of *Ineos* as being that there was no conceptual or legal prohibition against suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort. Nonetheless, it continued, a court should be inherently cautious about granting such an injunction against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance.

(10) Canada Goose

97. Only a few months later, in *Canada Goose* (para 11 above), the Court of Appeal was called upon to consider once again the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. The first claimant, Canada Goose, was the UK trading arm of an international retailing business selling clothing containing animal fur and down. It opened a store in London but was faced with what it considered to be a campaign of harassment, nuisance and trespass by protesters against the manufacture and sale of such clothing. Accordingly, with the manager of the store, it issued proceedings and decided to seek an injunction against the protesters.

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

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

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

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

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

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

103. Thirdly, the Court of Appeal held (para 89) that a final injunction could not be granted in a protester case against persons unknown who were not parties at the date of the final order, since a final injunction operated only between the parties to the proceedings. As authority for that proposition, the court cited *Attorney General v Times Newspapers Ltd* per Lord Oliver at p 224 (quoted at para 39 above). That, the court said, was consistent with the fundamental principle in *Cameron* that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. It followed, in the court's view, that a final injunction could not be granted against newcomers who had not by that time committed the prohibited acts, since they did not fall within the description of "persons unknown" and had not been served with the claim form. This was not one of the very limited cases, such as *Venables*, in which a final injunction could be granted against the whole world. Nor was it a case where there was scope for making persons unknown subject to a final order. That was only possible (and perfectly legitimate) provided the persons unknown were confined to those in the first category of unknown persons in *Cameron* – that is to say anonymous defendants who were nonetheless identifiable in some other way (para 91).

In the Court of Appeal's view, the claimants' problem was that they were seeking to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters (para 93).

104. This reasoning reveals the marked difference in approach and outcome from that of the Court of Appeal in the proceedings now before this court and highlights the importance of the issues to which it gives rise and to which we referred at the outset. Indeed, the correctness and potential breadth of the reasoning of the Court of Appeal in *Canada Goose*, and how that reasoning differs from the approach taken by the Court of Appeal in these proceedings, lie at the heart of these appeals.

(11) The present case

105. The circumstances of the present appeals were summarised at paras 6-12 above. In the light of the foregoing discussion, it will be apparent that, in holding that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had had an opportunity to contest the final order sought, Nicklin J applied the reasoning of the Court of Appeal in *Canada Goose.* The Court of Appeal, however, departed from that reasoning, on the basis that it had failed to have proper regard to *Gammell,* which was binding on it.

106. The Court of Appeal's approach in the present case, as set out in the judgment of Sir Geoffrey Vos MR, with which the other members of the court agreed, was based primarily on the decision in *Gammell*. It proceeded, therefore, on the basis that the persons to whom an injunction is addressed can be described by reference to the behaviour prohibited by the injunction, and that those persons will then become parties to the action in the event that they breach the injunction. As we will explain, we do not regard that as a satisfactory approach, essentially because it is based on the premise that the injunction will be breached and leaves out of account the persons affected by the injunction who decide to obey it. It also involves the logical paradox that a person becomes bound by an injunction only as a result of infringing it. However, even leaving *Gammell* to one side, the Court of Appeal subjected the reasoning in *Canada Goose* to cogent criticism.

107. Among the points made by the Master of the Rolls, the following should be highlighted. No meaningful distinction could be drawn between interim and final injunctions in this context (para 77). No such distinction had been drawn in the earlier case law concerned with newcomer injunctions. It was unrealistic at least in the context of cases concerned with protesters or Travellers, since such cases rarely if ever resulted in trials. In addition, in the case of an injunction (unlike a damages action such as *Cameron*) there was no possibility of a default judgment: the grant of an injunction was always in the discretion of the court. Nor was a default judgment available under Part 8

procedure. Furthermore, as the facts of the earlier cases demonstrated and *Bromley* explained, the court needed to keep injunctions against persons unknown under review even if they were final in character. In that regard, the Master of the Rolls made the point that, for as long as the court is concerned with the enforcement of an order, the action is not at an end.

4. A new type of injunction?

108. It is convenient to begin the analysis by considering certain strands in the arguments which have been put forward in support of the grant of newcomer injunctions, initially outside the context of proceedings against Travellers. They may each be labelled with the names of the leading cases from which the arguments have been derived, and we will address them broadly chronologically.

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

110. *Venables* has been followed in a number of later cases at first instance, where there was convincing evidence that an injunction contra mundum was necessary to protect a person from serious injury or death: see *X (formerly Bell) v O'Brien* [2003] EWHC 1101 (QB); [2003] EMLR 37; *Carr v News Group Newspapers Ltd* [2005] EWHC 971 (QB); *A (A Protected Party) v Persons Unknown* [2016] EWHC 3295 (Ch); [2017] EMLR 11; *RXG v Ministry of Justice* [2019] EWHC 2026 (QB); [2020] QB 703; *In re Persons formerly known as Winch* [2021] EWHC 1328 (QB); [2021] EMLR 20 and [2021] EWHC 3284 (QB); and *D v Persons Unknown* [2021] EWHC 157 (QB). An injunction contra mundum has also been granted where there was a danger of a serious violation of another Convention right, the right to respect for private life: see *OPQ v BJM* [2011] EWHC 1059 (QB); [2011] EMLR 23. The approach adopted in these cases has generally been based on the Human Rights Act rather than on principles of wider

application. They take the issue raised in the present case little further on the question of principle. The facts of the cases were extreme in imposing real compulsion on the court to do something effective. Above all, the court was driven in each case to make the order by a perception that the risk to the claimants' Convention rights placed it under a positive duty to act. There is no real parallel between the facts in those cases and the facts of a typical Traveller case. The local authority has no Convention rights to protect, and such Convention rights of the public in its locality as a newcomer injunction might protect are of an altogether lower order.

111. The next in time is the *Bloomsbury* case, the facts and reasoning in which were summarised in paras 58-59 above. The case was analysed by Lord Sumption in *Cameron* by reference to the distinction which he drew at para 13, as explained earlier, between cases concerned with anonymous defendants who were identifiable but whose names were unknown, such as squatters occupying a property, and cases concerned with defendants, such as most hit and run drivers, who were not only anonymous but could not be identified. The distinction was of critical importance, in Lord Sumption's view, because a defendant in the first category of case could be served with the claim form or other originating process, whereas a defendant in the second category could not, and consequently could not be given such notice of the proceedings as would enable him to be heard, as justice required.

112. Lord Sumption added at para 15 that where an interim injunction was granted and could be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it would sometimes be enough to bring the proceedings to the defendant's attention. He cited *Bloomsbury* as an example, stating:

> "the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction."

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

> "One does not, however, identify an unknown person simply by referring to something that he has done in the past. 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013', does not identify anyone. It does not enable

> one to know whether any particular person is the one referred to."

Nor was there any specific interim relief, such as an injunction, which could be enforced in a way that would bring the proceedings to the unknown person's attention. The impossibility of service in such a case was, Lord Sumption said, "due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is" (ibid). The alternative service approved by the Court of Appeal – service on the insurer – could not be expected to reach the driver, and would be tantamount to no service at all. Addressing what, if the case had proceeded differently, might have been the heart of the matter, Lord Sumption added that although it might be appropriate to dispense with service if the defendant had concealed his identity in order to evade service, no submission had been made that the court should treat the case as one of evasion of service, and there were no findings which would enable it to do so.

114. We do not question the decision in *Cameron.* Nor do we question its essential reasoning: that proceedings should be brought to the notice of a person against whom damages are sought (unless, exceptionally, service can be dispensed with), so that he or she has an opportunity to be heard; that service is the means by which that is effected; and that, in circumstances in which service of the amended claim on the substituted defendant would be impossible (even alternative service being tantamount to no service at all), the judge had accordingly been right to refuse permission to amend.

115. That said, with the benefit of the further scrutiny that the point has received on this appeal, we have, with respect, some difficulties with other aspects of Lord Sumption's analysis. In the first place, we agree that it is generally necessary that a defendant should have such notice of the proceedings as will enable him to be heard before any final relief is ordered. However, there are exceptions to that general rule, as in the case of injunctions granted contra mundum, where there is in reality no defendant in the sense which Lord Sumption had in mind. It is also necessary to bear in mind that it is possible for a person affected by an injunction to be heard after a final order has been made, as was explained at para 40 above. Furthermore, notification, by means of service, and the consequent ability to be heard, is an essentially practical matter. As this court explained in *Abela v Baadarani* [2013] UKSC 44; [2013] 1 WLR 2043, para 37, service has a number of purposes, but the most important is to ensure that the contents of the document served come to the attention of the defendant. Whether they have done so is a question of fact. If the focus is on whether service can in practice be effected, as we think it should be, then it is unnecessary to carry out the preliminary exercise of classifying cases as falling into either the first or the second of Lord Sumption's categories.

116. We also have reservations about the theory that it is necessary, in order for service to be effective, that the defendant should be identifiable. For example, Lord

Sumption cited with approval the case of *Brett Wilson llp v Persons Unknown* [2015] EWHC 2628 (QB); [2016] 4 WLR 69, as illustrating circumstances in which alternative service was legitimate because "it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form" (para 15). That was a case concerned with online defamation. The defendants were described as persons unknown, responsible for the operation of the website on which the defamatory statements were published. Alternative service was effected by sending the claim form to email addresses used by the website owners, who were providers of a proxy registration service (ie they were registered as the owners of the domain name and licensed its operation by third parties, so that those third parties could not be identified from the publicly accessible database of domain owners). Yet the identities of the defendants were just as unknown as that of the driver in *Cameron,* and remained so after service had been effected: it remained impossible to identify any individuals as the persons described in the claim form. The alternative service was acceptable not because the defendants could be identified, but because, as the judge stated (para 16), it was reasonable to infer that emails sent to the addresses in question had come to their attention.

117. We also have difficulty in fitting the unnamed defendants in *Bloomsbury* within Lord Sumption's class of identifiable persons who in due course could be served. It is true that they would have had to identify themselves as the persons referred to if they had sought to do the prohibited act. But if they learned of the injunction and decided to obey it, they would be no more likely to be identified for service than the hit and run driver in *Cameron.* The *Bloomsbury* case also illustrates the somewhat unstable nature of Lord Sumption's distinction between anonymous and unidentifiable defendants. Since the unnamed defendants in *Bloomsbury* were unidentifiable at the time when the claim was commenced and the injunction was granted, one would have thought that the case fell into Lord Sumption's second category. But the fact that the unnamed defendants would have had to identify themselves as the persons in possession of the book if (but only if) they disobeyed the injunction seems to have moved the case into the first category. This implies that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. For these reasons also, it seems to us that the classification of cases as falling into one or other of Lord Sumption's categories (or into a third category, as suggested by the Court of Appeal in *Canada Goose,* para 63, and in the present case, para 35) may be a distraction from the fundamental question of whether service on the defendant can in practice be effected so as to bring the proceedings to his or her notice.

118. We also note that Lord Sumption's description of *Bloomsbury* and *Gammell* as cases concerned with interim injunctions was influential in the later case of *Canada Goose*. It is true that the order made in *Bloomsbury* was not, in form, a final order, but it was in substance equivalent to a final order: it bound those unknown persons for the entirety of the only relevant period, which was the period leading up to the publication of the book. As for *Gammell,* the reasoning did not depend on whether the injunctions were interim or final in nature. The order in Ms Gammell's case was interim ("until trial

or further order"), but the point is less clear in relation to the order made in the accompanying case of Ms Maughan, which stated that "this order shall remain in force until further order".

119. More importantly, we are not comfortable with an analysis of *Bloomsbury* which treats its legitimacy as depending upon its being categorised as falling within a class of case where unnamed defendants may be assumed to become identifiable, and therefore capable of being served in due course, as we shall explain in more detail in relation to the supposed *Gammell* solution, notably included by Lord Sumption in the same class alongside *Bloomsbury*, at para 15 in *Cameron*.

120. We also observe that *Cameron* was not concerned with equitable remedies or equitable principles. Nor was it concerned with newcomers. Understandably, given that the case was an action for damages, Lord Sumption's focus was particularly on the practice of the common law courts and on cases concerned with common law remedies (eg at paras 8 and 18-19). Proceedings in which injunctive relief is sought raise different considerations, partly because an injunction has to be brought to the notice of the defendant before it can be enforced against him or her. In some cases, furthermore, the real target of the injunctive relief is not the unidentified defendant, but the "no cause of action defendants" against whom freezing injunctions, *Norwich Pharmacal* orders, *Bankers Trust* orders and internet blocking orders may be obtained. The result of the orders made against those defendants may be to enable the unnamed defendant then to be identified and served, and effective relief obtained: see, for example, *CMOC Sales and Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm); [2019] Lloyd's Rep FC 62. In other words, the identification of the unknown defendant can depend upon the availability of injunctions which are granted at a stage when that defendant remains unidentifiable. Furthermore, injunctions and other orders which operate contra mundum, to which (as we have already observed) newcomer injunctions can be regarded as analogous, raise issues lying beyond the scope of Lord Sumption's judgment in *Cameron.*

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

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

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

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

125. We turn next to the supposed *Gammell* solution, and its apparent approval in *Cameron* as a juridically sound means of joining unnamed defendants by their self-identification in the course of disobeying the relevant injunction. It has the merit of

being specifically addressed to newcomer injunctions in the context of Travellers, but in our view it is really no solution at all.

126. The circumstances and reasoning in *Gammell* were explained in paras 63-66 above. For present purposes it is the court's reasons for concluding that Ms Gammell became a defendant when she stationed her caravans on the site which matter. At para 32 Sir Anthony Clarke MR said this:

> "In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case …. In the case of KG she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

The Master of the Rolls' analysis was not directed to a submission that injunctions could not or should not be granted at all against newcomers, as is now advanced on this appeal. No such submission was made. Furthermore, he was concerned only with the circumstances of a person who had both been served with and (by oral explanation) notified of the terms of the injunction and who had then continued to disobey it. He was not concerned with the position of a newcomer, wishing to camp on a prohibited site who, after learning of the injunction, simply decided to obey it and move on to another site. Such a person would not, on his analysis, become a defendant at all, even though constrained by the injunction as to their conduct. Service of the proceedings (as opposed to the injunction) was not raised as an issue in that case as the necessary basis for in personam jurisdiction, other than merely for holding the ring. Neither *Cameron* nor *Fourie v Le Roux* had been decided. The real point, unsuccessfully argued, was that the injunction should not have the effect against any particular newcomer of placing them in contempt until a personalised proportionality exercise had been undertaken. The need for a personalised proportionality exercise is also pursued on this appeal as a reason why newcomer injunctions should never be granted against Travellers, and we address it later in this judgment.

127. The concept of a newcomer automatically becoming (or self-identifying as) a defendant by disobeying the injunction might therefore be described, in 2005, as a solution looking for a problem. But it became a supposed solution to the problem addressed in this appeal when prayed in aid, first briefly and perhaps tentatively by Lord Sumption in *Cameron* at para 15 and secondly by Sir Geoffrey Vos MR in great detail in the present case, at paras 28, 30-31, 37, 39, 82, 85, 91-92, 94, 96 and concluding at 99 of the judgment. It may fairly be described as lying at the heart of his reasoning for allowing the appeals, and departing from the reasoning of the Court of Appeal in *Canada Goose*.

128. This court is not of course bound to consider the matter, as was the Master of the Rolls, as a question of potentially binding precedent. We have the refreshing liberty of being able to look at the question anew, albeit constrained (although not bound) by the ratio of relevant earlier decisions of this court and of its predecessor. We conduct that analysis in the following paragraphs. While we have no reason to doubt the efficacy of the concept of self-identification as a defendant as a means of dealing with disobedience by a newcomer with an injunction, the propriety of which is not itself under challenge (as it was not in *Gammell),* we are not persuaded that self-identification as a defendant solves the basic problems inherent in granting injunctions against newcomers in the first place.

129. The *Gammell* solution, as we have called it, suffers from a number of problems. The most fundamental is that the effect of an injunction against newcomers should be addressed by reference to the paradigm example of the newcomer who can be expected to obey it rather than to act in disobedience to it. As Lord Bingham observed in *South Bucks District Council v Porter* (cited at para 65 above) at para 32, in connection with a possible injunction against Gypsies living in caravans in breach of planning controls, "[w]hen granting an injunction the court does not contemplate that it will be disobeyed". Lord Rodger cited this with approval (at para 17) in the *Meier* case (para 67 above). Similarly, Lady Hale stated in the same case at para 39, in relation to an injunction against trespass by persons unknown, "[w]e should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not."

130. A further problem with the *Gammell* solution is that where the defendants are defined by reference to the future act of infringement, a person who breaches the order will, by that very act, become bound by it. The Court of Appeal of Victoria remarked, in relation to similar reasoning in the New Zealand case of *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185, that an order of that kind "had the novel feature – which would have appealed to Lewis Carroll – that it became binding upon a person only because that person was already in breach of it": *Maritime Union of Australia v Patrick Stevedores Operations Pty Ltd* [1998] 4 VR 143, 161.

131. Nevertheless, a satisfactory solution, which respects the procedural rights of all those whose behaviour is constrained by newcomer injunctions, including those who obey them, should if possible be found. The practical need for such injunctions has been demonstrated both in this jurisdiction and elsewhere: see, for example, the Canadian case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048 (where reliance was placed at para 26 on *Attorney General v Times Newspapers Ltd* as establishing the contra mundum effect even of injunctions inter partes), American cases such as *Joel v Various John Does* 499 F Supp 791 (1980), New Zealand cases such as *Tony Blain Pty Ltd v Splain* (para 130 above), *Earthquake Commission v Unknown Defendants* [2013] NZHC 708 and *Commerce Commission v Unknown Defendants* [2019] NZHC 2609, the Cayman Islands case of *Ernst & Young Ltd v Department of Immigration* 2015 (1)

CILR 151, and Indian cases such as *ESPN Software India Private Ltd v Tudu Enterprise* (unreported), 18 February 2011.

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

133. As we have explained, the *Gammell* solution was adopted by the Court of Appeal in the present case as a means of overcoming the difficulties arising in relation to final injunctions against newcomers which had been identified in *Canada Goose*. Where, then, does our rejection of the *Gammell* solution leave the reasoning in *Canada Goose?*

134. Although we do not doubt the correctness of the decision in *Canada Goose,* we are not persuaded by the reasoning at paras 89-93, which we summarised at para 103 above. In addition to the criticisms made by the Court of Appeal which we have summarised at para 107 above, and with which we respectfully agree, we would make the following points.

135. First, the court's starting point in *Canada Goose* was that there were "some very limited circumstances", such as in *Venables,* in which a final injunction could be granted contra mundum, but that protester actions did not fall within "that exceptional category". Accordingly, "[t]he 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* … p 224" (para 89). The problem with that approach is that it assumes that the availability of a final injunction against newcomers depends on fitting such injunctions within an existing exclusive category. Such an approach is mistaken in principle, as explained in para 21 above.

136. The court buttressed its adoption of the "usual principle" with the observation that it was "consistent with the fundamental principle in *Cameron* ... that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard" (ibid). As we have explained, however, there are means of enabling a person who is affected by a final injunction to be heard after the order has been made, as was discussed in *Bromley* and recognised by the Master of the Rolls in the present case.

137. The court also observed at para 92 that "[a]n interim injunction is temporary relief intended to hold the position until trial", and that "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". That is an unrealistic view of proceedings of the kind in which newcomer injunctions are generally sought, and an unduly narrow view of the scope of interlocutory injunctions in the modern law, as explained at paras 43-49 above. As we have explained (eg at paras 60 and 73 above), there is scarcely ever a trial in proceedings of the present kind, or even adversarial argument; injunctions, even if expressed as being interim or until further order, remain in place for considerable periods of time, sometimes for years; and the proceedings are not at an end until the injunction is discharged.

138. We are also unpersuaded by the court's observation that private law remedies are unsuitable "as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters" (para 93). If that were so, where claimants face the prospect of continuing unlawful disruption of their activities by groups of individuals whose composition changes from time to time, then it seems that the only practical means of obtaining the relief required to vindicate their legal rights would be for them to adopt a rolling programme of applications for interim orders, resulting in litigation without end. That would prioritise formalism over substance, contrary to a basic principle of equity (para 151 below). As we shall explain, there is no overriding reason why the courts cannot devise procedures which enable injunctions to be granted which prohibit unidentified persons from behaving unlawfully, and which enable such persons subsequently to become parties to the proceedings and to seek to have the injunctions varied or discharged.

139. The developing arguments about the propriety of granting injunctions against newcomers, set against the established principles re-emphasised in *Fourie v Le Roux* and *Cameron,* and then applied in *Canada Goose*, have displayed a tendency to place such injunctions in one or other of two silos: interim and final. This has followed through into the framing of the issues for determination in this appeal and has, perhaps in consequence, permeated the parties' submissions. Thus, it is said by the appellants that the long-established principle that an injunction should be confined to defendants served with the proceedings applies only to final injunctions, which should not therefore be granted against newcomers. Then it is said that since an interim injunction is designed only to hold the ring, pending trial between the parties who have by then been served with the proceedings, its use against newcomers for any other purpose would fall

outside the principles which regulate the grant of interim injunctions. Then the respondents (like the Court of Appeal) rely upon the *Gammell* solution (that a newcomer becomes a defendant by acting in breach of the interim injunction) as solving both problems, because it makes them parties to the proceedings leading to the final injunction (even if they then take no part in them) and justifies the interim injunction against newcomers as a way of smoking them out before trial. In sympathy with the Court of Appeal on this point we consider that this constant focus upon the duality of interim and final injunctions is ultimately unhelpful as an analytical tool for solving the problem of injunctions against newcomers. In our view the injunction, in its operation upon newcomers, is typically neither interim nor final, at least in substance. Rather it is, against newcomers, what is now called a without notice (ie in the old jargon ex parte) injunction, that is an injunction which, at the time when it is ordered, operates against a person who has not been served in due time with the application so as to be able to oppose it, who may have had no notice (even informal) of the intended application to court for the grant of it, and who may not at that stage even be a defendant served with the proceedings in which the injunction is sought. This is so regardless of whether the injunction is in form interim or final.

140. More to the point, the injunction typically operates against a particular newcomer before (if ever) the newcomer becomes a party to the proceedings, as we have explained at paras 129-132 above. An ordinarily law-abiding newcomer, once notified of the existence of the injunction (eg by seeing a copy of the order at the relevant site or by reading it on the internet), may be expected to comply with the injunction rather than act in breach of it. At the point of compliance that person will not be a defendant, if the defendants are defined as persons who behave in the manner restrained. Unless they apply to do so they will never become a defendant. If the person is a Traveller, they will simply pass by the prohibited site rather than camp there. They will not identify themselves to the claimant or to the court by any conspicuous breach, nor trigger the *Gammell* process by which, under the current orthodoxy, they are deemed then to become a defendant by self-identification. Even if the order was granted at a formally interim stage, the compliant Traveller will not ever become a party to the proceedings. They will probably never become aware of any later order in final form, unless by pure coincidence they pass by the same site again looking for somewhere to camp. Even if they do, and are again dissuaded, this time by the final injunction, they will not have been a party to the proceedings when the final order was made, unless they breached it at the interim stage.

141. In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal for contempt: see para 129 above, and the cases there cited, with which we agree. Furthermore the evaluation of potential injustice inherent in the process of granting injunctions against newcomers is more

likely to be reliable if there is no assumption that the newcomer affected by the injunction is a person so regardless of the law that they will commit a breach of it, even if the grant necessarily assumes a real risk that they (or a significant number of them) would, but for the injunction, invade the claimant's rights, or the rights (including the planning regime) of those for whose protection the claimant local authority seeks the injunction. That is the essence of the justification for such an injunction.

142. Recognition that injunctions against newcomers are in substance always a type of without notice injunction, whether in form interim or final, is in our view the starting point in a reliable assessment of the question whether they should be made at all and, if so, by reference to what principles and subject to what safeguards. Viewed in that way they then need to be set against the established categories of injunction to see whether they fall into an existing legitimate class, or, if not, whether they display features by reference to which they may be regarded as a legitimate extension of the court's practice.

143. The distinguishing features of an injunction against newcomers are in our view as follows:

(i) They are made against persons who are truly unknowable at the time of the grant, rather than (like Lord Sumption's class 1 in *Cameron*) identifiable persons whose names are not known. They therefore apply potentially to anyone in the world.

(ii) They are always made, as against newcomers, on a without notice basis (see para 139 above). However, as we explain below, informal notice of the application for such an injunction may nevertheless be given by advertisement.

(iii) In the context of Travellers and Gypsies they are made in cases where the persons restrained are unlikely to have any right or liberty to do that which is prohibited by the order, save perhaps Convention rights to be weighed in a proportionality balance. The conduct restrained is typically either a plain trespass or a plain breach of planning control, or both.

(iv) Accordingly, although there are exceptions, these injunctions are generally made in proceedings where there is unlikely to be a real dispute to be resolved, or triable issue of fact or law about the claimant's entitlement, even though the injunction sought is of course always discretionary. They and the proceedings in which they are made are generally more a form of enforcement of undisputed rights than a form of dispute resolution.

(v) Even in cases where there might in theory be such a dispute, or a real prospect that article 8 rights might prevail, the newcomers would in practice be unlikely to engage with the proceedings as active defendants, even if joined. This is not merely or even mainly because they are newcomers who may by complying with the injunction remain unidentified. Even if identified and joined as defendants, experience has shown that they generally decline to take any active part in the proceedings, whether because of lack of means, lack of pro bono representation, lack of a wish to undertake costs risk, lack of a perceived defence or simply because their wish to camp on any particular site is so short term that it makes more sense to move on than to go to court about continued camping at any particular site or locality.

(vi) By the same token the mischief against which the injunction is aimed, although cumulatively a serious threatened invasion of the claimant's rights (or the rights of the neighbouring public which the local authorities seek to protect), is usually short term and liable, if terminated, just to be repeated on a nearby site, or by different Travellers on the same site, so that the usual processes of eviction, or even injunction against named parties, are an inadequate means of protection.

(vii) For all those reasons the injunction (even when interim in form) is sought for its medium to long term effect even if time-limited, rather than as a means of holding the ring in an emergency, ahead of some later trial process, or even a renewed interim application on notice (and following service) in which any defendant is expected to be identified, let alone turn up and contest.

(viii) Nor is the injunction designed (like a freezing injunction, search order, Norwich Pharmacal or Bankers Trust order or even an anti-suit injunction) to protect from interference or abuse, or to enhance, some related process of the court. Its purpose, and no doubt the reason for its recent popularity, is simply to provide a more effective, possibly the only effective, means of vindication or protection of relevant rights than any other sanction currently available to the claimant local authorities.

144. Cumulatively those distinguishing features leave us in no doubt that the injunction against newcomers is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn, as will appear, with some established forms of order. It is in some respects just as novel as were the new types of injunction listed in sub-paragraph (viii) above, and it does not even share their family likeness of being developed to protect the integrity and effectiveness of some related process of the courts. As Mr Drabble KC for the appellants tellingly submitted, it is not even that closely related to

the established quia timet injunction, which depends upon proof that a named defendant has threatened to invade the claimant's rights. Why, he asked, should it be assumed that, just because one group of Travellers have misbehaved on the subject site while camping there temporarily, the next group to camp there will be other than model campers?

145. Faced with the development by the lower courts of what really is in substance a new type of injunction, and with disagreement among them about whether there is any jurisdiction or principled basis for granting it, it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. This was cited in para 17 above, but it is convenient to recall its terms:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

This or a very similar formulation has provided the statutory basis for the grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, to inform the judge and the parties as to what is likely to be just or convenient.

146. Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, but the principles upon which they are granted (or withheld) have remained equitable: see *Fourie v Le Roux* (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the general limits or conditions within which injunctions are granted may properly be adjusted over time. The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed: see eg *Castanho v Brown & Root (UK) Ltd* (para 21 above).

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

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

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

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

150. Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Part 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* (para 67 above)

as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Lady Hale at para 25 is resonant:

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

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* (para 130 above) at pp 499-500, cited by Sir Andrew Morritt V-C in *Bloomsbury* at para 14.

151. The second relevant general equitable principle is that equity looks to the substance rather than the form. As Lord Romilly MR stated in *Parkin v Thorold* (1852) 16 Beav 59, 66-67:

> "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

That principle assists in the present context for two reasons. The first (discussed above) is that it illuminates the debate about the type of injunction with which the court is concerned, here enabling an escape from the twin silos of final and interim and recognising that injunctions against newcomers are all in substance without notice injunctions. The second is that it enables the court to assess the most suitable means of ensuring that a newcomer has a proper opportunity to be heard without being shackled to any particular procedural means of doing so, such as service of the proceedings.

152. The third general equitable principle is equity's essential flexibility, as explained at paras 19-22 above. Not only is an injunction always discretionary, but its precise form, and the terms and conditions which may be attached to an injunction (recognised by section 37(2) of the 1981 Act), are highly flexible. This may be illustrated by the lengthy and painstaking development of the search order, from its original form in *Anton Piller KG v Manufacturing Processes Ltd* to the much more sophisticated current form annexed to Practice Direction 25A supplementing CPR Part 25 and which may be

modified as necessary. To a lesser extent a similar process of careful, incremental design accompanied the development of the freezing injunction. The standard form now sanctioned by the CPR is a much more sophisticated version than the original used in *Mareva Compania Naviera SA v International Bulk Carriers SA*. Of course, this flexibility enables not merely incremental development of a new type of injunction over time in the light of experience, but also the detailed moulding of any standard form to suit the justice and convenience of any particular case.

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

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

155. It will be necessary to take careful account of this objection at various stages of the analysis which follows. At this stage it is necessary to note the following. First, equity has not been blind, or reluctant, to recognise that its injunctions may in substance have a coercive effect which, however labelled, extends well beyond the persons named as defendants (or named as subject to the injunction) in the relevant order. Very occasionally, orders have already been made in something approaching a contra mundum form, as in the *Venables* case already mentioned. More frequently the court

has expressly recognised, after full argument, that an injunction against named persons may involve third parties in contempt for conduct in breach of it, where for example that conduct amounts to a contemptuous abuse of the court's process or frustrates the outcome which the court is seeking to achieve: see the *Bloomsbury* case and *Attorney General v Times Newspapers Ltd,* discussed at paras 37-41, 61-62 and 121-124 above. In all those examples the court was seeking to preserve confidentiality in, or the intellectual property rights in relation to, specified information, and framed its injunction in a way which would bind anyone into whose hands that information subsequently came.

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

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

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

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

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

161. But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ("ISPs") to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of "ordinary principles of equity": see *Cartier* (para 20 above) per Lord Sumption at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] RPC 7 at para 198.

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

163. Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the

whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

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

165. We have considered but rejected summary possession orders against squatters as an informative precedent. This summary procedure (avoiding any interim order followed by final order after trial) was originally provided for by RSC Order 113, and is now to be found in CPR Part 55. It is commonly obtained against persons unknown, and has effect against newcomers in the sense that in executing the order the bailiff will remove not merely squatters present when the order was made, but also squatters who arrived on the relevant land thereafter, unless they apply to be joined as defendants to assert a right of their own to remain.

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

167. These considerations lead us to the conclusion that, although the attempts thus far to justify them are in many respects unsatisfactory, there is no immoveable obstacle in

the way of granting injunctions against newcomer Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle. But this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

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

(ii) There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by it (see paras 226-231 below); and the most generous provision for liberty (ie permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

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

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

(v) It is, on the particular facts, just and convenient that such an injunction be granted. It might well not for example be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries.

168. The issues in this appeal have been formulated in such a way that the appellants have the burden of showing that the balancing exercise involved in weighing those competing considerations can never come down in favour of granting such an injunction. We have not been persuaded that this is so. We will address the main objections canvassed by the appellants and, in the next section of this judgment, set out in a little more detail how we conceive that the necessary protection for newcomers' rights should generally be built into the process for the application for, grant and subsequent monitoring of this type of injunction.

169. We have already mentioned the objection that an injunction of this type looks more like a species of local law than an in personam remedy between civil litigants. It is said that the courts have neither the skills, the capacity for consultation nor the democratic credentials for making what is in substance legislation binding everyone. In other words, the courts are acting outside their proper constitutional role and are making what are, in effect, local laws. The more appropriate response, it is argued, is for local authorities to use their powers to make byelaws or to exercise their other statutory powers to intervene.

170. We do not accept that the granting of injunctions of this kind is constitutionally improper. In so far as the local authorities are seeking to prevent the commission of civil wrongs such as trespass, they are entitled to apply to the civil courts for any relief allowed by law. In particular, they are entitled to invoke the equitable jurisdiction of the court so as to obtain an injunction against potential trespassers. For the reasons we have explained, courts have jurisdiction to make such orders against persons who are not parties to the action, ie newcomers. In so far as the local authorities are seeking to prevent breaches of public law, including planning law and the law relating to highways, they are empowered to seek injunctions by statutory provisions such as those mentioned in para 45 above. They can accordingly invoke the equitable jurisdiction of the court, which extends, as we have explained, to the granting of newcomer injunctions. The possibility of an alternative non-judicial remedy does not deprive the courts of jurisdiction.

171. Although we reject the constitutional objection, we accept that the availability of non-judicial remedies, such as the making of byelaws and the exercise of other statutory powers, may bear on questions (i) and (v) in para 167 above: that is to say, whether there is a compelling need for an injunction, and whether it is, on the facts, just and convenient to grant one. This was a matter which received only cursory examination during the hearing of this appeal. Mr Anderson KC for Wolverhampton submitted (on instructions quickly taken by telephone during the short adjournment) that, in summary, byelaws took too long to obtain (requiring two stages of negotiation with central government), would need to be separately made in relation to each site, would be too inflexible to address changes in the use of the relevant sites (particularly if subject to development) and would unduly criminalise the process of enforcing civil rights. The

appellants did not engage with the detail of any of these points, their objection being more a matter of principle.

172. We have not been able to reach any conclusions about the issue of practicality, either generally or on the particular facts about the cases before the court. In our view the theoretical availability of byelaws or other measures or powers available to local authorities as a potential alternative remedy is not shown to be a reason why newcomer injunctions should never be granted against Travellers. Rather, the question whether byelaws or other such measures or powers represent a workable alternative is one which should be addressed on a case by case basis. We say more about that in the next section of this judgment.

173. A second main objection in principle was lack of procedural fairness, for which Lord Sumption's observations in *Cameron* were prayed in aid. It may be said that recognition that injunctions against newcomers are in substance without notice injunctions makes this objection all the more stark, because the newcomer does not even know that an injunction is being sought against them when the order is made, so that their inability to attend to oppose is hard-wired into the process regardless of the particular facts.

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

175. In the present context notice of the application would not risk defeating its purpose, and there would usually be no such urgency as would justify applying without

notice. The absence of notice is simply inherent in an application for this type of injunction because, quoad newcomers, the applicant has no idea who they might turn out to be. A practice requirement to advertise the intended application, by notices on the relevant sites or on suitable websites, might bring notice of the application to intended newcomers before it came to be made, but this would be largely a matter of happenstance. It would for example not necessarily come to the attention of a Traveller who had been camping a hundred miles away and who alighted for the first time on the prohibited site some time after the application had been granted.

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

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

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

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

180. There is some force in this point, but we are not persuaded that the general disinclination of Travellers to apply to court really flows from the newcomer injunctions having been granted on a without notice application. If for example a local authority waited for a group of Travellers to camp unlawfully before serving them with an application for an injunction, the Travellers might move to another site rather than raise a defence to the prevention of continued camping on the original site. By the time the application came to be heard, the identified group would have moved on, leaving the local authority to clear up, and might well have been replaced by another group, equally unidentifiable in advance of their arrival.

181. There are of course exceptions to this pattern of temporary camping as trespassers, as when Travellers buy a site for camping on, and are then proceeded against for breach of planning control rather than for trespass: see eg the *Gammell* case and the appeal in *Bromley London Borough Council v Maughan* heard at the same time. In such a case the potential procedural injustice of a without notice injunction might well be sufficient to require the local authority to proceed against the owners of the site on notice, in the usual way, not least because there would be known targets capable of being served with the proceedings, and any interim application made on notice. But the issue on this appeal is not whether newcomer injunctions against Travellers are always justified, but rather whether the objections are such that they never are.

182. The next logical objection (although little was made of it on this appeal) is that an injunction of this type made on the application of a local authority doing its duty in the public interest is not generally accompanied by a cross-undertaking in damages. There is of course a principled reason why public bodies doing their public duty are relieved of this burden (see *Financial Services Authority v Sinaloa Gold plc* [2013] UKSC 11; [2013] 2 AC 28), and that reasoning has generally been applied in newcomer injunction cases against Travellers where the applicant is a local authority. We address this issue further in the next section of this judgment (at para 234) and it would be wrong for us to express more definite views on it, in the absence of any submissions about it. In any event, if this were otherwise a decisive reason why an injunction of this type should never be granted, it may be assumed that local authorities, or some of them, would prefer to offer a cross undertaking rather than be deprived of the injunction.

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

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

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

186. Drawing all these threads together, we are satisfied that there is jurisdiction (in the sense of power) in the court to grant newcomer injunctions against Travellers, and that there are principled reasons why the exercise of that power may be an appropriate

exercise of the court's equitable discretion, where the general conditions set out in paragraph 167 above are satisfied. While some of the objections relied upon by the appellants may amount to good reasons why an injunction should not be granted in particular cases, those objections do not, separately or in the aggregate, amount to good reason why such an injunction should never be granted. That is the question raised by this appeal.

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

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

(1) Compelling justification for the remedy

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

189. This gives rise to three preliminary questions. The first is whether the local authority has complied with its obligations (such as they are) properly to consider and provide lawful stopping places for Gypsies and Travellers within the geographical areas for which it is responsible. The second is whether the authority has exhausted all reasonable alternatives to the grant of an injunction, including whether it has engaged in a dialogue with the Gypsy and Traveller communities to try to find a way to accommodate their nomadic way of life by giving them time and assistance to find alternative or transit sites, or more permanent accommodation. The third is whether the authority has taken appropriate steps to control or even prohibit unauthorised encampments and related activities by using the other measures and powers at its

disposal. To some extent the issues raised by these questions will overlap. Nevertheless, their importance is such that they merit a degree of separate consideration, at least at this stage. A failure by the local authority in one or more of these respects may make it more difficult to satisfy a court that the relief it seeks is just and convenient.

(i) An obligation or duty to provide sites for Gypsies and Travellers

190. The extent of any obligation on local authorities in England to provide sufficient sites for Gypsies and Travellers in the areas for which they are responsible has changed over time.

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

192. In the light of the problems caused by the CSCDA 1960, section 6 of the Caravan Sites Act 1968 ("CSA 1968") imposed on local authorities a duty to exercise their powers under section 24 of the CSCDA 1960 to provide adequate accommodation for Gypsies and Travellers residing in or resorting to their areas. The appellants accept that in the years that followed many sites for Gypsies and Travellers were established, but they contend with some justification that these sites were not and have never been enough to meet all the needs of these communities.

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

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

area and the assessment is approved by the Welsh Ministers, the authority has a *duty* to exercise its powers to meet those needs under section 103 of the H(W)A 2014.

(ii) General "needs" assessments

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

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

(iii) Planning policy

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

198. Indeed, in 1994, the government published planning advice on the provision of sites for Gypsies and Travellers in the form of Department of the Environment Circular 1/94 entitled "*Gypsy sites and planning*". This explained that the repeal of the statutory duty to provide sites was expected to lead to more applications for planning permission for sites. Local Planning Authorities ("LPAs") were advised to assess the needs of Gypsies and Travellers within their areas and to produce a plan which identified suitable *locations* for sites (location-based policies) and if this could not be done, to explain the *criteria* for the selection of appropriate locations (criteria-based policies). Unfortunately, despite this advice, most attempts to secure permission for Gypsy and Traveller sites were refused and so the capacity of the relatively few sites authorised for occupation by these nomadic communities continued to fall well short of that needed, as Lord Bingham explained in *South Bucks District Council v Porter*, at para 13.

199. The system for local development planning in England is now established by the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") and the regulations made under it. Part 2 of the PCPA 2004 deals with local development and stipulates that the LPA is to prepare a development scheme and plan; that this must set out the authority's policies; that in preparing the local development plan, the authority must have regard to national policy; that each plan must be sent to the Secretary of State for independent

examination and that the purpose of this examination is, among other things, to assess its soundness and that will itself involve an assessment whether it is consistent with national policy.

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

201. More specifically, in 2006 advice was issued in the form of the Office of the Deputy Prime Minister Circular 1/06 *Planning for Gypsy and Traveller caravan sites*. The 2006 guidance was replaced in March 2012 by *Planning policy for traveller sites* ("PPTS 2012"). In August 2015, a revised version of PPTS 2012 was issued ("PPTS 2015") and this is to be read with the National Planning Policy Framework. There has recently been a challenge to a decision refusing planning permission on the basis that one aspect of PPTS 2015 amounts to indirect discrimination and has no proper justification: *Smith v Secretary of State for Housing, Communities and Local Government* [2022] EWCA Civ 1391; [2023] PTSR 312. But for present purposes it is sufficient to say (and it remains the case) that there is in these policy documents clear advice that LPAs should, when producing their local plans, identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of sites against their locally set targets to address the needs of Gypsies and Travellers for permanent and transit sites. They should also identify a supply of specific, developable sites or broad locations for growth for years 6-10 and even, where possible, years 11-15. The advice is extensive and includes matters to which LPAs must have regard including, among other things, the presumption in favour of sustainable development; the possibility of cross-authority co-operation; the surrounding population's size and density; the protection of local amenities and the environment; the need for appropriate land supply allocations and to respect the interests of the settled communities; the need to ensure that Traveller sites are sustainable and promote peaceful and integrated co-existence with the local communities; and the need to promote access to appropriate health services and schools. The LPAs are also advised to consider the need to avoid placing undue pressure on local infrastructure and services, and to provide a settled base that reduces the need for long distance travelling and possible environmental damage caused by unauthorised encampments.

202. The availability of transit sites (and information as to where they may be found) is also important in providing short-term or temporary accommodation for Gypsies and Travellers moving through a local authority area, and an absence of sufficient transit sites in an area (or information as to where available sites may be found) may itself be a sufficient reason for refusing a newcomer injunction.

(iv) Consultation and co-operation

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

(v) Public Spaces Protection Orders

204. The Anti-social Behaviour, Crime and Policing Act 2014 confers on local authorities the power to make Public Spaces Protection Orders ("PSPOs") to prohibit encampments on specific land. PSPOs are in some respects similar to byelaws and are directed at behaviour and activities carried on in a public place which, for example, have a detrimental effect on the quality of life of those in the area, are or are likely to be persistent or continuing, and are or are likely to be such as to make the activities unreasonable. Further, PSPOs are in general easier to make than byelaws because they do not require the involvement of central government or extensive consultation. Breach of a PSPO without reasonable excuse is a criminal offence and can be enforced by a fixed penalty notice or prosecution with a maximum fine of level three on the standard scale. But any PSPO must be reasonable and necessary to prevent the conduct and detrimental effects at which it is targeted. A PSPO takes precedence over any byelaw in so far as there is any overlap.

(vi) Criminal Justice and Public Order Act 1994

205. The CJPOA empowers local authorities to deal with unauthorised encampments that are causing damage or disruption or involve vehicles, and it creates a series of related offences. It is not necessary to set out full details of all of them. The following summary gives an idea of their range and scope.

206. Section 61 of the CJPOA confers powers on the police to deal with two or more persons who they reasonably believe are trespassing on land with the purpose of residing there. The police can direct these trespassers to leave (and to remove any vehicles) if the occupier has taken reasonable steps to ask them to leave and they have

caused damage, disruption or distress as those concepts are elucidated in section 61(10). Failure to leave within a reasonable time or, if they do leave, a return within three months is an offence punishable by imprisonment or a fine. A defence of reasonable excuse may be available in particular cases.

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

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

(vii) Byelaws

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

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

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

212. Other powers to make byelaws and to impose penalties for breach are conferred on authorities in relation to commons by, for example, the Commons Act 1899.

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

214. We recognise that byelaws are sometimes subjected to detailed and appropriate scrutiny by the courts in assessing whether they are reasonable, certain in their terms and consistent with the general law, and whether the local authority had the power to make them. It is an aspect of the third of these four elements that generally byelaws may only be made if provision for the same purpose is not made under any other enactment. Similarly, a byelaw may be invalidated if repugnant to some basic principle of the common law. Further, as we have seen, the usual method of enforcement of byelaws is a fine although powers to seize and retain property may also be included (see, for example, section 237ZA of the LGA 1972), as may powers to direct removal.

215. The opportunity to make and enforce appropriate elements of this battery of potential byelaws, depending on the nature of the land in issue and the form of the intrusion, may seem at first sight to provide an important and focused way of dealing with unauthorised encampments, and it is a rather striking feature of these proceedings that byelaws have received very little attention from local authorities. Indeed, Wolverhampton City Council has accepted, through counsel, that byelaws were not considered as a means of addressing unauthorised encampments in the areas for which it is responsible. It maintains they are unlikely to be sufficient and effective in the light of (a) the existence of legislation which may render the byelaws inappropriate; (b) the potential effect of criminalising behaviour; (c) the issue of identification of newcomers; and (d) the modest size of any penalty for breach which is unlikely to be an effective deterrent.

216. We readily appreciate that the nature of travelling communities and the respondents to newcomer injunctions may not lend themselves to control by or yield readily to enforcement of these various powers and measures, including byelaws, alone, but we are not persuaded that the use of byelaws or other enforcement action of the kinds we have described can be summarily dismissed. Plainly, we cannot decide in this appeal whether the reaction of Wolverhampton City Council to the use of all of these powers and measures including byelaws is sound or not. We have no doubt, however, that this is a matter that ought to be the subject of careful consideration on the next review of the injunctions in these cases or on the next application for an injunction against persons unknown, including newcomers.

(viii) A need for review

217. Various aspects of this discussion merit emphasis at this stage. Local authorities have a range of measures and powers available to them to deal with unlawful encampments. Some but not all involve the enactment and enforcement of byelaws. Many of the offences are punishable with fixed or limited penalties, and some are the subject of specified defences. It may be said that these form part of a comprehensive suite of measures and powers and associated penalties and safeguards which the legislature has considered appropriate to deal with the threat of unauthorised encampments by Gypsies and Travellers. We rather doubt that is so, particularly when dealing with communities of unidentified trespassers including newcomers. But these are undoubtedly matters that must be explored upon the review of these orders.

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

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

219. The full disclosure duty is of the greatest importance (see para 167(iii)). We consider that the relevant authority must make full disclosure to the court not just of all the facts and matters upon which it relies but also and importantly, full disclosure of all facts, matters and arguments of which, after reasonable research, it is aware or could with reasonable diligence ascertain and which might affect the decision of the court

whether to grant, maintain or discharge the order in issue, or the terms of the order it is prepared to make or maintain. This is a continuing obligation on any local authority seeking or securing such an order, and it is one it must fulfil having regard to the one-sided nature of the application and the substance of the relief sought. Where relevant information is discovered after the making of the order the local authority may have to put the matter back before the court on a further application.

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

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

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

(4) The prohibited acts

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

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

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

(5) Geographical and temporal limits

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

(6) Advertising the application in advance

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

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

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

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

(7) Effective notice of the order

230. We are not concerned in this part of our judgment with whether respondents become party to the proceedings on service of the order upon them, but rather with the obligation on the local authority to take steps actively to draw the order to the attention of all actual and potential respondents; to give any person potentially affected by it full information as to its terms and scope, and the consequences of failing to comply with it; and how any person affected by its terms may make an application for its variation or discharge (again, see para 167(ii) above).

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

(8) Liberty to apply to discharge or vary

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

(9) Costs protection

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

(10) Cross-undertaking

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

(11) Protest cases

235. The emphasis in this discussion has been on newcomer injunctions in Gypsy and Traveller cases and nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction. Each of these activities may, depending on all the circumstances, justify the grant of an injunction

against persons unknown, including newcomers. Any of these persons who have notice of the order will be bound by it, just as effectively as the injunction in the proceedings the subject of this appeal has bound newcomer Gypsies and Travellers.

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

(12) Conclusion

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

6. Outcome

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

> (i) The court has jurisdiction (in the sense of power) to grant an injunction against 'newcomers', that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.
>
> (ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time

when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants.

(iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:

(a) that equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.

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

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

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

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

(iv) In deciding whether to grant a newcomer injunction, the application of those principles in the context of trespass and breach of planning control by Travellers will be likely to require an applicant:

(a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.

(b) to build into the application and into the order sought procedural protection for the rights (including Convention rights) of the newcomers affected by the order, sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them. Those protections are likely to include advertisement of an intended application so as to alert potentially affected Travellers and bodies which may be able to represent their interests at the hearing of the application, full provision for liberty to persons affected to apply to vary or discharge the order without having to

show a change of circumstances, together with temporal and geographical limits on the scope of the order so as to ensure that it is proportional to the rights and interests sought to be protected.

(c) to comply in full with the disclosure duty which attaches to the making of a without notice application, including bringing to the attention of the court any matter which (after due research) the applicant considers that a newcomer might wish to raise by way of opposition to the making of the order.

(d) to show that it is just and convenient in all the circumstances that the order sought should be made.

(v) If those considerations are adhered to, there is no reason in principle why newcomer injunctions should not be granted.

Neutral Citation Number: [2023] EWHC 1073 (KB)

Case No: QB-2021-003576, 3626 & 3737

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2023

Before :

MR JUSTICE COTTER

- -

Between :

The National Highways Limited	**Claimant**
- and -	
(1) Persons Unknown	**Defendant**
(2) Alexander Roger and 139 Others	**Defendant**

- -
- -

Myriam Stacey KC & Michael Fry (instructed by **DLA Piper LLB**) for the **Claimant**
A number of Defendants appeared in person and/or filed written submissions

Hearing dates: 24 April 2023

- -

Approved Judgment

This judgment was handed down at 10.30am on 5th May

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MR JUSTICE COTTER

Mr Justice Cotter:

Introduction

1. This is the Judgment on an application issued by the Claimant, National Highways Limited ("NHL") for the extension and variation of an injunctive order made on 9th May 2022 by Mr Justice Bennathan as amended by the Court of Appeal by the order of 14th March 2023.

2. The background facts and Bennathan J's reasoning are set out with his Judgment; **NHL-v-Persons Unknown** [2022] EWHC 1105 (QB). The Claimant successfully part of the order. The citation for the judgment of the Court of Appeal is **NHL-v- Persons Unknown** [2023] EWCA Civ 182.

3. The Claimants are represented by Ms Stacey KC and Mr Fry of counsel.

4. The following named Defendants made oral and/or representations prior to or at the hearing.

    (a) David Crawford (written and oral submissions at the hearing)
    (b) Mair Bain (written and oral submissions at the hearing)
    (c) Virginia Morris (written and oral submissions at the hearing)
    (d) Matthew Tulley (oral submissions at the hearing)
    (e) Ruth Jarman (oral submissions at the hearing)
    (f) Jerrard Latimer (oral submissions at the hearing)
    (g) Giovanna Lewis (oral submissions at the hearing)
    (h) Julia Mercer (written submissions)

5. At the hearing I stressed the importance of engagement with the Court and indicated that I would consider any further written submissions concerning the giving of an undertaking to the Court (I shall return to both issues in due course).

6. Following the hearing I received written submissions from a number of Defendants as set out in detail below.

The background facts

7. NHL is the licence holder, highways authority and owner of the land that comprises the strategic road network which includes the M25 motorway, certain Kent strategic roads and the feeder roads into the M25.

8. Insulate Britain ("IB") is an environmental activist group, founded by members of the environmental movement known as Extinction Rebellion. The aim of IB is to persuade the Government to improve the insulation of all social housing in the UK by 2025 and retrofit all homes with improved insulation by 2030. Members/supporters of IB believe that improved insulation of homes would likely reduce the use of fuel, such as natural gases and oil, mitigate the effects of fuel poverty, create jobs and help address the climate change crisis and save lives. Due to frustration with what they perceived to be Government's failure to address their concerns/demands members/supports of IB

organised activities designed to disrupt daily life and thereby draw attention to these issues.

9. The M25 became a focus for demonstration. IB organised protests on 13th, 15th, 17th, 20th and 21st September 2021. Each of these protests involved disruption and obstruction to the M25. This included some protestors sitting down on the carriageway, gluing themselves to the road surface, holding banners across the road, preventing vehicles from passing, and causing traffic jams and tailbacks with substantial delays. The demonstrations spread to other highways forming part of the strategic road network.

10. NHL made urgent applications for interim injunctions to restrain the conduct of the protesters arguing that the protests created a serious risk of danger and caused serious disruption to the public using the strategic road network and more generally. Most directly relevant to the application before me, three sets of proceedings were commenced and orders granted as follows:

    (a) In QB-2021-003576, Mr Justice Lavender granted an interim injunction (an interim injunction is intended to prevent injustice before a trial can take place) on 21st September 2021 in relation to the M25 against Defendants specified as "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 purpose of protesting".

    (b) In QB-2021-3626, Mr Justice Cavanagh granted an interim injunction on 24th September 2021 in relation to parts of the strategic road network in Kent;

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

11. The reaction to the order from Insulate Britain was described by Dame Victoria Sharp, President of The Kings Bench Division in **Heyatawin and others** [2021] EWHC 3078 (QB) at paragraphs 15 to 18:

> "15. On various dates and in various locations, Insulate Britain protestors publicly burned copies of the M25 Order.
>
> 16. On 28 September 2012 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.
>
> ..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 2021there 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 leaders/co-ordinators of IB made it publicly known that they did not intend to be prevented from taking what they considered necessary action by the orders of the Court. In so doing they notified anyone who read their statements (or associated media/social media coverage) of the existence of the prohibition against demonstrations of the type which had taken place.

13. 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.

14. On 1 October 2021, Mrs Justice May 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.

15. A further protest took place on the M25 on the 8th October 2012. This protest was the subject of the contempt applications in **Heyatawin and others**.

16. When the hearings in relation to the interim injunctions next came before the Court (what is referred to as "a return date") on 12th October 2021, the three injunctions were continued until trial or further order and the claims were ordered to proceed together.

17. There was a further protest on 27th October 2021. The actions of the protestors interfered with traffic entering the M25 anti-clockwise from the A206, and with traffic exiting the M25 clockwise onto the A206. This caused substantial traffic delays.

18. In October and November 2021 the claims were served on named defendants as identified through the information disclosed to NHL by the police as required by the order of the Court.

19. On 22nd October 2021, NHL filed a single Particulars of Claim in the three actions. The case was pleaded on the basis that the conduct of the protesters constituted

    a. trespass;
    b. private nuisance; and/or
    c. public nuisance.

20. 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. Paragraphs 18 and 19 of the pleading set out the basis for an anticipatory injunction. This is an injunction sought before a party's rights have been infringed on the basis of a fear that a wrong will be committed if an order is not made[1]. An anticipatory injunction was sought because

    > "there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the Roads"

    and references were made to open expressions of intention by IB/persons unknown/named 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.

21. On the same day as the pleading was filed, NHL made its first contempt application in relation to breaches of the M25 Injunction. This was determined on 17th November 2021. In the interim on 2 November 2021, approximately 60 IB protestors disrupted traffic on Junction 23 of the M25.

22. Two further contempt applications in relation to breaches of the M25 injunction were made on 19th November 2021 and 17th December 2021 they were determined on 15th December 2021 and 2nd February 2022 respectively.

23. As a result of these applications 24 of the defendants ("the contemnor defendants") were found to have been in contempt of court.

24. On 23rd November 2021, defences were served on behalf of three of the named defendants.

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[1] Bennathan J stated in his judgment in this case [2022] EWHC 1105 "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". Mr Justice Knowles stated in HS2 Limited-v-Persons Unknown and Named Defendants [2022] EWHC 2360 (KB); "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 of Morgan J ([2017] EWHC 2945 (Ch), [88]"

25. 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.

26. 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.

27. On 24 March 2022, NHL issued a summary judgment application. This type of application is brought when one party believes he/she/it has an overwhelmingly strong case and the opponent has no real prospect of success in the litigation. The procedural rules which bind the court; the Civil Procedure Rules ("CPR") provide as follows;

> "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. Although it NHL would have been entitled to apply for default judgment against all the remaining named defendants other than Mr Tulley (as they had filed no defences contesting the claim) it was explained in the witness statement in support of the application (the statement 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.

29. The summary judgment application was served on the named Defendants.

30. Ms Higson's witness statement set out details of the protests which had already occurred and what was considered to be the risk of future protests. This included quoting an IB press release of 7th 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."

31. The suggestion that the supporters/members of IB had "not gone away" was repeated within the application before me by Ms Stacey KC.

32. On the 15th of February 2022 IB announced by press release that it had joined "Just Stop Oil" in coalition with "Animal Rebellion". Ms Higson 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."

33. At paragraph 60-61 of her witness statement Ms Higson summarised the evidence before the Court and stated 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 strategic road network covered by the interim injunctions and that risk was unlikely to abate in the near or medium future.

34. On 17th March 2022 Mr Justice Chamberlain extended the duration of the injunctions.

35. At the hearing before Bennathan J on 4th and 5th May 2022 of its application NHL sought:

(a) A summary judgment against 133 named Defendants (the Defendants had all been arrested by various police forces in operations connected to IB protests, after which their details were notified to the Claimant under disclosure provisions of the interim injunctions).
(b) A final injunction in terms similar, but not identical to, to those granted in the interim orders.
(c) A declaration that the use of the SRN for protests is unlawful.
(d) Damages, though the Claimant stated in its Skeleton Argument that it was not pursuing damages against any of the Defendants, and
(e) Costs.

36. On 9th May 2022 Mr Justice Bennathan[2] made an order consolidating claims and granting interim and final precautionary injunctions. He 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.

37. At paragraph 13 of his judgment Bennathan J stated;

> "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"

[2] None of the named Defendants were represented before Mr Justice Bennathan but Ben Horton, who had been a named Defendant, attended at Court and made some submissions about costs. The Judge also heard argument from Owen Greenhall of Counsel, who appeared to make submissions on behalf of a person who took an interest in the litigation.

> ["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."

And at paragraph 16

> "16. In a further statement dated 25 April 2022, Ms Higson deals with three topics: ……..(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."

38. Bennathan J granted summary judgment against those who had been found to be in contempt of the order. However in relation to the other 109 Defendants he stated:

> "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."

And at paragraph 35(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.
>
> 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."

39. In relation to the issue of future risk Bennathan J stated:

> "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 largescale 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. The Judge also considered the circumstances in which injunctions could be granted against unidentified defendants and also the balance between the competing rights of protestors and others. In respect of the first issues he concluded:

> "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]."

41. He considered the relevant authorities and concluded.

> "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]. 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*[3], 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

[3] See paragraph 106 below

> 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."

42. The order made by the Bennathan J retrained the defendants from various acts (e.g. blocking, or endangering, or preventing the free flow of traffic on the roads for the purposes of protesting …) on either an interim or final basis (in relation to the Contemnor Defendants) until 23.59 on 9th May 2023.

43. He made orders in relation to substituted service and Third Party disclosure (which I shall return to) and provided (at paragraph 19) for a hearing in April 2023

> "at which the court shall review whether it should vary or discharge this order or any part."

44. The Claimant appealed on the single ground that the Judge made a mistake in law in concluding that a final injunction should not be granted against the 109 named defendants (and the unnamed defendants).

45. In July 2022 a JSO direct action protest took place on the M25. I subsequently found that on 20th July 2022 Louise Lancaster (Defendant number 55) had deliberately breached the order of Bennathan J in the respects alleged, and was in contempt of court. The Judgment can be found at [2021] EWHC 3080 (KB). Ms Lancaster accepted that she had been validly served with the order and that she had breached it. I stated:

> "I need not descend into detail about the defendant's culpability, save to say that these were deliberate acts and the risk of foreseeable harm, including through traffic accidents, given the nature and location of the protest, was clear. Further, that the motorway was highly likely to be closed. Indeed, the very objective of the protest was to cause disruption to as many members of the public as possible and the protest did indeed cause considerable delays to traffic and as a result caused public disruption. The economic loss that will have been caused as a result of this protest will have been very significant, including, that arising from the police having to divert valuable resources."

And

> "42. The defendant's action effectively sacrificed the interests of other members of the public who wanted to get to work, keep appointments, see families and friends, to what she considered to be her own higher aim of achieving publicity for her cause.
>
> 43. I do not doubt the sincerity of the defendant's beliefs. However, it is not for her to determine the outer limits of the right to express those views or to protest or the degree of disruption that must be tolerated by others. That would make her a judge in her own cause. She is not. The defendant, and no other, can lawfully and unilaterally ignore the order of the court without sanction. Everybody must comply with the law."

46. Also in relation to dialogue with the Court (another subject to which I shall return) I stated (in the context of the imposition of a penalty) I stated;

> "53. A lesser sanction may be appropriate if, as part of the dialogue with the court through the contempt process, the defendant has appreciated the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the right of others, even when the law or other people's activities are contrary to the protestors own moral convictions. The reason for this is because it would not be possible to co-exist in a democratic society if individuals chose the laws that they wished to obey.
>
> 54. Before me Mr Bryant has made two submissions…..Secondly, on her behalf, and on her instructions, he made an unequivocal statement to the court that the defendant will comply in future with the order of this court. That was a very important aspect of the mitigation dialogue. In a case such as this the court will have very upmost regard to whether or not the order is going to be complied with."

47. I imposed a suspended penalty i.e. I did not impose an immediate prison sentence.

48. On the 17th and 18th of October 2022 two protestors, who have been subsequently referred to as the "bridge protestors" attached themselves to cables approximately 200 feet above the carriage way of the Queen Elizabeth bridge at the Dartford crossing. It was estimated that nearly 630,000 vehicles were impacted by this action with a total economic impact of nearly £1million pounds. The claimant attempted personal service of the order made by Mr Justice Bennathan order on the bridge protestors but found it was not possible to safely do so[4].

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[4] On the 3rd of November 2022 there was a hearing to consider retrospective alternative service on the bridge protesters. The claimant did not continue with the application after the court giving an indication that it should be dealt with within the committal proceedings. These proceedings have not been determined and are defended on the basis that the alleged contemnors were not served personally with the order.

49. In November 2022 JSO activists targeted gantries on the M25 and as a result of issues with service, which had been highlighted by the protest undertaken by the bridges protestors, the Claimant made an urgent application for a further interim injunction to protect gantries and other structures on the M25. An order was granted by Mr Justice Chamberlain on 5th November 2022 ("the Structures Injunction"). The order provided for alternative service of the claim form and injunction order as against persons unknown.

50. By the return date 65 defendants had been identified and the order was amended by Mr Justice Soole on 28th November 2022 to require personal service on those named Defendants. In her statement prepared for this hearing Ms Higson stated that:

> "As has been the case since the inception of the protests in September 2021, the Claimant experienced significant difficulties in effecting personal service of the Soole order and it was not possible to serve 25 of the named Defendants, despite in some cases 7 separate attendances being made at their addresses for service by HCE."

51. Following on from the order made in May 2022, on the 16th of January 2023, Mr Justice Bennathan made a further order which dealt with the costs of the application which he had determined. I shall return to this order in due course.

52. On the 28th February 2023, in light of difficulties set out by Ms Higson in relation of service the claimant made an application for permission to serve the structures injunction and documents in those proceedings by alternative service upon the 65 named defendants on account of the difficulties in serving 25 of the named defendants.

53. Mr Justice Fraser granted an alternative service order in respect of the structures injunction on the 1st March 2023.

54. On the 14th March 2023 the Court of Appeal allowed the Claimant's appeal against the order made by Mr Justice Bennathan and made an amended order. Mr David Crawford and Mr Matthew Tulley, two of the named Defendants, addressed the Court on behalf of the 109 named Defendants.

55. The Court found that Bennathan J had correctly identified the test for granting anticipatory injunctions. However, he had then fallen into error in considering whether the injunction 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 that each defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. It was not a necessary criterion for an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort. Rather, the essence of that form of injunction, whether interim or final, was that the tort was threatened and for some reason the claimant's cause of action was not complete. Importantly Sir Julian Flaux Chancellor of the High Court stated:

> "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."

56. The Court held that the Judge should have applied the standard test under CPR r.24.2, namely whether the defendants had no real prospect of successfully defending the claim:

> "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."

57. The Court also stated:

> "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."

58. The Court also considered the position in relation to Persons Unknown

> "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."

59. As well as ordering a final injunction against the balance of the Defendants, the order made by the Court of Appeal;

(a) Provided for alterative service of the order in materially the same terms as those set out by Bennathan J. It is notable that the Claimant (the Appellant before the Court) did not seek to persuade the Court to vary order as regards service despite the difficulties which have been outlined in the statement of Ms Higson.
(b) Contained the same provisions in relation to Third Party disclosure as were set out in the order made by Bennathan J.
(c) Set out that;

> "17. There will be no variation of the costs order dated 16th January 2023 of Bennathan J and no order of the costs of this appeal."

Issues

60. Ms Stacey KC submitted that the issues for determination by the Court were;

a) Whether the injunction should be extended (i.e. extended beyond the 9th May 2023)?
b) Should the court permit amendments to the schedule of Defendants?
c) Should the court permit alternative service?
d) Should the court award the claimant costs of securing the order and of this review hearing (the appeal costs having been separately dealt with)?

In my view an additional issue arises:

e) Should the Court continue the third party disclosure order?

Evidence

61. In addition to the statements previously served in the proceedings the Claimant relied upon the evidence sets out in the witness statements of;

(a) Sean Martell (statement of 13th April 2023).

(b) Laura Higson (statement of 13th April 2023).

62. Whilst I had submissions made by and on behalf of Defendants, there were no statements signed with a statement of truth. I will deal with relevant content of the submissions when considering the issues in turn.

Should the injunction should be extended?

63. Although the Court of Appeal order transformed the order of Mr Justice Bennathan into a final order it expressly enshrined a liberty to apply to extend, vary or discharge the order (and clearly intended the Court to deal with the issue of costs at any review of the order)

64. It is first necessary to consider what test is to be applied at a hearing to extend an injunctive order. The Court is obviously entitled to review any aspect of the merits of claim and the entitlement to the order sought, given what has transpired since the order was made.

65. Mr Justice Bennathan's order was time limited with a review hearing set within the final month. He was faced with a state of affairs which could quickly and radically change. For example, if the Government had announced that it would consider the need for a national programme of home insulation, those who were only prepared to protest to achieve this limited aim may have, at last temporarily, publicly stated that they would cease demonstrations. Further the Judge may well have had in mind the references to the court's ongoing supervisory jurisdiction made to by the Master of the Rolls in **Barking and Dagenham LBC-v-Persons Unknown** [2022] 2 WLR 946:

> "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."

66. Although there has been no direct action on the strategic road network since November 2022, Ms Stacey KC submitted that there was a compelling case for the injunction order to be continued. She relied upon the fact that there have been a number of broader incidents of direct action protests since the autumn of 2022 which have been designed to cause disruption on other roads and bridges in central London. IB amalgamated with JSO and the activities of that group/organisation; now the JSO coalition (see further below) since October 2022 were instructing and illuminating of the continuing, imminent and real risk of deliberate disruption to the strategic road network which remained. The members/supporters of IB had not "gone away". She referred to the summary of the relevant history given by Mr Justice Cavannagh in **TfL-v-Lee** [2023] EWHC 402 (Judgment date 24th February 2023) at paragraph 12-13:

> "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.

67. Cavanagh J continued at paragraph 21-22

> "21. ……... 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*)."

68. In his witness statement prepared for this hearing Mr Martell explained fears at paragraph 31–35 of his witness statement. He stated:

> "(a) There is now an intersection between the groups IB, JSO and Extinction Rebellion and others; indeed JSO self identifies as "a coalition of groups" and an individual associated with one of the groups can become affiliated with one or more of the other groups;
>
> (b) JSO has made clear its intention to continue its campaign of civil resistance and has threatened to further escalate its campaign if the government did not meet with the group's demands (as delivered to 10 Downing Street on 14 February 2023) by 10th April 2023. It was stated;
>
> > "If you do not provide such assurance… We will be forced escalate our campaign-to prevent the ultimate crime against our country's humanity and life on earth"

> (c) JSO continues to actively recruit new members.
>
> (d) On 13 March 2023 regarding newspaper published an article about a new design for motorway gantries which had been announced by the claimant in the wake of the November 2022 protests. A spokesman for JSO is quoted as saying
>
> > "Just Stop Oil have always said the disruption will end immediately when the government agrees to end new oil and gas. Until then we look forward to the challenges the new gantry designs provide"
>
> (e) On 4 April 2023 after defendants who had carried out the protest on the Queen Elizabeth II bridge were found guilty of causing a public nuisance, a JSO member saying "just stop oil will not stop.""

69. Mr Martell continued:

> "Whilst the Bennathan Order has not wholly prevented unlawful disruption, it has been broadly successful and remains of great assistance to NHL's activities and its ability to ensure that the roads it is responsible for as highways authority can be safely and properly used by other road users. Whilst the injunctive relief granted by the Bennathan Order has not been wholly effective, NHL is aware that it has acted as a deterrent for some of the individuals who are associated with IB and JSO."

70. In this regard Mr Martell placed reliance on the comment made by Mr Tully at the hearing of the appeal in this matter that the order had had an impact on the defendants who were named on it;

> "In fact 109 of us did listen and take note of the injunction and we didn't do further protests at the injunction sites. We might have done the protest at other sites but we didn't do injunctions (sic) at the injunction sites precisely because the injunction was in place."

David Crawford also addressed the court and stated:

> "I chose not to break the injunction once the injunction was issued."

71. Ms Stacey KC submitted that there was no indication that the direct action protest had "reached its zenith". Rather the public statements made on behalf of JSO make it clear that the movement operating under that umbrella description had no intention bringing its campaign of protests to an end. The strategic road network continues to be a prime location for direct action for protest activities.

72. Ms Stacey KC described it as telling that no evidence or pleadings against variation had been received and that their absence was indicative of the absence of any arguable objection to the extension of the final injunction.

73. Further, although some defendants had provided undertakings that they would not engage in unlawful conduct prohibited by the injunction order; many had not. She invited the court to draw an inference that a person refusing to provide the undertaking which had been suggested by the claimant was someone who posed a risk of direct action protest (such protest/s consisting of actions currently prohibited by the injunction).

74. Finally, she prayed in aid the Court of Appeal's reference to regulation 15 of the Motorways Traffic (England and Wales) Regulations 1982. Pedestrians are not allowed on the motorway save in cases of accident or emergency so no lawful excuse was available to the protesters who ventured onto the M25 or its associated infrastructure.

75. As for the harm caused by the activities restrained by the injunction Ms Stacey KC submitted that the importance of maintaining the safe functioning strategic network (its name describing its nature) is obvious and the gravity of potential harm does not need to be addressed in any detail (it is set out within the statements of Mr Martell and Ms Higson).

76. I now turn to the submissions made by and on behalf of the defendants. I shall not set out all of the content of the emails/representations which I have received, rather I will focus upon the salient points raised

Submissions sent in before the hearing

77. Mr Crawford provided a statement that was headed "Statement from Insulate Britain". It stated:

> "we are some of the named defendants in this matter and we are supporters of the insulate Britain campaign. We are people drawn from many walks of life. We include but are not limited to: clergy, builders, scientists, carers, teachers, local councillors, artists, engineers and GPs." (*underlining added)*

He continued;

> "we wished through our civil disobedience to draw the public's attention to a simple and practical way in which the government could and should (act)."
>
> "the government alone (as evidenced by a publicly-disclosed instruction to the claimant) has chosen to seek to obtain and to use civil court orders, in order to suppress peaceful, legitimate and justified public protest on roads".
>
> "…..To our knowledge, none of the 109 named defendants…has been arrested on an injuncted road while it has been subject to this injunction. We believe that no evidence has been presented by the claimant to the court that any one of the 109 named

defendants constitutes a "real and present threat" to the operations of the claimant. We respectfully suggest that it cannot be reasonable in the above circumstances the claimant to be awarded any costs order against any named defendant who has not been arrested on an injunctive road whilst it is subject to this injunction."

"We have come to this hearing to make ourselves known to the High Court and to represent ourselves. None of us can afford to incur the extra ordinary magnitude of costs of employing lawyers to represent our interests in these proceedings. We have come to make representations about what we see as near continuous harassment for 18 months by the claimant, over this matter, and to ask the court to bring the matter urgently to a completion….

Which we bring before the High Court today are

1. The injunction obtained on the strategic road network by the claimant has had an effect of stifling lawful protest….

2. 24 of us have been found guilty of contempt of court. We have been given immediate or suspended custodial sentences. We have been subjected to enormous court costs…..

3.153 of us are being repeatedly threatened by the claimant with extortionate cost applications even though 109 of us have not broken the injunction

4….The roads do not belong solely to the claimant, but they belong to all the people. They are a legitimate site for peaceful protest and assembly.

5. It is impossible for us to appeal against the injunction, as the costs would be prohibitive….We are not on an equal footing, when faced with the vast financial resources of the claimant. We believe that these injunctions are being used to silence and intimidate people who do are to speak out to protest…

6. We and our families have had our privacy invaded by having our personal details publicised by the claimant on its website. This was an illegal data breach, which potentially endangered us and our families, as well as causing mental distress.

We advise the court that far from being "a real and imminent threat" to the claimant, we are, in fact, public spirited people, prepared to take costly, personal action to do what we can to avert or at least to slow imminent climate catastrophe. We accept that we may incur penalties under the criminal law as a result of our actions….However some named defendants have been pursued under the criminal law and the civil law for the same offence. We are not content also to be subjected to plain injustices of civil prosecution and unjust costs orders, which have been affected by the Government.

> This abuse of civil law, as we see it, brings the civil legal framework into disrepute. We urge the court to put a stop to this manifestly unjust action, one which plainly aims to try and punish further peaceful, public spirited people whose aim is to try and protect all life."

> "Acting out of compassion and a sense of moral responsibility, we interrupted traffic on roads, during 2021, in order to draw attention to the governments criminal inaction on reducing greenhouse gas emissions and on reducing avoidable deaths from cold homes….We believe that we have the right and the duty to act as we did….."

78. In my judgment the statement did not contain an unequivocal promise that those Defendants who had contributed to, and agreed, with its content, would not do what the injunction prevented them from doing and would abide by its terms in the future. Rather the view expressed is that all roads, including those within the strategic network are "a legitimate site for peaceful protest and assembly", what was done in 2021 was "peaceful, legitimate and justified public protest" and "lawful protest" which the order had stifled.

79. As Ms Stacey KC pointed out there had been an offer of acceptance of an undertaking which had not been taken up and fact that not one of the 109 defendants had been arrested "on an injunctive road…whilst...subject to this injunction", simply evidences the effectiveness of the order. It did not mean that if it were lifted there would be no further action on the strategic road network. The statement that those covered by the content are:

> "public spirited people, prepared to take costly, personal action to do what we can to avert or at least to slow imminent climate catastrophe…we accept that we may incur penalties under the criminal law as a result of our actions."

tends to support Ms Stacey KC's submission that views of IB members/supporters have not changed in way, other than as a result of a realisation that it is most unwise to breach an order of the Court as severe sanctions may follow.

80. Ms Bain (Defendant no 57) sent to the court a lengthy e-mail dated 21st April 2023. She stated that she objected

> "to the reasons inferred from defendants not engaging with the injunction legal proceedings. Many other defendants and myself did not engage in proceedings previously as the majority of us can't afford solicitors while also not qualify for legal aid and were concerned that engaging would increase extortionate costs claimed by DLA Piper."

And

> "I object to the reasons inferred not signing the undertaking. DLA Piper is conveniently ignoring the reasons I gave……I said I am not planning to do any civil disobedience road blocking

> protests in the next three years for various personal reasons but are not signing the undertaking is an act of protest against DLA Piper's actions…"

81. Ms Virginia Morris (Defendant 123) sent in a submission on her own behalf and on behalf of her sister; Ms Rebecca Lockyer (Defendant 120). She requested the removal from the injunction;

> "…On the grounds that neither myself nor my sister have protested on or been arrested on any NHL roads or highways."

She suggested that their names had been provided in error by the Police. She annexed an e-mail exchange in which she pointed this out to the Claimant's solicitors. She stated that whilst she had been arrested on 13th October 2021 on A1090, Thurrock (together with her sister) this was not a strategic road. Also Ms Lockyer had not been arrested on M25 on that date. She added:

> "We contend that alleged mere support for IB protests generally clearly does not meet the test in the injunction for police to pass on your details to NHL."

She also set out that

> "we have not broken NHL's various injunctions regarding protests by Insulate Britain and we do not intend to do so."

82. Julia Mercer sent an e-mail to the Court dated 20th April 2023 setting out that she did not in fact break the injunction at the time of taking part in the action by insulate Britain which briefly blocked the approach road junction 14 M25 on 27 September 2021. She stated that the legal action now been taken was totally disproportionate and was imposing blanket injunctions on increasingly large parts of the road network.

Submissions made at the hearing.

83. I explained the central role of the rule of law in society and the independence of the judiciary. Further that, judges must implement the laws enacted by democratically elected parliament and will not be drawn into "political" adjudication. Any personal views which a Judge may hold on political/topical issues must be left at the door of the Court building, and this should be borne in mind by the Defendants when making submissions. I was addressed on this issue and that given the history of the common law I could and should "take a stand".

84. I also explained the procedural position and what an undertaking meant.

85. The point was repeatedly made within the seven oral submissions that the process created by the injunction seemed "never-ending" and that most defendants had not breached the order once they were made aware of it. They felt locked into the process which meant that they would be "back here next year" (with consequential costs incurred) despite the fact that they had not breached the order. There was widespread dismay at the sum of costs claimed (and ordered to be paid) and

misunderstanding/mistrust of the offer made by the claimant solicitors to accept an undertaking.

86. I indicated that I would consider any offer of an undertaking by a defendant given what they had heard at the hearing.

Submissions received after the hearing

87. A letter dated 1st May 2023 was signed by a number of Defendants. It stated:

> We are named defendants on this injunction. Those of us who were present at the Review Hearing, in The High Court on April 24th, Monday, should like to acknowledge the courteous, open and patient manner in which you conducted the hearing. We write in response to your generous invitation, given at the hearing, to advise you under what terms we should be content to enter an undertaking to the court in this matter.
>
> Any undertaking to be offered to named defendants by the claimant or by the court, in order to be considered for approval by the court, should include the following components:
>
> - the scope of prohibitions in the undertaking should not exceed those of The Bennathan/CoA Final Injunction
> - on signing, the particulars of a named defendant would be removed from the Final Injunction
> - on signing, a named defendant's liability to be subject to any costs order in the case would cease.
>
> We respectfully request that any proportion of costs assessed as part of any new Order for costs should not fall disproportionately or unreasonably on any remaining named defendant, whose particulars may, for any reason, remain on the Final Injunction.
>
> We also respectfully request that the court does not make any costs order against any remaining named defendant, for whom there is no evidence that they pose a real, current and continuing threat of breaking the injunction or who has not broken an NHL injunction since the end of October 2021.
>
> We have attached for your information and reference observations on experiences of being an unjustified party to multiple and ongoing claims, submitted by The Government, via NHL, since September 2021.
>
> The Court of Appeal refused to make any costs order in favour of NHL for its appeal costs. Its grounds for refusal were that NHL claimed to be acting in the public interest. We too believe

> that we were acting in the public interest, because The Government had manifestly failed to adequately limit greenhouse gas emissions and excess winter deaths from hypothermia in the home.
>
> The review hearing was an example of a case where moral behaviour and lawful behaviour are engaged but are conflicted. The Final Injunction prohibits unauthorised access on foot to 'the Roads' except in the event of an emergency. Our actions on roads in general *were* in response to a real, present and worsening emergency. Current usage of 'emergency' has expanded to describe 'a loss of our life support systems' and 'an incipient, Sixth Mass Extinction'. We acted out of necessity. An accurate and appropriate meaning of 'imminent', in a case of acting to try to avoid imminent harm, is no longer limited to: seconds, minutes or hours. In the context of our life support systems, imminent means 'within the next few years'. What each of us chooses to do over this steadily shrinking period 'will determine the future of humanity'.
>
> We request that sufficient time may be allowed for the undersigned to make contact with all of the named defendants in order to give them an opportunity to sign an acceptable undertaking. Some named defendants are in prison."

88. The letter was signed by David Crawford, Goivanna Lewis and Diana Warner and stated "there follows a schedule of all of those named defendants with whom contact could be established by April 30th and who have read and support the above letter". The Schedule is at Annexe A to this judgment. It consists of 105 names. Obviously this letter a very significant development.

89. Following the hearing Ms Bain (Defendant no 57) sent in an e-mail dated 28th April in which she set out that;

> "I have no intention to protest on the SRN in future but objected to signing the Claimant's undertaking on multiple grounds. However I am happy to give a personal undertaking to the court promising I will not protest on the roads."

As for the reason why she would not be engaging further in protest activity she explained:

> "(after 12 arrests for climate protests in the last three years) I would struggle to do even conventional, uncontroversial types of campaigning for climate change if I'm in prison, so I will be focusing on other methods of change making now."

90. Ms Marguerite Doubleday (Defendant No 59) sent an e-mail to the Court on 28th April 2023 stating that she was "an ordinary person who is terribly concerned at the situation (climate change)" and that she had already paid costs and fines due to criminal proceedings (and still faced public nuisance trials). She explained;

> "I do not intend to break the injunction but am very concerned at the costs that DLA Piper are seeking."

91. Ms Susan Hagley (Defendant 98) sent an e-mail to the Court on 28th April 2023 stating:

> "I am prepared to give a promise to you that I will not obstruct the strategic road network again. I have not caused obstruction to the strategic road network since 21 September 2021 or since the injunction has been in place. I have been unable to sign DLA Piper's version as I did not understand the consequences of it for me. I have been unable to engage legal advice for this is as I am a state pensioner on a fixed income and do not have the means to do this. I think that DLA Piper have really played fast and loose with us by not offering an undertaking to us within the first few weeks of the injunction. I would have taken it up then if I had any idea of the costs that would be accruing to all of us…"

92. Ms Sarah Hirons (Defendant No 89) stated that she wanted to add an individual response beyond the group letter. She stated that she had fully complied with the injunction to prevent further obstruction of the highway. She stated that she had not been able to fully understand the paperwork which she had received and could not bear the costs of employing legal representation to get a clearer picture or challenge the injunctions so had not made an initial response. As she had fully complied "it is not reasonable and proportionate for me to pay costs"

93. Ms Giovanna Lewis (Defendant 133) sent in an e-mail on 27th April 2023. She stated that DLA Piper had advised her that she had been included as a named defendant due to an arrest on 2 November 2021, however this took place on a pavement (and not a strategic road) and did not proceed to a charge. She stated that it recently came to her attention that the other three people in the group who had been arrested at the same time that had their names removed from the injunction as a result she should not have stayed as a named defendant. She added:

> "The campaign had a beginning, middle and end and is over. It was never going to continue. It has done its job. The insulation industry have told us that our campaign did more for insulation in a few weeks than they have ever deemed able to do in decades. And I see that Labour has pledged to insulate 9 million homes – strikingly different to the government's latest scheme….I confirm that I never broke the injunction, I never intended to and I never would."

94. Mr Sargison (Defendant 39) sent in an e-mail dated 27th April 2023. He stated that he had fully complied with the terms of the injunction would have given an undertaking if he had understood what was being asked. He stopped his actions with insulate Britain as soon as the first injunction paperwork was sent out. He did not understand the process at all and it was unfair to assume that his lack of participation suggested that he was planning to break the injunction. He stated it would not be reasonable or proportionate to now expect him to pay the exorbitant and disproportionate costs of DLA Piper.

95. Mr David Squire (Defendant No 24) sent an e-mail to the Court on 28th April stating that he had pleaded guilty for his "so called criminal activity" and

> "I see no reason to sign a document to say that I will not do (break their injunctions), that which I have already chosen not to do…"

96. Ms Virginia Morris (Defendant 119) sent in a submission. She stated that since attending Court on 24th April, she had been in contact with Defendant Number 126, Mr Ben Horton who had been removed from the NHL injunction by Mr Justice Bennathan at a hearing on 4-5th May 2022 on similar grounds to hers (and by a subsequent order the Judge required the Claimant to pay his costs). She believed this may set a precedent and used his skeleton argument and reference to his case to help structure her submission. She argued;

> "Ms Stacey claimed that this road (the A1090, St Clements Road, Thurrock, which falls under the jurisdiction of Thurrock Council) was approximately 0.9 miles away from the M25 feeder injuncted road (the A1306) where another IB protest occurred on the same day.
>
> Ms Stacey appeared to infer that, due to the close proximity, we presented a very real risk or threat, and were thus rightly named on the NHL injunction.
>
> …….
>
> We contend that Ms Stacey's argument is not supported by the Injunction Order (which contains no reference to proximity) and therefore has no lawful basis for its application.
>
> It is not part of our defence and we say nowhere in our filed defence that we have not participated in an IB protest. Clearly, we have. Our defence does not deny any participation in IB protests. But we do deny having ever protested on any of the Roads (as defined) or any roads owned by NHL including any roads in the SRN.
>
> In summary, we argue that there were no grounds for our names being added to the list of defendants on the NHL injunction in October 2021."

And

> "We only became aware that we might have been incorrectly named on the injunction when I read DLA Piper's skeletal argument for the 16th February 2023 Appeal hearing and saw that some defendants were applying to be removed. We were not aware that this was even an option up to this point.
>
> Ms Stacey's argument during the hearing 24 April 2023, that we could have sent a 'simple email' is not supported. We were totally

> unaware of this option and, even had we been aware, would have been too cautious to do so considering that any information sent to the claimant's solicitor might have been used against us. As noted at (ii) we were advised to take no action, and we followed this advice in good faith.

97. Mr Biff Whipster (Defendant 12) sent in an e-mail stating that he wished to give such a personal undertaking to the Court and that he considered the undertaking which he has already signed, drafted by DLA Piper, was "rather one sided" and "thus (I) much rather await your thoughts on the letter my co-defendants have drafted and sent to you before my earlier undertaking is considered by the courts"

98. A submission was e-mailed in on behalf of:

a) Gwen Harrison (Defendant No 34)
b) Margaret Reid (Defendant No 134)
c) Simon Reding (Defendant No 90)
d) Amy Pritchard (Defendant No 4),

which stated

> "We write in response to your invitation, given at the Review Hearing in the High Court on April 24th, to advise you under what terms we should be content to enter an undertaking to the court in this matter. Any undertaking to be offered to named defendants by the claimant or by the court, in order to be considered for approval by the court, should include the following components:
>
> - the scope of prohibitions in the undertaking should not exceed those of The Bennathan/CoA Final Injunction
>
> - on signing, the particulars of a named defendant would be removed from the Final Injunction
>
> - on signing, a named defendant's liability to be subject to any costs order in the case would cease
>
> We request that any proportion of costs assessed as part of any new Order for costs should not fall disproportionately or unreasonably on any remaining named defendant, whose particulars may, for any reason, remain on the Final Injunction.
>
> We also request that the court does not make any costs order against any remaining named defendant, for whom there is no evidence that they pose a real, current and continuing threat of breaking the injunction or who has not broken an NHL injunction since the end of October 2021."

99. An e-mail was sent in by "Lex - CASP Legal" which stated:

> "I am writing on behalf of two individuals who have been listed as served defendants to be added to the proceedings, namely Marcus Decker and Morgan Trowland.
>
> Both individuals are currently serving custodial sentences for their protest which took place on the Queen Elizabeth II bridge (Dartford Crossing) in October 2022. Subsequently, they are serving sentences of 2 years and 7 months and 3 years, respectively.
>
> On 21 April 2023, both of the named defendants made submissions to HHJ Collery KC that neither of them will take part in disruptive nonviolent protests as a result of their already six month period on remand in HMP Chelmsford. Neither of the individuals have access or legal representation to make submissions to the civil courts regarding the injunction proceedings (which neither of them were aware of by the time the last hearing took place 24 April) within the suggested time restrictions and such are also unable to take part in the signing of any undertaking.
>
> As a result of both defendants submissions at their sentencing hearing, the assumed preventative nature of an injunction is clearly no longer necessary. I hope that both the claimant and the courts can find that is the case and work to remove both defendants from the proceedings, or at least, giving them the opportunity to sign a relevant and reasonable undertaking protecting themselves from costs related to proceedings which they can themselves not be part of."

100. Elizabeth Smail (Defendant No 114) sent in an e-mail stating that there was:

> "sufficient Law in existence to deter me from wanting to obstruct the roads, I do not think it is necessary or fair to add my name to the injunction." and
>
> I do not accept that I should have been included in the injunction, and indeed may not be lawfully included, as my name repeatedly appears in Capital letters.
>
> And
>
> "I have not been invited to have my name removed at an earlier time, when costs were lower."

101. Mrs Rosemary Webster (Defendant No 85) sent in an e-mail which stated she had been involved in IB protests which had resulted in her being before the criminal Courts and that it was her understanding that the injunction(s) were granted on the 21st Sept 21

> "which is four days after I had gone home, with no intention of going back…since then, I have received untold amounts of paperwork and legal letters, all of which I do not understand and all completely unnecessary… I emailed DLA Piper last June, to ask why they had included me in their injunctions. I felt that the answer I received was (intimidating) gobbledegook and as I am not in a financial position to pay for a solicitors assistance, I decided that further engagement with DLA Piper was not going to solve anything."

And

> "Time events have proved that I am not a risk to any injunction. I do not feel I should have to sign anything from NHL/DLA Piper as I feel it is wrong that I was included in the injunction in the first place, which is obviously a politically motivated process, initiated by the then Minister for Transport. I certainly do not feel I should be included in any costs, as they stand now or any potential costs in the future."

102. Anna Heyatawin ((Defendant No 5) sent in an e-mail which stated that she had previously served a prison sentence arising from her participation in the Insulate Britain protests. She asked the Court to allow the Defendants who are in prison to engage in the process and that she be removed from the action as she was willing to sign a personal undertaking.

103. Mr Buse (Defendant No 11) sent in an e-mail which stated:

> "Further to my email to the court on the 24th and please accept my apologies for not attending, I understand dialogue has started regarding an undertaking. I ask the Judge to ensure a reasonable and fair undertaking can be drafted to ending punitive liability to costs. The offences took place late 2021.
>
> The costs to DLA Piper in addition to criminal sentencing has created substantial hardship and seems excessively punitive given my resources and ceasation to represent a threat following the first committal hearing committal resulting in a custodial sentence and purge of contempt, and the important issue affecting millions of people, climate breakdown, at stake.
>
> Any undertaking I would ask not to exceed terms of The Bennathan/CoA Final Injunction; that I would be removed from the injunction and any cost liability would cease.
>
> Insulate Britain direct action campaign was of limited duration running until beginning of COP26, dealing with very important issues, determining the future for thousands of years."

Analysis

104. It is necessary to make some general observations about some of the points made by, and on behalf of, the Defendants about the role of the Court and to expand upon what I said at the hearing in relation to the rule of law.

105. In judgment in relation to the committal application for Louise Lancaster for breach of the order of Bennathan J I stated[5]:

> "13.When dealing with the protest on 8 October 2021 in the case of *National Highways Limited v Heyatawin* , the President of the King's Bench Division stated as follows:
>
> > "In our democratic society all citizens are equal under the law and all are subject to the law. It is integral to the rule of law, and to the fair and peaceful resolution of disputes, first, that the orders made by the court must be obeyed, unless and until they are set aside or subject to successful challenge on appeal, and, secondly, that a mechanism exists to enforce orders made by the court against those who breach them. In this jurisdiction that mechanism is provided by the law of contempt."
>
> 14. She added at paragraph 56:
>
> > "In a democratic society which recognises the right to freedom of peaceful assembly, protests causing some degree of inconvenience are to be expected and up to a point tolerated. But the words "up to a point" are important. Ordinary members of the public have rights too, including the right to use highways. The public's toleration of peaceful protest depends on the understanding that in a society subject to the rule of law the balance between the protestor's right to protest and the right of members of the public to use the highway is to be determined not by the say-so of protestors, but according to the law, as applied in the circumstances of a particular case by independent and impartial courts."
>
> 15. In this case that balance was struck by the Court, and the order was made. The rule of law demands every citizen obeys court orders, whether that be a government minister or a member of a pressure group or other organisation. Some may consider the aims of Insulate Britain or Just Stop Oil laudable, but if they can ignore a court order, so can anyone else, including those whose aims and intentions they may not think so laudable."

[5] [2021] EWHC 3080(KB)

106. 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:

> "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."

107. I recognise that the Defendants passionately believe that there is a climate crisis and the that the Government is failing to adequately address it. However the Government in this country is democratically elected to govern, Judges are not. It is the role of the courts to be independent and impartial and apply the laws as enacted.

108. Turning to the merits of the Claimant's application in my judgment it would be wrong, approaching a year after the order was, to treat the Defendants as a homogeneous group. The case for the continuation of an injunction again each named Defendant requires individual analysis.

109. I start with Virginia Morris, Rebecca Lockyer and Giovanna Lewis. Each stated that they had not been arrested after a protest on a strategic road. Ms Morris and Ms Lockyer stated that they were arrested on a non-strategic road and Ms Lewis whilst demonstrating on a pavement.

110. As regards Ms Morris' actions the facts do not seem to be in dispute. She was not arrested after a demonstration on a strategic road but on a road approximately 0.9 miles away from the M25 feeder injuncted road (the A1306) where another IB protest occurred on the same day. In my judgment the details of her arrest should not have been provided to the Claimant and she should not have been a named Defendant. I will not

continue the injunction against her or order that she is subject to either the costs liability to be borne by the 109 Defendants or the costs of the review hearing.

111. The position in relation to Ms Lockyer and Ms Morris is less straightforward. They have made assertions (not in statements accompanied by a statement of truth) which have not been expressly accepted as correct by the Claimant. If the assertions are correct it seems that they also should not have been added as named Defendants. I will not continue the injunction against either or order that they are subject to either the costs liability to be borne by the 109 Defendants or the costs of the review hearing, but make this subject to the right of the Claimant to set out within a short statement why it is said that they were properly named as Defendants. If such a statement is filed I will allow Ms Lockyer and Ms Morris to respond with a statement verified by a statement of truth and then consider how to determine the matter.

112. I turn to the submissions made by/on behalf of the other named Defendants. It necessary to separate out the Defendant's arguments about whether there should be liability for costs and the necessity in the past for obtaining an order and consider the matters set out in the context of future risk. As a generality the submissions made orally, and in writing, by those who have not breached the order (since becoming aware of it) explained that taking a principled stance had led to consequences which they did foresee. As is readily apparent there was widespread mistrust of and/or a failure to consider, the offer of an undertaking made by the Claimant's solicitors, but a greater willingness to engage directly with the Court. Nothing that has been said to me so far has led me to be believe that promises offered to the Court not to breach the terms of the injunction in the future (provided the terms were not expanded in some way) are likely will be breached. I recognise (and take into account) that Ms Stacey KC has not had the opportunity to consider/respond to the submissions lodged after the hearing, but as she indicated the acceptance of an undertaking is ultimately a matter for the Court.

113. When assessing the extent of future risks posed by Defendants during the consideration or whether to grant an extension of an existing order (and/or as part of the Courts supervisory function as envisaged by the Master of the Rolls in **Barking**) the Court should offer the opportunity to Defendants to provide a suitable undertaking; after explaining what such a step means. As I indicated in Court an undertaking is a formal promise to the Court and if breached then potentially leads to the same penalties as if an order were broken; a person may be held in contempt and may be imprisoned, fined or have their assets seized. It is a serious step not to be taken lightly or without careful consideration. However if such an undertaking is accepted in circumstances such as the present by the Court then a person may be released from being a Defendant going forwards.

114. However, the Court accepting an undertaking is not part of a settlement or compromise of the claim (or any part of it). Settlements/compromises are agreements reached between the parties and a Court cannot force parties to agree. Rather it is a step that regulates the position going forwards. So in the present case if the Court were to accept an undertaking from a Defendant (something which would be recorded within the order itself) then it may order that the injunction is not continued against that Defendant but that would not affect the existing rights/liabilities of the parties given the history of the case to date e.g. any liability for costs. It also leaves open any issues as to how the costs of the review hearing should be dealt with.

115. Turning to the period of the undertaking, the offer made by the Claimant to the named Defendants (by letter dated 15th March 2023) was to accept an "unretractable and unconditional" signed undertaking with a duration of three years. In my judgment given the time that has elapsed since the order was made an undertaking for two years would be sufficient.

116. Given the matters set out above and the indication by the large majority of the Defendants that they are willing to provide an undertaking if any named defendant signs an undertaking (promise) in the terms set out below (and not as varied), then, subject to something happening in the interim to change my view, I will not order that the injunction continue against them as a named Defendant. That means any costs liability going forward will cease and they will not be "back next year".

117. It is necessary for each Defendant who wishes to give and undertaking to sign and file a copy. The undertaking which is at annexe B to the order to make matters easier is as follows:

> "I promise to the Court that for a period of two years (up to 10th May 2025) I will not engage in the following conduct
>
> (a) Blocking or endangering, or preventing the free flow of traffic on the roads (as specified and defined at paragraph 4 of the order of Mr Justice Bennathan made on 12th May 2002) for the purposes of protesting by any means including their presence on the roads, or affixing themselves to the roads or any object or person, abandoning any object, erecting any structure on the roads or otherwise causing, assisting, facilitating or encouraging any of those matters
>
> (b) causing damage to the surface of or to any apparatus on or around the roads including by painting, damaged by fire, or affixing any structure thereto
>
> (c) Entering on foot those parts of the roads which are not authorised for access on foot other than in cases of emergency.
>
> I understand what is covered by that the promises which I have given and also that that if I break any of my promises to the court I may be fined, my assets may be seized or I may be sent to prison for contempt of court
>
> Signed …….
>
> Date……..."

118. I will give the named Defendants the opportunity to provide an undertaking by extending the current order against them but allowing a period of just over two weeks (to 4.00pm on 22nd May 2023) for the provision of undertakings at the end of which I shall amend the order to remove those who have signed an undertaking from the list of named Defendants.

119. Several Defendants expressed annoyance or dismay that they were not offered the opportunity to give an undertaking at an earlier stage. Also, as set out above, most Defendants feel that a costs order against them would be unjust. These matters highlight the importance in a case such as this of engagement/communication with the Claimant and the Court which may enable an understanding of a person's view about the order which is being sought against them (including whether they would agree not to repeat any relevant conduct). Some Defendants expressed gratitude to the Court for matters being explained to them and also the opportunity to address the court on relevant matters. However this is what can be expected of any Judge. The Judiciary is an independent constitutional body and strives at all time to be fair to all who are involved in litigation. The keystone in the procedural code for all civil Courts (the "CPR") is the "overriding objective" (CPR1) which is the requirement to deal with deal all cases justly and at proportionate cost which includes, so far as is practicable, ensuring that the parties are on an equal footing and can participate fully in proceedings. The duty on the Court to further this objective includes actively managing cases by (amongst other things)

    (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

    (b) identifying the issues at an early stage;

    (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

    (d) helping the parties to settle the whole or part of the case;

    (e) dealing with the case without the parties needing to attend at court;

    However it is very difficult to do any of these things if one party will not engage at all. A Judge will take into account that a person does have legal representation and will explain matters accordingly (although no Judge can give legal advice to any party). In nearly 40 years of working in the civil courts I cannot remember an example of a party's position being improved by ignoring proceedings and/or not engaging with the Court. This case is a paradigm. The failure to respond to the Claimant when served with proceedings, or at subsequent stages, or to file any documents with the court (such as a defence or evidence), or to appear at Court hearings has clearly not benefitted any of the Defendants at all. Many could have been spared stress and expense by engaging with the process, daunting though it may seem. As I shall set out Mr Justice Bennathan stated (in the context of the Claimant's application for costs) if a defendant chooses not to provide any submissions to the court they cannot not properly complain at a later stage that their voices were not heard.

120. I now turn to the position of those Defendants wo are not prepared to give an undertaking (or engage with the Claimant or the Court) and also to persons unknown.

121. Having carefully considered the history of all relevant matters to date (as set out above), including the public statements of intent as recently made, the evidence of Mr Martell[6]

[6] See paragraph 68 above

and the analysis of Mr Justice Cavanagh[7] I accept Ms Stacey KC's analysis that many individuals previously associated with/members of IB and now aligned with the JSO coalition of groups/causes still pose a real and imminent risk of serious harm through disruption of the strategic road network. Put simply "they have not gone away"; rather they are as committed to their cause as ever. The success of the order in halting protests on the strategic road network underlines the importance of continuing the protection whilst the likelihood of protest action remains and does not mean that the underlying threat were no restraint to be in place has diminished. Refusal to give an undertaking gives an insight as to future intention.

122. I repeat and endorse the analysis of Mr Justice Bennathan (and in so far as it differs the analysis of the Court of Appeal) set out above[8] as regards the necessary balancing exercise of the rights of the Claimant and of protestors ; named and unknown.

123. In my judgment the injunction should be extend against those unprepared to give an undertaking for a year with a review in the month before it expires.

Amendments to the Schedule

124. The Claimant wishes to remove as named Defendants, 11 people who have already signed an undertaking and one who has sadly died. An agreement has been reached with the Defendants who signed an undertaking as to costs of the review hearing. Obviously these amendments should be permitted and the agreements reached are very welcome.

125. The Claimant also wants to add six Defendants. These Defendants will have no liability for the costs incurred in respect of the hearings before Bennathan J but will have a liability for the costs of the review hearing. These defendants are stated to have engaged in direct action protest on the strategic road network since the order of May 2022 was made. The statement of Laura Higson explains that these proposed Defendants are the two individuals who took part in the Queen Elizabeth II bridge protest on 17th and 18th October 2022 and four individuals who took part in the July 2022 gantry protests. I allow these defendants to be added.

Alternative service

126. The Claimant seeks to amend the service provisions set out within the order of Mr Justice Bennathan in respect of both the First Defendant ("Persons Unknown") and the named Defendants.

127. I have not received any submissions or representations in relation to service by or on behalf of any defendant or interested person, save for a plea to the Court to consider the position of those in custody.

128. Bennathan J held

> "50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first

[7] See paragraphs 66-67 above
[8] See paragraphs 40-41above

> 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."

129. The Claimant did not appeal this aspect of the order or ask the Court of Appeal to adopt a different approach as regards service of its order (this despite the fact that all the difficulties relied upon now in support of the application to vary the service provisions were known to the Claimant at the time of the hearing on 16th February 2023 before the Court of Appeal). So the Court of Appeal order was served in a manner which the Claimant believed to be unsuitable yet the issue was not raised and the Court was not addressed on the matter. This is surprising and, given the tension between the approaches of Mr Justice Bennathan and Judges in other claims with the same or similar issues, was unfortunate. It would have provided the opportunity for appellate guidance.

130. On the 28th February 2023, in light of difficulties set out by Ms Higson in her witness statement in relation of service, the Claimant made an application for permission to serve the structures injunction and documents in those proceedings by alternative service upon the 65 named defendants on account of the difficulties in serving 25 of the

named defendants. Mr Justice Fraser granted an alternative service order in respect of the structures injunction on the 1st March 2023.

131. Ms Stacey KC argued that the approach of Mr Justice Bennathan (and the Court of Appeal as regards its order) was at odds with the approach taken by Mr Justice Knowles in **HS2 -v- Persons Unknown** [2022] EWHC 2360**.** Issues in relation to service had troubled me at an earlier hearing in the same case. Mr Justice Knowles received detailed submissions considered the matter in detail in a comprehensive and most helpful judgment. For ease of reference (given the number of people who may read this Judgment) I will set out a lengthy extract from his judgment:

> "143……It is a fundamental principle of justice that a person cannot be subject to the court's jurisdiction without having notice of the proceedings: *Cameron v Liverpool Victoria Insurance Co Ltd [2019] 1 WLR 1471, [14]*.
>
> 144. The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant: *Cameron* , [21], and *Cuciurean v Secretary of State for Transport and High Speed Two (HS2) Limited [2021] EWCA Civ 357, [14]* – [15], [25] – 26], [60] and [70]; *Canada Goose* , [82]. Posting on social media and attaching copies at nearby premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants: *Canada Goose*, [50]:
>
> > "50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protestors at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protestors and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure."
>
> 145. There is a difference between service of proceedings, and service of an injunction order. A person unknown is a newcomer, and is served and made a party to proceedings, when they violate an order of which they have knowledge; it is not necessary for them to be personally served with it: *Barking and Dagenham,* [84]-[85], [91], approving *South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429, [34]……*
>
> 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]*.

And

"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.

….

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:
>
> 1. Affixing 6 copies in prominent positions …
>
> 2. 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.
>
> 3. 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.

4. 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]."

132. In **TfL -v-Lee** [2023] EWHC 402 (judgment delivered on 24th February) Mr Justice Cavanagh stated:

> "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.

133. Ms Stacey KC relied on the content of a note (which she said could be verified with a statement of truth if necessary) in relation to media coverage. As set out above in November 2022 JSO activist targeted gantries on the M25 and as a result of issues with service which had been highlighted by the protest undertaken by the bridges protestors, the Claimant made an urgent application for a further interim injunction. An order was granted by Mr Justice Chamberlain on 5th November 2022 ; the structures injunction or "Gantries injunction". The order provided for alternative service of the claim form and injunction order as against persons unknown. By the return date 65 defendants had been identified and the order was amended by Mr Justice Soole on 28th November 2022 to require personal service on those named Defendants. After the publishing of the order of Soole J, the National Highways Facebook Page (which has 60,000 followers) had 6,208 impressions excluding private accounts (so most protestor accounts would not register in this data). The webpage publicised in the injunction has had 2,753 unique views.

134. NHL media monitoring suggests that articles discussing "National Highways" and "injunction to deter protestors on the M25" were mentioned in 1,590 articles in the short period between 6th–12th November 2022 alone with a total reach of over 31 billion. Search terms "M25" and "injunction" between the 5th–30th November 2022 returned 2,549 articles (2,217 online) with a reach of 48 billion. An NHL press release was covered widely within the daily media and on television channels

135. In my judgment, given what has occurred since early September 2021; including statements made by IB/the JSO coalition[9], the media and social media coverage in relation to making of the orders in relation to protests on the road network and subsequent committals, there is very widespread knowledge that an injunction against protesting on strategic roads, and especially the M25, is in force. This provides what Cavanagh J referred to as constrictive knowledge. I also respectfully agree with his analysis in relation to the large extent to which, in order to organise protests and support each other, protesters within the JSO coalition are in communication with each other both horizontally between members and vertically through its website and social media. It is my view to echo his phrase that "it is very unlikely, perhaps vanishingly unlikely",

[9] See paragraph 12 above

that anyone who is minded to take part in a protests on the strategic roads network is unaware that injunctive relief has been granted by the courts. When considering service provisions it is necessary consider all relevant circumstances including how relevant information has been disseminated and not to make the perfect the enemy of the good. It will always remain open to a person on any proceedings in relation to breach of the order to present evidence that they were unaware of the existence of an order.

136. Accordingly I do not consider it necessary or appropriate at this stage to continue with the approach adopted in the order of Mr Justice Bennathan (and continued with the order of the Court of Appeal) as it is my view that there now are "practical and effective methods to warn future participants about the existence of the injunction" given the level of constructive knowledge.

137. I also have the benefit of evidence as to how the service provisions in the orders made to date have operated in practice. Alternative service will prevent what is referred to by Ms Stacey KC as "a free pass" to breach the order without sanction notwithstanding knowledge of the existence of an injunction.

138. Ms Stacey correctly conceded that an application for prospective alterative against named defendants faces a high bar. The procedural position is that in order to dispense with personal service and to make an order for service by alternative method the Court requires good reason. CPR 6.15 provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

139. However I accept that the statement of Mr Higson (paragraphs 3-16) has set out sufficiently good reasons. As Ms Higson observes:

> "The Claimant has suffered acute difficulties in effecting personal service of any documents pertinent to the proceedings."

When effecting service of the order of Mr Justice Bennathan it was only possible for the Claimant to serve personally only 49 of the 132 Named Defendants and 40 of the 65 named defendants identified in the Order of Mr Justice Soole despite, in some cases seven separate attendances being made at addresses.

140. In my judgment the comprehensive proposed variations set out in the draft order can reasonably be expected to bring the existence of the order to the attention of any named defendant and any other interested person who may be considering a form of protest prohibited by its terms. My only concern is in relation to those in custody. I amend the draft order proposed by the Claimant to add the wording contained in the order of Mr Justice Fraser at paragraph 10 as suitably amended.

Costs

141. The Claimant seeks to vary/extend the costs order made by Mr Justice Bennathan made on 16th January 2023 so that it applies to the 109 Defendants as well as the 24 Defendants against whom it was made.

142. The claimant sought costs in the sum of £727,573.84 in respect of the three sets of claims leading up to and including the hearing in May 2022.

143. Within his reasons for his order of 16th January 2023 Bennathan J stated:

> "I have not received any submissions from the 133 named defendants but as they have consistently taken no part, and expressed no interest, in this litigation that is neither unexpected nor any basis for me to refuse an order, they are entitled to take no part but then cannot complain about the voices being heard on this application"

144. He stated that the claimant had proposed a reduced total of £600,000 in light of the dismissal of the summary judgment application against the other 109 Defendants and the "persons unknown aspect", but he considered that inadequate and arrived at a figure of £580,000 which he divided amongst the 133 named Defendants arriving at a figure of £4360 per Defendant. He ordered that the 24 defendants who had been subject to an order for summary judgement were to pay the claimant's costs on the standard basis but not exceeding £4,360 for each Defendant to be assessed if not agreed. Further that each of the 24 defendants was to pay £3000 "costs on account". In respect of the other 109 Defendants he ordered that costs were "in the case". This order ordinarily means that the party which is eventually successful will be entitled to recover the costs.

145. The Court of Appeal set aside the part of Bennathan J order of May 2022 which treated the 24 defendants as in a separate category to the 109. Ordinarily where a costs order follows on from a substantive order which is the subject of a successful appeal, an appellate court will consider whether it is necessary to set the costs order aside (as the Court below is likely to have made the order having regard to the effect of the incorrect substantive order). I presume that submissions to this effect were made to the court (I do not have a transcript). However the court ordered:

> "There will be no variation of the costs order dated 16 January 2023 of Bennathan J and no order as to the costs of the appeal."

146. Within paragraphs in the order headed "reasons" it is stated:

> "The court sees no reason to vary the costs order made by the judge. It will be for the High Court at any review hearing to determine what if any costs order to make in the case."

147. Ms Stacey KC submitted that the final words "in the case" is a reference to the order made by Bennathan J that the costs of the 109 would be "costs in the case". However, given that the Court of Appeal had made a final order against the 109 it is perhaps surprising that an order was also not made setting aside the consequential costs provision which gave them separate consideration. This would have resulting in an award of costs against all named Defendants, not to exceed £4360 per Defendant, which is the order which the Claimant now seeks. The claimant does not seek to set aside 20% deduction which the judge applied to reflect the (incorrect) failure of the applications against the 109 (and the claims against persons unknown). It is in effect a windfall reduction (not that any of the Defendants are likely to view it as such).

148. Mr Crawford, who attended at the appeal hearing submitted (in a document filed after the hearing entitled "Observations on being a named Defendant");

> "The CoA refused to issue any costs order against any named defendant. It refused to make a costs order in respect of NHL's claimed appeal costs (of ~ £120,000), as NHL claimed to be acting solely in the public interest. Given The Court of Appeal's ruling on costs in the case, The High Court is bound also to consider any extent to which there are any reasonable grounds for awarding NHL any of its claimed, considerable costs in the case against any of the currently 133 named defendants."

149. My judgment Mr Crawford is not right when he states that the Court of Appeal refused to issue any costs order against any named defendant. Rather Ms Stacey KC is correct in her analysis. The Court did not set aside the order in relation to the 24 defendants because it clearly intended that the High Court at a review hearing would deal with what order to make against the 109 defendants given what had occurred "in the case".

150. Given that I am not an appeal court from Bennathan J I have no jurisdiction to vary his determination in relation to costs in respect of the 24 defendants. Even if I did have jurisdiction there has been no material change in circumstances concerning the merits of the order made. As I have already observed it is very regrettable that the Defendants did not engage with either the claimant or the Court.

151. In respect of the 109 Defendants I fully appreciate that the sums involved are very large indeed and that many Defendants are of limited means. However it is in my view unarguable that if Bennathan J had approached the summary judgment application in respect of these claims as the Court of Appeal held that he should have done, he would have made a final order and the same cost provisions as he made in respect of the group of 24 defendants in respect of which the application was successful (save that he would have ordered a larger sum as the 20% deduction would not have been applicable). His decision was clear as to the principle of costs (i.e. who should pay them) and followed the guidance in CPR 44.2

> **44.2**
> (1) The court has discretion as to –
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> (b) the court may make a different order (underlining added).

The Claimant had been a successful party having obtained interim and then final injunctions.

152. I have carefully considered submissions made by the Defendants in relation to the costs order sought. However the order of Bennathan J has not been the subject of appeal on behalf of the defendants and I must respect its reasoning and conclusions. It was his view that the Defendants "could not complain" given that they had not engaged with the Court or the Claimant. In my judgment it would be wrong in principle not to order

that the 109 Defendants pay the costs of action up to and including the hearings before Bennathan J.

153. Where I do think that matters have changed is in respect of the amount of the interim payment as to costs. I have had submissions from, and on behalf of, the Defendants, which were not made to Bennathan J. CPR 44.2 (8) sets out that;

> "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

154. In a document submitted after the hearing Mr Crawford stated

> "The current costs application made by NHL is excessive. In the case of North Warwickshire Borough Council v Persons Unknown, in relation to protests at Kingsbury Oil Terminal, a similar number of defendants and duration of protests were involved. However, solicitors' fee-rates quoted in the case are a fraction of those claimed in NHL's DLA Piper-led case.
>
> At the Review Hearing on 24th April 2023, eight attendees for the claimant were noted. It appeared that just two of these took any active role in the proceedings. It is perplexing to try to understand to what extent such an apparently large number of attendees for NHL, with their likely, associated travel and other costs, could be reasonably claimed against the named defendants.
>
> If a costs order is to be made, then NHL's statement of costs should first be scrutinized for accuracy and reasonableness. On what grounds can charging thousands of pounds, simply for sending emails and letters, be justified? On what grounds does it require four people, charged for at a rate of £349 - £230 per hour, to do basic administrative work?
>
> How efficiently and effectively have NHL's costs been contained? Several named defendants elected to receive correspondence and documents electronically but also received duplicated bundles via post.
>
> On what grounds can a claimed charge of over £1,000 for assembling a statement of costs be justified?"

155. At first blush these are perfectly respectable arguments which may find favour on assessment. Other Defendants also challenge the amount of costs claimed. Taking all matters into account I order a payment on account of £1,500 in respect of the costs up to and including the hearings before Bennathan J.

Costs of the review hearing

156. Ms Stacey KC submitted that if an extension of the order is granted (which it has been) the costs of the review hearing should also "follow the event" i.e. the Claimant should receive its costs of (and caused by) the hearing as it had been the successful party. There had been a reasonable offer made to accept an undertaking and the Defendants who had done so were not the subject of a costs application in respect of the hearing (i.e. in addition to the costs order set out above). Those who had not accepted the offer and had come to court should pay the Claimant's costs. A schedule was submitted in the sum of £75,891.84.

157. It is correct to say that the Claimant has obtained an extension of the injunction against all those who are not prepared to sign an undertaking. Further that undertakings have only been offered by some Defendants at or after the hearing.

158. I have carefully considered the objections to an order for cost raised by the Defendants but I cannot see how they would alter the starting point mandated by the rules (that the successful party should pay the unsuccessful party's costs). Many of the objections are to the amount of the claim for costs, and these matters can be raised in the assessment. As a result I order that the relevant Defendants pay the Claimant's costs of the review hearing.

159. I originally intended to summarily assess costs. However given:

(a) the large sum of costs at stake,
(b) issues of proportionality;
(c) the submissions made by Mr Crawford which apply to the entire conduct of the claim (and also the need for the Claimant to have an opportunity to respond to them in detail);
(d) The need to ensure that costs referrable to the conduct of proceedings against those in respect of whom a costs order is not sought (because they signed an undertaking) are not passed onto the remaining Defendants;

I order that the costs be the subject of detailed assessment (if not agreed).

Police duty to disclose information

160. Some of the submissions made by the Defendants have raised the issue surrounding the disclosure of details of arrests to the Claimant (including the three Defendants who say that their details were wrongly provided[10]). If applied prospectively the terms of the existing order affects as yet unidentifiable people who have not yet been arrested and documents not yet in existence. Obviously people who have not yet decided to protest/attend a protest cannot object to the terms of the order.

161. Anthony Nwanodi, a lawyer with conduct of this matter on behalf of the Claimant made statement on 30th September 2021in support of an application (pursuant to CPR 31.17) for an order that a number of Chief Constables disclose the names and address of "protestors removed from the M25 and additionally "all material relevant to the

[10] See also the filmmaker and those protesting on a pavement referred to at paragraph 38 above

enforcement of the injunction order made by Mr Justice Lavender on 21st September". He stated that the application was "made at the request of the police" and

> "Stephen Bramley CBE is the director of legal services of the Metropolitan police. In this case he has worked through NPoCC to coordinate the approach being taken to the court's interim injunctions by the police. In particular, he has been liaising with the claimant as to the correct approach to be taken to providing information to the claimant so as to allowing (sic) the claimant's representatives to serve the injunctions of protesters, and to evidence breaches of the injunctions."

> "While some of these names have now been provided by some of the forces, Mr Bramley remains concerned as the scope of information that can be shared with national highways and it is not been possible therefore to obtain all the information as to identities held by the police."

162. It appears that the Police had some reservations about supplying the information/personal data requested. I do not know the extent to which the issue was the subject of argument before Bennathan J. It was not challenged before the Court of Appeal and does not appear to have been the subject of any argument before or consideration by the Court.

163. This aspect of the order (which has been sought in other cases) has recently caused concern amongst some High Court Judges given the nature and extent of the obligation imposed on third party in respect of future confidential information/ data concerning people who have been arrested, but not necessarily charged with any offence (and the fact that a person who is arrested is not afforded the right to challenge the provision of the information to the Claimant before it is provided). As far as I am aware, although raised in court in at least one case, the issue has not been the subject of any detailed consideration by any Judge. Given the general supervisory duty of the Court in respect of orders[11], I am not prepared to continue this aspect of the order in the longer term without understanding the basis upon which it is said the Court has, and should use, any power to make such an order and I invite further written submissions on the issue on behalf of the Claimant if this continuation of this part of the order is pursued. As the named Defendants have all been arrested and their information provided they are likely to have little interest in the issue and I see no reason for them to be individually served with the material (and accordingly there should be no costs consequences for them).

Conclusion

164. I formally make the order in the terms now circulated. As I indicated in Court in order to ensure total transparency and equality of arms (and contrary to normal practice) neither this Judgment nor the terms of the order have been circulated to any party in advance of the hand down to enable them to suggest corrections (obvious mistakes, spelling mistakes, grammar etc). Also this Judgment has had to be prepared within a very short time frame (which also included two other complex one day hearings). As a result I have included a liberty to apply provision out of an abundance of caution. This

[11] See Barking and Dagenham LBC-v-Persons Unknown [2022] 2 WLR 946

must not be used to re-argue matters which were covered at the hearing and addressed within this judgment.

165. I invite the Claimant to take all reasonable steps to make this judgment available to as many people as possible.

Annexe A

2	Alexander RODGER
5	Ana HEYATAWIN
7	Anne TAYLOR
8	Anthony WHITEHOUSE
9	Barry Mitchell
11	Benjamin BUSE
12	Biff WHIPSTER
13	Cameron FORD
15	Catherine EASTBURN
17	Christian ROWE
18	Cordelia ROWLATT
19	Daniel Lee Charles SARGISON
20	Daniel SHAW
21	David CRAWFORD
22	David JONES
24	David SQUIRE
25	Diana Elizabeth BLIGH
26	Diana HEKT
27	Diana Lewen WARNER
30	Elizabeth ROSSER
31	Emma Joanne SMART
32	Gabriella DITTON
33	Gregory FREY
35	Harry BARLOW
37	Ian Duncan WEBB
38	James BRADBURY
39	James Malcolm Scott SARGISON
40	James THOMAS
41	Janet BROWN

42	Janine EAGLING
43	Jerrard Mark LATIMER
44	Jessica CAUSBY
45	Jonathan Mark COLEMAN
48	Judith BRUCE
49	Julia MERCER
50	Julia SCHOFIELD
54	Louis MCKECHNIE
55	Louise Charlotte LANCASTER
56	Lucy CRAWFORD
57	Mair BAIN
58	Margaret MALOWSKA
59	Marguerite DOUBLEDAY
60	Maria LEE
61	Martin John NEWELL
62	Mary ADAMS
63	Matthew LUNNON
65	Meredith WILLIAMS
66	Michael BROWN
67	Michael Anthony WILEY
68	Michelle CHARLSWORTH
70	Nathaniel SQUIRE
71	Nicholas COOPER
72	Nicholas ONLEY
73	Nicholas TILL
75	Paul COOPER
77	Peter BLENCOWE
78	Peter MORGAN
79	Philippa CLARKE
80	Priyadaka CONWAY
81	Richard RAMSDEN
82	Rob STUART

83	Robin Andrew COLLETT
84	Roman Andrzej PALUCH-MACHNIK
85	Rosemary WEBSTER
86	Rowan TILLY
87	Ruth Ann COOK
88	Ruth JARMAN
89	Sarah HIRONS
91	Stefania MOROSI
93	Stephen Charles GOWER
94	Stephen PRITCHARD
95	Susan CHAMBERS
96	Sue PARFITT
97	Sue SPENCERLONGHURST
98	Susan HAGLEY
99	Suzie WEBB
101	Theresa NORTON
102	Tim SPEERS
103	Tim William HEWES
104	Tracey MALLAGHAN
106	Venitia CARTER
107	Victoria Anne LINDSELL
109	Bethany MOGIE
110	Indigo RUMBELOW
112	Ben NEWMAN
113	Christopher PARISH
114	Elizabeth SMAIL
116	Rebecca LOCKYER
117	Simon MILNER EDWARDS
118	Stephen BRETT
119	Virginia MORRIS

120	Andria EFTHIMIOUS-MORDAUNT
122	Darcy MITCHELL
123	David MANN
124	Ellie LITTEN
125	Julie MECOLI
126	Kai BARTLETT
127	Sophie FRANKLIN
129	Nicholas BENTLEY
130	Nicola STICKELLS
131	Mary LIGHT
132	David McKENNY
133	Giovanna LEWIS
134	Margaret REID

Annexe B

"I promise to the Court that for a period of two years I will not engage in the following conduct

(a) Blocking or endangering, or preventing the free flow of traffic on the roads (as specified and defined at paragraph 4 of the order of Mr Justice Bennathan made on 12th May 2022) for the purposes of protesting by any means including their presence on the roads, or affixing themselves to the roads or any object or person, abandoning any object, erecting any structure on the roads or otherwise causing, assisting, facilitating or encouraging any of those matters
(b) causing damage to the surface of or to any apparatus on or around the roads including by painting, damaged by fire, or affixing any structures thereto
(c) Entering on foot those parts of the roads which are not authorised for access on foot other than in cases of emergency.

I understand what is covered by that the promises which I have given and also that if I break any of my promises to the court I may be fined, my assets may be seized or I may be sent to prison for contempt of court

Signed …….

Dated ……..."

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

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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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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

- -

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	

- -
- -

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

- -

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 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.

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
[2022] EWHC 1477 (QB)

No. QB-2022-001098

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 27 April 2022

Before:

MR JUSTICE BENNATHAN

B E T W E E N :

(1) ESSO PETROLEUM CO. LIMITED
(2) EXXON MOBIL CHEMICAL LIMITED

Applicants

- and -

(1) PERSONS UNKNOWN
(2) PERSONS UNKNOWN
(3) PERSONS UNKNOWN

Respondents

MS K. HOLLAND QC (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Applicants.

THE DEFENDANTS did not appear and were not represented.

J U D G M E N T

(Transcript prepared from a poor quality recording and without the aid of documentation)

MR JUSTICE BENNATHAN:

1 This case is an application for an injunction. The claimants are two companies that import and process oil, Esso and Exxon. The defendants are those who it is anticipated may protest against the oil industry. In describing the application, the issues I have had to consider and my conclusions I shall do my best to follow the lead of Sir Geoffrey Vos, Master of the Rolls, and use non-technical English rather than the Latin tags which have "bedevilled" this area of law and practice (*London Borough of Barking and Dagenham & Ors v. Persons Unknown & Ors* [2022] EWCA Civ. 13 [8]).

2 The claimants are represented by Katherine Holland QC and Yaaser Vanderman, and I am grateful to them and their legal team for the presentation of their case. The defendants were neither represented nor present. There was, however, a degree of opposition to the order that came about in the following manner. An individual who had received one of the claimant's solicitor's emails instructed Hodge Jones & Allen Solicitors who in turn instructed counsel, Mr Powlesland. The recipient of the email is involved in the environmental movement but, as I understand it, has not protested at any of the claimants' sites and has no intention to do so.

3 Normally the courts hear arguments from claimants and defendants, not from people who are interested in, but not part of, the litigation. In this case, without opposition from Ms Holland for the claimants, I allowed Mr Powlesland to make submissions. In doing so I shall not be seen as setting any precedent that binds other judges, or indeed myself. I simply felt that the sort of very broad order sought against unnamed defendants would benefit from the scrutiny that could attach to other submissions.

4 Mr Powlesland made wide-ranging submissions including about the inequality of wealth between oil companies and protestors. The sinister nature, as he put it, of part of the order sought to, in effect, create cooperation between the police and the claimants' oil companies, and about other cases in which he had been involved and his concerns about the courts granting of injunctions such as these. A topic Mr Powlesland focussed on was the failure, as he suggested, by the claimants to establish the eight sites were actually theirs; in other words that they could prove ownership or other legal title to each part of the site.

5 I heard those submissions and invited Ms Holland to reply. Thereafter Mr Powlesland sought to press me further and to go through each of the eight sites in detail. At that point I cut him off and retired to consider my decision. I did not do so, I hope, out of rudeness but because I felt, given his limited and unusual status in this hearing and given he had already addressed me on broad propositions, and I had received a reply, I have a duty and a right to confine argument to matters that in my view will help me arrive at the right decision.

6 Section 12(2) of the Human Rights Act 1998 limits a court's ability to grant any relief, such as an injunction, in a case where freedom of expression is involved and the defendant is neither present nor represented. That limitation does not apply, however, where the applicant has taken all practical steps to notify the defendants. In this case I have the evidence of Nawaaz Allybokus, a solicitor from Eversheds, the claimants' solicitors. He makes clear that the email was sent to the various groups that are organising protests, and a copy of the interim injunction or warning of the interim injunction's existence had been left at the edge of all the claimants' sites thus alerting protestors to the existence of these proceedings. On that basis I am satisfied

the claimants have taken all practical steps and I can make the order sought if the other criteria are met.

7 Section 12(3) of the Human Rights Act also requires me not to issue an injunction unless I am persuaded the claimants are likely to succeed in any eventual action to stop "publication" that the order would forbid. On one view of the law that provision is not really aimed at protest cases such as this, but there is Court of Appeal authority that it should be taken as applying so, of course, I follow that authority. In fact the "likely" test is already required from the other parts of the law that I have to consider, so I will deal with that compendiously later in this judgment.

8 The various sites that are the subject of this application are the Fawley Petrochemical Complex in Southampton, the Hythe Terminal in Hardley, the Avonmouth Terminal near Bristol, the Birmingham Terminal, the Purfleet Terminal, the West London Terminal and the Hartland Park Logistics Hub near Farnborough and the ultimate compound at Holybourne.

9 The injunction sought before me is further to an interim injunction. What is it that the claimants fear? I have read a witness statement by Anthony Milne, Esso's Global Security Adviser, and by Mr Allybokus. Mr Milne writes that in early April of this year, four of the claimants' terminals, West London, Hythe, Purfleet and Birmingham, were subject to direct action which included attached barrels to a barrier to stop it lifting open, cutting through fences and placing objects, such as Extinction Rebellion's pink boat, so as to block an entrance. He also quotes various messages and proclamations by the group behind these protests promising more of the same and indeed calling for an escalation of their protests.

10 Mr Allybokus in his third witness statement for these proceedings updates the picture by a review of press reports of arrests [in the low hundreds] and by quoting from the protest group's website and by passing on what Mr Milne has now reported to him of actions taken since Mr Milne's witness statement.

11 To summarise the groups behind the protest they are "Just Stop Oil" and "Extinction Rebellion." There is also mention of a subgroup referred to as "Youth Swarm." The groups publicise their planned action, and they claim such actions as their own when they have occurred, and they make calls for other groups and individuals to join any such protests. The various detailed types of conduct that the claimants seek to have prohibited are all limited to actions on land owned by them, with the possible caveat I will come to later. It is significant that none of the actions the claimants seek to prohibit by this order are actions on the public highways with, once more, the caveat to which I will return.

12 I have been told by Ms Holland QC that another judge has granted an order or injunction against people carrying out activities on public highways. I do not know the details of that, nor have I sought them, but I have no doubt that other judges faced with other cases, and other applications, will arrive at orders different from the one I am going to grant in this case.

13 The power of the court to grant injunction is set out in very broad terms in s.37 of the Senior Courts Act 1981. One criminal offence that characterises the sort of conduct that the claimants fear is s.68 of the Criminal Justice and Public Order Act 1994, the offence of aggravated trespass; a trespass done to obstruct or disrupt a lawful activity. Another offence relevant to protests on roads is wilful obstruction of a highway, contrary to s.137 of the Highways Act 1980, which carries a power of arrest.

14 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 two aspects, whether there was 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 planned, carried out and publicised by the groups listed above clearly amount to a strong basis for an action for trespass and private and public uses. Given the sort of sums involved in the oil industry 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.

15 The injunction sought is an anticipatory injunction in the sense that any order against persons unknown always is, and is further placed within that category because not all of the sites have been the target of any protest. In *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch) Marcus Smith J summarised the effect of two 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*.

16 Injunctions against unidentified defendants were considered by the Court of Appeal in the case of *Ineos Upstream Limited v. Persons Unknown* [2019] 4 WLR 100 and *Canada Goose Retail Limited v. Persons Unknow*n [2020] 1 WLR 2802. As both cases are recent decisions concerning unknown defendants in protest cases they are of particular significance to the case I have had to decide.

17 *Ineos* concerned protests against fracking. There was an argument before the Court that addressed the protestors' Art.10 and Art.11 rights under the European Convention of Human Rights, the rights to freedom of expression and association. In the course of the judgment it was said at para.30 that, “Courts should be inherently cautious about granting injunctions against unknown persons, since the reach of such an injunction is necessarily difficult to assess in advance”. In his conclusions Longmore LJ "tentatively" framed the requirements of an injunction so as to include:

> (1) The terms must not be so wide that they prohibit lawful conduct.
>
> (2) The terms must be sufficiently clear and precise to enable persons potentially affected to know what they must not do.

18 *Canada Goose* was concerned with protests against clothing containing animal products. The Court of Appeal's judgment revisited *Ineos* and another decision from a fracking protest appeal, namely *Cuadrilla Bowland Limited v. Persons Unknown* [2020] 4 WLR 29, and described at para.82 a modified version of Longmore LJ's requirements. Once more I will reproduce only those that are pertinent to this case:

> (1) 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.

(2) 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.

19 An issue in any case like this is how I should approach the limitations on the Art.10 and Art.11 rights of the defendants. I turn to consider the Supreme Court's decision in the case of *The Director of Public Prosecutions v. Ziegler & Ors* [2020] 2 AC 408. Protestors had blocked a road leading to a venue where an arms fair was being held, by sitting in the road and attaching themselves to heavy objects, so-call "lock boxes." They had been arrested and prosecuted for obstructing the highway under s.137 of the Highways Act 1980, which offence has a "lawful excuse" defence. District Judge Hamilton, the District Judge hearing the trial, dismissed the charges on the basis that, having weighed up the considerations that point either way, including the protestors' Art.10 and Art.11 rights, he concluded the prosecution had failed to negate the statutory defence advanced by the defendants.

20 The Divisional Court allowed an appeal against the decision of the District Judge. The Supreme Court then allowed a 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 Supreme Court did not declare that henceforth all blocking of roads was 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.

21 The limits to *Ziegler* are made clear in the *Director of Public Prosecutions v. Cuciurean* [2022] EWHC 736 (Admin), in which Lord Burnett, Chief Justice, held that *Ziegler* did not impose an extra test in a case of aggravated trespass under s.68 of the Criminal Justice and Public Order Act 1994, as Art.10 and Art.11 rights do not generally include the right to trespass, and Parliament had said the balance between those rights and the lawful occupier's rights under Art.1 of Protocol 1 of the Convention by the terms of the s.68 offence.

22 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 Art.1 of Protocol 1. Article 10 and Art.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, Laws LJ said at para.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 *Kudrevičius and Others v. Lithuania* [2015] 62 EHRR 34 at para.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 ...

23 It is clear that once breach proceedings are underway 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, in this case now, when the injunction is granted (see *National Highways Limited v. Heyatawin & Ors* [2021] EWHC 3078 (QB) [44] and [45]).

24 Only one side was formally represented before me. Nonetheless, as I am being asked to impose an injunction that could expose those who breach it to imprisonment, I need to justify why I make any order. The order I am prepared to make forbids various acts of trespass including the blocking of gates on the claimants' premises. I make that order having been satisfied that:

> (1) Were the underlying claims ever to reach trial the claimants have a strong basis for an action of trespass and private and public nuisance, on the basis of a protest that had already occurred on some sites and are threatened for others.
>
> (2) Given the sort of sums involved in the oil industry 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.
>
> (3) There is a strong possibility that the defendants will imminently act to infringe the claimants' rights, given they have already done so and "promised" [if that is the right word] that similar actions will continue on other sites.
>
> (4) The harm caused by the activities I will seek to prevent on the terms of an injunction would amount to "grave and irreparable" harm in that trespassing on the sites could lead to highly dangerous outcomes, given the highly flammable or even explosive nature of the materials being handled. Prolonged obstruction of entrances could also lead to a different type of very serious damage in that some of the sites at least are parts of the critical national infrastructure and numerous businesses, emergency services, hospitals and other key parts of society depend on oil based fuels.

25 The claimants have rights under Art.1 of Protocol 1 and must be entitled, as are all companies and individuals, to seek the protection of the courts. The fact that others have strongly held views about fossil fuels and the environment cannot be a basis for my refusing protection to a law abiding business once the relevant criteria are met.

26 Mr Powlesland addressed me about the contrast between the access to the courts between oil companies and private individuals without great, private wealth. Access to the courts and public funding representation are intensely political matters that I cannot address. I have to hear what is said, consider what the proper law is, and then apply the law as is laid down both by Parliament and the numerous courts superior to me.

27 On the submissions that the claimants have not shown that they own or have other legal rights to the land, I have read the detailed submissions in the claimants' first skeleton argument and the numerous attachments and documents exhibited thereto. There was an issue that one site had been used by the claimants for many years but lacks any formal status, such as demonstrable legal ownership or a documented lease. The answer to that is short: a basic proposition of property law is that one who exercises a possessory right, as the claimants clearly do, is entitled to enforce that right. I declined Mr Powlesland's invitation to oblige the claimants to describe each legal basis for each part of each site that will be covered by this injunction. I am fully satisfied the claimants have shown they have sufficient proprietal interest on all remaining sites.

28 I do have a concern in cases such as this about banning any blocking of the road flowing from the Supreme Court case law in *Ziegler*. The effect of that decision, it seems to me, is that Parliament and the Supreme Court have brought about a situation where the rights of protestors and the rights of those against whom they protect can be assessed and weighed carefully with knowledge of all the facts. An injunction banning any blocking of any road would have the effect of demolishing that delicate balance. There would be no "lawful excuse" defence to a breach of that order. Protestors whose identities, dispositions and activities were completely unknown to the court when the order was made would be liable to imprisonment.

29 In my view the better course when dealing with actions by protestors that might be found lawful on a *Ziegler* assessment, is that taken by the claimants in this case allowing this court to leave those matters to the police to enforce and the Magistrates' Court to adjudicate. I should make clear that these observations on the law after *Ziegler* do not seek to encourage individuals to block highways nor to assure anyone that such action can be carried out with impunity. The police have the power to arrest those they consider to be committing an offence under s.137 of the Highways Act 1980, and the courts have the power to convict them.

30 Taken the approach I have, I am not purporting to lay down any sort of immutable rule. There will be cases where the court is justified in making an order that bans any blocking of a road. To quote Sir Geoffrey Vos, Master of the Rolls, once more from *London Borough of Barking and Dagenham* at para.123:

> The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under s.37 against the world.

31 The qualification to that is that Ms Holland QC, for the claimants, sought to rely on the private law right of an owner of land under common law to have access to the highway at any point where his or her land touches it. I acknowledge, of course, that common law does indeed establish such a right. However, my view, in this case at least,-is that should not be used to avoid the *Ziegler* issue and in any event an attempt to create an adjunct to an order otherwise confined to private land would inevitably lead me to make an order that would be unclear, which an injunction must not be.

32 The claimants also sought an order for all the relevant police forces to disclose material that would be evidence of breaches of the injunctions. All the various police forces that cover the claimants' numerous sites were notified of this application and all replies stated they were neutral on the application and have no objection to the court dealing with it at the hearing. It seems to me that the disclosure sought is the most sensible and efficient way to identify any breaches of the injunction but the terms of the draft order need the addition of suitable confidentiality clauses. This was an aspect to which Mr Powlesland objected, as I have described already, but it seems to me best that any evidence that could be used by the claimants to pursue breaches is gathered by the legally regulated and democratically accountable police forces of the United Kingdom. On that basis I also make this part of the order sought.

33 I have asked Ms Holland QC to draft an order that reflects my comments both in the course of the hearing and in this judgment. I am prepared to allow Mr Powlesland to make any submissions by email on the detail of the draft order, but I will not entertain any further substantive arguments about the scope of the injunction.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge

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.